



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Divorce Cause 58 of 2006

M.D..... PETITIONER

VERSUS

J. M..... RESPONDENT

JUDGEMENT

This is the petition of **M.D** (hereinafter referred to as ‘the Petitioner’) seeking the dissolution of her marriage to **J.M** (hereinafter referred to as ‘the Respondent’). The petition was filed in court on 8.12.2006. After obtaining leave from the court the respondent was served by way of substituted service in the [particulars withheld] Newspaper of 20.3.2007, and again on 7.3.2008. Despite this the Respondent neither entered appearance nor filed an Answer to the Petition. The matter then proceeded for formal proof as an undefended cause.

The Petitioner in her evidence told the court that she and the Respondent got married on 15.12.2001 at the V Hotel in Mombasa. She produces the original copy of her marriage certificate Serial No. [.....] as evidence of this fact **Pexb.1**. The Petitioner being a German National had to leave soon after the marriage to return to her homeland. She testifies that since she left in 2001 and despite numerous attempts on her part she has been completely unable to trace the accused. She then decided to file this divorce petition.

The law governing divorce in Kenya is to be found in the Matrimonial Causes Act Cap 152 Laws of Kenya of which S. 6 (1) provides

“6 (1) No petition for divorce shall be presented to the court unless at the date of the presentation three years have passed since the date of the marriage”

In this case as evidenced by the marriage certificate **Pexb.1** the marriage between the couple was solemnized on 15.12.2001. This petition was filed in court on 8.12.2006 a period of about 5 ½ years after the marriage ceremony. I am therefore satisfied that this present petition has been brought in compliance with S. 6(1) of the Matrimonial Causes Act and is properly before the court.

In this petition the petitioner alleges that the respondent is guilty of constructive desertion particulars of which are stated thus: -

“The respondent deserted the matrimonial home and has never come back to provide your Petitioner with husbandly attention. The said conduct has subjected your Petitioner to extreme emotional deprivation and mental anguish”

S.8 of the Matrimonial Causes Act provides for the grounds upon which a divorce may be granted. One of such grounds is desertion. S.8 (1) (b) provides

“A petition for divorce may be presented the Court either by the husband or the wife of the husband on the ground that the respondent –

(b) has deserted the Petitioner without cause for a period of at least three years immediately preceding the presentation of the petition ...”

The couple got married on 15.2.2001. On 19.2.2001 hardly one week later the Petitioner traveled back to Germany. The arrangement was that the Respondent would obtain his travel documents and join her there. This did not happen. The Petitioner states that she and the Respondent remained in communication until October 2001, but he was unable to obtain the requisite travel documents. Thereafter the Petitioner never heard from the Respondent again. It was as if he had vanished into thin air. She tells the court that she has made trips to Kenya each year since then but has been totally unable to trace her husband. It is now nine (9) years since she last set eyes on him. This evidence of the Petitioner was not controverted at all and I have no reason to doubt the veracity of the same. The Respondent was duly served but failed to enter appearance or file any response to the petition. This is clear evidence of his lack of interest both in these proceedings and indeed in his marriage.

It is clear that the Respondent does not wish to be found, at least not by his wife. His behaviour in my view amounts to **“constructive desertion”** as it is impossible for the Petitioner to have a marital relationship with a man who has gone underground so to speak. A couple who have not spoken to, seen each other or cohabited for a period of close to ten (10) years cannot be deemed still married to each other. If the Respondent was still interested in saving the marriage he would have made some effort to communicate with the Respondent or at the very least he would have responded to this petition. I find that the Respondent’s **“disappearing act”** amounts to desertion, which desertion still continues to date. As such I find that this ground of desertion has been proved. I do hereby allow this petition for divorce and direct that a decree nisi be issued to be made absolute within three (3) months of today’s date.

Dated and Delivered in Mombasa this 26th day of March 2010.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Mkan for Petitioner

M. ODERO

JUDGE

26.3.2010