



REPUBLIC OF KENYA

High Court at Mombasa

Divorce Cause 31 of 2009

V. J. S.....PETITIONER

VERSUS

N. V. J. S.....RESPONDENT

JUDGMENT

In this matter V J S (hereinafter referred to as “*the petitioner*”) filed a petition dated 7th May, 2009 seeking the dissolution of his marriage to N V J S (hereinafter referred to as the ‘cross-petitioner’). The cross-petitioner later filed her own petition dated 6th August, 2009 in which she sought the following orders:

“(a) THAT the marriage be dissolved.

(b) THAT the Respondent (the petitioner herein)

be condemned to provide maintenance for the Petitioner (the cross-petitioner herein) as according to section 2(1) of the Matrimonial Act.

(c) THAT the property acquired by the Respondent during the marriage be divided equally and shared between the Petitioner and the Respondent.

(d) THAT the matrimonial home in which the Petitioner dwells be shared equally between the Petitioner and the Respondent.

(e) THAT the Petitioner may have such further relief as may be just.

(f) THAT the Respondent be condemned to pay the Petitioner costs of the petition.”

The two divorce causes were on 14th March, 2010 consolidated and it was directed by Hon. Justice M. K. Ibrahim that they be heard as one cause. It was further directed that Cause No. 41 of 2009 would be deemed to be a cross-petition to Cause No. 31 of 2009 with the pilot file being Divorce Cause No. 31 of 2009. MS. ADAGI Advocate acted for the petitioner in this cause whilst MR. SHAKELI represented the cross-petitioner.

The undisputed facts of the case are that the petitioner and cross-petitioner are a couple who met and got married in India in March 1995. After their marriage the couple came back to Mombasa where they have cohabited as man and wife to-date. The couple lived in the family home which was firstly a rented premises in {*particulars withheld*} but in the year 1998 the petitioner’s father purchased a spacious four-

bed roomed apartment in {*particulars withheld*}. As is common with the Asian community the couple occupied this home in {*particulars withheld*} with their parents-in-law and occasionally with other relatives.

By all accounts the marriage was peaceful despite the fact that due to the impotence of the petitioner the couple never engaged in sexual relations at all for the full duration of their marriage. As a result they bore no child. The cross-petitioner told the court in her evidence that because divorce was a taboo in the Hindu community she opted to persevere in the union, hoping and believing that her husband's problem would be solved through medical intervention. In the meantime the couple sought fertility treatments both in India and the United Kingdom but to no avail.

In 2003 the petitioner's father passed away and three years later in 2006 the mother also died. This appears to have marked the turning point for the marriage. Problems, disagreements and quarrels became the norm in the once peaceful union. According to the cross-petitioner the petitioner became belligerent and uncaring, he commenced a relationship with one of their neighbours called R. and made concerted efforts to get the respondent to leave and return to India. Finally, in 2009 the petitioner filed these divorce proceedings against her.

By the time the petitioner filed the Divorce Cause No. 31 of 2009 the couple had been married for a period of 14 years from 1995 to 2009. As I find that such this petition does comply fully with the provisions of section 6(1) of the Matrimonial Causes Act Cap 152 Laws of Kenya.

Having listened to the lengthy testimonies of both the petitioner and the cross-petitioner and having considered the evidence on record, I find that the following five (5) issues arose for determination:

- (1) Has the petitioner adduced sufficient grounds to prove his petition for divorce?
- (2) Has the cross-petitioner adduced sufficient grounds to prove her cross-petition for divorce?
- (3) Is the cross-petitioner entitled to her claim for a half-share of the matrimonial home and a share of the monies in the various bank accounts held by the petitioner?
- (4) Is the cross-petitioner entitled to her claim for alimony and if so in what amount?
- (5) Is either party entitled to an order for costs?

I will now proceed to consider each limb on its own basis.

(1) HAS THE PETITIONER PROVED GROUNDS FOR DIVORCE?

