



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO.128 OF 2009

K.D.K.C.....PETITIONER

VERSUS

A.S.P.....RESPONDENT

J U D G M E N T

1. By her Petition dated 27 August 2009, the Petitioner, K.D.K.C. seeks dissolution of her marriage to the Respondent. She also seeks orders that her share of the matrimonial property be determined and the Respondent be ordered to maintain her and the two (2) issues of their union. Costs are also sought.

2. The grounds on which the divorce is sought are that;

- i) Cruelty.
- ii) Adultery.

The particulars of the alleged cruelty are that;

“a) The Respondent has been physically abusive towards the Petitioner and the issues of the marriage hence causing them a lot of pain and suffering.

b) On diverse dates during the subsistence of the marriage, the Respondent has been cruel to the Petitioner by denying her companionship.

c) The respondent always comes home very late in the night and has made it a habit to spend his nights out of the matrimonial home, drinking alcohol and returning home in a drunken stupor.

d) Since the year 2001, the Respondent has been an alcoholic causing the Petitioner much pain and suffering. The Respondent was in a rehabilitation centre in March 2006 but he has continued to be cruel to the Petitioner causing her a lot of pain and suffering.

e) The Respondent has been physically assaulting the Petitioner and the issues of the marriage causing them untold and suffering and pain.”

The particulars of the alleged adultery are that;

“a) During the subsistence of the marriage the Respondent has been caught by the Petitioner with

other women of ill repute unknown to her.

b) The Respondent has during the subsistence of the marriage been caught in compromised situations with women not known to the Petitioner.” (sic)

3. It is the Petitioner’s further case that the Respondent’s actions have caused her emotional and psychological pain and the marriage celebrated in January 1994 in Nairobi, has irretrievably broken down.

4. The Respondent by an Answer to Petition and Cross-Petition filed on 9th October 2009 admits that the marriage has broken down beyond retrieve and that the Petitioner is the cause of it. He alleges that the Petitioner has committed the matrimonial offences of desertion and cruelty and the particulars thereof are;

“Desertion;

a) In September 2007 the Petitioner moved from the matrimonial home and carried away the two (2) issues of the marriage to her father’s home.

b) Deserting the matrimonial home and denying the Respondent the love of a wife.

c) Abandoning and neglecting her wifely duties.

d) Continually denying the Respondent his conjugal rights.

Cruelty;

a) Causing the Respondent a lot of emotional pain and suffering.

b) Being very hostile to the Respondent, emotionally and verbally abusing the Respondent thereby causing untold mental anguish, grief, humiliation and agony.

c) Being very rude, sarcastic and abusive to the Respondent even in the presence of family members, other people and the general public causing the Respondent embarrassment.

d) The Respondent has after celebration of this marriage acted in an openly defiant and paranoid manner and indifferent manner to the Respondent.”

5. During the hearing, each of the parties repeated the above assertions and my opinion of the evidence is as follows;

One of the allegations made by the Petitioner is that the Respondent was an alcoholic and in evidence she stated as follows;

“When he was sober, he was fine but he was uncontrollable when drunk”

In his own evidence, the Respondent stated as follows;

“I am an alcoholic. I have gone for rehabilitation”.

6. I am inclined to believe the Petitioner’s evidence that an alcoholic is susceptible to late nights and drunken stupors and may not be able to control his actions. More likely than not, he was also violent to the Petitioner and so the allegations of cruelty are not far-fetched and are in fact believable.

7. As for adultery on the part of the Respondent, the evidence tendered was less than satisfactory. In Mathai vs. Mathai [1980] KLR 154 at 156, the Court of Appeal accepted the argument that the charge of adultery must be proved to the satisfaction of the Court and circumstantial evidence in proof of adultery

ought to be carefully and cautiously considered and that the Court must move with great care in that regard. Law, J. A. went further to say;

“At the same time, I am of the opinion that, when considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the Court must be satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved; there is no need for a Court to preoccupy itself with other words and expressions used by other Judges in other places. This can only lead to confusion.”

8. I am wholly guided and in the instant case, I am not satisfied that the generalized statements in the Petition can be anything more than that but certainly they cannot be prove of the matrimonial offence of adultery.

9. Turning to the Cross-Petition, I will quickly dismiss the allegations of desertion on the part of the Petitioner. Once I have found that the Respondent was cruel to the Petitioner, her departure from the matrimonial home was a matter of necessity and for her own safety.

I also see no reason to find that the Petitioner was cruel to the Respondent as alleged and in fact in evidence before me, the Respondent merely gave open ended statements of alleged cruelty towards him and I was left with no doubt that his statements were made up merely to deny the obvious.

10. In the end, I find no evidence at all to support the Cross-Petition and I will instead dismiss it.

11. For obvious reasons, I will allow the Petition with the final Order that since the marriage between the parties has broken down irretrievably, I will order its dissolution and a decree nisi shall issue forthwith and to be made absolute within thirty (30) days. Further, parties recorded the following orders by consent on 30th June 2011.

“The two properties viz L.R. No. [...] and L.R. No. [...] be shared as follows;

- i) L.R. No. [...] be registered in the names of the Petitioner to hold in trust for the minors of the marriage.***
- ii) L.R. No. [...] to be registered in the names of the Respondent to hold in trust for the minors of the marriage.***
- iii) The Respondent to pay school fees for the minors as per the school fees structure and if need be the two (2) minors may only be transferred to another school with the consent in writing of both parties.***
- iv) Respondent to provide a medical insurance cover for the minors till they attain the age of majority.***
- v) Respondent to pay the Petitioner Kshs.50,000/- every month towards maintenance of the minors.***
- vi) Respondent be allowed access to the minors on every 2nd and 4th weekend of every month alternatively from 8.00 a.m. on Saturday to 6.00 p.m. on Sunday.***
- vii) The Petitioner to have the minors during the first half of the school holidays and the Respondent will have custody during the 2nd half of the holidays.***
- viii) The Respondent undertakes to remain sober for the period he has custody for the children.”***

12. I shall make no orders as to costs in any event.

13. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF JANUARY, 2012.

CORAM

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Isoe hold brief for Mr. Omwenge for Petitioner

No Appearance for Respondent

ORDER

Judgment duly read.

ISAAC LENAOLA

JUDGE