



REPUBLIC OF KENYA

High Court at Mombasa

Divorce Cause 48 of 2011

W.M.N PETITIONER

=VERSUS=

M.M.S RESPONDENT

JUDGEMENT

The Petitioner **W.M.N** filed this Petition in court on 18th November 2011 seeking the dissolution of his marriage to the Respondent one **M.M.S**. The Petitioner also prayed for costs of the petition. The Respondent despite having been duly served with the petition did not enter appearance nor did she file any reply thereto. The matter therefore proceeded as an undefended cause.

The Petitioner in his evidence told the court that he and the Respondent first met in the year 2000. A friendship developed between them and they eventually cemented that friendship by getting married to each other on 29th July 2006 at Agape church. The couple lived as man and wife in M[...]. Later problems and disagreements arose between the two and they separated in 2011. Hence this petition for divorce.

The fact that the couple were married is not in any doubt and is proved by the Certificate of Marriage Serial No. [.....] which is produced as an exhibit **Pexb1**. Section 6(1) of the Matrimonial Causes Act provides:

“6(1) No petition for divorce shall be presented to the court unless at the date of that presentation of the petition three years have passed since the date of marriage”

The Petitioner and the Respondent herein got married in July 2006. This petition was filed in November 2011 a full five (5) years **after** the marriage. I therefore find that S. 6(1) has been complied with and that this petition is properly before the court.

The Petitioner in his petition relies on the grounds of Adultery and Cruelty as grounds for his petition for divorce. Both are grounds provided for in section 8 of the Matrimonial Causes Act.

On the ground of Adultery the Petitioner states that he **believed** the Respondent was unfaithful because despite her claiming that he could not father children the Respondent got pregnant and miscarried. The Petitioner has not told the court whether in actual fact he was incapable of siring children nor does he make it clear whether he and the Respondent had conjugal relations. Further the Petitioner does not say who the Respondent could have been engaging in adultery with. I find evidence on this ground to be both unclear and unconvincing. I therefore dismiss this ground of adultery.

The ground of cruelty is provided for by S. 8(1)(c) of Cap 152. Cruelty need not be only

physical. The law does recognize emotional or psychological cruelty as a ground for divorce. In his evidence the Petitioner told the court that the Respondent brought into his home three children whom she told him were the children of her late sister. The Petitioner readily accepted the children on that basis. He later came to learn that the 3 children were actually the Respondent's own children. She had therefore deceived the Petitioner to get him to allow the children to live with them. Aside from this the Petitioner claims that the Respondent became quarrelsome and abusive towards him constantly stating that he was unable to father children. This would of course be the ultimate insult to any man. The evidence of the Petitioner is unchallenged and uncontroverted since the Respondent made no reply to the petition and opted not to participate in these proceedings. The behavior described by the Petitioner does certainly amount to psychological cruelty. It would be difficult to sustain any marriage in those circumstances. I find this ground of cruelty to have been sufficiently proved. The couple separated in 2011 and despite the Petitioner's attempts to seek reconciliation using their Pastors the Respondent has been unwilling to discuss their problems.

In his evidence the Petitioner seeks to be refunded for monies he spent on the Respondent's treatment for a brain tumour. He claims to have taken a loan for this purpose which loan he is still paying to date. No evidence has been shown to this court by way of medical reports to prove that the Respondent was ever hospitalized for a brain tumour. Further the Petitioner has not told court how much he is claiming and has not tendered any proof that he took out a loan much less that he is still repaying the same. The law is that he who alleges must prove. I find no evidence to support this claim for a refund and I do hereby dismiss that claim.

The Petitioner's prayer for divorce is hereby granted. Decree Nisi to issue to be made absolute within six (6) months of today's date. This being a family matter I find it prudent to make no orders with respect to costs.

Dated and Delivered in Mombasa this 17th day of December 2012.

M. ODERO
JUDGE

In the presence of:

Ms. Njuguna for Petitioner