W.M. M.....PETITIONER

VERSUS

B.M.L.....RESPONDENT

J U D G M E N T

1. The Petitioner, Dr. W.M.M, filed the Petition in this cause on 16.12.2009 seeking dissolution of his marriage to **Prof. B. M.L, the Respondent**, on the ground that the Respondent, since the celebration of the marriage, treated him with cruelty. In her cross-petition, the Respondent alsoseeks dissolution of the marriage on the ground that "during the subsistence of the marriage, the Petitioner has been guilty of cruelty". Both parties gave particulars of cruelty.

2. The Petition and Cross-Petition and the documents filed by the parties and the evidencepresented show the following.

3. The Petitioner,**Dr. W.M.M**, is aged 64 years. Prior to assuming the [*office withheld*], he was the Programme Officer,of [*name of institution withheld*]. He holds a PhD degree in Jurisprudence and is an accomplished Scholar.

4. The Respondent, **Prof. B.M.L**, an American citizen domiciled in Kenya,holds a PhD degree and is [*profession withheld*]. She taught for 10 years at two Universities in Nairobi. She is aged 54 years and celebrates her 55th birthday on [….2012].It is discernible from the evidence that she has been in Kenya for a long time and that between 1989 and 1994, she lived in Nairobi.

5. The parties were in a relationship for many years prior to their civil marriage on 20th July 2000 in Forster City, San Mateo, California, U.S.A. which was celebrated by former Mayor of San Mateo, Claire Mack.The Petitioner had an ex-wife and two children with her, a son and a daughter who were small when the parties met. The Petitioner also had 2 sons from other relationships. His support to the children and his links with them and their mothers subsequently became an issue and the bane of the marriage.

6. The Petitioner's links with the first-family and two sons from other relationships spawneddisagreements between the parties even before the solemnization of the marriage because the Respondent was opposed to resources being spent on them. Thisprecipitated marital friction and gave rise to the need for counseling of the parties. One of the counselors advised against the intended marriage on the ground that the Respondent had not come to terms with the Petitioner's past.The Respondentwas optimistic that the marriage would work out although it appears she wanted the Petitioner to sever completely all links with his children and their mothers. This, the Petitionerfound to be morally unacceptable and continued to support them. He could not eschew contacts with their mothers as the children were small.

7. As it turned out, the parties solemnized their marriage on 20th July 2000 in California, U.S.A. as aforestated. There is no child of the said marriage. But due to acts which the Petitioner termed as acts of cruelty on the Respondent's part, the marriage broke down irretrievably and the Petitioner moved out of

the matrimonial homein October 2009 and a *de facto* separation commenced as there was, from the evidence, *animus deserendi* on the Petitioner's part. The Petitioner filed the Petition on 16.12.2009.

8. In his Petition, the Petitioner put forward the following particulars of cruelty against the Respondent.

Particulars of Cruelty

a. The Respondent is a person of ungoverned temper and on various occasions during the course of the marriage, the Respondent has physically and verbally assaulted the Petitioner.

b. Sometime in 2003, the Respondent, knowing fully well that the Petitioner had only one copy of his LLM Thesis, tore up, mutilated and destroyed that single bound copy of the Thesis. The Respondent is well aware that the Petitioner is an accomplished and passionate scholar, and knew that he intended to publish his work in books form, which book would be a first on landlord-tenant relationships in Kenya. The Respondent's callous act was well calculated, deliberate and maliciously intended to cause the Petitioner maximum psychological, emotional and intellectual pain.

c. During the entire duration of the marriage, the Respondent has persisted in calling the Petitioner's ex-wife, daughter and son from his first marriage, "parasites" knowing at all times that such name-calling was causing and did cause the Petitioner immense pain and torture.

d. Throughout the marriage, the Respondent has persistently abused two children from prior relationships that the Petitioner had with two women that resulted in the birth of two sons in 1993, and 1999 respectively before his marriage to the Respondent. At all times prior to the Petitioner marrying the Respondent, the Respondent knew of the two children. The Respondent has cruelly persisted in abusing the two boys and their mothers, despite that fact that the Petitioner has always made it clear, and the two women have always understood that his only relationship with them is strictly with respect to the maintenance of their sons.

e. On various occasions in the year 2009, the Respondent has accused the Petitioner of wanting her dead when she underwent surgery at Stanford University Medical School. Her words and insinuations were extremely cruel and hurtful to the Petitioner who helped her through her recovery for over six weeks and was at her bedside for the 5 days in which she was admitted to the hospital.

f. The Respondent has further falsely and maliciously alleged, with no consideration for the Petitioner's feelings, that in an attempt to murder her during her hospitalization, he pulled off her oxygen mask while she was in hospital, causing her pass out after her surgery, knowing fully well that she passed out due to her allergy to drugs administered by the attending physicians. Indeed, the Petitioner was overcome by grief during the incident prompting an attending nurse to lead him out of the ward.

g. The Respondent's aforesaid actions have been calculated, deliberately malicious, cruel, callous and have caused the Petitioner immense grief, pain and emotional trauma.

9. The Respondent in her cross-petition put forward the following particulars of cruelty against the Petitioner:

Particulars of Cruelty

(a) The Petitioner has since the celebration of the marriage directed unkind and cruel verbal insults to the Respondent which insults were calculated to strip and undermine the Respondent's self worth.

(b) The Petitioner has constantly and frequently displayed a violent and uncaring attitude towards the Respondent and has physically assaulted her.

(c) The Petitioner concealed the existence of his relationship with women whom he had sired children with and the existence of the children themselves, and the Respondent only discovered the same when she

stumbled upon birth certificates and other documents pertaining to the said children, thus causing her great distress and agony.

(d) The Petitioner refused to discuss issues affecting the marriage with the Respondent, making the Respondent feel like she was a burden on the petitioner and further making her feel neglected and unwanted.

(e) The Petitioner frequently lied to the Respondent about the financial assistance that he accorded to his children from former relationships.

(f) The Petitioner kept an open relationship with his former wife despite knowing the adverse effect it was having on the marriage and further causing great tension between the parties and causing emotional and psychological trauma to the Respondent.

(g) The Petitioner is a pathological liar who lied to the Respondent numerous times in order to obscure the truth about his wayward behavior and to further cover up his extra-marital affairs.

