



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA, AT MILIMANI LAW COURTS

DIVORCE CAUSE NO.124 OF 2011

J.S.W.....PETITIONER

J.R.W..... RESPONDENT

JUDGEMENT

The Petitioner, J.S.W, seeks in the Petition dated 25th July 2011 an order that his marriage to **J.R.W** be dissolved. The parties were married to each other on 13th August 1994 in the United States of America. The Petitioner was then a bachelor and the Respondent a spinster. They cohabited after the marriage in U.S.A., from August 1994 to May 1995 when they moved to Kenya, and then returned to U.S.A. until August 1999 when again they returned to Kajiado, where they resided up to January 2001 before moving back to the U.S.A. that month. They again returned to Kenya in 2001 and resided in various places until 26th April 2010 after which they stopped cohabiting.

Their marriage was blessed with two children, namely, **S.M.W**, born in 2002 and **K.J.W**, born in 2006.

Both the Petitioner and the Respondent are domiciled in the United States of America but the Petitioner resides in Kenya where both returned in June 2001. The Respondent now resides in Vietnam where she works.

The Petitioner seeks dissolution of the marriage on the grounds that the Respondent treated him with cruelty. In the divorce Petition, the Petitioner avers that the Respondent suffered mental anguish when the Respondent abandoned him on 9th May 2010. He also avers that the Respondent blocked him from her life completely and refused to discuss the issues affecting their marriage.

Produced during the hearing by the Petitioner as exhibit No.P2 was a Separation Agreement which, inter alia, sets out the terms of visitation rights of the parties to the children. The two children, said the Petitioner, are with him (the Petitioner) and the Respondent is doing voluntary work in Vietnam. The Petitioner denied collusion in bringing this divorce petition.

Under Section 4 of the Matrimonial Causes Act, Cap 152, no order for dissolution of marriage can be made unless the Petitioner is domiciled in Kenya at the time when the Petition for divorce is presented but the court has jurisdiction under Section 5(1) of the Act in proceedings by a wife for divorce if the wife is resident in Kenya and has been ordinarily resident in Kenya for a period of 3 years immediately

preceeding the commencement of the divorce proceedings (notwithstanding that the husband is not domiciled in Kenya). This requirement seems predicated on the assumption that the wife has the domicile of the husband which is acquired on marriage. The law entitles the wife whose husband is not domiciled in Kenya to petition for divorce pursuant to Section 5(1) of the Matrimonial Causes Act. Why is it that if the wife petitions for divorce where the husband is not domiciled in Kenya the court has jurisdiction but the husband cannot? The Grant of any other relief (other than dissolution of marriage) can only be made if one of the parties to the proceedings has his or her residence in Kenya or unless the marriage was solemnized in Kenya. (See section 4 (b) of Cap 152)

In this case, the marriage between the parties was solemnized in the United States of America where both parties are domiciled. However, the Petitioner has been ordinarily resident in Kenya since 2001. The Petition is not by the wife who, although a foreign national domiciled elsewhere, would under Section 5(1) of the Matrimonial Causes Act be entitled to seek divorce if she were ordinarily resident in Kenya for 3 years before the filing of the Divorce Petition. This provision in the Matrimonial Causes Act discriminates against husbands. There is no place for it in our Constitution. While Article 27 of the Constitution has enshrined the right of every person to equal protection and equal benefit of the law, Article 20(4) of the Constitution enjoins the court to promote the values that underlie an open and democratic society based, inter alia, on equality and freedom. Moreover, the court is enjoined while applying any provision of the Bill of Rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Although the Petitioner is a husband who is neither domiciled in Kenya nor a Kenyan citizen but is otherwise ordinarily resident in Kenya, and notwithstanding Sections 4 and 5 of the Matrimonial Causes Act, I hold the view that he is entitled to Petition for divorce in Kenya. It is my view also that Section 5(1) of the Matrimonial Causes Act is discriminatory of husbands who although ordinarily resident in Kenya for a period of 3 years cannot file a Divorce Petition unless the marriage was solemnized in Kenya or are domiciled in Kenya. It is to this extent that Section 5 of the Matrimonial Causes Act is inconsistent with the Constitution. It seems Section 5(1) of the Matrimonial Causes Act is premised on the assumption that a wife takes the domicile of her husband on marriage under Section 7 of the Law of Domicile Act, Cap 37.

