



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**DIVORCE CAUSE NO. 81 OF 2008**

D A K.....PETITIONER

VERSUS

M K.....RESPONDENT

**JUDGMENT**

The petitioner herein **D A K** filed in court this petition dated 11<sup>th</sup> November, 2008 in which she sought the following prayers:

“(a) **THAT** the marriage between the petitioner  
and the respondent be dissolved.

(b) **THAT** a permanent injunction be issued

restraining the respondent whether by himself and/or his servants, agents and/or employees from possessing, dealing, managing and/or whatsoever in any manner whatsoever dealing with the two residential plots at Shanzu where the petitioner managed to put up and fully furnished the matrimonial home comprising of a three bed-roomed house and an external food kiosk, the farm at Nguuni within Kisauni Division in Mombasa and where the petitioner put up a mud house and has been cultivating crops thereat since acquisition, the farm at Kashani around Lwangwani measuring over 12 acres and the farm at Kashani measuring around one and three quarter acres which the petitioner had solely acquired long before the marriage herein and further orders that the respondent be further restrained by an order of injunction whether by himself and/or his agents, servants and/or employees from in any way approaching confronting, threatening, abusing, shaming and/or in any other manner detrimental to the petitioner’s dignity and honour as a person either by herself, her servants, employees and/or agents in any manner whatsoever either at her work place or elsewhere;

(c) The respondent do provide maintenance to the petitioner accordingly;

(d) Any other and/or further order this Honourable court deems fit and just to grant in the circumstances.

(e) The respondent be condemned to pay all the costs of this petition.”

The respondent **M K** filed a Reply to the Petition and cross petition dated 26<sup>th</sup> January, 2009 in which he made the following prayers:

**“(a) The petitioner’s petition be dismissed with**

**costs.**

**(b) Marriage between the petitioner and respondent be dissolved on the above grounds set out herein .**

**(c) The petitioner be condemned to pay the respondent –**

**(i) Alimony**

**(ii) Cost of the cross petition**

**(iii) The respondent to retain and live in the matrimonial home and land without interference of the petitioner.**

**(iv) The respondent to retain any other property acquired by the respondent before the marriage subsists and after.**

**(v) Any other relief this Honourable court may deem fit to grant.”**

This cause was heard by way of vive voce evidence. The hearing commenced on 10<sup>th</sup> December, 2010 and concluded after both parties had filed their submissions on 13<sup>th</sup> February, 2013. **MR. JADI** Advocate acted for the petitioner whilst the respondent was represented by **MR. OKONJI**. At the outset I wish to sincerely apologize for the delay in preparing this judgment. This delay was occasioned by the fact that I was assigned to hear two (2) election petitions which under the Constitution were to be determined within a period of six (6) months. Due to this and other institutional challenges I was not able to address my mind to the preparation of this judgment within a reasonable time. Once again I do apologize to the parties for this delay.

This court will adopt the two issues for determination as stated in the petitioner’s submission filed in court on 3<sup>rd</sup> December, 2012. These were as follows:

- i. Whether the marriage between the parties herein has irretrievably broken down as a consequence of adultery and/or cruelty and ought therefore to be dissolved.
- ii. Who between the petitioner and respondent is entitled to the properties acquired during the course of the marriage being
  - a. Farm at Kashani measuring about 1<sup>3</sup>/<sub>4</sub> acres.
  - b. Farm at Kashani around Lwangwani measuring over 12 acres.
  - c. Two residential plots at Shanzu.
  - d. Plot at Nguuni.

The undisputed facts of this case are that the petitioner and the respondent who was a pastor met sometime in 2002 during the course of church activities. They got married on 8<sup>th</sup> February, 2005. The fact of the marriage was conceded to by the respondent in his evidence. The petitioner told the court that they got married on 8<sup>th</sup> February, 2005. On his part the respondent concurs that they got married in February, 2005 about three (3) years after they first met. They bore no children together. Neither party was able to avail a copy of their marriage certificate as they claim that it got lost. The respondent told the court that it was he who had custody of the marriage certificate but that he had misplaced it. However, he readily concedes that he and the petitioner did in fact get married to each other in church. Therefore notwithstanding the absence of a marriage certificate, in view of the fact that the marriage is conceded to

and in line with the original jurisdiction vested the High Court of Kenya and given the fact that this court is already seized of this matter and has heard all the evidence I will proceed to render a determination on the case.