(h) In June 2008 or thereabout, the Petitioner lied to the Respondent about gifting some Tanzanian stools to a friend namely Salih Booker and the Respondent took great effort to ensure that the stools were purchased and packaged. The Respondent suffered great humiliation and embarrassment 6 months later when she discovered in the presence of the said Salih Booker that the stools were not purchased for him but for a former girlfriend of the Petitioner.

(i) In November 2009, when the Respondent was undergoing treatment in New York for Autoimmune Hepatitis, the Petitioner refused to call the Respondent even once to enquire about the ongoing treatment or her health despite also being in New York on a business trip. The Petitioner further refused to pick up any of the Respondent's phone calls or meet her, depicting a careless and unloving attitude towards the Respondent during her illness and time of need.

(j) Despite the Respondent's efforts to salvage the marriage, the Petitioner has failed to make an effort to consolidate and enhance the same, as a result of which the Respondent has suffered psychologically.

(k) The Petitioner denied the Respondent her conjugal rights.

(l) The Petitioner's cruelty to the Respondent escalated when he insensitively informed the Respondent of his decision to file the divorce via email while the Petitioner was seeking a second medical opinion about her condition in hospital and while the Respondent was also battling with her mother's illness of cancer, facts which were well within the Petitioner's knowledge at the time.

(m) In 2009, the Petitioner duped the Respondent to invest a huge amount of her inheritance in a condominium in California, pretending to be interested in the property, only to later reveal in the email aforesaid of his intention to keep the home that they jointly own in Kenya so that the Petitioner can remain in the condominium in California.

(n) That as a consequence of the Petitioner's cruelty aforesaid, the marriage has irretrievably broken down and cannot be salvaged.

10. In addition to seeking dissolution of the marriage, the Respondent also **claimed maintenance** from the Petitioner in the cross-petition.

11. Mr. ChachaOdera of **MessrsOraro& Co. Advocates** represented the Petitioner while **Mrs. Judy Thongori** of **Judy Thongori& Co. Advocates** represented the Respondent.

12. On 28.9.2010, the Registrar issued Certificate of Compliance pursuant to Rule 29(1) of the Matrimonial Causes Rules and certified the matter as a defended cause.

13. The hearing came up before me on 19.1.2012 and again on 16.2.012 and continued on 29.3.2012 and 26.4.2012. The Petitioner testified on 19.1.2012 and closed his case while the Respondent testified on 16.2.2012 and again on 29.3.2012 when she closed her case. Neither party called witnesses.

14. It is public knowledge that the Petitioner became the [*office withheld*] in the year 2010 during the pendency of these divorce proceedings and that he holds that position.

15. The Petitioner in his testimony told the court that the Respondent is a person of ungoverned temper and that on various occasions during the course of the marriage, the Respondent physically and verbally assaulted him due to her temper. Acts of assault and battery, he testified, started immediately after the marriage and were staggered during the period of the marriage. He referred to the acts of cruelty set out in para 7(a) of the Petition and testified that the Respondent, knowing full well that the Petitioner had only one typed bound copy of his LLM Thesis, mutilated, tore up and destroyed it in 2003. It was the Petitioner's evidence that the Respondent was alive to the fact that the Petitioner is an accomplished and passionate scholar and that he intended to publish his works in book-form which would have been a first on landlord and tenant relationships in Kenya. The Petitioner testified that he read callousness on the part of the Respondent and discerned malice in the act and a deliberate and well calculated intention to cause him maximum psychological, emotional and intellectual pain which hesuffered. As a result of the destruction of the Thesis, the Petitioner's plans to write a book which would have been a first were scotched. He told the court that the intellectual pain and frustration he suffered was excruciating and that he considered the act to be very cruel. The Respondent, he testified, was a Professor who taught in a University and appreciated the value of the Thesis and knew the import of what she did, not least because the Thesis was the work of years of painstaking research. Its destruction clearly demonstrated the Respondent's ungoverned temper, he said. He told the court that even after destroying the Thesis, the Respondent did not ask for forgiveness and so, he never forgave her, nor did he condone the cruel act.

16. In her evidence-in-chief, the Respondent did not deny destroying the Thesis. She admitted that she was aware of the Petitioner's Thesis even before the solemnization of their marriage. She admitted that she was angry with the Petitioner and that that is why she tore up the Petitioner's LLM Thesis. She testified that she tore a few pages and that this did not make the Thesis illegible. It was her evidence that she did not intend to inflict intellectual pain on the Petitioner. As she gave evidence, she appeared miffed that the Petitioner kept open communication lines with his ex-wife and sons andshe declined to answer questions put to her in cross-examination by the Petitioner's Advocate and instead introduced and harped on the issue of the Petitioner's unfairness to her in keeping links with his children and their mothers. Sheadmitted that she knew her action in tearing the Thesis made the Petitioner angry. The court observed that she tried to trivialize the matter by attributing the Petitioner's anger to life's pressures which she did not identify. She was alive to the fact that the Petitioner was a scholar.

17. It was clear to the court from the evidence of both parties and from their demeanor that the Respondent deliberately tore up the Petitioner's LLM Thesis and destroyed his painstaking work of many years so as to hurt him. The incident confirmed her ungoverned temper. The evidence of the Petitioner was credible and was to be preferred to that of the Respondent which showed clear malice on her part and a desire to hurt. The Respondent attempted to show that the Thesis was destroyed before the marriage but her memory was hazy. After a health break of 20 minutes on 16.2.2012, the Respondent resumed her evidence apparently energized and told the court that she did not know why the Petitioner was divorcing her. She admitted having vented her anger on the Petitioner when she mutilated his Thesis. I believe the evidence of the Petitioner that the Thesis was destroyed in the year 2003. Although the Respondent refuted this, she did not show by evidence on what other date it could have been destroyed if not in 2003. She was cagy and lacked candor in her evidence on this issue. I do not believe her evidence.It is my finding that the Respondent deliberately and maliciously destroyed the Petitioner's LLM Thesis.

18. It was admitted by the Respondent in her evidence that she moved in with the Petitioner before the marriage and that that is when she got to know about the Petitioner's ex-wife and his children. She denied using derogatory language and thewords "bitch', "parasites", or the "FU" word and stated that she heard the words in court during the proceedings. Asked by Mr. ChachaOdera if she had not shown the Petitioner in court her middle finger, she stated that she had gesticulated in giving evidence. I observed the

Respondent who appeared very agitated.She failed to answer questions from the Petitioner's counsel even after being implored to do so. She was uncontrollably garrulous and I had to intervene severally and insist on heranswering the questions. She struck me as impatient and overbearing and not intent on telling the whole truth if it seemed to prejudice her case.

