



No. 2931

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

DIVORCE NO. 2 OF 2009

E.N.K PETITIONER

-VERSUS-

C.M.G. RESPONDENT

JUDGMENT

By a petition dated 11th May, 2009 filed in this court through Messrs Migos Ogamba & Co. Advocates, **E.N.K** hereinafter “**the petitioner**” sought the dissolution of her marriage to **C. M.G** hereinafter “**the respondent**” on grounds of cruelty and adultery.

In October, 2000, the petitioner then a spinster was married to the respondent then a bachelor, first under Kisii customary law and later formalized that marriage under the **Marriage Act** on or about 9th September, 2002 at the District Commissioner’s office, Central Kisii District. Following the marriage, the couple cohabited at N[...] in Kisii town. The marriage was blessed with one issue of the marriage namely **B.B** born on 26th June, 2001. However, during the subsistence of the marriage the respondent became cruel and adulterous. The respondent was a man of violent temper and nature, had severally brutally, savagely and physically assaulted the petitioner and humiliated her. In particular on 18th December, 2004 the respondent violently assaulted the petitioner and had to attend hospital.

With regard to adultery, the petitioner accused the respondent of illicit relations with many women whilst married to her. Indeed as of the time of hearing the petition, the respondent was living openly and in adulterous relationship with another woman with whom he had sired two issues. As a result of the respondent’s conduct, the petitioner was forced to flee the matrimonial home, to her parent’s home on or about 10th March, 2003.

In petitioning for the dissolution of the marriage, the petitioner had not in any way whatsoever or howsoever connived or condoned the respondent’s cruelty or adultery nor had she presented the petition in collusion with the respondent. To the petitioner, the marriage had irretrievably broken down and all efforts to reconcile the couple had been futile, hence the plea for divorce.

Through **Messrs Kerosi Ondieki & Co. Advocates**, the respondent answered the petition. The respondent denied allegations of cruelty and adultery made against him by the petitioner. He averred that the petitioner deserted the matrimonial home on 10th March, 2003 and went to cohabit with another man. Otherwise, he also prayed for the dissolution of the marriage and custody of the issue of the marriage on that account.

When the petition came before me for plenary hearing on 21st July, 2011, the petitioner testified that she came from Manga Division and worked in Nairobi as a sales representative. She had contracted a marriage with the respondent sometimes in 2002 and tendered in evidence a certificate of marriage. During coverture, they were blessed with one issue, **B.B.** However, since March, 2003, the couple no longer cohabited together. The petitioner left the matrimonial home because of cruelty and adulterous liaisons that the respondent was having with countless other women. On one occasion, the respondent assaulted her so badly that she had to go to hospital where she was treated and discharged. She tendered in evidence medical records in support of this contention. The petitioner too was aware that as at the time she was testifying, the respondent was already married to another woman and in fact had three issues. After she left the matrimonial home with the only issue of marriage, the respondent came and took him away. She only got him back through a court order. She was not willing to release the issue to the respondent because she had created a foundation for him which should not be disrupted or tampered with. The respondent had after all never been close to the issue nor had he supported him all this time. In any event the respondent was already married with three other children. The marriage cannot be salvaged hence the plea for divorce and custody of the issue of the marriage.

In response, the respondent testified that he was the husband of the petitioner. He had named the issue of the marriage after his father as **B. G.M.** but the petitioner had changed the name without his consent. After marriage, they stayed together for sometime and she then left with the issue when he was hardly 1 ½ years old. During that time, the issue led a good life. He was willing to take full responsibility for the issue. He was willing to provide for school fees as well as insurance cover. On visitation he would prefer that he stays with the child ½ of the school holidays. He was however categorical that he did not want the petitioner in his life as he understood that she was already married elsewhere to another man.

With the formal hearing concluded, parties elected not to make any submissions as issues involved in the petition and answer had been settled by the evidence led.

I quite agree with **Mr. Otieno** and **Mr. Kerosi**, learned counsel for the petitioner and respondent respectively, that the issues involved in this petition were settled by the evidence led by both parties. Parties testified and were agreed as to why the divorce should be granted, who should have the custody of the minor, visitation rights, education and insurance cover. It is unfortunate that the law as it is, now does not allow for divorce by consent. Otherwise, this was a clear and classic case in which a consent in that respect would have sufficed. All parties are agreed that they do not need each other. They want to be set free from this bondage of marriage so that they can go their separate ways. The petitioner does not want to have the respondent in her life. The respondent is of the same view. They all accused each other of adultery. A part from making general accusations of adultery against the petitioner, the respondent led no cogent evidence, to sustain such accusation. On the other hand the petitioner testified that the respondent now lives in an adulterous relationship with another woman with whom they now have 3 issues. That evidence was neither challenged and or rebutted. If anything, the respondent gleefully admitted the accusation. That being the case, I accept the evidence of the petitioner that the respondent is guilty of adultery and the marriage ought to be dissolved on that basis.

On the issue of custody of the sole issue of the marriage, it is common ground that the petitioner should retain such custody with visitation rights by the respondent. However parties agreed that details of such visitation rights can be worked out later.

Finally, the respondent offered and the petitioner did not object to take care of the minor's school fees as well as insurance cover. Suffice to add however that the school in which the minor will be registered whether boarding or day school must be agreed upon between the parties in advance. So is the insurance cover. My only hope is that it will be on the same terms as those he has taken out for his other children if at all.

In the result the final orders I make in this petition are as follows:-

§ The marriage between the petitioner and the respondent be and is hereby dissolved. Accordingly, a decree nisi shall forthwith issue to be made absolute within the statutory period.

§ The petitioner shall have the physical custody, care and control of the only issue of the marriage, B.B. **.K.A , B.G.M** with visitation rights by the respondent whose details will be worked out later by the parties.

§ The respondent shall be responsible for the school fees for the issue of the marriage. The school in which the minor shall be registered whether boarding or day school shall be agreed upon by the parties in advance.

§ The respondent shall also take out an insurance policy or cover for the issue of the marriage. The same again to be agreed upon and be on the same or similar terms as those he has taken out for his other children if at all.

§ I make no order as to costs.

Judgment dated, signed and delivered at **KISII** on this 23rd day of September, 2011

ASIKE – MAKHANDIA
JUDGE