The Matrimonial Causes Act Cap 152 Laws of Kenya provides in section 6(2) that a petition for divorce may only be filed in court three (3) years **after** the celebration of the marriage. In this case where the marriage was celebrated in 2005 and the petition was filed in court in November, 2008, there is intervening period of 3 ½ years. As such I find that this petition is properly before this court. Section 8 of the Marriage Act provides the grounds upon which a marriage in Kenya may be dissolved. These include both adultery and cruelty, two of the grounds raised by the petitioner. In her evidence the petitioner told the court that a few weeks after their marriage the respondent began to demand that she surrender to him all her salary. She claims that the respondent confiscated her ATM card and used it to withdraw monies from her account as he wished. She stated that the respondent would only dish out small amounts of money to her and would even go so far as to deny her money for bus fare forcing her to walk to work and that he would even deny her money to buy necessities like sanitary towels. The petitioner further alleged that the respondent began a relationship with a white woman named 'I' whom he was fond of cavorting with on the beach. The petitioner went on to claim that the respondent would continually taunt her saying that she was too ugly to be his wife and that he should have married a certain lady called 'L'. She stated that the respondent was abusive towards her and that he severally threatened violence against her. On his part the respondent denied all allegations of cruelty and adultery. He claims that the petitioner deserted the matrimonial home in 2008.

The allegations of adultery made by the petitioner against the respondent are given credence by the testimony of **PW3 W K** who was a neighbour to the couple in Shanzu. He told the court that the respondent admitted to him his romantic involvement with a white woman whom the respondent often went to meet at the beach. **PW3** told the court that the respondent told him that he intended to leave the petitioner and marry this white woman. Under cross-examination **PW3** confirms that he often saw the respondent and this **I** go off to secluded places together. Why would a married man be keeping company with a woman on the beach and going to secluded places with her. This certainly points to a more than casual relationship between the two. **PW3** also confirmed to the court that the couple often fought over the demands by the respondent to take control of the petitioner's ATM card.

The fact that the couple had a stormy relationship is also corroborated by the testimony of **PW2 M N K** who was the petitioner's elder sister. She told the court that in 2007 the petitioner began to complain to her family about abuse and hostility from the respondent. The petitioner began to suffer symptoms of stress. Therefore on 19<sup>th</sup> January, 2008 **PW2**, their sister **I** and her son **B** went to the couple's home to attempt to discuss and reconcile them. **PW3** states that the respondent refused to hear them out and chased them away with a panga. Although the respondent denies that such an incident ever occurred, I find no logical reason why **PW2** a mature woman with her own home would fabricate stories about problems in her own sister's marriage. **PW2** struck me as an honest witness who was acting in good faith and was only trying to help save her sister's marriage.

On the issue of abuse the petitioner testified that she did report the threats to Bamburi Police station. She produces a letter written by police to the respondent **Pexb7** and from the chief **Pexb6** as well as a threatening letter which the respondent wrote to her **Pexb8**. It is clear from this documentation that the petitioner felt threatened/harassed enough to seek the intervention of local administration authorities. To subject one's wife to constant threats and abuse certainly amounts to cruelty. I am satisfied that the petitioner has proved on a balance of probability both grounds of adultery and cruelty against the respondent.

