



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

Divorce Cause 7 of 2009

JW.....PETITIONER

VERSUS

MC.....RESPONDENT

JUDGMENT

By a Petition dated 31st March 2008 and filed on 4th April 2008, the Petition herein brought orders that-

- (a) *the marriage between the Petitioner and the Respondent be dissolved;*
- (b) *the Petitioner be granted custody of the issue of the marriage;*
- (c) *the Respondent to pay such monthly sum as the court may deem fit for the upkeep and maintenance of the Petitioner;*
- (d) *the Respondent be condemned in costs.*

The Petition was served upon the Respondent on 11th July 2008. According to the Affidavit of Service by Richard Wachira the Process Server sworn on 21st July 2008, the Respondent accepted service but declined to sign the copies of the Petitioner, saying "*he is not interested with the broken marriage*". Consequently the Senior Deputy Registrar issued a certificate that it was an order for the Petitioner to proceed as an undefended cause pursuant to the provisions of Rule 3(3) and 29(2) of the Matrimonial Causes Rules which provide for the issue of the Registrar's Certificate that the proceedings are in order, and the matter be heard as an undefended cause.

The matter consequently proceeded before me on 2nd March 2010. Miss Ogembe represented the Petitioner and led her in her evidence. Counsel also confirmed to the court that she knew the Process Server, Richard Wachira who had sworn the Affidavit of Service, and that the Affidavit was genuine and true, and not made up.

It was the Petitioner's evidence that she and the Respondent first married under Kikuyu Customary Law and later solemnized their marriage under the Marriage Act (*Cap. 150, Laws of Kenya*) and were blessed with three issues of the marriage -

- (i) *K M- 19 years of age*
- (ii) *E M - 17 years of age*
- (iii) *A M - 15 years of age*

As the marriage was solemnized under the Marriage Act only on 24th August, 1995, and broke down two years later, in 1997, it means the children of the marriage were all born well before the solemnization of the marriage under the Marriage Act, although nothing turns on this point for there is no denial by the Respondent of either the marriage or the issue of children under the marriage.

The Petitioner pleaded the three grounds for divorce, desertion, cruelty and adultery.

On desertion the Petitioner told the court that the Respondent started deserting her in 1997, and he would assault her when she raised the issue, upon his returning home from time to time. The Respondent also had extra-marital affairs with the house-girl, and had a baby boy with her. This information, was given to the Petitioner by the house-girl and in any event the baby boy the Petitioner testified, resembled her own children, and also had no doubt about its paternity. This was therefore a clear case of adultery. The Petitioner also testified that the Respondent had several homes in Nyahururu and Nanyuki, but had no other particulars, she herself was not interested as she lives and works for gain in Thika, and has no contact with the Respondent. She therefore prayed that her Petition be granted, with costs and that the Respondent be condemned to an order for maintenance of the children whose custody should be granted to her.

The Petitioner pleaded and testified that there is no collusion between her and the Respondent on the Petition to dissolve their union of marriage. The plea was that her marriage with the Respondent had completely broken down and that she and the Respondent have neither contact nor any relationship and prayed that the Petition be allowed.

I have reviewed the Petition herein, the evidence of the Petitioner in relation to the law, the Matrimonial Causes Act (Cap 149, Laws of Kenya) and I have no doubt in my mind that this is one of those causes where a court can say, the union of marriage between the Petitioner and the Respondent has irretrievably broken down. Where a married man walks away from his wife after defiling her matrimonial bed with the house-help or girl (woman), and turns away from the children of his own loins it is futile for the court to foist such a marriage on either party. In the circumstances therefore, I direct that a decree NISI issue, and the same be confirmed six months thereafter.

As to the custody of the children, I note that the eldest child KM was 19 years of age at the time of filing the Petition. He was an adult then having attained 18 years, the age of majority. EM was 17 years of age then, he is now also over 18 years of age and therefore an adult. AM who was 15 years on about 31st March 2008 when the Petition was filed is now just over 17 years. He is the only minor. I would grant the Petitioner the custody of AM until he attains the age of 18 years. KM and EM being adults are capable of making their own choices, to be with their mother or seek their father. I decline to make any order of their custody by the Petitioner.

I would grant the Petitioner the costs of the Petition. There was no material such as the assistance the Respondent used to give the Petitioner during the subsistence of the marriage upon which I could make an order of maintenance. I decline to make such an order.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 7th day of May 2010

M. J. ANYARA EMUKULE
JUDGE