



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 56 OF 2012

P M S.....PETITIONER

VERSUS

E N K.....RESPONDENT

JUDGMENT

The petitioner herein **P M S** filed in court this petition dated 7th November, 2012 seeking the dissolution of his marriage to the respondent **E N K**. In addition to the prayer for divorce the petitioner also sought orders of custody of the two (2) children of the marriage as well as costs of the suit. The respondent was properly served with the petition and summons to enter appearance as evidenced by the affidavit of service dated 26th April, 2013. Despite proper service the respondent neither entered appearance nor filed any reply to the petition. The matter therefore proceeded for formal proof.

Section 6(1) of the Matrimonial Causes Act provides:

“No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage.”

In this case as evidenced by the Marriage Certificate serial No. *[Particulars withheld]* the marriage was solemnized on 5th May, 2001. The petition for divorce was filed in November, 2012 a full ten (10) years after the marriage. I am therefore satisfied that this petition has been brought in compliance with section 6(1) and is properly before the court.

In his testimony the petitioner told the court that after their marriage he and the respondent cohabited in the Shimanzi area of Mombasa. Their union was blessed with two daughters:

- B M born on 31st May, 2002
- P M born on 7th April, 2005

Initially all was well and the couple lived in peace. However, the respondent in 2011 ejected the petitioner from the matrimonial bed claiming that he was committing adultery. She also claimed to have no interest in sex as she was undergoing menopause. She demanded that the petitioner undergo an HIV

test. From 2011 the couple did not enjoy conjugal relations as the petitioner was banished to sleep in the sitting room. On her part the respondent adopted a habit of coming home late regularly claiming to be attending classes though she could not specify exactly which college she was attending. In April, 2012 the respondent moved out of the matrimonial home to an unknown location leaving the petitioner to raise their two daughters on his own. The petitioner had to call in his sister to help him raise the children.

This narration by the petitioner remains uncontroverted and the court has no reason to doubt his testimony. In my assessment the respondent's behaviour can be classified as totally unreasonable. It appears that for reasons best known to herself she was determined to avoid any intimacy with her husband. It is difficult for any marriage to survive without intimacy between the partners. The respondent's action in deserting the matrimonial home and in leaving the petitioner to care for their two daughters alone was not only reckless and unreasonable but also amounts to cruelty. In a marriage the couple have a duty to care for their children jointly. Where one spouse abandons all parental responsibility leaving the burden wholly to the other spouse, this amounts to extreme irresponsibility and cruelty. It is clear that this marriage has totally broken down. The petitioner does not know the whereabouts of his wife and since she left in April, 2012 she has not bothered to return if only to check on the welfare of her daughters. I therefore find that the ground of cruelty has been proved and I do hereby grant the petition for divorce. Decree nisi to issue to be made absolute within three (3) months of today's date.

The prayer for custody ought ideally to be canvassed before the Children's Court. However, I note that the petitioner currently lives with and provides for the two children. Whilst I will not make any final orders on custody I do direct that the current status quo be maintained pending any further orders from the Children Court. No order on costs.

Dated and delivered in Mombasa this 18th day of December, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Ngugi for Petitioner

Court Clerk Mutisya