



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

MISCELLANEOUS CAUSE 72 OF 2012

D M K.....PETITIONER

VERSUS

E K B.....RESPONDENT

RULING

The applicant has come to court under rule 2(1) of the Matrimonial Causes Rules. He seeks leave to commence divorce proceedings before the three years required by statute have expired.

Rule 2(1) of the Matrimonial Causes Rules provides that an application for leave to present a petition for divorce before three years have passed since the date of the marriage should take the form of an Originating Summons. The application should be supported by an affidavit which sets out the matters itemised in Rule 2(2) of the Matrimonial Causes Rules. The additional requirement is that a copy of the intended petition for divorce shall be exhibited to the application.

Rule 2(1) of the Matrimonial Causes Rules is subsidiary to Section 6 of the Matrimonial Causes Act. **Section 6** places restrictions on the filing of petitions for divorce during the first three years after the marriage, but with a proviso that the court may on application under the rules allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.

The critical consideration here will be **“exceptional hardship suffered by the petitioner”** or **“exceptional depravity on the part of the respondent.”** The concise Oxford Dictionary, Ninth Edition, defines hardship to mean severe suffering or privation. It also refers to the circumstances causing such **“severe suffering or severe privation”**. The same dictionary defines depravity to bespeak moral corruption or wickedness.

The details given in the application and the affidavit in support of it, show that the parties celebrated marriage under statute on 31st July 2010. The respondent is alleged to have deserted and separated herself from the applicant on 13th September 2011. There are no children of the marriage. Efforts to reconcile have failed and the marriage has for all purposes broken down. On the face of it, the application appears to meet all the requirements of Rule 2(2) of the Matrimonial Causes Act, save that the petition proposed to be filed should leave be granted.

To allow an application of this nature Section 6 of the Matrimonial Causes Act and Rule 2(2)(b) of the Matrimonial Causes Rules should be satisfied. It must be demonstrated that there is petitioner is suffering exceptional hardship or that there has been exceptional depravity on the part of the respondent. Particulars of the exceptional hardship or exceptional depravity must be given in the affidavit in support. The affidavit of the applicant in support of the application was sworn on 13th June 2012 I have carefully gone through it, and I note that the applicant has not given particulars of the exceptional hardship that he has suffered to justify the orders being sought. I have also noted that he has not given particulars of exceptional depravity on the part of the respondent. He merely complains that the respondent has separated herself from him, that there have been no conjugal relations between them since 2011 and that the respondent has declined to come back. He has not demonstrated that he is suffering severely in one way or the other and therefore cannot wait for the three years to elapse. Neither has he demonstrated that there was serious moral corruption or wickedness on the part of the respondent, so bad that he cannot wait for the three years to expire.

In my view the Originating Summons dated 13th June 2012 has not met the threshold set in Section 6 of the Matrimonial Causes Act and Rule 2(2) of the Matrimonial Causes Rules. It lacks merit therefore and I hereby dismiss it with costs.

**DATED, SIGNED and DELIVERED AT NAIROBI THIS 27th DAY OF June 2013.**

**W.M. Musyoka**

**JUDGE**