



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
DIVORCE CAUSE NO. 17 OF 2009

G.N.....PETITIONER

VERSUS

K.M.K.....RESPONDENT

JUDGMENT

The Petitioner approached the seat of justice by way of a Petition dated 2nd day of October 2009, and filed the same date. The salient features of the same are that:-

- The two namely Petitioner and Respondent married each other in accordance with the provisions of the marriage Act Cap 150 laws of Kenya on the 7/6/96 as per the content of the marriage certificate produced as exhibit.
- Thereafter they cohabited at their matrimonial home in Kisumu
- They have two issues between them namely L. N. aged eleven (11) years and K. O. aged nine (9) years as at the time of presentation of the petition.
- The reason for moving to court to seek divorce are set out in paragraph 7 of the petition and in a summary form these are that, the Respondent has been rough and violent towards the Petitioner for no apparent reason, failing to provide adequate maintenance and upkeep for the petitioner and the children of the marriage and yet he can afford to do so, persisting in abusing the petitioner during the subsistence of the marriage, deserting the petitioner, causing the petitioner mental anguish and torture by reason of the afore said acts of cruelty.
- By reason of the aforesaid acts on the part of the Respondent ,the petitioner and the

Respondent separated informally in the year 2008, and the marriage cannot work. In consequences thereof the petitioner seeks the following reliefs from the court:-

- (a) That the marriage be dissolved.**

- (b) That she be given legal custody of the minor children.**

- (c) That the Respondent be ordered to pay a monthly amount for the maintenance of the issues of the marriage.**

- (d) That the Respondent do pay the costs of the proceedings to the petitioner.**

The respondent was duly served with the petition and notice to appear. He did file a memorandum of appearance dated 12th day of October 2009 simultaneously with the answer to petition and cross petition. The salient features of the same are as follows:-

- **Denied contents of paragraph 5 of the petition**

- **Admitted contents of paragraphs 3, 4, and 6 of the petition.**

- **Denied contents of paragraph 7 together with the particulars given and paragraph 8 – 13 and put the petitioner to strict proof.**

- **Gave notice to raise a preliminary objection on a point of law.**

In cross petition the following were asserted:-

- **Relies on the content of paragraph 1 – 8 of his Answer to petition.**

- **That it is the petitioner who has been immoral and adulterous to the matrimonial bed and will adduce evidence to this effect at the hearing thereof.**

- **That by reason of the Petitioner not being honest and moral to the matrimonial bed, she is not fit to have custody of the issue of the marriage which should be given to the Respondent.**

By reason of the foregoing, prayed for the petition to be dismissed in it's entirety.

In her answer to cross petition, the Petitioner denied the contents of paragraph 9, 10, 11 and 12 of the cross petition and that the Respondent could not be given custody of the minor children because he was not currently in Kenya then.

The Registrars' certificate was granted on 19/11/2010 and *interpartes* hearing proceeded on the 3/3/2011. The Petitioner was the sole witness on her side. She adopted the content of the petition and added that she is willing to give custody of the minors to the Respondent with unlimited access to her. It is her stand that the marriage cannot work and that the same should be dissolved.

The Respondent was also the sole witness on his side. He stood by the contents of his answer to petition and cross petition. No submissions were filed by the parties save that parties recorded a consent on the issues of custody which should be incorporated in the judgment.

On the courts assessment of the rival pleadings and evidence, It is this court's, opinion, that the following are own framed questions for determination in the disposal of these proceedings:-

- 1. Is the court properly seized of this matter to enable it make a pronouncement on its merit?.**
- 2. What relief or reliefs are the disputants seeking from the court?.**
- 3. Is there a marriage capable of being dissolved?**
- 4. What are the ingredients required to be established by the claimant in order to earn the relief sought?**
- 5. Have the disputants satisfied those ingredients?**
- 6. What are the final orders to be granted herein in the disposal of this matter?.**

In response to question one the answer is Yes because pleadings of both sides are procedurally on the record and the Registrars' certificate was also issued.

The relief the Petitioner is seeking is divorce, custody of the issues of the marriage and maintenance of the minor children of the marriage and costs. Whereas the Respondent in his cross petition sought custody of the children and dismissal of the petition.

The ingredients required to be established before one can earn a relief of dissolution of the marriage are well settled and are set out in Section 8 and 10 of the Marriage Act Cap 150 Laws of Kenya. These form a proof of the existence of a marriage capable of being dissolved, followed by proof of existence of a matrimonial offence or offences. Matrimonial offences are:-

- (a) Adultery**
- (b) Desertion**

(c) Cruelty

(d) Insanity

With regard to proof of existence of marriage capable of being dissolved this has been demonstrated by the existence of a marriage certificate number 64773 of 7/6/96 as well as the confirmation of both parties that they were so married.

This court has judicial notice of the fact that there is no legal requirement that all the ingredients be proved at the same time. Only one suffices. The standard of proof required to establish the ingredient, is one of proof to the satisfaction of the court that a matrimonial offence has been committed.

Applying that standard to the proceedings herein, It is clear that the allegations of neglect and desertion asserted by the petitioner have not been specifically controverted by the Respondent despite putting the Petitioner to strict proof. The court is satisfied that these have been proved on account of failure to controvert the evidence of PW1 on the same since she adopted her own averments in the petition.

As for the counterclaim save for the order for custody of the children, allegations of immorality stand unproven and for this reason the cross petition stands ousted.

Turning to the custody of the issues of the marriage, it is clear that both parties sought their custody but this has been sorted out by the consent and it only needs to be reflected in the judgment.

For the reasons given in the assessment, the court proceeds to make the following orders in the disposal of this matter:-

1. From the content of the pleadings and evidence on the record both parties have lost interest in the marriage the same cannot be salvaged. It is treated as having irretrievably broken down and so it is a proper candidate for dissolution. The court therefore makes an order that the marriage solemnized between the parties herein at the Registrar of marriages office in Kisumu vide marriage certificate number 64773 on 7/6/96 be and is hereby ordered dissolved.

2. Decree *Nisii* to issue forthwith

3. Decree absolute to issue 6 months after decree *nisii* or within such a short time upon application by either party.

4. The consent entered between the parties on 31/3/2011 be and is hereby adopted as an order of this court as follows:-

(i) The custody, care and control of the issues of the marriage namely L. N. and K. O. be and is hereby granted to the Respondent father K.M.O.

(ii) The Petitioner Mother G.N.K. be and is hereby granted unlimited access to the said children.

5. There will be no order on the issue of a monthly payment of maintenance since the same was not pursued by both sides.

6. The cross petition is dismissed as no evidence was adduced by the Respondent to prove the allegations of immorality and adultery.

7. The petitioner will have costs of the petition and the dismissed cross petition

8. There will be liberty to apply by either side on any issue arising from the orders made affecting the minor issues of the marriage.

Dated, signed and delivered at Kisumu this 8th day of July 2011.

R. N. NAMBUYE

JUDGE

RNN/aao