In his petition dated 7th May, 2009 the petitioner basically raised one single ground for divorce that being the ground of cruelty. Section 8(1) of the Matrimonial Causes Act sets out the grounds upon which a party to a marriage may petition the court for a divorce. Section 8(1) (c) provides that a divorce may be granted by a court on grounds that the respondent:

“(c) has since the celebration of the marriage treated the petitioner with cruelty.”

What then is this '*cruelty*' that the petitioner alleges the cross-petitioner exhibited towards him. One is the claim by the petitioner that the cross-petitioner on one occasion threatened to cut him with a panga. The petitioner was very vague on this particular allegation. No details were given as to when or where this alleged incident occurred. No report was made by the petitioner to the authorities of any threat made by the cross-petitioner against him. The fact that the couple lived under the same roof, occupied the same room and slept in the same bed, not only for the duration of their marriage but even during the course of the hearing of this divorce petition makes it highly improbable that the petitioner had any apprehensions for his life or that he feared any threat from the cross-petitioner. The cross-petitioner told the court that she cooked all their meals and continued to do so during the course of this hearing a fact

which the petitioner did not deny nor controvert. Once again this is not the picture of a man whose life had been threatened and who feared for his safety. In my view the claim that the cross-petitioner threatened to cut the petitioner with a panga while he was sleeping is totally unsubstantiated.

Another incidence of cruelty mentioned by the petitioner

was that the cross-petitioner went about telling people that he was impotent and was unable to perform sexually causing him great embarrassment. In her evidence the cross-petitioner told the court that she and the petitioner have never engaged in sexual intercourse for all the 18 years of their marriage. Once again this fact is neither denied nor controverted by the petitioner. Indeed the fact that the couple both concede that they spent a lot on time, effort and money on fertility treatments and in vitro fertilization attempts is proof enough that they were unable to conceive a child in the normal manner. Whereas the petitioner claims that the cross-petitioner broadcast his sexual inadequacies to all and sundry, he has failed to name even one person to whom she broadcast this information, much less has he called any witness to confirm that indeed the cross-petitioner did pass on this information. Once again this allegation is presented in a vague manner and remains totally unsubstantiated. It is a central tenet of law that '*he who alleges must prove*'. The petitioner has made allegations against the cross-petitioner but has made no effort at all to prove those allegations before the court.

Lastly, the petitioner claims that the cross-petitioner acted in a manner to embarrass him by breaking a glass in their home and by creating a scene at the *{particulars withheld}*. The cross-petitioner gave an explanation for her conduct in both cases. She explained that she was provoked when she caught the petitioner in a compromising position with one of the female Asian dancers at the *{particulars withheld}* where they had gone with friends for the evening. Her actions appear to have been more than reactions of a wounded spouse rather than those of a woman out to humiliate and to belittle her husband. Once again I am not persuaded that the cross-petitioner's action on these instances can be said to have amounted to cruelty. Taken as a whole I find the petitioner's allegations of cruelty on the part of the cross-petitioner to be totally without basis. The petitioner appears to have been groping for reasons to justify his petition for divorce. I find the sole ground of cruelty unproved and as such I hereby dismiss the petitioner's prayer for divorce on this ground.

(2) HAS THE CROSS-PETITIONER PROVED GROUNDS FOR DIVORCE?

The cross-petitioner in her evidence told the court that she met the petitioner in India in the year 1995 when he and his family having travelled to India from Mombasa in search of a bride, came across the cross-petitioner's bio-data in a marriage bureau. They approached the cross-petitioner who accepted the petitioner's proposal for marriage on condition that he would cease from drinking alcohol and eating meat (the cross-petitioner being a Hindu was a vegetarian and would neither eat nor cook meat). Everything was agreed upon and the marriage took place. The cross-petitioner told this court that she is from a family of humble means and was raised by a single mother. She told the petitioner and his family that her family could not afford a lavish wedding nor could they afford to pay a dowry as Hindu custom dictates. After the wedding the couple travelled back to Kenya and the cross-petitioner who could speak neither English nor Kiswahili at the time took up her duties as a wife and daughter-in-law.

