



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Divorce Cause 172 of 2009

S. P. K.....PETITIONER

VERSUS

V. P. K.....RESPONDENT

J U D G M E N T

1. The marriage between the Petitioner, S. P. K and the Respondent, V.P.K was solemnized on 5th August, 2006 in accordance with Hindu Vedic Ceremonies at the Shree Lohana Mahajan Mandal Oshwal Temple in Nairobi. Upon solemnization of the said marriage, the Petitioner and the Respondent lived and co-habited in Arusha within the Republic of Tanzania up to 14th April 2008, when the Petitioner returned to Nairobi.

2. By her Petition dated 4th October 2009, the Petitioner seeks dissolution of that marriage. She also seeks Orders that the Respondent be ordered to pay her such alimony periodically as may be just and further that the Respondent be ordered to return to the Petitioner all the gifts granted to her by virtue of her marriage and in accordance with the Hindu customs. She also prays that the Respondent be condemned to pay costs thereof.

3. It is the Petitioner's case that her marriage to the Respondent has irretrievably broken down and the parties cannot possibly live together for the rest of their lives for reasons of cruelty on the part of the Respondent. The particulars of cruelty are that;

- (a) On several occasions the Respondent has rebuked the Petitioner in front of his family and friends without due regard to her feelings.**
- (b) The Respondent has withdrawn from the Petitioner's company by coming home late, refusing to take the Petitioner to recreational places and or other public outings.**
- (c) The Petitioner has refused refusal to give any due care, attention and love to the Petitioner.**
- (d) In or about the month of September 2007 the Petitioner was taken ill and required hospitalization. The Respondent did not show any concern and made flimsy and totally inadequate arrangements to have the Petitioner admitted to a run down hospital in Arusha that did not possess adequate medical facilities. As a consequence, the Petitioner's family made hasty arrangements and had the Petitioner evacuated to Aga Khan Hospital in Nairobi. This caused and has continued to cause the Petitioner considerable distress.**
- (e) On several occasions during the marriage, the Respondent and his mother have continuously**

**used foul and obscene language to the Petitioner, alleging inter alia that the Petitioner was a woman of loose morals, temperamental, emotional and that she was not fit to be the Respondent's wife.**

4. It is the Petitioner's further case that since the celebration of the marriage, the Respondent has, on numerous occasions, withdrawn from cohabiting with the Petitioner and has been seen in the company of one married Asian woman, unknown to the Petitioner and whom allegedly, the Respondent has been committing adultery with. She further alleged that the Respondent had on several occasions boasted to the Petitioner about his friendship with this woman and added that he had continuously spent hours on the telephone talking with her. As a result, the Petitioner claimed that the Respondent's conduct has caused her considerable stress that has aggravated her frail medical condition.

5. The Respondent by an Answer to Petition and Cross-Petition dated 9th December, 2009 admits that the marriage has broken down irreparably and blames the Petitioner for causing it. He denies any cruelty on his part and also denies committing the matrimonial offence of desertion as alleged. He indeed avers that he has never left the matrimonial home with friends and failed to return for several days except one time when he traveled for funeral arrangements of his aunt who had died away from Arusha.

6. It was the Respondent's case that in any event, it was the Petitioner who committed the matrimonial offences of desertion and cruelty and alleged that;

***"...for a period of over eighteen (18) months preceding the filing of this Cross-Petition, the Petitioner has been guilty of deserting the Respondent as stated in the Petition without any lawful or reasonable cause, the Petitioner deserted the Respondent by departing from the matrimonial home and removing the Respondent from her society. Since that date, the Petitioner has refused and or neglected to return to the matrimonial home or to cohabit with the Respondent."***

7. The Respondent further alleged that;

***(I) the Petitioner has constantly ill treated the Respondent's parents who reside with the Respondent and insulted them during public functions and also when the Respondent's friends visited his home.***

***(ii) the Petitioner has on many occasions ridiculed the Respondent before his friends that he is not capable of earning a better salary thus causing more stress and strain in the relationship.***

***(iii) the Petitioner has constantly insisted that he ought to move to Nairobi because in Arusha he will had no opportunity to achieve his goals.***

8. It is the Respondent's further assertion that due to the aforesaid actions of the Petitioner, he has not been able to concentrate on his work and has been caused anguish and stress. He further avers that he now suffers from blood pressure which requires constant medical attention and because of several bouts of depression he was forced to seek counseling.

9. The Respondent also claimed that both parties herein have never consummated their marriage.

10. During the hearing, each of the parties repeated the above assertions and in her testimony, the Petitioner added that their marriage was arranged and that she only knew the Respondent for three months before the marriage.

