



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

**AT EMBU**

**Divorce Cause 1 of 2008**

**EMN.....PETITIONER**

**VERSUS**

**NWM.....RESPONDENT**

**J U D G M E N T**

This divorce is uncontested. The petitioner filed the same on 14<sup>th</sup> day of February 2008 asking the court to dissolve the marriage between him and his wife NWM. The same was served on

NWM. She actually filed a memorandum of appearance dated 20/3/2008 but did not file any response to the petition. She was subsequently served with the hearing notices each time the matter was fixed for hearing but she did not come to court. She was therefore aware of the cause but chose not to contest.

The petitioner has asked the court to dissolve the marriage which they contracted on 3/3/1989 at the Registrar's office in Nairobi. He has also asked to be awarded the custody of the issues of the marriage and costs of the petition. It transpired later from the petitioners submissions that 2 of the issues of the marriage are already adults and the issue of custody would only apply in respect of the last born- one MNM who is currently in her mother's custody. The petitioner relies on grounds of adultery and cruelty which he has particularized under paragraph 6 of his petition. When he testified in court however he was in my considered view unable to prove either the adultery or the cruelty. On the issue of adultery, he said that she is the one who had admitted once that she had love affair with her boss. He nonetheless proceeded to tell the court that he had forgiven her and they continued to live together. This would therefore mean that he acquiesced to the said adultery and condoned it and he is estopped from relying on it as a ground for divorce. The act of cruelty he cited was only on one occasion where he said that the respondent came home at 3.00 a.m. and said that she had been drinking with her girlfriends. That to me cannot amount to an act of cruelty. Would the same act have been termed as cruelty if it was the petitioner who went home inebriated at 3.00 a.m.? That would I think be stretching the concept of cruelty too far. Like I told the petitioner in court, his petition was a joke. He even conceded that they are still on friendly terms and they meet frequently when they go to visit their daughter in school. He said that they are still good friends. He still pays school fees for his daughter while the mother has her custody and that does not seem to pose a problem to him. All he wants is to be allowed to visit his daughter like he has been doing.

All that notwithstanding, he still wants the divorce, the Respondent has not filed a response and it is clear

that she is not opposing the divorce. They seem to want to remain friends but not to be shackled in the marriage institution. I have agonized about this decision principally because in my considered view none of the statutory grounds of divorce have been proved on a balance of probabilities. Would the court nonetheless insist on not dissolving a marriage where the partners for whatever reason feel that they have had enough of each other? My principle has always been that if the couple does not wish to stay together, then the court should let them be. Neither of the parties herein is desirous of saving this marriage. They have lived apart for 6 years. This has been enough time for them to reconsider if they can live together again. They still don't want to live together. I agree that their marriage has irretrievably broken down and neither of them wants to salvage it. I cannot force them to remain joined only by a marriage certificate which has ceased to have meaning to them. Once again I wish to state like I have done on several occasions that I think time is now ripe for our laws to be amended to accommodate **"divorces by consent."** Where parties feel that they do not wish to be bound together through marriage, they should be allowed once the petition is filed, to file consent and the marriage should be dissolved without having to adduce evidence in court which evidence is more often than not quite murky and uncomfortable. This could save valuable court's time and other resources and leave the dignity of the parties unscathed.

For the foregoing reasons, I allow this divorce cause and order that:-

- (1) ***The marriage between the petitioner and the Respondent be and is hereby dissolved. A decree nisi to issue. Either party to apply for decree absolute after 6 months from the date of this Judgment.***
- (2) ***Custody of MNM is awarded to the Respondent.***
- (3) ***The Petitioner be at liberty to visit her in school or any other place as he and the Respondent may agree.***
- (4) ***Petitioner to bear the costs of the petition as the same was undefended.***

Delivered, signed and dated at Embu this 10th day of May 2010

W.

**KARANJA**

**JUDGE.**

**In presence of:-Ms Kimani for Ms Wairimu for petitioner.**