



R. G. W. T.....PETITIONER

VERSUS

A. A. O. T.....RESPONDENT

JUDGMENT

The Petitioner presented a Petition dated 28th April 2006 seeking that the marriage between the Petitioner and the Respondent be dissolved. That the Petitioner to continue having custody of the child of the marriage. The Petitioner avers that on the 26th September 1994 the Petitioner then a divorcee was married to the Respondent under the Marriage Act 1994 (British). The said marriage was celebrated in the City of Westminster in Great Britain. That after celebration of the said marriage the Petitioner and the Respondent moved to Kenya, lived and cohabited as wife and husband at Mswambweni within the Republic of Kenya. That there is one issue of the marriage namely, H. B. T. The Petitioner avers that since March 2000 the Respondent has deserted the Petitioner and the same has resulted into infringement of Petitioner's conjugal rights and lack of companionship from the Respondent. That the Respondent has been treating the Petitioner with cruelty. The particulars given are that the Respondent has on several occasions threatened the Petitioner with cruelty, abusing verbally, threatening his life and residence and causing him anxiety. The Petition was amended with leave and filed on 23rd September 2009. The Petitioner sought alimony from the Respondent.

The Respondent filed an answer to the Petition and cross-petition for divorce alleging cruelty and adultery. The hearing started on 12th March 2009 before Justice Sergon. The proceedings went on *ex parte*. The Petitioner closed his case. The Respondent then made an application to arrest judgment so that she may be heard. It was agreed by consent that a date by taken for hearing the Respondent case and the application to arrest judgment was allowed.

On 24th September 2009 it was agreed that the case proceeds from where Justice Sergon had stopped. The Petitioner was sworn in to continue with evidence-in-chief. The Petitioner stated his names and that he was a pensioner living in Kenya. He lives in Msabweni. He got married to the Respondent in September 1994 in the UK. (Before Justice Sergon the Petitioner had produced the marriage certificate as P Ex. 1.). He stated that they have a son called H.B. T.. He was 14 years old. They cohabited for 6 years and the Respondent got another home. She went to Europe via Dubai. She did not come back. This was in 2000. They have not been together since that time. They have been communicating on telephone. She never told him what she was doing in UK. She is working. She is a businesswoman. She moves to London from Dubai. He earns pension of 997 Euros. In Kenya shillings it is less than 100,000/=. It varies depending on exchange rate. He rents a house and pays about 350 Euros. He has custody of the child. The child is living with the mother in London. He pays 288 Euros for child support. His mother sends part of the school fees about 1000 sterling pounds per term. He asks the court to dissolve the marriage. He does not have money to maintain the Respondent. She has more money than him.

On cross examination he stated that matrimonial property is registered in their joint names. He denied abandoning the Respondent. He vacated earlier house and could not disclose new house for security reasons. His pension is paid in Germany. He has access to it. He child went to school in Kenya before he surrendered him to Respondent. He stated that he lives with another woman called F. as from 2004 to

date. He did not refuse to see the child but he did not want the Respondent to know where he lived. He was stopped from taking the son out of the country through court order. He receives about Kshs 100,000 pension. The child spends about 3,500 sterling pounds per term. He contributes 280 + 150 Euros for child support and maintenance.

On re-examination PW 1 stated that the Respondent left in 2000. He did not know F. then. He came to know F. in 2004. His pension has not changed. Cost of living is now higher. He left the house for his safety. Counsel for the Petitioner then closed the Petitioner's case.

The Respondent was sworn in as DW1. She stated that she lives in London. She works with National Health Services in London, Westland Mental Health Trust. She knows the Respondent. She had heard what he said. She did not leave him in 2000. Since they got married she worked during holidays. She could live the baby with his mother and sister and could go to work even outside Germany. She was a hotelier by profession. She intended to start a hotel business. It did not materialize. She was pregnant when they came back. They lived in D[...] during the week and went to Msabweni during the weekend to enable the child attend school in D[...]. Their son was born in 1995 and started school in 1999. She did not move out of the house in 1999 or 2000. They had an arrangement she could go to Europe to get work. They needed the money. The Petitioner helped her to support her siblings. The last time she went to Msambweni was in 2003. In 2004 when she went to Msambweni there was no one to receive her at the gate. The Petitioner informed her that she was not welcome because he had another woman in the house. She was not allowed to see her son. She had to get court order to enable her see her son and stop the Petitioner from taking him out of the country. He was stopped on 29th June 2004. She later gave him custody of their son by consent. She went to court for the matrimonial house and to access it. She found that all her personal effect had been vandalized. The Petitioner had alcohol problems. He used to abuse the Respondent in the presence of the child. He was violent when drunk. He used derogatory language and was aggressive towards the Respondent and the child. They did not have much of a sex life. The Petitioner still lives with the woman. He name is F. N.. The Petitioner and Respondent have no marriage. She respects the Petitioner as father of her child. Marriage has broken down and it cannot be saved. She asks that it be dissolved. She asks for Cross-petition to be allowed. She also seeks maintenance.