The cross-petitioner also raised the issue of cruelty as a ground for her seeking a divorce from the petitioner. The term '*cruelty*' is often taken in its literal sense to mean physical abuse or some kind of violence meted out by one spouse as against the other. However, in the present context the term cruelty would also include any kind of verbal abuse, mental or psychological torture or indeed any extreme, unreasonable or undesirable conduct from one spouse to the other. In the case of **WMM – VS – BMI [2012] e KLR** Judge G.B.M. Kariuki in defining the term cruelty held that:

“Acts of cruelty like acts of negligence in the law of torts are said to be infinitely variable.”

The learned Judge went on to cite the two English cases of **COLLINS – VS- COLLINS 2 All E.R. 966** and **WILLIAMS –VS- WILLIAMS [1963] All E.R. 944**. Both cases reviewed the law of cruelty and in both the balance came down in favour of giving relief to a party in **a situation which has become**

intolerable. In the two above cited English cases from which Kenya receives much of its common law, Judge Kariuki held thus:

“A principle that emerged is that if the Respondent’s conduct injures the complainant’s health or is likely to do so, it will amount to cruelty if it is grave and weighty and is such that the petitioner cannot reasonably be expected to put up with it or to tolerate it. It must be emphasized that the test as to whether a Respondent’s conduct is cruel in law is whether it has the effect of producing actual or apprehended injury to the Petitioner’s physical or mental health.” [my own emphasis]

The cross-petitioner raised several examples of the cruelty which she alleges was directed towards her by the petitioner. The main one is that when the petitioner married her he failed and/or declined to reveal to her that he was impotent and that he would never be able to consummate the marriage. The fact that the petitioner was fully aware of his impotence when he married the cross-petitioner is evidenced by his admission that his first marriage which lasted only six (6) months was also devoid of any sexual intercourse. The petitioner said that he and his first wife did not have sexual intercourse because they did not want children. It is inconceivable that a couple would marry and decide not to have sexual relations in order to avoid having children. Even if they did not want children this was not a bar to sexual relations. That is the reason why contraceptives exist. I have no doubt that the petitioner’s first marriage must have ended because he was unable to perform his manly duties. A key component of any marriage is shared intimacy which is manifested in sexual relations between the parties. Upon cross-examination by **Mr. Shakeli** for the cross-petitioner the petitioner admits that for the full duration of their marriage the couple have never engaged in sexual intercourse despite their sharing a bed all this time. The cross-petitioner in her evidence stated that initially when she made advances the petitioner would make a variety of excuses as to why he could not be intimate with her. It later dawned on her that he was incapable of doing so. She told the court that she had never seen the petitioner with an ‘erection’. The fact that the petitioner was impotent is not in itself an act of cruelty. The cruelty arises from his action in failing to inform the cross-petitioner of this fact **before** he married her. As such the petitioner denied the cross-petitioner a chance to make an informed decision as to whether she wished to proceed with the marriage in view of the fact that there would be no sex and probably no children. The petitioner therefore procured the cross-petitioner’s consent to this marriage by false pretences. He presented himself to her as a man who would be able to perform all functions of a husband when he knew very well that he was lacking in one crucial function. The fact that the cross-petitioner resigned herself to this sexless union does not negate the deceit on the part of the petitioner. The cross-petitioner explained that upon learning the truth she decided to remain in the union because firstly she believed and hoped that a medical solution would be found and secondly because divorce was a great stigma in her Hindu community and she did not want to face rejection from her community members. The cross-petitioner decided to put on a brave face and to soldier on because as stated “*marriage is not only about sex*”. I find that this act of deception by the petitioner was cruel in the extreme. It condemned the cross-petitioner to a life devoid of sexual intimacy and devoid of children which is the desire of any woman in a marriage. The cross-petitioner cannot in any way be said to have consented or acquiesced to this state of affairs.

