



**REPUBLIC OF KENYA**

**High Court at Meru**

**Divorce Cause 2 of 2012**

**D.M.M.....PETITIONER**

**VERSUS**

**E.W.N.....RESPONDENT**

**J U D G M E N T**

The petitioner in his humble petition dated 16<sup>th</sup> March, 2012 seeks that marriage between the petitioner and the respondent solemnized on 8<sup>th</sup> June, 2006 be dissolved on account of cruelty, desertion and adultery and that the two issues of the marriage be granted to the petitioner and that the respondent be ordered to maintain the petitioner and the issues of marriage. The respondent upon being served with the petition filed Memorandum of Appeal on 13<sup>th</sup> April, 2012 through the firm of M/S Mithega and Kariuki Advocates but did not file answer to the petition. That directions were given on 6/11/2012.

The petition was heard on 12<sup>th</sup> March, 2012 in absence of the respondent. The petitioner's learned Advocate Mr. Rimita filed written submissions on 25<sup>th</sup> March, 2013 and on 11<sup>th</sup> April, 2013 sought judgment date. The petition was subsequently set down for judgment on 23<sup>rd</sup> May, 2013. The court has considered the petition, the evidence by the petitioner and the written submissions very carefully and the issues raised in the petition.

The petitioner's evidence is that on 8<sup>th</sup> June, 2006 the petitioner then a bachelor and the respondent, then a spinster, celebrated and solemnized a marriage under the Marriage Act (Cap.158) in (location withheld), Meru County. The petitioner produced certified copy of marriage certificate No.[...] as P.Exhibit No.1 as the original is with the respondent. The petitioner testified the petitioner and the respondent had been living at (location withheld) since 2006 and upto 2011 when their marriage broke down.

He testified that they were blessed with two daughters namely J.M born on 8<sup>th</sup> June, 2005 and G.N born on 8<sup>th</sup> October, 2008. That the petitioner and the respondent separated in 2009 when the respondent left the matrimonial home for (location withheld) in Nairobi.

The petitioner testified that they separated due to many issues arising between themselves. He averred that the respondent was cruel to him. That petitioner could not wash the petitioner's clothes or serve him with food. That they were not communicating. That the respondent denied the petitioner his conjugal rights. The petitioner also testified that the respondent admitted to him that she was committing adultery. That the petitioner and the respondent ceased living together as man and wife since 2011.

The petitioner testified that the respondent is the one who deserted the matrimonial home. He testified

that since 2009 the petitioner and the respondent never had sex together. He testified that his attempts to have the marriage reconciled has failed. He averred their marriage has broken beyond repair. He testified that he has not connived or condoned the respondent's acts and that the petition is not presented or prosecuted in collusion with the respondent.

After close of the petitioner's case Mr. Rimita, learned Advocate for the petitioner filed his written submissions dated 20<sup>th</sup> March, 2013 and submitted that the petitioner has proved his case on balance of probabilities and sought the petition to be granted. He urged that the petitioner had in his unchallenged evidence proved that respondent was guilty of cruelty, desertion and adultery. He averred the particulars given in paragraphs 6, 7 and 8 of the petition were not challenged at all by the respondent. He submitted the petitioner relied on his pleadings and his evidence both of which were not challenged by the respondent who did not file answer to the petition nor give evidence to controvert the same.

The Counsel referred court to an Arbitration Award/Agreement on settlement of Matrimonial property and Parental Responsibility Agreement dated 20<sup>th</sup> May, 2012 drawn by Mithega & Kariuki Advocates and duly executed by the petitioner and the respondent before an Advocate. He prayed that the agreement be considered and adopted by the court. The said agreement partly provides as follows:-

***WHEREAS D.M I.D NO.\*\*\*\*\* (hereinafter referred to as the 1<sup>st</sup> party) and E.W I.D. NO.\*\*\*\*\* (hereinafter referred to as the 2<sup>nd</sup> party) are husband and wife respective, having contracted a valid statutory marriage AND WHEREAS the parties now believe that the marriage has irretrievably broken down and divorce proceedings have already commenced AND WHEREAS the parties acquired property jointly during the currency of the marriage and have agreed on the settlement of the matrimonial property and have agreed on the sharing of parental responsibility over the two children."***

***NOW THIS DEED SHOWETH AS FOLLOWS:-***

- 1.....
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10....."