19. It was the Petitioner's testimony that the Respondent persisted in calling the Petitioner's ex-wife, and children "parasites" knowing that such name-calling caused the Petitioner immense pain and anguish. It was the Petitioner's testimony that prior to their marriage in July 2000, the Respondent had been made aware that the Petitioner had an ex-wife and a son and a daughter and two sons from other relationships. The Respondent's use of derogatory language while referring to his sons caused him anguish and trauma, he said. He told the court in evidence that prior to his marriage to the Respondent, he had bared his past life to her and that she was unhappy about the existence of the Petitioner's sons and their mothers and that this is what had led the parties to seek professional help from two counselors on how to deal with it. The advice of onecounselor was against the marriage because the Respondent did not appear reconciled to the Petitioner's past. In spite of the advice, the parties proceeded with the marriage but soon after the marriage disagreements ensued about the Petitioner's first family and this became the bane of the marriage.

20. The Petitioner's evidence that the Respondent used derogatory language was denied by the Respondent in her evidence and the latter allegedthat it was the Petitioner who used these derogatory words against his children. I watched both parties testify in this regard and I was left in no doubt in my mind that it was highly unlikely in the circumstances that the Petitioner who fondly referred to his children would at the same time use derogatory words against them. On the other hand, the Respondent who was irked by the Petitioner's links with the first family was more likely to use the derogatory language. Moreover, the Respondent had shown by her conduct in court that she was very disagreeable and pugnacious and had flashed to the Petitioner her middle finger and I got the vivid impression that the Respondent was the one more likely to vent her spleen by use of the words. On the balance of probabilities, it is my finding that the Respondent used the derogatory words as alleged by the Petitioner.

21. In further evidence of the Respondent's cruelty, the Petitioner referred to the particulars in para 7(e) of the Petition and testified that when the Respondent underwent surgery in the year 2009 at Stanford University Medical School, she falsely accused him of "wanting her dead". This was extremely hurtful and cruel, he said, as he helped her through her recovery for over six weeks and was at her bedside for the days she was admitted to the hospital. It was the Petitioner's further evidence that the Respondent falsely and maliciously alleged, with no consideration for the Petitioner's feelings, that the Petitioner pulled off her oxygen mask while she was in the hospital in an attempt to kill her, causing her to pass out after her surgery. The Petitioner testified that the Respondent knew that the truth was that she passed out due to her allergy to drugs administered to her by the attending physicians. So overcome by grief was the Petitioner on account of this accusation that he had to be led out of the ward by a nurse.

22. The Respondent denied these allegations but otherwise confirmed the Petitioner's testimony that he took care of her after surgery and would take her for walks and for exercise and help her dress. In her own words, the Respondent stated in evidence that the Petitioner "was very good to me." However, she told the court that she could not remember making the remarks that the Petitioner accused her that he wanted her dead. I observed her as she testified and I got the vivid impression that she seemed embarrassed about the allegation which she declined to admit. Instead, she stated that she could not remember. Yet it was

so profound that in normal circumstances any person in her position would be unlikely to ever forget it. After all, allegations of killing are not commonplace in marriages. When they occur, they leave indelible memory. But the Respondent admitted having woken up in I.C.U. without oxygen mask after cardiac and pulmonary arrest. She had a tube in her throat. Although she denied in her evidence-in-chief having accused the Petitioner of attempting to killher, she did not, however, state that she did not make accusations against him nor did she state what else she accused him of.

23. In cross-examination by advocate Judy Thongori, the Petitioner stated that the Respondent physically hit him fairly hard with her fist and spat on him in anger because of his links to his children

and their mothers. It was his evidence that the Respondent hurled abuses at him and called him the “F” word. Throwing tantrums, the Respondent also threw objects at him and all the time the Petitioner merely defended himself by holding her so as to eschew getting hurt.

24. In January 2010, when the Respondent was in U.S.A. the Petitioner took advantage of herabsence to move out because he realized that he would not be able to move out if she was present. When she returned, she expressed the wish to meet him and he accepted subject to the mediators being present. In cross-examination, the Respondent admitted that she knew that the Petitioner had said he feared meeting her alone and she admitted that when the Petitioner was being interviewed for the position of [office withheld], she sent him mobile text messages. She confirmed that she was not polite to him in the text messages. She told the court in evidence that she asked the Petitioner during the interview what kind of [office withheld] he was going to make. She owned up to the fact that she sent the text messages as she watched his interview on television. I observed her give evidence. I formed the vivid impression that the Respondent was not only ill-tempered, bellicose and touchy but also had a streak of malice and jealousy towards the Petitioner. She seemed irritated as she responded to questions from the Petitioner’s counselbut when her advocate, Mrs. Judy Thongori, embarked on re-examining her, she tried to ameliorate her evidence with regard to her text messages to the Petitioner during his interview by telling the court that all she was trying to do in calling the Petitioner during the interview was to request him to collect his book-case, which she called trash, from her house. That was certainly not believable! But she owned up to the fact that the texts she sent to him had everything to do with the interview. It was my observation that the Respondent would, if she could, have sabotaged the Petitioner’s chances of being appointed office withheld] . That in my view smacked of malice on her part. It is my finding that the Respondent accused the Petitioner of attempting to kill her.I find the allegations in paragraph 7(e) and (f)of the Petition proved.

25. The Respondent adduced evidence in support of the cross petition and stated that she got to know of the Petitioner’s ex-wife 4 years into their relationship but before marriage. She was miffed by the fact that the Petitioner was renting a flat for the ex-wife in Nairobi while all along she thought that the ex-wife lived in Kitui as this is what the Petitioner, she said, had led her to believe. It was in December 1999, she said, when she discovered that the Petitioner had a son born in 1993, a fact the Petitioner owned up to. She alleged that the Petitioner told her lies but this was not proved.The Respondent told the court that from the year 2008, the marriage deteriorated and she cited an incident when the Petitioner turned off lights in the kitchen while he sat watching soccer on T.V. with the chandelier lights on. She read harassment by the Petitioner in this. There was a time, she said, when he pushed her and she hit her head on the bed side table. She did not state where or when this had happened and whether it was before or after marriage. This was denied by the Petitioner in his evidence.