10. On the allegations of cruelty, the Petitioner claimed that when she fell ill for about three weeks, the Respondent abandoned her at home and left for dinner with friends. She also alleged that she was taken for treatment at a shady hospital and the Respondent declined to take her to Aga Khan Hospital in Nairobi for specialised treatment after medical tests indicated that she had little oxygen in her brain. It was the Petitioner's family that took her to Nairobi instead. The Respondent in his testimony alleged that he took care of the Petitioner by taking her to the best doctor in Arusha, a Dr. Mohammed, where he spent Ksh. 7,000.00/- on treatment. He claimed that he did not have a medical insurance and could not afford to

take one for the Petitioner.

11. Taking into account the evidence on record, it is my opinion as follows; I am unable to believe that the Petitioner was abandoned by the Respondent when she fell sick. It is clear that the Respondent did the best he could in the circumstances. In fact the Petitioner admits this in her testimony when she stated thus;

***“...when I fell ill, I was taken to a down town hospital. There were no better hospitals in Arusha. I was medically taken care of although I should have had better treatment”.***

I will touch on another aspect of alleged cruelty later in this judgment.

12. As for adultery on the part of the Respondent, the Petitioner stated that she did not have any evidence indicating that the Respondent had an adulterous affair. She only suspected it because he used to speak for lengthy periods with someone on phone. She also claimed that the Respondent ignored her and had no time for her at all. And further that the Respondent used to lie to her and left her when he went out of town. It was her allegation therefore that he wholly abandoned her. I am not satisfied that this statements can amount to anything other than generalized allegations. They do not prove anything in respect of the matrimonial offence of adultery whose standard of proof is beyond reasonable doubt and for the Court to be satisfied of guilt – per Law JA, in Mathai vs. Mathai [1980] KLR 154 at 155. This ground therefore must fail as well.

13. Turning to the Cross-Petition, the Respondent alleged that the Petitioner was cruel towards him and he has constantly ill treated the Respondent's parents who reside with him and has on many occasion insulted them during public functions and also when his friends visited the home. He further alleged that the Petitioner has ridiculed him before his friends for reasons that he is incapable of earning a better salary. I will quickly dismiss these allegations of cruelty on the part of the Petitioner. I am inclined to believe the Petitioner's evidence that she enjoys a cordial relationship with the Respondent's parents. In any event, the Respondent failed to provide particulars as to where and when the Petitioner insulted him and his parents nor details as to how she was mistreating his parents.

14. In his Cross-Petition, the Respondent further alleged that the Petitioner deserted their matrimonial home in Arusha for eighteen (18) months prior to filing of this cause without any lawful or reasonable reason and I am now called upon to determine whether the Petitioner has committed the matrimonial offence of desertion.

15. From the parties' testimonies, it is clear that the Petitioner left her matrimonial home on several occasions, including for four days after her honeymoon where she left for Nairobi to stay with her mother for two weeks. She also left in order to attend treatment at Aga Khan Hospital in Nairobi and went back to Arusha and stayed for one year. She further left again for Nairobi this time to allegedly look for work and never returned.

16. **Section 10(1)(b)** of the **Hindu Marriage and Divorce Act Cap 157** stipulates that a divorce Petition may be presented to the Court by either party to the marriage on the ground that the Respondent has deserted the Petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. In the instant case, the Respondent must prove that the Petitioner deserted her matrimonial home throughout the three years. This period must be continued - See **Brown v Brown (1967) 3 ALL ER 105 and Terry v Terry (1939) 3 ALL ER 546.**

17. The Petitioner allegedly deserted her home for eighteen (18) months prior to the filing of the Cross-Petition on 17th December 2009 and a simple count would therefore reveal that the Petitioner had deserted her matrimonial home for one year and six months prior to the presentation of the Cross-Petition. Accordingly, I am unable to find that the Petitioner deserted her matrimonial home within the meaning of the Law. In the end, this ground must fail.

18. I now turn to consider the last ground raised that the parties herein have never consummated their marriage. As the facts are, I have no reason to disbelieve this. It is an uncontested fact. Under **Section**

**11(1)(b)(i)** of the **Hindu Marriage and Divorce Act Cap 152**, a marriage may be declared a nullity on the grounds *inter alia* that;

**(i) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or**

That Section must also be read with **Section 14(1)** of the **Matrimonial Causes Act**.

The Respondent stated at paragraph 9.5 of the Cross-Petition “**...That both concerned parties herein have never consummated their marriage**”. That notwithstanding, he failed to seek an appropriate prayer in that regard. In the answer to the Cross-Petition, the Petitioner contends that;

**“9. The Petitioner admits the contents of paragraph 9.5 of the Cross-Petition but avers that;**

**(a) their marriage was arranged and only knew each other for a period of 3 months.**

**(b) the Respondent concentrated too much on his career.**

**(c) the Respondent never organized for any honeymoon despite having promised the same to the Petitioner.”**

In Law, there are generally two instances when a party may Petition for nullifying a marriage for non-consummation; that the marriage has not been consummated owing to the impotence or incapacity of either party to consummate it or that it has not been consummated owing to the Respondents willful refusal to do so - See **Clarke v Clarke, (1943) 2 ALL ER 540**.

