



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Divorce Cause 95 of 2009**

**S.I.....PETITIONER**

**VERSUS**

**C.K.B.....RESPONDENT**

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

1. The parties herein started co-habiting in July 2002 and in December 2004 solemnized their marriage at the Registrar's Office in Nairobi. Thereafter, they lived in various places within the city of Nairobi until October 2007 when the Petitioner moved to the United Kingdom where he had obtained employment.

2. During their union, they were blessed with two (2) issues;

i) *L.I – born in 2004*

ii) *N.I – born in 2008*

3. In his Petition dated 24<sup>th</sup> April 2009, the Petitioner claimed that for “one year after their co-habitation begun, they had no problems but in 2003, their relationship started becoming sour for reasons connected to finances” and what he termed “family related issues”. He further claimed that in June 2005, he was chased away from their matrimonial home in South C, Nairobi but upon the intervention of their parents and a marriage counselor, the parties resumed companionship in November 2005. However in May 2006 the Petitioner was again denied access to the matrimonial home after an argument and the Respondent allegedly tore his academic and professional certificates. He moved away, rented a house in Nairobi West Estate until he moved to the United Kingdom in October 2007.

4. According to the Petitioner, the Respondent's actions throughout the marriage caused him both mental and physical anguish and the Respondent's cruelty led to the breakdown of their union. The particulars of cruelty are set out in the Petition as being that;

***“i) On diverse dates between the year 2003 and 2006, the Respondent has psychologically tormented the Petitioner with baseless allegations of infidelity.***

***ii) That sometime in May 2006 during a confrontation between the parties, the Respondent locked the Petitioner out of their matrimonial home and tore the academic and professional certificates of the Petitioner. That further, the Respondent destroyed most of the personal effects of the Petitioner causing the Petitioner extreme anxiety and mental anguish.***

**iii) The Respondent has on various occasions caused the Petitioner embarrassment at work and loss of reputation when she contacted the Petitioner's employer both in the United Kingdom and in Kenya and persists in interfering with the Petitioner's work.**

**iv) The issues of the marriage have undergone psychological torture as a result of the Respondent's violent temper and physical abuse of the Petitioner in the issues presence.**

**v) The Respondent and Petitioner are not in conjugal union any more."**

5. The Petitioner has added that as a result of the above actions, he has lost **"love and desire"** for the Respondent who has also exhibited no love for him and since the marriage has broken down irretrievably, the following Orders should be granted in his favour;

**"i) That the marriage solemnized between himself and the Respondent be dissolved.**

**ii) The Petitioner be given custody of the issues of the marriage.**

**iii) The Respondent pays costs of this Petition.**

**iv) Any other relief that the honourable Court deems fit and just to grant."**

6. The Respondent filed an Answer to the Petition and Cross-Petitioned for dissolution of the marriage and in the said document filed on 11<sup>th</sup> August 2009, she stated that although the marriage was tumultuous, the same was caused, not by differences related to finances, but because of the Petitioner's habit of drinking heavily and coming home late or not at all.

7. Regarding the allegations that the Petitioner was chased out of the matrimonial home, the Respondent denied those allegations and instead insisted that the Petitioner moved out of the matrimonial home voluntarily and without provocation and his actions amounted to desertion of his family. That in fact, the Petitioner moved away to the United Kingdom accompanied by his girlfriend, evidence of infidelity on his part as well. That it is true that as a result thereof, the Respondent has also lost love and desire for the petitioner and agrees that the marriage has broken down beyond retrieval. She prays for the following orders in her favour;

**"i) The custody of the issues of marriage L.I and N.I be granted to the Respondent.**

**ii) The marriage be dissolved.**

**iii) The [payment] Alimony pending suit be determined and allowed in favour of the Respondent.**

**iv) Adequate maintenance be granted for L.I and N.Ii.**

**v) Secured provision and or adequate maintenance be provided for the Respondent."**

8. In evidence before me, the parties repeated all the above assertions save that on the part of the Petitioner, he added that he had been paying the Respondent varying sums of money every month as upkeep for the issues of the marriage. Further, that he wants custody of the children and admitted that he has been living with a girlfriend for over three (3) years and the two of them are prepared to raise the minors.

9. The Respondent on her part has added that the Petitioner pays school fees for the children and pays her between Kshs.40,000/- and Kshs.60,000/- a month and the figure changes depending on the Petitioner's mood swings and that he complains that the amounts are too much to pay, in any event. She demands Kshs.105,000/- every month in order to maintain the same lifestyle for herself and the children.

10. On my part, I am obligated to determine the cause of the obvious breakdown in the marriage between

the parties and to determine whether I should allow the Petition or Cross-Petition.