26. In 2004, the Respondent found evidence of transfer of $6000 to the mother of the Petitioner’s son. She told the court that the Petitioner avoided discussing his children and their mothers and that this made her very angry and frustrated.

27. The evidence shows that the Respondent did not trust the Petitioner. She was suspicious about his association with the first family and persons of female gender. She did not believe anything the Petitioner said to her before verifying its truthfulness. She believed that the Petitioner was holding truth from her on many issues including issues of finances and fidelity. I watched both the Petitioner and Respondent testifying before me. I formed the vivid impression that the Petitioner was a control freak, and overbearing, and violent in her language.I saw her flash to the Petitioner her middle finger in court although she denied it. Ostensibly afraid of the Respondent’s violent nature, the Petitioner resorted to communicating with her through emails. The Respondent did not take this kindly.

28. The issue of violence featured quite early in the marriage and the Petitioner clearly told the Respondent in his emails to her that he was unable to tolerate her cruelty. The Respondent loathed communication by email. She preferred to discuss issues with the Petitioner face to face. But he declined to do so. The emails show that the Respondent suspected that the Petitioner had extra-marital affairs with other women. But there was no evidence to show that her suspicion was well founded. It is clear, from the emails exhibited by the Respondent herself in her list of documents that her suspicion made her very

angry and it is no wonder that the Petitioner kept a wide berth from her and communicated only via emails. For example, in her email to the Petitioner dated December 7, 2009, the Respondent stated, inter alia,

"Anger is a part of my MO – and the only time and the only things that really make me angry are lying and lack of honesty. Honesty, I feel, is what you have kept and are keeping from me. It is not fair. It is not right. Dishonesty is so disrespectful. You won't put up with violence – and you should not. I, too, will not put up with dishonesty – I will not – after 22 years! So, any future discussions – no dishonesty, no anger. That has been my premise all along in 'discussions' in my relationship with you. But.... only to get more dishonesty from you."

29. The issue of violence had been raised in the Petitioner's email of 7th December 2007 to the Respondent to which the above email was a response. Said the Petitioner in the email of 7th December 2009:

"As you get your treatment (the ancestors say you will be all right) take time to consider the issue of separation. I do not see any alternative going forward. Also think of a solution that does not result in acrimony and long and protracted court proceedings. I want to be on my own. If you really wanted to make amends we should start thinking along these lines.

I am meeting my lawyer tomorrow over lunch, I need to brief him on what is going on. You exhibited some violence the last time we had a discussion. I will not put up with any violence in future. I think it is totally wrong. I wish you the best in your treatment. W".

30. In the following email copied to his advocates, the Petitioner clearly told the Respondent that he could not tolerate her cruelty. He stated:

"the breakdown of the marriage has everything to do with me and you. We need not look for other reasons or try to blame third parties. You have your reasons and I have mine. You have repeated the reasons ad nauseam. My reasons are based on your cruelty, your failure to make any meaningful material contributions to the marriage and simply that we should never have gotten married in the first place. All this is water under the bridge. I have moved out, filed a divorce petition and that is what is relevant for now.-

I get upset when you question my expenses when you have made nil contribution since I joined the FF. I have not questioned your expenses and I have supported your lifestyles. As we will eventually look at these issues when the issue of marital property crops up all the documentation will be available.

I believe you need to start looking for a job. I find it laughable that while I am 10 years older than you, and as qualified as you are I am still working 24/7 and all you can say is that you have made my home comfortable, cooked for me and my life worth living. This a rationalization for indolence and early retirement. I believe you can still do a lot of work in your editing and Kiswahili (and external examination) if you worked harder and complained less.

Found your question about T odd. You have for at least 3 times asked for her telephone number. Have you ever called her? I found it odd that I am supposed to have introduced Maria to T so that they can sell properties. Do not look for people to blame for our problems. You also said Makau is to blame for problems! Let us blame ourselves for this and do what is to be done. W."

31. The Respondent's anger due to the moving out of the Petitioner from the matrimonial home and his filing of the divorce petition got the better of her. This is exemplified by the email by T, a family friend, written to the Petitioner which, upon receipt, the Petitioner transmitted to the Respondent. The email by T to the Petitioner on Tuesday 8th, March 2011 stated:

W

"I had a rather unpleasant encounter with Binti last night at the US Ambassador's residence. I know that you have been separated a while so was very surprised and taken aback by such uncouth and ridiculous behavior by a supposedly intelligent, educated and mature woman. 'She loudly stated that I was her husband's girlfriend to her companion including all within earshot as well as asking me if you were on the grounds to which I suggested she ask you directly. I am not interested or inclined to engage her in any manner as I have absolutely nothing to do with her. From what you have shared with me, your marriage was unhealthy and on the rocks for a while and from some of the indicators both of you are in agreement that it is over. What you choose to do with your life is your business. Is that not your right? Seems like she feels she still owns your life..... I will not have some idle mind defame my reputation nor speak to me in that manner. Who I choose to go out with is my business as I am answerable to no-one but myself. On my behalf kindly ensure that Binti does not look for a scapegoat in me or play the blame game as I will not accept it. You and your wife are both responsible for the breakdown of your marriage so please sort your issues and leave me and other innocent parties out of your nonsense. If she EVER chooses to address me again in any manner at all I will embarrass and shame her as I have no issues saying what I feel to people that have nothing better to do with their time and mind other people's business. I trust you will do the needful. Thanks and my best Taz."

32. In relation to T's email, the Petitioner wrote in his email to the Respondent thus:-

"*Binti, I am forwarding this mail to you because I find this kind of behavior unpardonable and unacceptable. You do not have the right to insult and embarrass my friends. We are solely to blame for the breakdown of the marriage and we are in court to legalize that breakdown. If we were in some jurisdictions we would by now be divorced because they allow divorces by consent (in our court documents we both want divorce and we both say the marriage had broken down irretrievably) and we would have moved on with our lives. For all practical purposes our marriage is a legal fiction and we should not make anything else. I recall you once asked for T's cell phone number and I gave it to you. If you have issues with her why not talk to her rather than engage in public outbursts which in my view embarrass you more than anyone else. I know my advice means nothing to you, but I will give it nonetheless. I hope that even after divorce we will be able to treat each other as human beings. W."*

33. On October 7, 2009, when the Respondent was still in the U.S.A. the Petitioner sent the Respondent an email stating, inter alia, thus:

"I do not know whether this is the right timing to email you, but I feel I have to come out clean on what my feelings are about this relationship."

