



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

DIVORCE CASE NO. 11 OF 2010

MAS.....PETITIONER

**VERSUS
E**

ARESPONDENT

JUDGMENT

The petitioner herein approached the seat of justice vide a petition dated 26th day of October 2010 and filed on the 28th day of October 2010. The salient feature of the same are that:-

- **The disputants celebrated a marriage at the Registry of Marriages at the Kisumu Registry on the 7th day of April 2006 and there after established a matrimonial home at Kisumu.**
- **The couple has a son between them BOS aged three (3) years .**
- **The reason for moving to court to seek divorce is on account of cruelty particularized in paragraph 7 of the petition as being rough and**

violent towards the petitioner, failing to provide adequate maintenance and upkeep for the petitioner and his children, persisting in abusing the petitioner, deserting the petitioner and exposing the petitioner to verbal and emotional abuse.

In consequence thereafter the petitioner seeks:-

- (a) The said marriage be dissolved.**
- (b) Legal custody of the issue of the marriage namely BOS.**
- (c) That the costs of the suit be borne by the Respondent.**

The petition was served on to the Respondent who entered appearance through counsel but filed no papers in response. She later filed a notice to Act in person on 10th December 2010. An application for the Registrars certificate dated 6th day of January 2011 and filed on 7th January 2011 was made.

The Registrars' certificate was granted on the 26th January 2011 to the effect that the petition be heard as an undefended cause.

The petitioner was the sole witness and in his oral testimony he simply reiterated the content of the petition and stressed the following:-

- They have been married for five (5) years and they have one child.
- The marriage cannot work because of the complaints raised in the petition.
- That they have already reached s marriage agreement which should be incorporated in to this judgment.
- That he will have custody of the child.

The Respondent was in court but chose not to cross examine the petitioner and since she had not filed an answer to petition, she offered no evidence. This court has made due consideration of the above and in its opinion the following are own framed question for the disposal of this matter

(i) Is the court properly seized of this matter?.

(ii) Is there a marriage capable of being dissolved ?

(iii) What relief is the petitioner seeking from the court?

(iv) What are the ingredients required to be established before one can access such a relief?

(v) What is the standard of proof required to be attained?.

(vi) Has the petitioner brought himself within the ambit of the said ingredients?.

(vii) What final orders are to be issued herein?.

(viii) Does this court have jurisdiction to incorporate the agreement reached between the parties?.

This court has made due consideration of the said own framed questions and applied them to the facts of this case proceeds to make the following findings on the same:-

(1) There is inexistence marriage capable of being dissolved evidenced by existence of a marriage certificate number[Particulars Withheld]being

document number 1 in the petitioners list of documents.

(2) The proceedings are procedurally before this court, because the petition was filed and served on the Respondent who entered appearance, but filed no response and although present in court at the time of hearing, chose not to participate in the proceedings. There is also the Registrar's certificate that the cause do proceed as an undefended cause. The court is therefore properly seized of the matter.

(3) The relief being sought by the petitioner is dissolution of the marriage.

(4) The ingredients required to be established by the petitioner are those set out in Section 8 of the matrimonial causes Act Cap 152 Laws of Kenya namely:-

(a) Adultery

(b) Cruelty

(c) Desertion

(d) Insanity

The petitioner herein relies on cruelty. There is no requirement that all the four (4) be established. It is sufficient to establish just one. The petitioner relies on cruelty which has not been controverted. The court finds it proved.

(5) The standard of proof is one of proof on a balance of probability with the court being satisfied that in fact a matrimonial offence was committed.

(6) As regards the afore mentioned, this court has jurisdiction to incorporate the agreement reached in view of the fact that it affects a minor subject of these proceedings. For purposes of the record and judgment the agreement reads:- “ **We MAS holder of Passport number [particulars withheld] and EA holder of national Identity Card number [particulars withheld] and both of Kisumu do hereby agree/state that our marriage**

has irretrievably broken down and we are now headed for divorce.

That we have agreed that BOS our son will be under the custody of the father and the mother shall have free access to him.

That I EA will not lay any claim on our Dunga House parcel number [particulars withheld].

That in exchange of EA relinquishing her interest in the aforesaid Dunga House, MAS shall pay EA a total of Kshs. 2,800,000/= (Two Million Eight Hundred Thousand only)

That MAS shall pay EA amount of 2,500,000/= (Two Million Five Hundred Thousand) only on or before 15th January 2011, and the balance of Kshs. 300,000/= (Three Hundred Thousand) only on or before 1st April .

Signed by the said MAS

This 2nd day of December 2010

Before (Commissioner for oaths)

Signed by the said

EA

This 2nd day of December 2010

Before me Commissioner for oaths

(7) The final order are as follows:-

(1) The marriage solemnized between the disputants herein at the Registrar of marriages, Registry in Kisumu District on 7th April 2006

vide entry number 18/06 certificate number [particulars withheld] be and is hereby declared to have irretrievably broken down and the same is hereby ordered dissolved.

(2) The agreement signed by the petitioner and Respondent on the second day of December 2010 be and is hereby incorporated as being part of this judgment.

(3) The custody, care and control of the minor BOS is granted to the petitioner with reasonable access to the mother.

(4) The parties are at liberty to work out the modalities of access.

(5) Decree Nisii shall issue forth with

(6) Decree absolute to issue within six (6) months from the date of the reading of the judgment or within such a shorter period upon application by either party.

(7) The petitioner will bear own costs.

(8) There will be liberty to apply for any order in relation to the minor in connection with issues of access or any other issues affecting the said minor.

Dated, signed and delivered at Kisumu this 17th day of March 2011.

R. N. NAMBUYE

JUDGE

RNN/aao