11. On the Petition, cruelty is alleged by the Petitioner and the grounds are set out elsewhere above. Having seen the parties before me and having seen their demeanours during the hearing, I am convinced that what triggered the breakdown of the marriage are not the alleged cruel actions of the Respondent but two clear things;

*i) The Petitioner lost fire and love for the Respondent and started courting other women. I say so because when a married man begins communicating with other women on short message service (sms) and specifically calls one of them, “my love”, his wife is entitled to suspicion of infidelity if she discovers those matters.*

*It is instructive that the Petitioner has not denied that when he moved out of the matrimonial house in 2007, he soon thereafter moved to the United Kingdom with his girlfriend. Obviously the relationship between him and his girlfriend did not begin after he left his home to go and co-habit with another.*

*ii) When the Petitioner’s infidelity was discovered, the Respondent reacted angrily, tore the Petitioner’s academic certificates and testimonials (presumably to stop him from advancing in his career; no other reason is plausible) and locked him out of the house. The Petitioner then got a good reason to walk away only to return in 2007, have sexual intercourse with the Respondent upon which she became pregnant and then he walked away for good, never to return. He has never lived with that child todate.*

11. To my mind, all the allegations of cruelty are not so serious as to warrant a finding that the Respondent is responsible for the breakdown of the marriage but on the other hand, I find that the desertion by the Petitioner was voluntary and his own admitted infidelity are good reasons for dissolving the marriage.

12. In the event, the Petition must be dismissed and the Cross-Petition allowed to that extent.

13. Turning to the issue of custody of the children, I am aware that the general rule is that young girls should be raised by their mothers unless it can be shown that the mother is a drunkard; a woman of loose morals or generally an irresponsible mother - see S.O. vs. L.A.M. [2009] eKLR and Olela & Anor vs. Obiera Civil Application No.NAI 16 OF 1979 (Civil Appeal). In this case, the girls are seven (7) and four (4) years respectively and I see no sound reason advanced before me why their mother should not retain custody. In any event, the petitioner is a stranger to them; he left them when one was three (3) years old and the other was unborn and it would certainly disorganize them if they are transplanted to live with a father they hardly know. There is also the fact that the Petitioner is living with a girlfriend and there is no assurance that she can be a better custodian than their biological mother.

14. On the issue of maintenance of the Respondent and the children, to his credit and commendably so, the Petitioner did not deny that he was the father of the younger girl who was conceived during their separation, neither has he wholly abandoned them to the care of the Respondent. He has continued to pay school fees and he has continued to pay the Respondent some money for maintenance.

15. In evidence, the Respondent claimed kshs.105,000/- as maintenance. That sum was made up of Kshs.80,000 maintenance and upkeep and Kshs.25,000/- school fees per month. In his Submissions, the Advocate for the Petitioner has proposed Kshs.30,000/- as maintenance per month plus the school fees and the occasional clothing, toys etc.

16. To my mind, and reading **Article 53(1)(e) of the Constitution**, each parent is obligated to provide care and protection to a child and so to expect the Petitioner to solely give such care and protection would be unlawful. The Respondent has heaped all her monthly bills on the Petitioner as if she has no contribution to make on her part. I note that the medical needs of the children are taken care of by the common employer of the parties i.e. the Co-operative Bank of Kenya Ltd. The only expenditures that the parties have are;

- i) School fees,
- ii) Daily upkeep,
- iii) Clothing,
- iv) Housing.

17. The Respondent seems to have been taking care of (iii) and (iv) above and so it is only fair that the Petitioner takes care of (i) and (ii) above. School fees has been estimated at Kshs.25,000/- a month for both children and as for daily upkeep, he has been paying between Kshs.40,000/- and kshs.60,000/- a month. The average is Kshs.50,000/- a month and that is a reasonable figure to pay in the circumstances. Taking the two figures together, Kshs.75,000/- a month is reasonable and I say so noting his gross salary of Kshs.330,000/- a month and other engagements including the assistance he may be providing to his parents and siblings.

18. In the end and for the above reasons I shall make the following final Orders;

***i) The Petition is dismissed and the Cross-Petition is allowed.***

***ii) The marriage between the parties is dissolved. A decree nisi shall issue forthwith and to be made absolute within thirty (30) days.***

***iii) The Respondent shall have the custody of the issue of the marriage but the Petitioner shall have such right of access as shall be agreed between them within thirty (30) days failure to which this Court will determine such access.***

***iv) The Petitioner shall pay to the Respondent Kshs.75,000/- a month as school fees and maintenance and should the school fees change, such amounts as shall be demanded by the school (s) until they reach the age of majority or completion of their studies whichever is the latter.***

***v) Each party will bear its own costs.***

19. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2012.**

**24/1/2012**

**CORAM:**

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Ochieng for Respondent

No appearance for Petitioner

**ORDER**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**