



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Divorce Cause 5 of 2009

D.N.K.....PETITIONER

VERSUS

J.K O. N.....RESPONDENT

Divorce:

· **Marriage under Maasai Customary Law- followed by Civil Marriage under the Matrimonial Causes Act, (Cap 150, Laws of Kenya) - A customary law marriage consummated after a Civil Law marriage is not an adulterous union. Dissolution of such marriage under the Matrimonial Causes Act.**

JUDGMENT

By a Petition dated and filed on 26th May 2009, the Petitioner, D.N.K (*the Petitioner*) sought the dissolution of her marriage to one J.K O. N (*the Respondent*). The Petitioner also sought the following ancillary orders-

(b) *An order compelling the Respondent herein to pay school fees for the issues of their marriage as well as pay such an amount of money essential for their maintenance and upkeep as well as offer support for herself and the issues of their marriage.*

(c) *An order requiring the Respondent to provide maintenance and a matrimonial home for the Petitioner and their issues of the marriage.*

(d) *That the Petitioner be granted custody, care and control of the issues of their marriage.*

(e) *The Petitioner be granted costs of this cause.*

(f) *Any other relief that this Honourable Court may deem fit to grant.*

In support of her Petition, the Petitioner pleaded that the Respondent has been engaged in extra marital affairs with one P.S with whom they were now married and have three minor children.

The Petitioner also pleaded that the Respondent has subjected her and the issues of the marriage to all manner of misery and neglect, and above all, the Respondent has been cruel to her. In the particulars of cruelty, which she reiterated in her evidence, the Petitioner accused the Respondent of severally threatening to kill her with a panga, chasing her from the matrimonial home, assaulting her and denying her access to the matrimonial home, and for all those reasons, the Respondent prayed for the dissolution of the marriage and the consequential orders for custody of the children, their maintenance and upkeep.

In his ANSWER TO PETITION dated 16th June, 2009, and filed on 17th June 2009, the Respondent denied the allegations of adultery, cruelty or neglect of the Petition and the issues of the marriage.

On the allegation of adultery, the Respondent stated that he was married to P.S in accordance with Maasai Customary Law. He denied ever assaulting, or threatening to kill the Petitioner with the use of a panga, and in his evidence stated that he did not even keep or have a Maasai sword in his matrimonial house in Narok Town. On the contrary, the Respondent testified that it was the Petitioner who habitually abused him by reminding him firstly of his poor education, although he was educated upto Form IV level, and secondly of his low salary, and could not therefore stay married to such a man. The Respondent also pleaded and contended in his evidence that it is the Petitioner who deserted him, and has been cohabiting with several men, and in particular one H.N, a private [particulars withheld] practicing in Narok Town with whom the Petitioner has a 3^{1/2} months baby.

What clearly comes out of the proceedings and evidence of the Petitioner and Respondent is that parties were darling friends before the solemnization of their marriage in a civil marriage before the Marriage Officer at the District Commissioner's Office on 7th February 1995. By that time they had their first two children, Y.S - born on Christmas Day (25th December 1989), D.M born on 22nd October 1992, A.S, the third issue was born on 17th March 1997, that is, some three years after the Respondent had married P. S The Petitioner acknowledged in her evidence that polygamous unions are allowed and common among Maasai and other communities in Kenya.

A customary law marriage consummated after a civil law marriage is therefore not an adulterous union. Her concern is the cruelty, neglect and denial of conjugal rights, and that as a young woman, she had natural emotions, desires, and feelings which are to be satisfied. She was not getting them in her marriage with the Respondent.

The Respondent too showed the same and similar frustration with the marriage. His wife was openly cohabiting and had had issue with another man. She had openly despised him as a man of poor education and earned a low salary as a [particulars withheld] with the County Council of Narok. In these circumstances of accusations, and counter accusations, the marriage can truly be said to have irretrievably broken down.

Accordingly, the Petition is allowed and there is hereby issued an order of dissolution of the marriage solemnized between the Petitioner and Respondent.

The decree NISI shall issue and remain in force for a period of three (3) months after which if there is no application made, it shall be made absolute.

The Petitioner had sought custody of the issue of the marriage. The principle of law as set out in Section 4(3) of the Children Act 2001 (No. 8 of 2001) enjoins that all judicial and administrative institutionsto treat the interests of the child as first and paramount considerations in order to conserve, safeguard and promote the rights and welfare of the child. The said Act also guarantees the right of the child against discrimination on any ground, the right to parental care, education, religious instruction and to health care.

The right to parental care includes, the right to the care of both parents, father and mother. A child is defined as any human being

below the age of eighteen years. In this case, Y.S who was born on 24th February 1989, is now turned 20 years of age. She is no more a child. She is at liberty to choose to live with either of her parents, father or mother. So long as she continues to attend any tertiary institution of education, her father will continue to provide her college education until she attains the age of twenty-five or completes her post-secondary education, whichever shall be earlier.

D.M was, according to her Certificate of Birth born on 18th October, 1992. She is now seventeen (17) years of age. She is still a child being under 18 years of age. She is however a child of sufficient understanding. She is at liberty to elect to live with either of her parents and visit the other parent as necessary. The Respondent shall however continue to cater for her school fees and other necessities for school and upkeep.

A.S was born on 16th March 1997. She is now just over twelve (12) years of age. It is in her best interest to remain with the mother, the Petitioner but the father, the Respondent shall continue to provide for her education and other necessities for upkeep in school and at home.

I decline to grant an order for the maintenance of the Petitioner by the Respondent. The Petitioner clearly showed in her evidence and demeanor that she wants to get on with her life. She described herself as a young woman, she has a relationship with another man, and would thus certainly not wish to be tied to the Respondent (*except only as a gold digger*). I also decline to grant her any costs, and direct that each party shall bear her/his respective costs.

In summary, there shall be an order nisi for dissolution of the marriage of the Petitioner and Respondent, such order to become absolute after three (3) months, in the absence of application. The issues of the marriage to be supported in their education by the Respondent in the manner earlier stated, the Petitioner to have custody of the two children under eighteen years of age, with liberty to see and visit their father, and each party to bear its respective costs.

These shall be orders accordingly.

Dated, delivered and signed at Nakuru this 5th day of February 2010

M. J. ANYARA EMUKULE

JUDGE

