



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 62 OF 2009

S M K.....PETITIONER

VERSUS

V M M.....RESPONDENT

JUDGMENT

The petitioner herein **S M K** has filed this petition dated 2nd November, 2009 seeking the dissolution of his marriage to the respondent **V M M**. The respondent was properly served with the petition as well as a summons to enter appearance but failed to enter appearance or to file a reply to the petition. The matter therefore proceeded for formal proof.

Section 6(1) of the Matrimonial Causes Act, Cap 152 Laws of Kenya 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 the couple celebrated their marriage on 30th December, 1992. This is evidenced by the copy of the marriage certificate serial No. *[Particulars withheld]* annexed to the petition. The petition for divorce was filed on 4th November, 2009 a full seventeen (17) years after the marriage. As such I find that this petition complies with section 6(1) and is properly before the court.

The petitioner told the court, in his evidence that after the marriage the couple lived together as man and wife in Likoni, Mikindani and Tudor. They bore two (2) sons together namely:

- A K born on 4th November, 1992
- S K born on 4th April, 2004

Initially all was well and the couple lived together in peace. However, in 2005 the respondent left the matrimonial home together with the children and went to an unknown location. This was after the respondent had adopted a habit of locking the petitioner out of the house. The petitioner also took exception to the respondent's action of purchasing a house in Mikindani with a third party without consulting or informing the petitioner. The petitioner bases his petition for divorce on the ground of desertion.

Section 8(1)(b) of the Matrimonial Causes Act provides that the court may grant a divorce on grounds that the respondent:

“has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition.”

The petitioner’s evidence which is not controverted is that the respondent left the matrimonial home in the year 2005. This was a full four (4) years preceding the presentation of the petition. The petitioner states that the marriage has broken down. Clearly a marriage cannot be sustained where one partner willfully refuses to inhabit the matrimonial home. If the respondent had just cause or reason to depart as she did, she has not availed herself of the legal opportunity to explain to the court what these reasons might have been. As such I am satisfied that the ground of desertion has been proved and on this basis I do allow this petition for divorce. Decree nisi to issue to be made absolute within three (3) months of today’s date.

The petitioner also made a prayer for custody of the two (2) children. A prayer for custody ought properly be heard and determined in the Children Court. The petitioner told the court that although he provides for the education of his sons they live with their mother. I am not inclined to interfere with the status quo and I decline to make any orders with regard to custody. No order on costs.

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

M. ODERO

JUDGE

In the presence of:

No Appearance by Petitioner

Court Clerk Mutisya