The cross-petitioner came into the marriage having trained and worked as a Nurse in India. She told court that although she desired to continue to exercise this calling after her marriage, the petitioner declined to allow her to work on the basis that she was required to care for his aging parents and to cook for the family. Indeed the evidence is that the cross-petitioner performed both duties with distinction. Not only did she nurse both parents of the petitioner upto their final days, she even made trips with the petitioner’s terminally ill father to India for treatment. The cross-petitioner also performed similar duties for the husband of the petitioner’s sister – duties which even the wife was unwilling to perform. From the evidence of the cross-petitioner what comes out clearly is that the petitioner made a deliberate and calculated decision to marry her on account of her nursing experience. No doubt he felt that he needed someone to care for his parents in their final days. Although the cross-petitioner was given the necessities of life and even travelled with the family to exotic locations, she was not treated as an equal partner in the marriage. The cross-petitioner told the court that the petitioner would not allow her to phone her mother in India, he controlled all the finances, if she needed money she would have to ask for it, he would not allow her to work and generally directed that she stay home and cook for the family. She even performed domestic duties for her sister-in-law. Indeed what emerges is that the cross-petitioner lived a life of virtual

servitude in return for food, shelter, trips, etc. She was required to take care of all the needs and requirements of the petitioner's family. Once the petitioner's parents and brother-in-law died, he no longer had any use for the cross-petitioner and began an active campaign to get her to leave the country and return to India. At one time when the cross-petitioner had travelled to India to visit her mother and the petitioner was in the United Kingdom the petitioner phoned her mother saying that his wife should not bother to return to Kenya. This prompted the cross-petitioner to cut short her trip and she returned to Kenya earlier than expected. All these actions amounted to psychological torture and cruelty. The petitioner even tried actively to prevent the cross-petitioner from obtaining a dependants pass to enable her to remain in the country legally. It was only after the intervention of this court that the petitioner accepted to provide the necessary documents to facilitate her application.

The cross-petitioner alleges that the petitioner forced her to undergo inhuman and painful treatments in an attempt for the couple to conceive a child. I have no doubt that continuous IVF and fertility treatments can be both painful and distressing. However, I find no evidence to show that the petitioner forced and/or compelled the cross-petitioner to undergo these treatments. The cross-petitioner claimed that as a result of these treatments she later developed deep vein thrombosis – a life threatening condition. However, no evidence was adduced to prove that the deep vein thrombosis was a direct consequence of these fertility treatments. The cross-petitioner never objected or declined to undergo the fertilization treatments. My impression was that she voluntarily participated in the same hoping to realize her dream of bearing her own biological child. I therefore reject the contention that these fertility treatments amounted to evidence of the petitioner's cruelty towards her.

The cross-petitioner did also allege that the petitioner was involved in an adulterous liaison with one **Rupal** a married neighbor who lived in the upstairs apartment. The petitioner on his part denied any involvement in a love affair with the said woman. In the case of **MEME –VS- MEME 1976-80 1 KLR 17** the High Court held that:

“evidence required to establish adultery must be more than mere suspicion and opportunity; evidence of guilty inclination or passion was necessary.”

In her cross-petition the cross-petitioner only relied upon cruelty as a ground for divorce and not adultery. However, in her evidence she stated that the petitioner would eat meals prepared by this ‘Rupal’ and decline to eat the meals she had prepared in their own home. He would abandon the matrimonial home every evening to go and spend time with this lady. Why would a married man abandon meals cooked by his wife and accept meals cooked and brought to his home by another woman (who incidentally was another man's wife). In 2008 family members held a meeting to reconcile the couple. It was agreed that they each go away on holiday – a sort of “cooling off” period. The cross-petitioner went to India to visit her mother whilst the petitioner went to the United Kingdom. Upon returning home earlier than expected the cross-petitioner found that the petitioner had left the house keys including the cupboard keys to this Rupal. I find it hard to believe that there was no other person e.g. a relative or colleague to whom the petitioner could entrust these keys. The petitioner's actions are a clear indication that his relationship with Rupal was more than just casual. His interest in this neighbour was certainly not innocent.