When you get back to Nairobi we will live together but lead separate lives. There is no way I am going to afford living in a rented apartment with all the debts now payable from my salary. I similarly am of the view that we cannot afford a separate flat for you unless you are ready to pay for it. You will not be able to continue you current situation of not seeking gainful employment, particularly after divorce. I would want a resolution of this problem that is amicable but really up to you to let me know how you want to deal with this problem. I do not want to discuss this issue over the phone so we will discuss it when you get here next week. Roda will email you about your return trip for October 15. Ibrahim will meet you at the airport the evening of October 16. See you soon. W,"

34. In her evidence in support of the allegations of cruelty against the Petitioner, the Respondent generally referred to incidents arising out of friction between the parties. She referred to an incident in which she alleged that the Petitioner hit her on the mouth as they drove on Mombasa Road to a furniture shop when the issue of first family came up. She did not give the date of the incident to show whether it was before or after the marriage nor whether it ever recurred during marriage if it had occured before the marriage. She alleged that the Petitioner concealed that his ex-wife lived in Nairobi and confronted him about it. He declined to discuss the matter. She testified that the Petitioner made her buy stools when he was going to New York in June 2008 which were supposed to be a gift for S. Booker, a family friend, only to later discover that they were meant for a woman called Camille. The Respondent further alleged that the Petitioner did not tell her that in October 1998 he would soon go to Canada on a trip that had been pre-planned. She alleged that he hid his relationship with T to whom he sent funds. As T had divorced in

2004, the Respondent suspected extra marital affair. But even after the Petitioner had communicated to the Respondent that he was going to divorce her, the latter still demanded that he sees her in New Jerseywhen he was attending Ford Foundation meeting in New York. The Petitioner declined. She complained of denial of conjugal rights, lies and failure to discuss issues affecting the marriage.

35. Both advocates made submissions. **Mr. ChachaOderafor the Petitioner submitted** that the Respondent had failed to prove the allegations in her cross-petition as she had not adduced evidence to establish cruelty on the part of the Petitioner. On ground 1(a), (b), (c), (d) and (e) of the Respondent's cross-petition, she contended that the allegations by the Respondent in 1(a) and (b) were of no probative value as the same were not put to the Petitioner during cross-examination for his comments while the allegations in 1 (c), (d) and (e) were supported by hotel receipts and emails which were incapable of proving a matrimonial offence especially viewed from the perspective that the Petitioner had come clean on his past relationships and the existence of children from those relationships. Indeed, the disclosure had led to the pre-marital counseling, he said. It was submitted by the Petitioner's counsel, a fact borne by the record,that it was never put to the Petitioner that the Respondent only found out about the children and their mothers after the marriage by stumbling upon their birth certificates. Consequently, the Respondent's evidence in this regard lacked probative value, he submitted.

36. With regard to ground 1 (f) of the Respondent's cross-petition, the Petitioner's counsel submitted that there was no evidence to show that the Petitioner supported his ex-wife from the Respondent's resources nor was there any allegation that as a result of the support, the quality of life that the Petitioner and the Respondent led was adversely affected. It was the Petitioner's evidence that issues touching on his previous marriage were often a recipe for conflict and that for the sake of tranquility in the marriage, he kept them away from the Respondent. It was contended on behalf of the Petitioner that ground 1(f) of the cross-petition cannot constitute cruelty. It was further pointed out by counsel for the Petitioner that the Petitioner's ex-wife had a medical condition which rendered her incapable of looking after herself and consequently the Petitioner found himself under a moral and a legal duty to support her. In her evidence in cross-examination, the Respondent denied knowing the illness of the Petitioner's ex-wife and its residual effect. Mr. ChachaOderosubmitted that probably if the Respondent had cared to know, she would not have advanced ground 1(f) as an allegation of cruelty.

37. In response to ground 1(g), (h) and (i), of the cross-petition, it was submitted on the Petitioner's behalf that no evidence was led of extra marital affairs. All that the Respondent had was suspicion, he said. There was no evidence that the Petitioner made payments for illicit or clandestine purposes, he added. On the issue of Tanzanian stools, the Petitioner testified during cross-examination and showed that his conduct in relating to the Respondent was informed by the latter's suspicious nature which gave rise to the Petitioner's guarded communication.

38. In answer to ground 1 (j) (k) (l) and (m) of the cross-petition,counsel for the Petitioner submitted that the marriage between the parties had irretrievably broken down by the time the Petition was filed and the relationship between the parties was beyond reconciliation and consequently the exercise of conjugal rights was not an issue. At any rate, he said, no evidence was led on this ground. Due to the Respondent's violent nature, the Petitioner informed her via email, said counsel.

39. It was further the submission of the Petitioner's counsel that the Respondent failed to adduce any credible evidence in support of ground 1 (n) in her cross-petition. From the Respondent's own testimony, there was no evidence that the Petitioner duped her, contended Mr. ChachaOdera who posed **"**how could he have duped her when it was conceded by her that the Petitioner was going to make some end financing from his employer to purchase the condominium?" Moreover added counsel, "how could the Petitioner have duped her in purchasing the said property when it is conceded that the property was to have been registered in the joint names of the Petitioner and the Respondent?**"**

40. It was Mr. ChachaOdera's submissions that the Respondent had failed to adduce evidence to support the allegations of cruelty against the Petitioner and that, on his part, the Petitioner had adduced sufficient evidence to establish cruelty against the Respondent on the acts of cruelty specified in the particulars in paragraph 7 (a) to (f) of the Petition.

41. The Petitioner's Counsel referred to the case of **N. v N.***and another* [2008] I KLR [G & F] 16 (which was also referred to by Mrs. Judy Thongori) as the authority for the propositions that firstly that an intention on the part of one spouse to injure the other is not a necessary element of cruelty as a matrimonial offence and secondly that whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard.

