

REPUBLIC OF KENYA

High Court at Kakamega

Divorce Cause 4 of 2002

TMS PETITIONER

V E R S U S

ZBS RESPONDENT

J U D G M E N T

The petitioner filed her petition dated 3.5.1999 seeking dissolution of her marriage with the respondent on the grounds of cruelty and willful neglect. The petition was initially filed in Nairobi as No. 80 of 1999. The respondent filed an answer to the petition and a cross-petition dated 21.10.1999. The cross-petition was based on cruelty on the part of the petitioner. On the 31.1.2002 the High Court in Nairobi transferred the petition to Kakamega and it was registered as No. 4 of 2002.

On 18.6.1007 the petitioner through her advocate informed the court that she would only pursue the issue of desertion and abandon all the other grounds of divorce. On the 22.6.2007 counsel for the respondent filed a notice withdrawing the cross-petition. That left the main issue for determination to be the petitioner's petition seeking dissolution of the marriage on the grounds of desertion. The petitioner's evidence is that the two got married on the 10.9.1956 at the [particulars withheld] Church, Musoli and a marriage certificate number [particulars withheld] was issued. The marriage was blessed with six children but one has since passed on. All the children are adults having been born between the years 1957 and 1963. I do not see any reason of giving their names and date of birth as they are not part and parcel of the dispute. The petitioner further testified that the two lived in various places together including Vihiga, Tigoni, Nairobi West, Kakamega Town, Nyeri, Riruta, Kasarani and finally Karen in Nairobi. The two established their matrimonial home at [particulars withheld]. In 1973 the respondent was imprisoned for three years at Kamiti and when he was released he did not go back to the [particulars withheld] home but went to settle at [particulars withheld] on the "[particulars withheld]". In 1977 the respondent married another woman and used to make frequent visit to the Nairobi matrimonial home. Since 1992 the respondent has not been visiting the Nairobi matrimonial home. According to the petitioner the two parties have not lived as husband and wife since 1973. In 2008 the respondent made a brief visit to the matrimonial home. The petitioner had previously filed divorce cause number 76 of 1970 but the same was withdrawn in 2007 while the current petition was pending.

The petitioner acknowledges that the two parties have been appearing together in several family occasions including during the marriage of their daughters in 1990 and 1997, during the graduation of their daughter, when one of their daughters got her first child in 1998 and when she visited Kitale during the pre-wedding of one of their daughters. During cross-examination the petitioner stated that the respondent wrote to her in 1976 informing her that he had gotten married to one T. The respondent stopped taking interest in the petitioner's health and care and the petitioner concluded that she had been deserted. She could not move to [particulars withheld] after the petitioner left prison as the children were attending school in Nairobi. The petitioner is still living in the matrimonial house at [particulars withheld]. There is a guest wing within the compound which is let out and the petitioner collects the rent.

The respondent testified that he married the petitioner on the 10.9.1956 after courting for three years. In relation to the family the respondent's evidence is similar to that of the petitioner. He further testified that he was imprisoned in 1974 but was released in 1976 through a presidential mercy. After his release he joined his family in Nairobi for a short while and later decided to move to his farm at [particulars withheld]. The respondent used to be a civil servant. He agreed with the petitioner that she would live in Nairobi but would visit him at [particulars withheld] and the respondent would likewise

visit her in Nairobi. He supported his family financially as well as sending food from the [particulars withheld] farm. When the children finished school the respondent asked the petitioner to join him at the [particulars withheld] farm but she refused. According to him the guest wing at their [particulars withheld] house is rented out currently at KShs.56,000/= per month and it is the petitioner who collects the rent. Whenever there was any family occasion at [particulars withheld] the petitioner would join him. The respondent produced several photographs showing the two parties together during different family gatherings. The respondent further testified that he was 77 years when he was testifying on 24.11.2009 while the petitioner was 73 years then. Parties have grandchildren and the respondent is opposed to the dissolution of the marriage. He has offered the petitioner 30 acres of land at the [particulars withheld] farm. He has also offered to acquire another maissionate in Nairobi and rent out their matrimonial house at [particulars withheld]. The parties have another matrimonial home at [particulars withheld] in Kakamega. During cross-examination the respondent testified that he stopped cohabiting with the petitioner when she asked him to marry another wife. He has also given the petitioner 2 acres of land at [particulars withheld].

The respondent called two more witnesses. **DW2, GAK**, is a first cousin to the respondent. His evidence is that he is opposed to the divorce being granted as it will not culturally go down well in the family. DW2, tried to reconcile the parties and thought that he could have solved the problem. According to him the dispute between the parties has been there since the 1970s but he has not achieved much in reconciling the parties. **DW3, BK**, is a younger sister to the respondent. She too is opposed to the granting of the divorce as the parties have children. If divorce is granted something bad might happen in the family. She confirmed that her brother, the respondent, has another wife but the petitioner is the first wife. Her own husband who is now deceased used to marry other wives and divorce them but since she was the first wife she was never divorced.