The petitioner's relationship with Rupal coupled with the other act of cruelty mentioned above caused much distress to the cross-petitioner and indeed caused her to attempt to take her own life. The cross-petitioner swallowed an overdose of sleeping pills and was found lying on the floor barely conscious by her husband. Even at such a critical time the first thing the petitioner did was to call the very Rupal who had been a thorn in the flesh of the cross-petitioner. The petitioner together with Rupal rushed the cross-petitioner to hospital and it is only when the cross-petitioner threatened to walk out of the hospital despite the facts that she was seriously ill that Rupal eventually left them alone. Even here the petitioner was still using his relationship with this woman to demean and humiliate the cross-petitioner.

From the narration above, I am satisfied that the cross-petitioner has proved the ground of cruelty beyond a balance of probability. Both parties have told this court that their marriage has irretrievably broken down and neither wishes to remain bound to the other. In the case of **N –VS- N and Another [2008]**

1KLR 16 Hon. Madan J. as he then was stated:

“If two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear them, they are entitled to be released from their matrimonial union, the guilty parties bearing the consequences.”

In the circumstances I find no reason to deny the cross-petitioner’s petition for divorce. As such I hereby direct that decree nisi do issue to be made absolute within six (6) months of today’s date.

(3) IS THE CROSS-PETITIONER ENTITLED TO HER CLAIM FOR A HALF SHARE OF THE MATRIMONIAL PROPERTY?

The cross-petitioner has made a prayer that the property acquired during the marriage (referring to monies held in various joint bank accounts) be divided and shared equally between the couple. In addition the cross-petitioner prays that the matrimonial home be shared equally between the petitioner and the cross-petitioner. The cross-petitioner has relied on Article 45(3) of the Constitution of Kenya which provides:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

The petitioner’s advocate **Ms. Adagi** on her part submits that the cross-petitioner is not entitled to these prayers for division of matrimonial property because no such remedy is provided for under the Matrimonial Causes Act Cap 152 Laws of Kenya. The cross-petitioner conceded that she did not work and as such earned no income for the duration of the marriage. She therefore could not have made any financial contribution towards the purchase of that house. As such although there existed joint accounts in the names of both parties in various banks, the cross-petitioner made no deposits into those accounts. The house in question an apartment in Kizingo was purchased by the petitioner’s father in 1998 for KShs. 7.8 million. The value has now risen (as expected) to about KShs. 20 million. Upon the death of the petitioner’s father he bequeathed this flat to his wife (the petitioner’s mother) who in turn upon her death in 2006 bequeathed the flat to the petitioner. Later on the petitioner transferred the ownership of this flat into the joint proprietorship of himself and his brother ‘**NITIN**’. It is quite clear that this was a move undertaken by the petitioner to ensure that the cross-petitioner could never stake a claim the flat since even if anything ever happened to him the whole flat would devolve to his brother.

Be that as it may it is important at this point to consider the question whether this court has the requisite jurisdiction under the present cause to pronounce on a division of matrimonial property. It is said that jurisdiction is everything and without it a court must down its tools immediately. In as much as Article 45(3) of the Constitution provides for equal treatment of the parties to a marriage, the principles in our Constitution are given life and actualized by the statute law. In this regard I am persuaded by the decision of my learned senior brother in the earlier cited case of **WMM –VS – BMI 2012 KLR** wherein he held:

“The equality in this Article [referring here to Article 45(3) of the Constitution of Kenya] does not create nor is it intended to create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices.”

The divorce petition filed by the cross-petitioner was filed under the Matrimonial Causes Act Cap 152 Laws of Kenya. As such the remedies and orders available to the cross-petitioner are limited **only** to those set out in the Matrimonial Causes Act and Rules. The prayer for division of matrimonial property is one which ought properly to be determined in a cause specifically for division of matrimonial property,

presented by way of an originating summons. The issue of division involves proof of income as well as proof of direct and/or indirect contribution by spouses towards the purchase of any assets in question. The pleadings and evidence necessary to enable a court make a just decision on the division of matrimonial property is quite different from the pleadings and evidence required to prove a cause for divorce. More time and evidence would require to be invested in a cause for division of matrimonial property in order to meet the ends of justice for both parties. This is not merely an issue of procedure of a technicality. The provisions of the Married Women's Property Act Specifically section 17 are clear and relate specifically to the question of Division of Matrimonial Property. It is not open to this court to consider and rule on this question in a cause brought seeking divorce under Cap 152. Best convenience demands that specific remedies and orders be sought under the enabling statute of law which in this case is the Married Women's Property Act.