The respondent on his part has not tendered any proof to support his allegation of cruelty against the petitioner. He claims that the petitioner deserted the matrimonial home on or about 15<sup>th</sup> January, 2008. Section 8(b) of Cap 152 provides that a divorce may be granted where the respondent "*has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition*". The key words in this provision are 'without cause'. It must be shown that the petitioner left the matrimonial home for no justifiable reason. In a situation where her lawful husband had declared his

feelings for another woman and was constantly harassing and threatening her, the petitioner cannot be said to have had no justifiable cause to leave. In her evidence the petitioner said of the respondent:

**“His behaviour made it impossible to live with him.”**

This court agrees. The petitioner had to leave in order to secure her safety as well as her sanity. The respondent cannot drive the petitioner away through his actions and then turn round to accuse her of desertion. I find no merit in this allegation. The respondent’s cross-petition fails in its entirety and is hereby dismissed.

The couple have lived apart since the year 2008. Attempts to reconcile them have failed. The marriage has clearly broken down as evidenced by the fact that both parties made a prayer for its dissolution. I do allow the petitioner’s prayer for divorce and I direct that a decree nisi do issue to be made absolute within three (3) months of today’s date.

Both the petitioner and the respondent made prayers for maintenance. However neither party made any effort to canvass this particular prayer. Neither the petitioner nor the respondent adduced any evidence to show and/or prove that they were dependant on the other for sustenance. Each appeared to have their own sources of income, the petitioner from her paid employment in the Department of Government Chemist in Mombasa and the respondent from his various business and farming activities. I am not persuaded that either party is entitled to an award of maintenance/alimony and this prayer in both the petition and cross-petition is hereby dismissed. As stated earlier the union between the petitioner and the respondent bore no issue thus there is no need to address issues of custody at all.

The next issue which this court has to deal with is the division of matrimonial property. As a general procedural rule a prayer for division of matrimonial property would be by way of originating summons in a cause which is separate from the Divorce Cause. The reasoning for this is clearly evident – it is to separate the emotive issues of divorce from the practical issues involved in proof of contribution to the acquisition of property. However, in this case the petitioner has made a specific prayer for a permanent injunction to restrain the respondent from dealing with the stated properties. The only way for this court to determine whether such an injunction is warranted or not, is to settle once and for all the question of division of matrimonial property.

I have carefully perused the evidence adduced by both parties regarding the matrimonial property. On her part the petitioner claims that she alone acquired the four pieces of property without any contribution and/or assistance from the respondent. On the other hand the respondent claims to have purchased at least two (2) of the properties single handedly and claims to have developed the matrimonial home in Shanzu where he currently lives on his own. The difficulty this court finds itself in is that for none of the four (4) properties has a title document been availed in the name of either one or the other party. All the parties have availed are sale agreements, which sale agreements do not give proper and/or adequate description of the property in question. **Pexb1** a sale agreement relied upon by the petitioner simply refers to “*plot mbili za marehemu baba yangu na mama yangu Fatuma*”. Nowhere is the plot described by location or plot number. Similarly the **Pexb1** relied upon by the respondent the seller describes the property as “*plot yangu*”. Again this could refer to virtually any piece of land in this country. The location is not described, no plot number or LR number is cited. Not even an allotment letter in the name of the purported seller has been produced. A court cannot give orders based on such scanty information. Even if this court were to proceed and grant the injunctive orders prayed for the same would be virtually impossible to enforce and/or execute since the properties in question have not been properly identified. In Kenya the ownership of land is proved by way of an instrument of Title. In this case no title has been produced. Therefore the sale agreements availed to court fall short of proving ownership.

Given these shortcomings I am reluctant to delve into the division of matrimonial property until such time as better particulars are availed. This matter was filed as a divorce petition under which division of matrimonial property is not provided for. The proper course is for one or other party to file an originating summons seeking division of matrimonial property. Under such a cause the parties can conduct in-depth searches at the relevant land registries to enable proper descriptions of the properties to be availed.

Similarly the parties can adduce direct evidence to prove each ones contribution to the acquisition of said asset. For the reasons cited above I decline to grant the injunctive orders sought. Each party to pay his/her own costs.

**Dated and delivered in Mombasa this 29<sup>th</sup> day of October, 2013.**

**M. ODERO**

**JUDGE**

In the presence of:

Ms. Chesaro for Respondent

Mr. Cheruiyott h/b Mrs. Jadi for Petitioner

Court Clerk Mutisya