The Respondent referred to her affidavit of means. She earns 1395 sterling pounds. Her son's needs are 3500 sterling pounds per term and 10,500 per year. It is a private school. She pays mortgage of 295 sterling pounds a month. She was a good businesswoman. She was able to work and save. She is living off her savings. She was kicked out of the matrimonial home. She now looks after it. It is prime property.

On cross-examination she stated that she does not work in Dubai. She does not go there anymore. She used to. When the son refused to stay with the father she took him in and she had to work. She is a trained nurse. She is a nurse/coordinator for the hospital. She earns 1395 sterling pounds. She was not welcome in 2004. She went to court. In December 2003 they were supposed to go to Zanzibar. They went to Germany together. She did not ask the Petitioner to divorce her. There is a pending case about the matrimonial property. She went to court to access it. The boy is 14 years and goes to school. He is not allowed to leave the child alone. The boy wanted to stay with her. The Petitioner refused to leave Kenya. She takes care of the boy.

On re-examination she confirmed that she is paying one J. to take care of the matrimonial land. They agreed that she takes custody of the child. The Respondent then closed their case.

I directed that written submissions be filed and exchanged. Matter was fixed for mention to confirm compliance and take a judgment date. I regret the delay in delivering this judgment. This delay has been occasioned by factors beyond my control.

I have considered the pleadings, the evidence on record and the submissions of the parties. Counsel for the Petitioner contends that the Respondent is guilty of desertion having left the matrimonial home in the year 2000. The Respondent has never returned and since more than three years lapsed before the date of presentation of the petition then the Petitioner is entitled to a divorce decree on the ground of desertion. Due to the desertion it is to be inferred that the Petitioner had been denied conjugal rights and that

constituted cruelty. That the marriage is no more. That the Respondent has not asked for a specific sum for alimony and as such she is not entitled to any. That most of the child's needs are provided for by either the Petitioner or his parents and that what is left the Respondent can take care of.

The Respondent on the other hand denies deserting the Petitioner. She came back from her work trips abroad and found that she was not welcome in the matrimonial home. The Petitioner was cohabiting with one F. N. when the marriage was still subsisting. That the ground of adultery in the cross petition had been established. That the Petitioner was cruel to the Respondent. That the Petitioner was entitled to permanent alimony since she was taking care of the child. That the marriage is no more.

After evaluating the evidence on record the Petitioner version of desertion is denied by the Respondent. The Respondent pointed out that she used to work to bridge the family needs. This arrangement was agreed upon. In December 2003 they were supposed to go to Zanzibar but they went to Germany instead. That they came back to Kenya. She must have gone back to work abroad since she stated that when she came back the Petitioner did not welcome her. This was in 2004. The Petitioner was in the matrimonial home with their son and another woman. The Petitioner informed her that she was not welcome since he was living with another woman. The Petitioner denied her access to their son. She had to get a court order to obtain access and custody of the son. She was not allowed in the matrimonial home and she had to file a case for accessing the matrimonial home. The Respondents version of making a visit to Germany in December 2003 was not tested in cross-examination. It went unchallenged. This casts doubt on the desertion theory put forward by the Petitioner. The Petitioner admitted to having another woman in the matrimonial home as from 2004. This is clearly an admission that adultery was committed. The Petitioner himself categorically informed the Respondent that she was not welcome because he had another woman.

The Petitioner also stated that he did not want the Respondent to know where he lives. He narrated that he had been attacked where he used to live and he suspected that the Respondent was behind it. This made him fearful of his life. He never made any report to the police. The Respondent stated that the Petitioner was guilty of using abusive language towards her in front of the child. That he was aggressive and violent when drunk. I find that these amounted to cruelty towards the Respondent. The Petitioner further refused to allow the Respondent to the matrimonial home. I am satisfied that the Respondent did not condone the acts of cruelty and adultery and is therefore entitled to a divorce decree. I further note that both parties have expressed their desire that the marriage be dissolved as there is no marriage any more.

The Respondent has asked for alimony on the grounds that she is taking care of the child. Her income is not sufficient to meet the child's needs. The Petitioner did not file any affidavit of means unlike the Respondent. He however stated that he is pensioner. His pension is about 997 Euros. His contention was that the Respondent earns more than him. Having considered the circumstances of both parties I find that the Petitioner should provide alimony of Euros 500 per month. This is within his pension income. I therefore enter judgment for the Respondent in the cross- petition and issue a divorce decree on the grounds of cruelty and adultery. The Petitioner shall pay Alimony/maintenance of 500 Euros per month to the Respondent. Custody to the Respondent with visitation rights to the Petitioner. The petition is dismissed. The Petitioner will pay costs of both the petition and cross- petition. Decree nisi shall be made absolute in accordance with the law.

Dated AND Signed At Nairobi ON ThiS 14TH DAY Of AUGUST 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered at Mombasa on this 31ST day of AUGUST 2012.

J.W MWERA
JUDGE

Delivered in the presence of: