

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CAUSE NO.110 OF 2008

J.I.O.....PETITIONER

VERSUS

E. O.O.....RESPONDENT

J U D G M E N T

The petitioner and the respondent were married under Luo customary law in April 2002. However, they converted their marriage into a statutory one on 26th July 2005 when they got married at the Registrar's office in Nairobi. The marriage was celebrated under the **Marriage Act**. The marriage is blessed with two (2) issues, a son and a daughter. According to the petitioner, she cohabited with the respondent as husband and wife up to December 2007 when she was compelled to leave the matrimonial home. The petitioner wishes to be divorced from the respondent on the grounds of cruelty and adultery. The petitioner averred that the respondent had since the celebration of the said marriage treated her with cruelty by falsely accusing her of promiscuity and denying her and the children of the marriage financial and material support. The petitioner averred that the respondent had caused her such mental anguish that she was at various times between December 2003 and April 2007 admitted at Nairobi Hospital for treatment due to the fact that she was suffering from depression. She accused the respondent of engaging in illicit affairs with women unknown to her. The petitioner was of the view that because of the respondent's behaviour, their marriage had irretrievably broken down with no possibility of salvage. She therefore urged the court to grant her petition for divorce. She further prayed to be granted custody of the children of the marriage.

When the respondent was served with the petition, he filed an answer to the petition. In the said answer, he denied the averments by the petitioner that he had treated the petitioner with cruelty or that he had committed adultery during the subsistence of the marriage. He put the petitioner to strict proof thereof. He accused the petitioner of deserting from the matrimonial home without any justification. He denied the claim that he had materially failed to provide for the upkeep of the family. The respondent cross petitioned for divorce on the grounds of cruelty and desertion. The respondent accused the petitioner of treating him with cruelty during the subsistence of the marriage. In particular, he claimed that the petitioner was a person of irrational behaviour particularly when she suffered from depression. He accused the petitioner of physically assaulting him on several occasions in the presence of their children. The respondent averred that the petitioner deserted from the matrimonial home in December 2007 and had since not returned to the said matrimonial home. He urged the court to grant his cross-petition for divorce. He further urged the court to grant him custody of the children of the marriage.

At the hearing of the case, the court heard oral testimony adduced by petitioner and by the respondent. This court has carefully considered the said evidence. The petitioner and the respondent essentially reiterated the contents of the petition, the answer to the petition and the cross petition. It was

clear to the court that the marriage between the petitioner and the respondent had irretrievably broken down with no chance of being salvaged. During the subsistence of the marriage, it was apparent that the petitioner and the respondent had a breakdown in communication caused by, firstly, the respondent's failure to provide for the family, and secondly, the respondent's constant claim that the children of the marriage were sired by another man. Matters were not helped by the fact that during this material period, the petitioner went into depression to an extent that she required hospitalization on several occasions. Matters came to head in December 2007 when the petitioner could no longer tolerate life with the respondent. She left the matrimonial home and relocated to another residence near her place of work. She broke off all communication with the respondent. The petitioner and the respondent have not resumed cohabitation since parting ways in December 2007. It was clear to the court that the ground of desertion was proved to the required standard of proof on a balance of probabilities. Since separating, the petitioner and the respondent have not made any effort to be reconciled. It was apparent to the court that the petitioner and the respondent no longer wish to be bound by the matrimonial contract.

In the premises therefore, this court will allow the petition for divorce. The marriage celebrated between the petitioner and the respondent on 26th July 2005 at the Registrar's office in Nairobi is hereby dissolved. *Decree nisi* dissolving the said marriage is hereby issued. The said decree nisi shall be made absolute thirty (30) days from the date of this judgment. As regard custody of the children of the marriage, this court will grant interim custody to the petitioner pending determination of the same by the Children's Court. The Children's Court has jurisdiction, in the first instance, to deal with issues regarding custody and maintenance of children. There shall be no orders as to costs.

DATED AT NAIROBI THIS 27TH DAY OF APRIL, 2011

L. KIMARU

JUDGE