



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
DIVORCE NUMBER 3 “A” OF 2010

A. G. K.....APPLICANT

-VRS-

M.K.....RESPONDENT

JUDGEMENT

A.G.K (Petitioner) has petitioned this court for the dissolution of her marriage to the Respondent (**M.K**). The parties met in 1998 when Petitioner was a spinster and Respondent was a bachelor. They commenced an intimate relationship and started co-habiting as husband and wife. On 30th April 2002, they solemnized their union under the Marriage Act (Cap 150). After the celebration of the marriage, they cohabited in Kilifi and were blessed with two issues namely;-

J.K now aged 17 years

B.M now aged 12 years

The Petitioner is a field worker with Kenya [particulars withheld](Kilifi) while Respondent is a businessman in Kilifi. During the subsistence of the marriage they acquired the following properties through their joint efforts and funds;-

- (i) Unregistered parcel of land measuring 50 ft situated at Kilifi Town near Kilifi G K Prison.
- (ii) A Permanent residential house comprising 3 bedrooms, sitting room, kitchen and toilet, built on the sand unregistered parcel of land which the Petitioner and Respondent have been using as their matrimonial house.
- (iii) A commercial building on the same land comprising 3 rooms and a toilet.
- (iv) A parcel of land measuring 25ft X100 ft at Siakago District.
- (v) 2 market stalls at Makima location in Siakago District.

Since the year 2006, the Respondent has committed adultery with the Petitioner`s sister, in Kilifi and Malindi, and as a result the Petitioner`s sister and Respondent got two children, a baby girl named S born in the year 2006, and another baby girl named L born in year 2009. The Petitioner has not condoned

and/or connived at the adultery.

The Respondent has also treated the Petitioner with cruelty and the particulars pleaded as;-

- (1) Constantly evicting Petitioner from the matrimonial house
- (2) Being hostile to the Petitioner and engaging the Petitioner with constant quarrels
- (3) The Respondent has caused Petitioner mental torture and generally ensured she has no peace of mind
- (4) Respondent has failed to provide maintenance for the children of the marriage, causing Petitioner to heavy financial burden.
- (5) The Respondent has frequently threatened to kill the Petitioner

It is for this reasons that Petitioner prays for;-

- (a) Dissolution of the union between her and Respondent
- (b) That Petitioner be given her share of the matrimonial properties
- (c) She be granted custody of the two children
- (d) Respondent be condemned to pay the costs of this cause

At the hearing of the matter, Mr Mwarandu appeared for Petitioner whilst Mr Ole Kina appeared for Respondent. The Petitioner narrated how they had lived in harmony with the Respondent and their two sons, until the year 2005, when she got very sick and the Respondent thought she would die. So he took the Respondent`s sister DMMas his wife. When Petitioner was discharged from hospital, she did not know what was going on but her relatives informed her about the relationship and that D was even pregnant. D eventually got baby S. Since Petitioner has not consented to this extra affair, her relationship with the Respondent deteriorated and one time when she got sick and was admitted in hospital, Respondent did not visit her. Again at the one time during her illness, the Respondent left her in Malindi and went to live with her sister in Mombasa. Petitioner no longer wanted to get intimate with the Respondent and she would resist his advances, but he would force her to get intimate. Many were the times he locked Petitioner out of the house, claiming that she was not obedient.

Once the Respondent took over Petitioner`s sister, he moved to Malindi in 2006 along with the “offending sister”. It was Petitioner`s evidence, that their marriage has no basis as they longer live as husband and wife, and in any event Respondent made it clear to Petitioner that he would never leave her sister. Petitioner in turn told him that she cannot share him, so the marriage has collapsed completely. As for the children, she seems to have made a shift on her prayer regarding custody saying the children are grown up and can decide who they want to live with. She only prays that if the children elect to live with their father, then she be granted access, and the court to direct that Respondent provides for the children`s needs.

The Respondent did not file any answer to the Petition though appearance was entered on his behalf by Mr Ole Kina. Even at the hearing the defence counsel opted not to cross-examine Petitioner. This then means that Petitioner`s evidence is not denied or rebutted. From the unrebutted evidence, it is clear the Respondent has been involved in an adulterous relationship with the Petitioner`s sister, which is confirmed by the existence of the two baby girls under section 3 (a) of the Matrimonial Causes Act one of the ground upon which a marriage may be dissolved is adultery.

Petitioner has satisfactorily presented her claim and it is apparent the two can no longer live together. I therefore allow the prayer sought and order that the union between Petitioner and Respondent be and is hereby dissolved. A decree nisi shall issue and be made absolute at the expiry of six months.

(2) As regards the matrimonial property it seems Petitioner intends to pursue an appropriate claim separately.

(3) Custody of the children has been left open and I will not make orders on this. The only order I will give is that if the two children that is J and B choose to live with the Respondent, then the Petitioner must be given access to the children. The parties are at liberty through their counsel to work out a suitable visiting programmes within 30 (Thirty) days from today. If J has already reached 18 years as at the date of judgment, then the order shall only apply with regard to Brian.

Should they elect to live with their mother then of course the same applies in relation to access for respondent. In the event that parties are unable to agree on a visiting programme then each is at liberty to apply to this court to make appropriate directions.

Costs of this cause shall be borne by the Respondent.

Delivered and dated this 24th day of February 2011 at Malindi

H A OMONDI
JUDGE