Parties agreed to file written submissions. I have gone through the submissions by counsel for the parties. Counsel for the petitioner has given a detailed background of the petition as well as the evidence on record. Counsel is urging the court to grant the divorce and relies on four authorities. In one of the authorities **SO v VCT [2006] eKLR** divorce was granted even when the petitioner had not proved his case based on desertion. On the part of the respondent counsel submitted that the petitioner did not prove that the respondent had deserted her. The petitioner still lives in the respondent's home in [particulars withheld]. The respondent made several visits to the petitioner and similarly the petitioner visited the respondent in [particulars withheld]. The respondent still loves his wife and has taken care of her. Counsel further submits that the marriage between the parties has not irretrievably broken down as the respondent has not deserted the petitioner.

The main issue for determination is whether the petitioner has proved her case on a balance of probabilities. According to the petitioner the respondent deserted her when he came out of prison and married another wife. She denied that she allowed the respondent to marry another wife. She abandoned her other grounds of divorce and mainly based her petition on the act of desertion. In the petition dated 3.5.1999 the petitioner stated that the respondent is irresponsible and had abandoned the matrimonial home while cohabiting with one **TMA** in [particulars withheld]. The petitioner also stated that the respondent was not buying food and clothing or provide for the family's subsistence. According to the petitioner the respondent used to visit Nairobi but would on some occasions stay at Nairobi Club or United Kenya Club. It is her evidence that since 1976 she has never cohabited with the respondent. The respondent is of the view that the parties are aged. He belongs to the Catholic Church which does not allow divorce. He still loves his wife and takes care of her. They have grandchildren and he is willing to give the petitioner part of his farm in Kitale. He too confirms that he stopped cohabiting with the petitioner from the time he married his second wife.

Section 2 of the Matrimonial Causes Act, Chapter 152 Laws of Kenya defines marriage as the voluntary union of one man and one woman for life to the exclusion of all others. Article 45 (2) of the Constitution gives every adult the right to marry a person of the opposite sex based on the free consent of the parties. From the evidence on record it is clear that the two parties have not been cohabiting since 1976 or there about. Section 8 of the Matrimonial Causes Act gives the grounds for divorce and desertion is one of them. The requirement is that the desertion should have occurred for a period of at least three

years immediately preceding the presentation of the petition. The petitioner contends that the respondent deserted the matrimonial home when he left prison in 1976. The evidence on record shows that the petitioner had initially filed another divorce cause this being divorce cause number 76 of 1970 before the Nairobi High Court. The petition was withdrawn vide a withdrawal notice dated 13.7.2007 and filed on 19.7.2007. This current petition was filed in 1999 but registered in Kakamega in 2002. It has taken over 10 years for the matter could be determined. From 1999 when the divorce cause was filed to 24.11.2008 when the petitioner testified it had taken over 10 years for the case to start. Although the respondent testified that there is no reason to grant the divorce, from the evidence on record I am satisfied that the respondent left the matrimonial home and relocated to [particulars withheld] where he has been living. For the last 10 years the parties had an opportunity to reconcile their differences but this did not happen. DW2 did appreciate that he has tried to reconcile the parties but nothing fruitful has resulted. It is DW2's evidence that the differences started in the 1970s. I do agree with that evidence as the petitioner herein had filed another petition for divorce in 1970. It appears that since then the parties have been living apart. Although parties are not categorical as to who denied the other one his/her conjugal rights, it is clear from the evidence of both parties that they have not been cohabiting for almost 35 years.

The respondent testified that his church does not allow divorce. However, the marriage was celebrated under the Marriage Act which Act does not outlaw divorce. Divorce proceedings are catered for under the Matrimonial Causes Act which provide for grounds for divorce. Further **Article 45 (3)** provide that 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. In essence the Constitution recognizes that a marriage can be dissolved. Given the long period the parties have been apart, I do find that the visits by the respondent to the petitioner at the matrimonial home can only be termed as technical and cannot erode an objective conclusion that the respondent had deserted the petitioner. From the evidence on record it can be construed that the respondent deserted the petitioner. The Black's Law Dictionary defines desertion as "the act by which a person abandons and forsakes, without justification, or unauthorized, a station or condition of public, social or family life, renouncing his responsibilities and evading his duties". The manner in which the two parties have been living far apart from each other for a period of over 30 years amounts to desertion.

From the evidence on record I do find that the petitioner has proved her case. The marriage has irretrievably broken down and no amount of persuasion can convince the petitioner to retreat her steps and go back to the marriage. Ordering the parties to live as husband and wife would be tantamount to enslaving the petitioner. Despite the age of the parties it is clear that there is no love between them. One has to be tied to a marriage when he or she is willing to remain in that marriage. I do appreciate the efforts by family members to reconcile the parties but it is clear that petitioner's mind is set for a divorce. That being the case I do find that desertion has been proved and the marriage between the petitioner and the respondent is hereby dissolved. A decree nisi shall issue and either party is at liberty to apply and have it made absolute upon the expiry of 6 months from the date of this judgment. Given the history of the petition I do find that each party shall meet his/her own costs.

Delivered, dated and signed at Kakamega this 29th day of May 2013

SAID J. CHITEMBWE

J U D G E