42. He also referred to **Gollins v Gollins** [1963] 2 All ER 966 in which Lord Reid stated that "*if the conduct complained of and its consequences are so bad that the Petitioner must have a remedy, then it does not matter what the state of the Respondent's mind is."* It was further submitted by Mr. ChachaOdera that the law is whether the act complained of was cruel and not whether the Respondent was a cruel person. The case of**A v. M** [2008] 1 KLR 193 (G & F) was also referred to by counsel. In that case, Justice Sergon, held that the standard of proof in cruelty in divorce proceedings is "beyond reasonable doubt"

43. Mrs. Judy Thongorisubmittedon behalf of the Respondent that the Petitioner did not adduce evidence to support ground 7(a)& (b) of the Petition because there was no evidence of physical or verbal assault and that no report was ever made to the police on physical assault. On the use of the word M.F*,the respondent had denied it. With regard to the destruction of the Petitioner's LLM Thesis Mrs. Thongori agreed that her client had admitted having "ripped off a few pages" in a fit of frustration and anger but contended that the anger was caused by the Petitioner's conduct and that the Respondent did not want to cause him pain as alleged.

44. With regard to paragraph 7 (c) and (d) of the Petition, it was the submission of the Respondent's counsel that there was no evidence to prove that the Respondent called the Petitioner's ex-wife and children "parasites". She tried to make heavy weather of the statement by the Petitioner when he said "I told the Respondent that if my children are parasites because they depend on me, then she is also a parasite." But it seems obvious that in the context in which the Petitioner made the statement it cannot be said with any justification that he called or referred to the Respondent as a parasite. To attribute or assign such meaning is to fail to see the context.

45. It was Mrs. Thongori's submission with regard to paragraph 7 (d) (e) and (f) of the Petition that the abuse alleged was not proved. She contended that the Petitioner had not proved cruelty against the Respondent and that the Petitioner was guilty of concealing his financial support to his children and their mothers as well as his relationship with T.E.Further, it was submitted that the Petitioner refused to discuss issues affecting the marriage. On the other hand, Mrs. Judy Thongorisubmitted that the Respondent had proved the allegations of cruelty made against the Petitioner.

46. I have carefully perused the Petition and cross-petition and the evidence adduced by the Petitioner and the Respondent. I have also perused the bundles of documents submitted by the parties and I have duly considered the submissions made by Mr. ChachaOdera, the learned counsel for the Petitioner, and Mrs. Judy Thongori, the learned counsel for the Respondent, including the authorities they relied on to buttress their respective cases.

47. The issue for determination is whether cruelty is proved and if so by which party and further,whether the Respondent is entitled to maintenance and if so the quantum thereof.

48. The law applicable to the marriage is the **Matrimonial Causes Act, Chapter 152** of the Law of Kenya. Under Section 8(1) of the Matrimonial Causes Act, a petition for divorce may be presented to court either by the husband or the wife on the ground, inter alia, that the Respondent has since the celebration of the marriage treated the Petitioner with cruelty. Cruelty is not defined in the Matrimonial Causes Act but what amounts to cruelty as a ground for divorce can be discerned from case law in Kenya as well as from English Common Law applicable to Kenya by virtue of Section 3(1)(c) of **The Judicature Act**, Chapter 8 of the Laws of Kenya. One may note that the grounds for divorce set out in Section 8(1) of the Matrimonial Causes Act are the age-old traditional grounds which were the only ones applied in English courts before. I have lamented in many cases the regrettable failure by the Legislature

and the Law Reform Commission in Kenya to expand the menu for grounds for dissolution of marriage under the Act. 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 so as to keep abreast with changes in our society.

49. Both parties rely on the ground of cruelty in seeking dissolution of the marriage. Courts have avoided formulation of an exhaustive definition of cruelty. Acts of cruelty, like acts of negligence in the law of torts, are said to be infinitely variable. Conduct that may undoubtedly be cruel in one case may clearly not be cruel in another on account of differing circumstances. That this isso seems to have led Sir Charles Newboldto state in **COLAROSSI v COLAROSSI [1965] E.A. 129**that"*no comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree."*It is for this reason that it is dangerous to use one case as a precedent for another presenting similar facts. All that a Judge, in my view, should do is attempt to extract and formulate from the decided cases the main principles by which the court should be guided. In England from where Kenya has received most of her common law, the House of Lords in the judgements in the cases of **GOLLINS Versus GOLLINS [1963] 2 All E.R.966 H.L. [1964] AC 644and WILLIAMS versus WILLIAMS [1963] 2 All ER 944 HC [1964] AC 694** which were delivered on the same day and together reviewed the law of cruelty and, broadly, the balance came down in favour of giving relief to a complainant in **a situation which has become intolerable.** The principle that emerged is that if the Respondent's conduct injures the complainant's health or is likely to do so, it will amount to cruelty if it **is grave and weighty and is such that the Petitioner cannot reasonably be expected to put up with it or to tolerate it.** It must be emphasized that the test as to whether a Respondent's conduct is cruel in law is whether it has the effect of producing actual or apprehended injury to the Petitioner's **physical** or **mental health**. In the words of Lord Justice Lopes **in Russell v. Russell [1897] AC 395**, *there must be danger to life, limb, or health, bodily or mental or a reasonable apprehension of it to constitute legal cruelty.* It is not necessary that the injury is suffered. A reasonable apprehension that injury will result if the conduct persists will suffice for the simple reason that the court will not wait for a spouse to be actually injured before affording such spouse relief. It is the same practice in other litigation where courts grant ***quiatimet*** injunctions as a relief to prevent probable harm.

50. Under English common law, (as modified by our circumstances), acts of cruelty that amount to conjugal wear and tear of married life and ordinary domestic quarrels that reflect mere incompatibility are said not to be sufficient to constitute legal cruelty on the basis of which marriage may be dissolved.It has also been held that an outburst by a husband, however reprehensible it might be, is not sufficient to amount to cruelty if it is in the heat of anger and without real intention that the threats made will be carried out. Words of passion even of threatened violence are held not to be sufficient to prove cruelty if they are spoken in the heat of anger and without any real intention that they are to be carried out.

51. As long ago as 1862, it was accepted in English law that **"the law does not require that there should be many acts (of cruelty) and if one act should be of that description which should induce the court to think that it is likely to occur again and to occur with real suffering, there is no rule that should restrain the court from granting a decreeof divorce."** It has been held that where in the case of a single act of cruelty **"the court takes the view that the injured spouse would be in danger of further ill-usage, then cruelty is sufficiently established. In short, the real question that the court has to determine is whether the conduct complained of and its consequences are so deplorable that the complaining spouse must have a remedy."**

52. Cruelty has been held to be willful and unjustifiable conduct of such 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 danger **(see Russell v. Russell [1895] P.315 – 322**. See also **Tolstoy on The Law and Practice of Divorce**, 6thEdn. It is now 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. 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. But it must be noted that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct that is the consequence of mere obtuseness or indifference **(see Jamieson v. Jamieson [1952] AC 525, 535**. Moreover, it is accepted that a deliberate intention to hurt may turn into "cruelty conduct" which, without such intention, would not constitute cruelty.