From the Petitioner's pleadings, it may appear that the instant marriage was not consummated for the reasons *inter alia* that the parties were strangers to each other because their marriage was arranged and also that the Respondent was too busy in his career to have time for congress with his wife.

19. The Respondent did not respond to the twin issue of raised by the Petitioner above. Are these reasons given by the Petitioner sufficient to find that the Respondent has willfully refused to consummate the marriage?

20. The words 'willful refusal' to consummate the marriage connote a settled and definite decision without just excuse and, in determining whether there has been such a refusal, the court must have regard to the whole history of the marriage. See **Horton v Horton (1947) 2 ALL ER 871**. Even if the instant marriage was arranged and the Respondent was too busy with his career, both parties failed to show that each had undertaken reasonable steps as a good husband or wife would take in the circumstances - See **Baxter v Baxter (1947) L.J.R 785**. Neither of the party proved that the marriage had not been consummated owing to the other's willful refusal.

21. I must now examine the last limb of nullifying a marriage for lack of consummation i.e. impotence. As stated above, a marriage can be nullified if it is demonstrated that the Respondent is impotent or is incapable of consummating a marriage. Impotence may be presumed to exist from the Respondent's refusal to consummate. In **G v M (1885)10 App.Cas.171**, the Court stated thus; '**...if a marriage has not been consummated after three years cohabitation through no fault of the Petitioner, the Respondent must be impotent.**'

This holding holds true in the instant case as the Respondent could not explain why he failed to have congress with his wife throughout the marriage and I would apply the above reasoning and presume that the Respondent is impotent.

22. Even though none of the parties sought for an order declaring the instant marriage a nullity, the law is clear that when a marriage has not been consummated owing to the Respondent's impotence, the same is voidable and the only remedy available lies in divorce.

23. I therefore declare the marriage as between the Petitioner and Respondent a nullity, and dismiss the Petition and the Cross-Petition. I will order a **decree nisi** to issue forthwith and to be made absolute within 30 days hereof.

24. I now quickly turn to consider the issue of maintenance of the Petitioner by the Respondent. The Petitioner claimed Ksh.140,000.00/- per month as maintenance from the Respondent. She alleged that even if she is employable she still want to be maintained by her husband. It is her case that she has been unemployed since March 2010 and her father has been supporting her even though he is suffering from cancer. Currently, she is running a flower shop where she earns Ksh.30,000/- plus other perks although it was never her career. She is a Medical Chemist.

25. On his part, the Respondent contends that he is employed by a private company known as Emislies Ltd which is a sale agent for International Travels. The Petitioner claimed that the Respondent had intimated to her that he earns US\$ 3,500. This was however controverted by the Respondent who claimed that he earns Tshs. 886,650/- I have no reason not to believe the Respondent as this amount is evidenced from the letter of his employer and also the banking slips which were all produced in evidence. However, in his evidence before me, the Respondent claimed that his salary has been increased since 2009 to Tshs.1,000,000.00/- He further alleged that he spends 75% of his salary maintaining his family in particular his siblings and his parents who do not work. He therefore claims that he cannot afford the Ksh.140,000.00/- demanded by the Petitioner or any maintenance at all of the Petitioner because he has little salary and has no savings. He alleged that he spent all his savings during the time he cohabited with the Petitioner.

26. To my mind, and reading **Section 25(2)** of the **Matrimonial causes Act, Cap 152** Laws of Kenya, this court should have due regard to the ability of the Respondent to pay maintenance before making such an order. This Section reads as follows;

***“25(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. ”***

27. I am wholly guided and in the instant case I am unable to order the Respondent to pay any maintenance to the Petitioner. His salary being Tshs.1,000,000.00/- (an equivalent of Ksh.58, 823.529/-) is indeed way below the amount requested by the Petitioner. The Petitioner in her evidence had alleged that the Respondent has extra income from the supply of computers. She failed to provide any evidence to support this claim and can only amount to an allegation. I am left with no doubt that the Respondent cannot afford to maintain the Petitioner and such an order cannot issue. She is sickly and so is the Petitioner and let each manage their lives separately from each other. All gifts exchanged during the marriage have been returned and let each now go their separate ways.

28. The final orders to be made are that;

- (1) The Marriage between the parties is declared a nullity.
- (2) Let each Party bear its own costs.

29. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2012**

**ISAAC LENAOLA**  
**JUDGE**

**In the presence of:**

Coram: Irene – Court clerk

*Mr. Ng'ang'a for Respondent's*

*No Appearance for Petitioner's*

**Order**

*Judgment duly read.*

**ISAAC LENAOLA  
JUDGE**