



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Divorce Cause 43 of 2009

D C B.....PETITIONER

-VERSUS-

P G..... RESPONDENT

JUDGMENT

In the petition of 22nd July, 2009 filed on even date, the petitioner pleads that his marriage to the respondent was solemnised at the office of the Registrar of Marriages, Mombasa on or around 20th September, 1972. Both parties are Kenya citizens domiciled in Kenya. Following the celebration of the marriage, the parties lived and cohabited together as husband and wife in Mombasa, for a total of 22 years during which they begat three children all of who have now attained the age of majority.

The petitioner states that the respondent enlisted the support of the children of the marriage, for the purpose of evicting him from the matrimonial home in 1994 – such action against him being attributed to his alleged improvidence and inutility to the other members of the family. The petitioner describes such a scenario as cruel treatment towards him, showing that his marriage to the respondent had for some 15 years existed in legal form, but entirely devoid of substance.

The petitioner sets out the instances of alleged cruelty as –

- (i) respondent having evicted him from the matrimonial home without just cause;
- (ii) respondent having actually and constructively deserted the petitioner, and having unilaterally denied the petitioner conjugal rights for the last 15 years;
- (iii) respondent having totally abdicated her matrimonial, domestic and financial duties, causing the petitioner to suffer mental and emotional anguish;
- (iv) petitioner gloating over his suffering while recovering from radical surgery for prostate cancer;
- (v) petitioner having filed several suits seeking to strip the petitioner of his property;
- (vi) petitioner stating in open Court that she has no intention of saving her marriage to the petitioner;

The petitioner pleaded that his marriage to the respondent had irretrievably broken down. He asked for a divorce decree, with costs.

The process server's affidavit of service dated and filed on 12th August, 2009 shows clearly that a notice to enter appearance and file an Answer, had been served upon the respondent. Indeed, the respondent took action on 17th August, 2009 by filing, through her advocates M/s. Cootow & Associates, a Memorandum of Appearance.

Although the petitioner filed a subsequent document (dated 14th October, 2009) contesting the respondent's Answer to Petition, that Answer to Petition/Cross-Petition is not on file, and besides, the respondent was not in Court and was unrepresented on the occasion of hearing the divorce cause. Even on the occasion of directions by the Deputy Registrar, 4th December, 2009 on whether the pleadings and proceedings were in order and the hearing may take place, the advocates on record for the respondent were absent. These circumstances make it clear that the respondent had not the concern about the hearing and disposal of the matter which the petitioner obviously had: and there was a basis for disposing of the cause as prayed for by the petitioner.

Giving his testimony before this Court on 17th December, 2009 the petitioner substantiated the basic facts as pleaded in the petition papers: about the taking place of the marriage, and about his eviction by the respondent, from the matrimonial home. Of the alleged eviction, the petitioner told the Court of the accompanying symbolism. At 7.00 p.m., sometime in 1994, when the petitioner returned home, he found that the respondent had dispersed on the floor, right from the main door up to the sitting room, a trail of living cockroaches mixed with dead: and the respondent then censored him for making her and other members of the family "live like animals."; and this was attended with shouts at the petitioner, emanating from the respondent and the children of the twenty-six-year-old marriage. These members of the family told the petitioner off, for not affording them a better residential location, such as Nyali in the North Coast of Mombasa. Even as the petitioner defended himself on the ground that he had sent his children abroad for education and this had financially disempowered him, he felt betrayed by his family. In his psychological anguish, the petitioner on that occasion wept; but later, at mid-night, the other members of his

family evicted him, and he sought accommodation elsewhere.

The petitioner asked that his marriage be dissolved.

The petitioner's case is clearly stated, and the Court perceives well his reason for seeking the dissolution of his marriage to the respondent. There were notable milestones marking the married life of the parties herein: they spent more than quarter of a century together, as man and wife, and during this period of time they had not less than five children together; the petitioner expended substantial sums of money, educating five of his children in India; in the course of married life, ill-health befell the petitioner, and he had to undergo a major surgical operation; the petitioner's finances went through a down-turn, and this was not to the liking of his wife and children. The family's objections to the life-style availed to them by the petitioner, culminated in an outright expulsion of the petitioner from the matrimonial home, something that caused him anguish and much suffering. For more than a dozen years, the petitioner has not enjoyed the family life which he once had, with the respondent as his wife; and he has given evidence that the respondent is determined not to have a restoration of the married life.

All these circumstances show, in my opinion that the marriage between the petitioner and the respondent has irretrievably broken down. To keep the parties together in those circumstances, is a play with legal form, in a manner that is completely contrary to the needs of real life; and such false unity could only serve to further oppress the petitioner. Such is not the object of the law. The law gives and sustains sanctity that is built on rewarding relationships. There is no such a relationship between the parties herein; and the law will not keep an oppressive relationship.

Guided by these principles, this Court has the obligation, which it hereby exercises, to declare the marriage in question dissolved. I hereby grant the decree *nisi* of divorce, which may be made absolute by a suitable application.

The respondent shall bear the petitioner's costs.

DATED and DELIVERED at Mombasa this 12th day of March, 2010.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ibrahim

For the Petitioner: Mr. Kithi

Respondent absent and unrepresented.