



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CASE NUMBER 20 OF 2009

G.K.T..... PETITIONER

VERSUS

A.F.M..... RESPONDENT

R U L I N G

Following the decision of this court to dissolve the marriage between the Petitioner and the Respondent, the respondent filed this application by way of Chamber Summons dated 11th June, 2010.

The application was brought under section 3A, and 63(e) of the Civil Procedure Act (**Cap 21**), Order IXA rule 10, Order XXI Rule 22 and Order 9B Rule 3(b) of the Civil Procedure Rules, as well as section 30(1) of the Matrimonial Causes Act (**Cap.152**) and Rules 8 and 10 of the Matrimonial Causes Rules. The application as filed under certificate of urgency, with the following prayers: -

- 1. THAT this application be certified as urgent and service thereof be dispensed with in the first instance.**
- 2. THAT there be a stay of execution of the orders made by then Justice Dulu on the 11th March 2010.**
- 3. THAT the judgment given by this Honourable court on 11th March 2010 be set aside forthwith.**
- 4. THAT the orders granted by the Honourable Justice Dulu on the 11th of March, 2010 be vacated.**
- 5. THAT the Respondent be allowed to file a cross petition, application for custody and maintenance of the infant children and that the divorce petition proceeds as a defended cause and be heard on merit.**
- 6. THAT care and custody and control of the two infant children of the marriage be granted to the Respondent pending the hearing and determination of this cause.**
- 7. THAT costs of this application be provided for.**

The application has grounds on the face of the Chamber Summons. The application was filed with an affidavit running into 37 paragraphs. In summary, it was deponed in the said affidavit, inter alia, that the petitioner had subjected the respondent to severe brutality and cruelty during the time of their

cohabitation; that as a consequence thereof on or about the 20th September, 2007 the respondent who is a Tanzanian was forced to leave the matrimonial home at Kericho and proceed to Tanzania alone, as the Petitioner had taken away the two children; that in 2009 the respondent managed to come to Kenya and filed Nairobi Children's Case No. [...]; that the petitioner had unlawfully committed bigamy by marrying another woman while the marriage between the petitioner and the respondent subsisted; that it was when the respondent made a complaint to the police in 2010 about the petitioner committing bigamy, that she was informed that the petitioner had divorced her in Nairobi High Court Divorce Cause No. [...] and was given the custody of the children; that the Children's Court had prior to that given orders which the petitioner did not disclose to the High Court; that the petitioner did not disclose to the High Court that there were proceedings pending in the Children's Court; that the petitioner did not inform the Children's Court that he had filed divorce proceedings in the High Court; that the petitioner did not serve the respondent with the petition in the divorce case herein as alleged; and that the alleged personal service, if at all, was illegal and of no effect as the law required that such service be done through a court process server not by the petitioner as alleged.

The respondent, through her counsel filed written submissions on 28th July 2010, as well as a further affidavit sworn by herself on 16th November, 2010 which was filed on 18th November 2010. The further affidavit annexes copies of documents related to the Children's Court Case No.[.....]

In response, the petitioner filed a replying sworn by himself on 12th July 2010. It was deponed, inter alia, that the respondent had abandoned the two children in 2007; that service of pleadings in this divorce cause was properly effected in February 2009; and that there were two independent reports prepared by the Child Welfare Society, which were submitted in Nairobi Children's Court case No. [...], both of which concluded that the respondent was an unfit mother.

The petitioner also, through his counsel, filed written submissions on 22nd July, 2010.

On the hearing date, Mrs. Njogu for the respondent appeared in court and argued the application on behalf of her client. The petitioner argued the application personally, as his advocates S. Ndege & Company Advocates did not attend court, though he stated that they were aware of the case.

I have considered the application, documents filed, the submissions and the law.

The decree for divorce herein has not yet been made absolute. It is still a decree Nisi. Under the provisions of section 15(2) of the Matrimonial Causes Act (cap 152), this court can reverse the decree Nisi. The said section provides: -

“15(2) After the pronouncing of the decree nisi and before the decree is made absolute, any person may in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.”

There is no doubt that the petitioner did not disclose to this court the existence of a case between the parties in the Children's Court. He did not disclose that there were orders on the children issued by the Children's Court which were in force. There are also arguments as to whether the petitioner served the respondent herein with the petition in these divorce proceedings. In my view, this is a case where the circumstances and facts dictate that the court should exercise its discretion and reverse the decree Nisi. There was non disclosure of material facts. I will do so in order to allow each of the parties ventilate their case. Thereafter a substantive decision will to be made after considering evidence on both sides.

There have been arguments that the alleged service on the respondent was either not effected, or if it was effected, it was done in an invalid manner. Currently, I can say that the respondent is aware of these proceedings. She is also represented by an advocate. I take it that she is aware of the contents of the petition and will be able to file a response, as there is no prayer in the application for service of the

petition. I will not be bogged down by technicalities as the respondent has now come to court, and is aware that a petition for dissolution of marriage has been filed. I will allow the respondent to file a response to the petition.

The respondent has asked for orders of care, custody and control of the two children. Already, the Children's Court has made orders on the children, which I have maintained. I find no new facts that would persuade me to vary the orders on the children which were made by the children's Court. I will retain the said orders.

I therefore allow the application and order as follows: -

- 1. The judgment delivered by this court on 11th March 2010 is hereby set aside, and the orders therefrom are vacated.***
- 2. The respondent is allowed to file a response to the petition within 14 days from today, and the divorce petition herein will proceed as a defended cause and be heard on merits. If the respondent fails to file the response within 14 days, this application will stand as dismissed and the judgment and orders of 11th March 2010 will be effective.***
- 3. The orders on the children granted in Nairobi Children's Case No. [...] on 28th June, 2010 will continue to have effect, pending determination of these proceedings, unless varied by court.***
- 4. Costs in the cause.***

Dated and delivered at Nairobi this 14th day of February 2011.

.....
GEORGE DULU
JUDGE

In the presence of

The Petitioner in person

C Muendo – court clerk