53. In considering an act or acts of cruelty by a spouse against the other, reasonable apprehension of bodily hurt or psychological harm must be weighed properly always bearing in mind that apprehension must be reasonable and that the court is not to wait until the hurt is actually done.

54. With regard to bars, there was no evidence of condonation by either party to the cruelty alleged. Condonation or forgiveness of a matrimonial offence is a bar to a divorce petition. It arises where the complaining spouse is shown to have forgiven the offending spouse and to have restored such spouse to the same position as he or she occupied before the matrimonial offence.

55. The onus or burden of proving cruelty reposes on the party alleging it.

56. On the standard of proof of cruelty, some Judges opine that it should be beyond reasonable doubt as in criminal cases while others place it on the balance of probabilities and yet others opine that it is the same as the standard in civil suits, namely on the balance of probabilities. The preponderance of opinion appears to be that it should be higher than "on the balance of probabilities," because cruelty is a serious charge that touches on character of the party against whom it is alleged. In this case, the Petitioner was enjoined to prove the acts of cruelty alleged against the Respondent no less than the Respondent was enjoined to prove the acts of cruelty alleged against the Petitioner at that standard.

57. And now the real nitty gritty in this cause.Was cruelty proved?It is plain to see from the evidence that the marriage between the parties has irretrievably broken down. Both parties seek its dissolution on the ground of cruelty. The pleadings before the court on which evidence was led were**(1)** the Petitioner's Petition dated 9.12.2009**(2)** the Respondent's answer to the Petition and the cross-petition dated 17.5.2010 and **(3)** the Petitioner's answer to the cross petition dated 4.6.2010 and reply to answer to Petition.

58. I have already made a finding that the Respondent mutilated the Petitioner's LLM Thesis. I have also made a finding that the Respondent accused the Petitioner of trying to kill her when the Respondent was at Stanford University Medical School. Each of these two acts was shown by evidence to be grave, weighty and profound. Each gave rise to psychological and mental torture on the part of the Petitioner. And each constituted reprehensible conduct on the part of the Respondent. Both depicted a departure from normal standards of conjugal behavior and kindness. In the case of the Thesis, the evidence reflected malice and desire on the part of the Respondent to frustrate and intellectually wound the Petitioner while in the case of the hospitalaccusation of killing, the evidence showed the Respondent to be callous and suspicious. In both, it was extremely cruel of the Respondent. I believe the evidence of the Petitioner. There was no reason shown why he would conjure up the incidents. At any rate, the Respondent conceded having damaged or destroyed the Thesis and with regard to the hospital incident she admitted having made accusations against the Petitioner but denied it was about killing. Yet in the circumstances, there was no reason or rhythm why the Petitioner would conjure up such a heinous allegation. Evidence from both parties shows that the Petitioner was so traumatized by the accusation at the hospital that a nurse had to help inwalking him out of the ward.I pose, if in **N v N** (supra) decided in 1977 by Madan, J, as he then was, it amounted to crueltyif a wife hit a husband on his private parts with her knee when he attempted to have sexual intercourse with her and ifsuch cruelty justified dissolution of marriage, how much more so where, as here, the psychological, emotional, and intellectual pain and

frustration sufferedis more enduringunlike the physical pain in **N.v N.**which was ephemeral!As stated in **N v N** (supra) by Justice Madan**"**if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences.**"** I adopt this principle and hold that the Respondent's acts of cruelty in para 7(a), (b), (c) (d) and (f) of the Petition have been proved beyond any reasonable doubt and taken singly or cumulatively are so grave and weighty and so deplorable that the Petitioner must have remedy. It is also patent that it is likely that they can recur again if the parties lived together. The court cannot allow an injured spouse to be exposed to such cruelty again. The Petitioner has proved cruelty against the Respondent.

59. The evidence adduced by the Respondent in support of the alleged acts of cruelty against the Petitioner is not credible and, at any rate, it amounts to no more than ordinary domestic quarrels that reflect mere incompatibilitybetween parties. The evidence relates to incidents that merely show wear and tear of conjugal life. It is my finding that the Respondent did not prove cruelty against the Petitioner and the evidence presented by her cannot remotely be referred to as cruelty in law for purposes of dissolution of marriage**.**

60. The Respondent has sought maintenance in her cross-petition. She swore an affidavit in which she provided a statement of her expenses. Section 25 of the Matrimonial Causes Act confers jurisdiction on this court to order maintenance. It states:

S.25(1) In any suit under this Act, the wife may apply to the court for alimony pending the suit, and the court may thereupon make such order as it may deem just:

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue in the case of a decree nisi of dissolution of marriage or of nullity of marriage until the decree is made absolute.

(2) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable.

(3) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (2) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable.

61. In considering a claim for maintenance, regard must be heard to the provisions of Article 45(3) of the Constitution of Kenya which recognize that "parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage." The rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms.The equality in this Article does not create nor is it intended to create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquiredand paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatmentwithout discriminationon the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) is in harmony with Article 21(3) of the Constitution which enshrines equality of men and women and specifically states that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." In the light of Article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance.In short, in cases where, as here, spouses have no children,a wife does not enjoy advantage over a husband or the vice

versa and the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spousesdoes not hold trueanymore. Under the Constitution, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself. No spousewho is capable of earning should be allowed to shirk his or her responsibility to support himself orherself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much. It seems clear that an adjustment to sections 25 and 26 of the Matrimonial Causes Act (and to a host of other provisions) to align the same with the Constitution is called for.

62. In her submissions, Mrs. Thongori contended that the Petitioner had agreed that the Respondent could continue to stay in the apartment in Westlands and that the Petitioner had provided Shs.150,000/= per month together with monthly expenses relating to service charge, DSTV, fuel, car maintenance, electricity, insurance and cost of a trip to U.S.A. for Respondent to see her ailing mother. She suggested as monthly maintenance a net figure of Sh.400,000/=. It was Mrs. Thongori's submission that the payment of maintenance should be until the Respondent gets employment. As a rider, Mrs. Thongori submitted that the Respondent has been looking for jobs both locally and internationally but she offered no evidence in this regard. It was not denied that the Respondent transmitted from the joint account of the parties to her own personal account in the U.S.A. the sum of US $155,000 on the basis that the money was her inheritance from the Estate of her late father. In her testimony, the Respondent told the court that she needs the money to sit in her account for use by her on a rainy day.

