



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Divorce Cause 3 of 2004

JA.G.....PETITIONER

-VERSUS-

R.M.T.....RESPONDENT

JUDGMENT

On 15th July, 2004, J.A.G hereafter referred to as “*the petitioner*” filed the instant petition seeking the dissolution of his marriage to one, R.M.T hereinafter referred to as “*the 1st respondent*”. The petitioner however unnecessarily dragged into these proceedings one, A.T, as the 2nd respondent. She is the mother of the 1st respondent though and therefore a mother in law to the petitioner. I say that it was unnecessary for the 2nd respondent to be brought in this Cause because there is no prayer sought against her in the petition by the petitioner. Other than stating that the 2nd respondent was the recipient of 8 herds of cattle as dowry from the petitioner, there is no other pleading touching on her. The petitioner in his prayers has not even asked for the return of the dowry allegedly paid to the 2nd respondent as aforesaid.

Be that as it may, the petitioner apparently married the 1st respondent in 1990 in the Attorney General’s Chambers. After the marriage the duo cohabited as man and wife in Kisii for about 7 years. They were blessed with 3 children; R.N.A born in September, 1985, E.K.A, born in June, 1990 and W.K.A born in June, 1994. However, R.N.A was not their biological daughter but was a product of the 1st respondent’s previous relationships.

During the coverture, the two were able to acquire the following immovable properties:

- i) Central Kitutu/[PARTICULARS WITHHELD]
- ii) Central Kitutu/[PARTICULARS WITHHELD]
- iii) Suna East/[PARTICULARS WITHHELD]
- iv) Suna East/[PARTICULARS WITHHELD]

The petitioner was also able during the same period to acquire several movable and personal items particularised in paragraph 8 of the petition. I need not reproduce the same at this juncture.

All was well in the marriage until about 29th September, 1996 when out of the blue the 1st respondent changed the locks of the doors to the matrimonial home and ran away to her maiden home together with the 3 children of the marriage. She also allegedly took off with all the petitioner’s personal items and documents enumerated in paragraph 8 of the petition as aforesaid. Since then the 1st respondent has not seen it fit to resume cohabitation with the petitioner. Indeed it is the contention of the petitioner that due to her desertion aforesaid, she had neglected him and completely withdrawn her society from him. Infact she had gone back to stay with her parents in her maiden home and had in any event re-married elsewhere. Accordingly the marriage had irretrievably broken down. Various reconciliatory meetings have been unsuccessful. It is for this reason that the petitioner was seeking for the dissolution of the marriage, an order directing the 1st respondent to return all his personal documents and properties listed in paragraph 10 of the petition and sharing of the immovable properties listed in paragraph 8 of the petition at the ratio of 50%/50%.

The petitioner too had sought for the dissolution of the marriage on the grounds of Adultery and Cruelty. However at the hearing, he abandoned those grounds and instead elected to pursue the petition on grounds of desertion only.

The record shows that the petition was duly served on the respondents. They entered appearance to the same through *Messrs K. Getanda & Co. Advocates* on 13th August, 2004. The respondents however failed to file an answer to the petition and upon application by the petitioner, a default judgment was entered in favour of the petitioner. Thereafter the petition was set down for hearing by way of formal proof. To my mind this was irregular as under the marriage Act and the Matrimonial Causes Act, there is no provision for entry of interlocutory or default judgment in Matrimonial Causes. Instead what the petitioner should have done at the expiry of the period limited for entry of appearance and or filing of the Answer to the petition was to move the court for the registrar’s certificate under *rule 29 of the Matrimonial Causes Rules* and indicate whether the Cause was defended or undefended. In the circumstances of this Cause, it is clear that the petitioner should have

sought for directions from the registrar that the cause should be heard as undefended since the respondents had failed to file an answer to the same in good time or at all. Anyhow since the petition is uncontested, I will ignore those procedural omissions and or flaws on the part of the petitioner though represented by able and Senior Counsel who is expected to know better.

From the record, it would appear that the respondents applied to set aside the ex-parte default judgment by an application dated 8th December, 2004. However that application was on 21st April, 2008 dismissed by *Musinga J.* On 8th November, 2007, the respondents instructed *Messrs. B.N.Ogari & Co. Advocates* to take over the conduct of the Cause on their behalf from *Messrs. K.Getanda & Co. Advocates*: On 18th November, 2009 this cause was fixed for hearing on 16th February, 2010.

Come 16th February, 2010 and though the respondents' counsel had been served with the hearing Notice, neither the respondents and or their counsel appeared for the hearing. The petitioner though was present and rearing to go. Satisfied that the respondents' counsel had been served going by the affidavit of service on record and there being no explanation for their non-appearance, I directed that the Cause be heard as undefended, the absence of the respondents and or their counsel notwithstanding.

The testimony of the petitioner was along the same lines as what has already been reproduced elsewhere at the beginning of this judgment. Suffice to add that when he married the 1st respondent, he was a soldier with the Disciplined forces and that the 1st respondent later got a job with an Insurance brokerage firm. Further, that he did not collude with 1st respondent in the prosecution of this petition. Finally he abandoned the claim to the custody of the children of the marriage as they had all come of age.

Under *section 8 of the matrimonial Causes Act* a Petition for Divorce may be presented to the court either by the husband or the wife on the grounds of Adultery, desertion, cruelty, if one of them is of incurably unsound mind and by wife on the ground that her husband had, since the celebration of the marriage, been guilty of rape, sodomy or bestiality. In the circumstances of this case, the petitioner who is the husband of the 1st respondent has elected to pursue the Divorce on the single ground of desertion. For him to succeed on this ground, he must demonstrate that the 1st respondent deserted him without lawful or just cause for a period of at least three years immediately preceding the presentation of the petition. He must also show that he was not the cause or had a hand in the desertion in which event then he will be guilty of constructive desertion.

There is uncontroverted and unchallenged evidence that the 1st respondent without or without just cause deserted the Matrimonial home sometimes on 29th September, 1996. Since then she has not deemed it necessary to resume cohabitation. It has been 14 or so years since the 1st respondent deserted the matrimonial home. It can therefore be safely assumed that the marriage has irretrievably broken down. Attempts at reconciliation have born no fruits at all. The petitioner in his testimony conforms that he did not cause or author the 1st respondent's desertion. This petition was filed on 15th July, 2004 8 years or so after the 1st respondent's desertion aforesaid. Accordingly it was filed more than 3 years after the 1st respondent's desertion and therefore within the law. That being the case I am satisfied that the petitioner has been able to discharge admirably the burden of proving that he is entitled to the dissolution of his hitherto marriage on the ground of desertion. A decree Nisi shall forthwith issue to the petitioner in those terms to be made absolute within the statutory period. The evidence led as regards the immovable and movable property that the petitioner sought to have a stake in was insufficient to lead this court into granting the prayers. Accordingly prayers (b) and (c) in the petition are denied. I make no order as to costs as well.

Dated, signed and delivered at Kisii this 4th Day of February, 2010.

ASIKE-MAKHANDIA
JUDGE