Having said that all is not lost. The cross-petitioner having succeeded in her petition for divorce retains the right to pursue the issue of the division of Matrimonial Property including the apartment and proceeds of joint bank accounts under a separate cause brought under section 17 of Married Women's Property Act. She remains at liberty to pursue this avenue if she should so wish to.

(4) IS THE CROSS-PETITIONER ENTITLED TO A LUMP SUM ALIMONY PAYMENT AND IF SO IN WHAT AMOUNT?

Ms. Adagi for the petitioner argued against an order for an alimony payment on the basis that such an order is only available upon judicial separation and not upon divorce. However, section 25 of the Matrimonial Causes Act provides for payments of "*alimony pendente lite, alimony and maintenance*" [*my own emphasis*]. The term '*alimony*' is defined by the concise Oxford Dictionary 9th Edition as follows:

"Money payable by a man to his wife or former wife or by a woman to her husband or former husband after they are separated or divorced" [*my own emphasis*].

Section 25(2) of Cap 152 provides as follows:

The court may, if it thinks fit, on any decree for divorce or nullity of marriage order that the husband shall, to the satisfaction of the court secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortunes, if, to the ability of her husband and to the conduct of the parties, the court may deem reasonable."

This provision very clearly empowers a court to upon granting a decree of divorce direct the husband to provide alimony either by way of a lump sum payment or by way of periodic payments [section 25(3) of Cap 152].

In determining whether a party is entitled to any alimony payment a court must look at the peculiar circumstances of each individual case. In this case whilst the petitioner worked and earned an income as a company director the cross-petitioner was not involved in any income-generating activity from the time of her marriage to the petitioner. This was not due to laziness or failure by the cross-petitioner to seek and secure employment. It was rather a result of the petitioner's demands that she stay home and care for her home and family. The cross-petitioner being a dutiful Hindu wife obliged. It is only after the commencement of these proceedings that the cross-petitioner through her own humble efforts undertook a beautician's course and was then able to earn a minimal amount by working from home. The petitioner told the court that he paid out to the cross-petitioner a monthly sum of Kshs. 4,000/= to cater for her needs a pittance which in the modern times amounts to an insult given that the minimum wage in Kenya is now KShs. 7,000/= or thereabout. By a deed of settlement presented to Hon. Justice Mohamed Ibrahim (who initially handled this cause), the petitioner offered to pay out to the cross-petitioner a lump sum of KShs. 5.75 million in full and final settlement. However, my learned senior brother Justice Ibrahim rejected this amount and the deed of settlement on the grounds that the whole arrangement smacked of "*inequity, oppression, and unfairness*" more so because the cross-petitioner did not give evidence on her own behalf before him.

This court has now had the benefit of hearing from the cross-petitioner at great length. What emerges is as I stated earlier a scenario reminiscent of modern day servitude. The cross-petitioner was lured into marriage on a false pretence, brought to a foreign country and turned into the family cook, housekeeper, nursemaid and general dogsbody. She was denied any opportunity at self actualization. She could not work, was not allowed to drive (even when she eventually was allowed to drive her sister-in-law's car, this too was taken away once the petitioner filed for divorce) and once she had served the intended purpose of caring for her elderly parents-in-law the cross-petitioner was cruelly shunted aside. The cross-petitioner gave to the petitioner and his family the best years of her life. She must receive an alimony sufficient to enable her to rebuild her life, purchase a home for herself and enable her to re-train so as to continue with her nursing profession (or any other profession she desires).

