



No. 2791

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
DIVORCE CAUSE NO. 6 OF 2009

M.F.A.....PETITIONER

-VERSUS-

M.K.A.....RESPONDENT

JUDGMENT

M.F.A. (*the petitioner*) went through the ceremony of marriage with M.K.A. (*the respondent*) on 13th January, 2006 at the District Commissioner's Office, Kericho. By then the petitioner was a bachelor whereas the respondent was a spinister. After the solemnization of their marriage, they intended to reside or cohabit at L[...] township in Transmara district as man and wife. However, the stay was shortlived as within one week of the marriage, the respondent left the matrimonial home for her maiden home, under the pretext of going to fetch or obtain her personal effects. Subsequent thereto, she declined, failed and or refused to return to the matrimonial home and has persisted in such refusal to date. Arising from the foregoing the marriage was not blessed with any issues.

Having waited for eternity for the respondent to resume cohabitation in vain, the petitioner on 22nd September, 2009, said enough was enough and launched this petition for the dissolution of the marriage on the grounds of desertion, cruelty and adultery. In so far as the petitioner was concerned, the marriage had irretrievably broken down as various attempts at reconciliation had proved futile. He had neither connived at, colluded with and or condoned the acts of desertion, cruelty and adultery perpetrated by the respondent on him. He therefore prayed for the dissolution of the marriage, the *decree Nisi* do issue forthwith and be made absolute within three (3) months or such shorter period as the court may deem fit and expedient. He also prayed for the costs occasioned by the petition.

On being served with the petition, the respondent filed an answer to the same. She denied each and singular, the allegations made by the petitioner against her. In particular, that she deserted the matrimonial home, that she was adulterous and cruel to the petition. In her view the entire petition was a contraption sculptured to facilitate a second marriage which the petitioner was intent on contracting. Otherwise the petition was hopelessly defective, spurious, contains irreconcilable averments, an abuse of due process, misconceived and an affront to mandatory legal provisions governing pleadings.

On the hearing of the petition interparties on 22nd March, 2011, only the petitioner ventilated his petition though. The respondent was nowhere to be seen. Indeed her counsel intimated to the court that the respondent was not going to testify. As it is therefore, the cause was heard as undefended. The petitioner largely reiterated the contents of his petition in his evidence. However, he narrowed down the grounds of divorce to that of desertion. It was his testimony that they married on 12th January, 2006. Upon such marriage, they stayed for one week only together at L[...] township before the respondent left for her maiden home. They parted ways because the respondent insisted that her mother moves in with them. For the one week they cohabited they engaged in sex. She left the matrimonial home on 20th January, 2006 and she has never looked back. The petitioner too had made up his mind that he no longer required the respondent in his life.

Section 81(1) of the **Matrimonial Causes Act** gives grounds upon which a marriage such as the one the petitioner entered into with the respondent can be dissolved. Among those grounds is desertion. The petitioner would be entitled to a divorce on that ground if he can demonstrate that the respondent deserted him without cause for a period of at least three years immediately preceding the presentation of the petition for dissolution of the marriage. According to the petitioner, the respondent deserted the matrimonial home on 13th January, 2006 and has not been seen thereat since. This evidence was neither controverted nor rebutted since the respondent led no evidence at all in opposition to the petition. The evidence of the petitioner in this regard must be taken therefore to be true. By simple calculation, it is now over five years since the desertion. This petition was filed on 22nd September, 2009 well beyond the three year threshold required.

There is no evidence that the petitioner made conditions in the matrimonial home so difficult that the respondent was compelled to vacate the matrimonial home. If that had been the case then it would have been a case of constructive desertion on the part of the petitioner. Luckily that is not the case here! According to the petitioner, the respondent did not take kindly to the petitioner's refusal to have her mother join them in the matrimonial home. I do not think that this was an unreasonable demand. I cannot therefore hold it against the petitioner.

The petition is accordingly granted in terms of prayers (a) on its face. The *decree Nisi* that will ensue will however be made absolute within the statutory period.

Judgment **dated, signed** and **delivered** at Kisii this 30th May, 2011.

ASIKE-MAKHANDIA

JUDGE