



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 10 OF 2011

J.C.M.....PETITIONER

VERSUS

C.W.K.....RESPONDENT

JUDGMENT

J.C.M herein after referred to as “**the Petitioner**” has filed this case seeking for orders, inter alia.

1. **That** an order for divorce do issue and, the marriage between him and the Respondent be annulled.
2. **That** the Respondent be condemned to pay costs of the petition.
3. Any further or other Relief that the Honourable Court may deem just and fit to grant to the Petitioner in the circumstances.

The Petitioner testified that on the 27th day of April 2007 he married the Respondent under the Marriage Act, and the same was solemnised at the Registrar’s office at Mombasa, within the Coast Province in

Kenya. After the celebration of the said marriage the Petitioner and the Respondent did not begin to cohabit as husband and wife until 10th August, 2007 when they moved to M[...] and later to V.O.K area of Mombasa. That the marriage was not blessed with any issues. The petitioner however alleges that the Respondent has been adulterous, cruel towards him and has deserted the Matrimonial home since January 2008 to date. He has given the particulars of adultery to the effect that, the Respondent is pregnant by another man and is cohabiting with him in the Bamburi area of Mombasa. That previously the Respondent had strange behaviours with a neighbor one Jeff. As regards cruelty, the petitioner told the Court that the Respondents' desertion had occasioned him mental anguish, embarrassment and deprived him of his right to companionship. That, the Respondent has persistently shown lack of warmth, care and demonstrated total contempt for marriage. That she always caused his arrest on trumped up charges and has failed to carry out her wifely duties.

On desertion, the Petitioner told the Court, that the Respondent walked out of the home on 8th January, 2008 carrying away all her belongings and on being questioned, she became abusive and left.

In answer to the petition, and in her oral evidence, the Respondent denied in total all the allegation leveled against her. She told the Court that she was working with the Petitioner before she left. That as soon as they started to cohabit as husband and wife, they had a fight with the Petitioner, and that is when they decided to move to V.O.K from M[...] to avoid gossips from their neighbours about their fights.

As regards the ground of adultery she testified that she was not adulterous, to the contrary, she told the Court the petitioner subjected her to domestic violence and chased her away on the particular day. That when she returned the next day the door had been locked and locks changed. She admits being pregnant with another man after she separated with the petitioner. She testified that the Petitioner too has re-married another woman and they have a two year old baby. She denied having an affair with one Jeff the neighbour.

In relation to cruelty she denied all acts of cruelty described by the Petitioner, she also denied having declined to give the Petitioner his conjugal rights on purpose. Finally she denies the allegation of desertion and testified that the Petitioner subjected her to domestic violence and chased her away. In her final prayers, she has sought that:-

1. **That** the said marriage be dissolved.
2. **That** an order for such alimony and/or maintenance be awarded to her, per month should the Court dissolve the said marriage.
3. **That** Any such order and/or further relief as the Court deems just and expedient to grant.
4. **That** the costs of the petition be borne by the petitioner in any event.

I have considered the petition, the evidence in support, the answer to the petition, the evidence in support thereof and the submissions filed. I find that there is no dispute that, the Petitioner and the Respondent were married herein on 27th April 2007, that is evidenced by the Marriage Certificate produced in Court. In deed there is no dispute that the petitioner and the Respondent have not been blessed with any issues of the marriage. The petitioner seeks for the dissolution of the marriage, the Respondent seeks for the same. They accuse each other of cruelty and adultery. They have been separated since 8th January 2008, that is over four years. They have moved on with their lives and seem to have gotten into other relations. The petitioner is allegedly to have remarried and has a child 2 years old, and the Respondent is said to be pregnant, or has a child (not of the Petitioner). In deed no efforts have been made by either of them to reconcile with the other or reconstruct their marriage. **Are these people capable of re-uniting?** In my considered opinion, their marriage has irretrievably broken down.

The Respondent sought for an order for alimony and/maintenance, the same was resisted by the Petitioner. In the submissions filed, the Respondents claims the alimony on the ground that, she was being maintained financially by the Petitioner before separation. Thus, she qualifies as a benefactor of alimony settlement. The Respondent relied on the case of **Civil Appeal No. 74 of 1984**. (-no full citation-) was given. In response, the Petitioner submits that that prayer for alimony is not only an abuse of the provisions of Law and powers delegated to the Court but also frivolous and the figure of Kshs. 60,000/= sought is highly exaggerated. The petitioner submits that the Respondent is capable of fending for herself as she is salaried employee and the cause of the dissolution of their marriage. That she has admitted she receives maintenance of Ksh. 35,000/= from the father of her child and she earns Kshs. 20,000/=. That before the parties broke up, they had been married for only 8 months. If anything she has been away for 4 years separated. The benefactor of alimony must be an **“innocent”** party or wholly dependent on the petitioner. That in ascertaining the alimony the Court has to have regard for both the income of and or means of both the husband and wife. The Petitioner relied on the case of **S.M.N Vs A.O.B (2010) KLR.**

In relation to this issue I find that:

1. The marriage between the parties lasted for only (about) 8 months.
2. They have been separated for a period of 4 years during that period the Respondent was not being, supported by the Petitioner.
3. That, as of now the Respondent has admitted, that she is in another relationship. She has an issue in that relationship. The issue is maintained by the father to an extend of Kshs. 35,000/= per months.
4. That she earns at least Kshs. 20,000/= per month.

The Question is this: **Is she entitled to Alimony?** Alimony is payable to a person who would be compensated for loss occasioned by the other party or under a right of maintenance. In this case, both

parties are leveling accusations at each other for dissolution of their marriage. None of them has made an effort to reconcile or reconstruct their marriage. They have moved on. They are in other relations. They have not even faithfully filed their income and means of livelihood. I don't think it would be legally and morally right in the circumstances to order any of them to pay alimony to the other, or even the Petitioner to the Respondent. In view of the fact that, the Respondent is already in another relation, where she has given birth to an issue (which does not belong to the Petitioner), it may amount to enrichment, to be maintained by two "men" at the same time (as she is expected to be maintained by the father of the child). I therefore dismiss the prayer for alimony in the interest of justice.

In conclusion therefore I grant the prayers (a) in the petition dated **17th February, 2011** and the corresponding prayer **(a) in the Answer to petition dated 14th April, 2011**. All other prayers in the Petition and/or the Answer thereto are disallowed. Each party shall pay their own costs. Decree Nisi to issue accordingly.

Orders accordingly.

G.L. NZIOKA

JUDGE

22ND MARCH, 2012

Dated, delivered and signed at Mombasa.

G.L. NZIOKA

JUDGE

22ND MARCH, 2012

In the presence of:-

The Counsels Njoroge for the petitioner

Kipsang for the Respondent

Cc Maroro