I am mindful that in determining the sum payable as alimony the court must also consider the means and earning capacity of the petitioner. The provisions of section 25 of the Matrimonial Causes Act require that any order for maintenance and/or alimony on a decree of divorce or nullity must take into account the wife's fortune (if any) the ability of the husband, the conduct of the parties and the reasonableness of the maintenance. The petitioner told court that he worked as a director in the family business from which he earned a net salary of KShs. 87,128/=. The lifestyle of the petitioner is certainly that of one who earns way above this sum of money. There is evidence that for the duration of the marriage the couple lived a lavish lifestyle with holidays to exotic locations, stay in five-star hotels not to mention the costly IVF treatments. All this could not have been possible on a monthly salary of KShs. 87,000/= only. Further, there is evidence of several other accounts held and run by the petitioner and even a joint bank account in the United Kingdom. Throughout the trial and in the final submissions by **MR. SHAKELI** references were made to accounts in Switzerland where amounts of up to KShs. 60 million were said to be held. Firstly, no tangible evidence has been adduced to prove that such accounts actually do exist and no evidence has been adduced to show how much these accounts actually hold. This court cannot make orders based on evidence not presented before it. However, under cross-examination by **MR. SHAKELI** the petitioner concedes that he has at least KShs. 3.0 million in accounts in Kenya. He also holds a sum of British Sterling Pounds 25000 in a United Kingdom account (approximately KShs. 3.0 million). He has a further KShs. 4.5 million in a fixed account as well as KShs. 3.5 million in an account held with Eco Bank, a further KShs. 3 million at Guardian Bank. Clearly the petitioner is not a man of straw. He is more than comfortable financially and is well able to afford to pay a generous sum as alimony to his wife certainly much more than the KShs. 5.75 million offered in the first deed of settlement. The cross-petitioner on the other hand is basically destitute, she owns no property, has no job and earns virtually no income therefore in view of the means clearly available to the petitioner including his family business which I have no doubt runs at some profit I am of the opinion that a total lump sum of KShs. 10 million would suffice as a reasonable and just alimony payment to the cross-petitioner. It is my view that a lump sum payment would in the circumstances of this case be preferable to periodic payments, in view of the acrimony between the couple and in view of the fact that no child was born of the union. I do agree with the submissions of counsel **Ms. Adagi** that a clean break would be best in the circumstances. This I believe would enable the cross-petitioner embark about rebuilding her own life and would allow her to chart her future and maintain as closely as possible the lifestyle to which she had become accustomed. In view of the fact that the sum of KShs. 5.75 million had already been paid out to and is being held by the cross-petitioner's advocate on her behalf, I hereby order that the petitioner pay an additional KShs. 4,250,000/= to make a total of KShs. 10 million payable to the cross-petitioner's advocate within sixty (60) days of today's date.

(5) IS THE CROSS-PETITIONER ENTITLED TO COSTS?

The general rule is that since matters pertaining to divorce are family matters and involve people who lived as spouses courts would ordinarily order that each party to meet their own costs. However, this court cannot ignore the unique circumstances under which this union was conducted, the circumstances of the marriage which were certainly detrimental to the well-being of the cross-petitioner, and bearing in mind the fact that the cross-petitioner has no employment or indeed any definite means of support at the moment, I feel it is only fair that the petitioner meet the costs of this cause.

For avoidance of doubt this court makes the following orders:

- (1) The petitioner's prayer for divorce is dismissed.
- (2) The cross-petitioner's prayer for divorce is allowed. Decree nisi to issue forthwith to be made absolute within three (3) months of this pronouncement.
- (3) The cross-petitioner's prayer for division and apportionment of matrimonial property is dismissed.
- (4) The petitioner shall pay to the cross-petitioner an additional Kshs. 4.25 million (to make a total of Kshs. 10 million) as lump sum alimony. Such payment to be made within sixty (60) days of today's date.
- (5) Costs for this cause are awarded to the cross-petitioner.

Dated and delivered in Mombasa this 8th day of February, 2013.

M. ODERO

JUDGE

In the presence of:

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for the Petitioner

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for the Cross-Petitioner

Mutisya Court Clerk