In Section 8 of the Matrimonial Causes Act states:

S.8(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent-

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

The marriage between the parties was a valid marriage. It was monogamous. The provisions of Matrimonial Causes Act define the marriage as “a voluntary union of one man and one woman for life to the exclusion of all others.”

The Petitioner alleged **cruelty on the part of the Respondent**. It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner’s health or reasonable apprehension of such injury. *Cruelty is willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable*

apprehension of such a danger (see **Russell v. Russell [1895] P. 315, 322**. See also **D. Tolstoy on The Law and Practice of Divorce, Sixth Edn**. It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see **Gollins v Gollins [1964] AC 644; Williams v Williams [1964] AC 698, 760**. Tolstoy, 6thEdn states that the question in all cases is whether the Respondent's conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see Gollins v. Gollins (supra) at page 670 and Williams v Williams (supra) at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see **Jamieson v Jamieson [1952] A.C. 525, 535**. Moreover, a deliberate intention to hurt may turn into "cruelty conduct" which, without such intention, would not constitute cruelty.

The Petitioner alleged in his evidence that he suffered mental anguish when the Respondent abandoned him and shut him out of her life. But does that constitute an act of cruelty? I think it would be a dangerous precedent to hold that where a spouse leaves and refuses reconciliation, if the other party suffers mental anguish, that that is evidence of cruelty on the part of the Respondent or the deserting or guilty party. Normally, where a spouse has left the matrimonial home, and deserted the other, the party not in desertion is entitled to seek divorce on the ground of desertion. But the act of desertion, per se, cannot constitute cruelty on the part of the deserting spouse merely because the Petitioner has suffered anguish as a result of being left alone or with the children in the matrimonial home. For starters, desertion is not an act intended to hurt although, hurt it will, but rather is an exercise of a spouse's freedom of choice. It would not auger well nor would it be right if the act of desertion were to be construed as amounting to cruelty. Cruelty is a serious charge that touches on one's character.

In this undefended cause, the Petitioner's evidence is that the Respondent left, refused to reconcile, and shut the Petitioner out of her life. The charge of cruelty cannot in the circumstances of this case hold good. What is salient in this divorce cause is that the Petitioner is not alleging that the conduct of the Respondent is such that it has made it impossible for the couple to live together. On the contrary, the Petitioner was intent on continuing to live with the Respondent but the latter refused. Such refusal cannot constitute cruelty! No doubt the marriage has irretrievably broken down. But the Petitioner did not stop living with the Respondent because of anything she did that can be termed as cruelty. She simply wanted out. It is my finding that the Petitioner has failed to prove cruelty on the part of the Respondent as a matrimonial offence

I have lamented before the regrettable failure by the authorities concerned to develop the law on the grounds of divorce in the Matrimonial Causes Act when I said in an earlier case that "*Once again I lament the fact that the Law Reform Commission and the Office of the Attorney General continue to ignore the need for legislation to amplify grounds for divorce. While other jurisdictions have continued to review their law in this branch so as to keep it in tandem with societal changes and values, Kenya continues to lag behind in this area of our laws. As a result, the only grounds for divorce are the traditional three, namely, adultery, cruelty and desertion and by the wife on the ground of rape, sodomy or bestiality on the part of the husband. This is not good enough. In other jurisdictions grounds such as irreconcilable differences and circumstances that make marriage untenable have been brought into the vortex of grounds for divorce. We ought to be a forward-looking jurisdiction and to set pace in development of our law to keep abreast with changes in our society.*"

This Petition fails not because the Petitioner is not domiciled in Kenya but rather because cruelty was not established on the part of the Respondent. In these circumstances, I dismiss the Petition with no order as to costs.

Dated at Milimani Law Courts, Nairobi, this 16th day of February 2012.

G.B.M. KARIUKI SC
JUDGE
COUNSEL APPEARING

Mrs. J. Thongori Advocate for the Petitioner

Ms Pamela Osodo – Court Clerk