63. It was conceded by the Respondent in evidence that the maintenance paid to her by the Petitioner was not as a result of a court order but rather was made voluntarily by the Petitioner.

64. On his part Mr. ChachaOdera on behalf of the Petitioner submitted that it is common ground that there is pending in this court two suits, to wit, H.C.C.C. No.33 of 2011 and H.C.C.C. No.44 of 2011 (OS) between the Petitioner and the Respondent for determination of division of the matrimonial assets and that in the circumstances, the Petitioner in his evidence has offered to pay certain sums of money and settle certain bills pending the determination of the suits. However, Mr. ChachaOdera submitted that both the Petitioner and the Respondent are highly educated and have the requisite qualifications to look after their respective selves. The Respondent, he submitted, is ten years younger, than the Petitioner and therefore has a longer working life ahead of her. Moreover, on her own admission, he said, the Respondent has a hefty deposit of US$155,000 which is more than enough to take care of herself for many years to come. The Respondent, he added, testified that she has chosen to remain unemployed because she "has not found a job she likes." As for the Petitioner, he has only four more years to work before retirement and there is therefore need for him to place some income aside as a social security in old age. It was pointed out by Mr. ChachaOdera that the Constitution places both husband and wife on equal plane.

65. I have duly considered the submissions of bothcounsel. The payment of alimony and maintenance on decree of divorce or nullity is in the discretion of the court and the court is enjoined to make orders for reasonable payments. Mr. ChachaOdera referred to S.25 (1) (2) and (3) of the Matrimonial Causes Act. The provisions of Section 25 of the Matrimonial Causes Act show that an order for maintenance on decree of divorce or nullity is required to take into account the wife's fortune, if any, the ability of the husband, and the conduct of the parties and the reasonableness of the maintenance.The Petitioner's counsel submitted thatthe facts in their totality and the legal regime governing the dispute between the parties, the Petitioner's offer of Shs.150,000/= p.m. by way of maintenance is more than generous.

66. I have duly examined the evidence and it is not in dispute that the Respondent is sitting on a fortune of US $155,000/=. It is not also in dispute that the Respondent is a highly educated person and it is patent that she can get employment if she desired. In her testimony, she told the court that she has not found "a job she likes." Her conduct in this regard and her fortune of US$155,000 which is sitting in her bank

account are relevant factors which the court is enjoined to take into account while considering maintenance under Section 25 of the Matrimonial Causes Act. Compared to the Petitioner, the Respondent is younger by close to ten years. Admittedly, the Respondent has taught in universities locally and worked as an external examiner for Strathmore University and as a Consultant. She does not currently pay rent. The Petitioner offered Shs.150,000/= p.m. He retires in 4 years and the evidence does not show that he has any money tacked away for a rainy day. As persons who under our Constitution enjoy equal rights, the parties must also equally share obligations. The Respondent has no invalidity or physical or mental disabilities that impede her ability to seek and engage in gainful employment. In her testimony, however, the Respondent alluded to a liver condition which she said gives her chronic fatigue. She told the court that sometimes people refer to her as lazy on account of fatigue. She expects a share of the matrimonial property which is registered in the joint names of the parties. On the other hand, the Petitioner's net pay in November 2011 was Shs.833,602/=. He has children from previous relationships, a fact that was known by the Respondent before the marriage. The quantum of maintenance must make sense. It must be such as the party paying can afford i.e. within the ability of the spouse paying it. It must not enrich the spouse to whom it is paid nor oppress the spouse paying it. Where the spouse seeking maintenance is capable of engaging in gainful employment but refuses to work, such conduct may be oppressive to the other spouse and the court is entitled to have regard to it when considering the quantum of maintenance. Equality of spouses under Article 45(3) of the Constitution connotes equal treatment under the law.

67. The evidence in this case shows that the Respondent could be in gainful employment if she utilized her high academic qualifications and skills. She is however selective in what she says she would like to do. It is not reasonable for her to expect the Petitioner to fully maintain her if she decides, as she seems to have done, not to work. Meanwhile, she has a fortune from inheritance of US$155,000 sitting in her account in a U.S.A. bank.

68. In the circumstances of this case, would it be reasonable to require the Petitioner to carry the burden of maintaining the Respondent fully while the latter does nothing? In the light of the evidence and the law, and after weighing one thing with another, it is my considered view that the offer made by the Petitioner of Shs.150,000/= per month is reasonable in the circumstances of this case taking into account that the Respondent is living in a rent free house. I so hold. I realize that it is possible for the Respondent to enhance this sum by engaging in gainful employment. At her age and as a Professor of Linguistics who has taught in universities, it is realistic to expect her to engage in teaching or consultancy work and to earn.

In the result, I make the following orders.

1. I dismiss the cross-petition save where it seeks maintenance.

2. I allow the Petition against the Respondent.

3. I pronounce a decree of divorce and hereby dissolve the marriage between the Petitioner and the Respondent on the ground of cruelty on the part of the Respondent.

4. In the first instance, a decree nisi shall issue forthwith, and subject to the provisions of Section 15 of the Matrimonial Causes Act, Cap 152, the decree nisi shall be made absolute after the expiry of three months after this pronouncement.

5. I order that the Petitioner shall pay to the Respondent monthly maintenance of Shs.150,000/= for a period of 6 months from the date of this judgment or untilsuits numbers H.C.C.C. 33 of 2011 (O.S.) and H.C.C.C. No 44 of 2011 (O.S.) for division of matrimonial of properties are heard and determined, whichever date comes first.

6. Each party shall bear its own costs.

Dated at Milimani Law Courts, Nairobi, this 26th day of July, 2012.

G. B. M. KARIUKI SC
JUDGE

COUNSEL APPEARING

Mr. ChachaOderaAdvocate, of Oraro& Co. Advocates for the Petitioner

Mrs. Judy Thongori Advocate of Judy Thongori& Co. Advocates for the Respondent

Court Clerk – Kugwa