

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CAUSE NO.116 OF 2005

DR. C.K.T.....PETITIONER

VERSUS

E.N. L.....RESPONDENT

J U D G M E N T

The petitioner and the respondent were on 4th January 2000 married under the **Marriage Act** at the Registrar's office in Nairobi. According to the petitioner, after the said marriage, he cohabited with the respondent as his wife in K[particulars withheld]estate, Nairobi and at Thika. The said marriage has been blessed with one issue, a boy, who is now thirteen (13) years of age. The child resides with the respondent. According to the petitioner, since the celebration of the said marriage, the respondent has committed adultery. In particular, the petitioner averred that the respondent conceived a child while he was undertaking his further studies in the United States of America. Upon his arrival in Kenya, the petitioner realized that the respondent was pregnant. The respondent gave birth to a baby boy on 13th March 2005. The petitioner further accused the respondent of deserting the matrimonial home from 3rd November 2004. The petitioner averred that since then, he has been separated from the respondent. It is for the above reasons that the petitioner formed the opinion that his marriage to the respondent had irretrievably broken down with no chance of salvage and hence should be dissolved by this court granting his petition for divorce. The petitioner further prayed to be granted custody of the child of marriage.

Upon the respondent being served with the petition for divorce, she duly entered appearance and filed an answer to the petition. She cross-petitioned for divorce. She denied the allegations by the petitioner that she has committed adultery or that she had deserted the matrimonial home. She put the petitioner to strict proof thereof. In her cross-petition for divorce, she accused the petitioner of committing act of cruelty against her. In particular, she averred that the petitioner denied her a fulfilled conjugal relationship. She stated that the petitioner failed to make time for her during the subsistence of the marriage. She further accused the petitioner of using abusive language in communicating with her thus causing her to suffer distress and embarrassment. She stated that the petitioner was a person of violent temperament and on several occasions had threatened to physically harm the petitioner and children. It is for the above reasons that the respondent pleaded with the court to grant her petition for divorce. She prayed to be granted legal custody of the child of the marriage. She further prayed for the court to order the respondent to provide reasonable maintenance for the upkeep of the respondent and the child of the marriage. The petitioner filed an answer to the cross-petition denying the averments made by the respondent in her cross-petition.

During the hearing of the petition, this court heard evidence adduced by the petitioner and the respondent. From the said evidence, it was clear that the marriage between the petitioner and the respondent has indeed irretrievably broken down. The petitioner and the respondent have lived separately since November 2004. The respondent testified that she left the matrimonial home after she could no longer tolerate living with the petitioner. She admitted that she conceived her second child when the petitioner was in the United States of America for further studies. This court is of the view that the grounds of the petition of desertion and adultery were proved to the required standard of proof on a balance of probabilities. From the evidence adduced, it appears that the petitioner and the respondent have moved on with their respective lives. They do not wish to be reconciled.

In the premises therefore, I will grant the petition for divorce. The marriage solemnized between the petitioner and the respondent on 4th January 2000 at the Registrar's office in Nairobi is hereby

dissolved. Decree nisi dissolving the said marriage is hereby issued. The decree nisi shall be made absolute thirty (30) days from today's date. As regard the custody and maintenance of the child of the marriage, this court is of the view that the petitioner and the respondent did not place sufficient materials before this court to enable it make a determination in that regard. For instance, the petitioner and the respondent did not supply to the court affidavits of means setting out their respective incomes to enable this court make an appropriate order of maintenance. Furthermore, this court is of the view that issues regarding custody and maintenance ought to be heard and determined in the first instance by the Children's Court. In the circumstances therefore, the petitioner and the respondent are advised to file an appropriate case before the Children's Court for the issue regarding maintenance and custody of the child of marriage to be resolved. There shall be no orders as to costs.

DATED AT NAIROBI THIS 11TH DAY OF MARCH, 2011

**L. KIMARU
JUDGE**