***ON THE CHILDREN***

***10. THAT the marriage between the parties was blessed with two children namely J.M.M and G.N.M.***

***11. THAT both parties shall have legal custody over the children but the actual custody shall remain with the 2<sup>nd</sup> party.***

***12. THAT the parties shall make monthly contributions of Kshs.13,000/ each towards the maintenance of the children. The amount shall be deposited every month in a bank account No.\*\*\*\*\* (Bank name & branch withheld). The amount shall cater for shelter, food, entertainment, housekeep, outpatient medical care and daily upkeep of the children. The position shall be reviewed annually in case of change in the needs of the children.***

***13. THAT the 1<sup>st</sup> party shall in addition pay school fees, buy clothing and cater for any impatient medical attention for the children. The position shall be reviewed after the children complete primary school education.***

**14. THAT the 1<sup>st</sup> party shall have visitation rights to the children anytime at school subject to the rules and regulations of the school. In addition, the 1<sup>st</sup> party shall take actual custody of the children over the mid-term break and over any holiday when the 2<sup>nd</sup> party is away in school. Nothing in this clause, however, shall limit the power of the parties to enter into any arrangement over the custody of the children.**

**15. THAT the parties shall always act in the best interest of the children and shall always ensure that the children are fed with positive information about both parties. The parties shall dedicate their efforts towards proper mentorship of the children.**

**16. THAT the parties agree to always respect each other and treat each other with dignity and decorum and always act in utmost good faith.**

I would like to point out that the agreement herein and which petitioner's Counsel seeks this court to consider and adopt was not produced in evidence but has been introduced through the submission. The document ought to have been introduced and produced when the petitioner has giving evidence, however as it has been mentioned in the submission I shall consider the same in my judgment.

The petitioner's pleadings have not been challenged by way of filing an answer to the same. Paragraph 6 of petition on cruelty and particulars thereto have not been challenged or controverted. Paragraph 7 of petition which sets out the grounds of desertion similarly remains unchallenged or controverted and the same applies to paragraph 8 of the petition on adultery.

The petitioner's evidence on respondent's cruelty, desertion and adultery has not been challenged at all. The petitioner has therefore on balance of probability proved that the respondent is guilty of cruelty, desertion and adultery. It is evident from the petitioner evidence and document of agreement referred to the court through submission that the marriage between the petitioners and the respondent has irretrievably broken down and cannot be repaired. The parties have even agreed on settlement of matrimonial property and parental responsibility pending determination of the divorce proceedings.

The petitioner referred the court to an Agreement between himself and the respondent and requested the court to consider and adopt the same. The said agreement between the petitioner and the respondent, confirms that the parties arrived at the terms of agreement mutually, voluntarily and without any coercion or undue influence whatsoever and accepted the terms as binding on them. The petitioner is not challenging the terms and conditions of the agreement. The issue of the custody of his daughters who are minors was settled by the parties.

Both agreed to have legal custody but the respondent to have actual custody. On maintenance parties agreed each to make monthly contributions of Kshs.13,000/- and amount to be deposited every month in bank account No.\*\*\*\*\* (Bank name & branch withheld). The amount was to cater for shelter, food, entertainment, housekeep, outpatient, medical care and daily upkeep of the children. The petitioner was in addition to paying school fees, to buy clothing and cater for any impatient medical attention for the children.

The petitioner was to have visitation rights to the children anytime at school subject to the rules and regulations of the school. The petitioner was to have actual custody of the children over the mid-term break and over any holiday when the respondent is away in school.

The law is very clear on the issue of custody of the children of tender years and especially when the children are girls such as in this case, the custody of the minor children should be with the mother save on exceptional circumstances.

In the case of **K V K (1975) EA 18** in which Court of Appeal stated:-

***“The substantial question in this appeal is whether or not the Judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over***

***seven years of age, and the son was six years old. The Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother.”***

In this cause the petitioner did not assert and prove any exceptional circumstances to warrant him have the custody of the minor two girls instead of their mother. Even in the agreement document which he has asked the court to consider and adopt and which document was entered into after filling of this petition he voluntarily agreed the actual custody of the children be with the respondent, mother to the said two minors.

In view of the foregoing I find that the petitioner has proved his case on balance of probabilities and that the agreement dated 20<sup>th</sup> May, 2012 between the parties ought to be considered and adopted in this judgment. I therefore make the following orders:

- 1. The marriage solemnized between the petitioner and the respondent on 8<sup>th</sup> June, 2006 at (particulars withheld), before the registrar of Marriage, vide certificate No.\*\*\*\*\* be and is hereby declared to have irretrievably broken down and the same is hereby ordered dissolved.***
- 2. The agreement dated 30<sup>th</sup> May, 2012 executed by the petitioner and respondent before commissioner for Oaths be and is hereby incorporated as being part of the judgment as regards paragraphs 10 and 16.***
- 3. The custody, care and control of the minors J and G be and is hereby granted to the respondent with reasonable access to the petitioner.***
- 4. The parties are at liberty to work out modalities of access.***
- 5. Decree Nisi shall issue forthwith.***
- 6. Decree Absolute to issue within six (6) months from the date of the reading of the judgment or within such shorter period upon application by either party.***
- 7. The application for maintenance of the petitioner was not proved and is rejected.***
- 8. Parties are at liberty to apply for any order in relation to the minors in connection with issues of access or any other issues affecting the said minor.***
- 9. Petitioner to bear his own costs.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF MAY, 2013.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

- 1. MR. Rimita for the petitioner**
- 2. Mr. Kariuki for the respondent (absent)**

**J. A. MAKAU**  
**JUDGE**