



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Divorce Cause 220 of 2003

M.W.M.....PETITIONER

versus

M.M.N.....RESPONDENT

JUDGMENT

M.M.N and **M.W.M** who are the parties to this suit solemnized their marriage on 6/10/1990, but have lived apart since the year 1998. They have two children, now aged 19 and 14 years.

M.N initially petitioned this court on 20/12/2002, for the dissolution of her marriage to **M.M**, on the grounds of cruelty and adultery. She also prayed for the custody of the children and for maintenance.

M.M who opposed the petition filed his 'Answer and Cross Petition' on 7/11/2003 in which he also prayed for inter alia, the dissolution of the marriage and custody of the children. He based his claim on cruelty.

The issues of custody and maintenance were however resolved on 4/12/2003, when the two recorded a consent

Though given sufficient time, **M** failed to appear in court and her petition was finally dismissed on 2/7/2009, for want of prosecution, after which **M.M** proceeded to prove his case.

I have considered this matter and especially the fact that **M.N's** counsel raised an objection to what is referred to at the 'Answer and Cross Petition'. It was her submission that it merely contains an answer to the original petition by **M.N**

I readily agree with **M.N's** counsel, and it is indeed trite that parties are bound by their pleadings. I have perused the said pleading in which he clearly denies the allegations contained in **M.N's** petition, and in which he also states that **M.N** has since the celebration of the marriage treated him with cruelty, for which reason he prays for the dissolution of their marriage.

In my humble opinion having clearly denied the allegations and having clearly pleaded cruelty, it cannot be said that his pleading is not a cross petition.

Be that as it may, having pleaded cruelty, one would seek guidance from the provisions of section 8 (c) of the Matrimonial Causes Act wherein it is provided that:

' (1) A petition for divorce may be presented to the court

either by the husband or the wife on the ground that the

respondent –

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality’.

(2).....

In furtherance to the above legal provision, ‘*In a cause where the petitioner alleges cruelty, it is for her to satisfy the court, and she is indeed under an obligation to prove her case on a balance of probabilities, and thereby to establish that there ‘existed a misconduct of a grave and weighty nature; that there was real injury to his health or reasonable apprehension such injury; that the injury was caused by misconduct on the part of the respondent, and that the conduct amounted to cruelty in the ordinary sense of that word’ (Meme vs. Meme [1976] K L R 13).*

It was his evidence that M.N had treated him with a lot of cruelty; that she was abusive to their children, his relatives and siblings; that she would burn his belongings and destroyed his car in 1996, and that she attempted to scald him with hot water once. He also testified that she was a wasteful wife and would keep late hours with men. It was also his evidence that she was and still is an alcoholic, and that though he has made several attempts to reconcile with her, his efforts have been in vain.

Mr. Kwengu, who appeared for the petitioner urged the court to find that his client had proved the allegations set out in out in his petition; that he had proved the particulars of cruelty as his evidence was not challenged.

Mrs. Kinyanjui, who appeared for respondent however opposed the petition, and it was her submission that M.M’s statement contained mere hearsay; that his allegations were not substantiated, and that in the circumstances, he would not qualify for any relief.

From the above, it is clear that though he testified on several issues, which in my view are very serious, for they touch on his wife’s reputation and integrity, as well as on their relationship, he did not make any effort, as one would have expected him, to have his testimony corroborated, and in the circumstances. He who pleads must prove his case on a balance of probability. It cannot lie for his counsel to say that since it was not challenged in evidence, his case was well cut out. I am thus not convinced that he has proved his case to the expected standards, and would for that reason dismiss his petition.

But the issue that arises then is what would their fate be? They have lived apart for the last 13 years. It is evident that chances of reconciliation are nil. In my view this marriage has broken down irretrievably and it would be in the best interest that on that ground that I dissolve it, which I hereby do, with each party bearing its own costs.

Having confirmed that he would meet the younger child’s school fees requirements until she completes her

studies, and that he would also meet the costs of their housing, I do order that he does so until further orders of this court.

A decree nisi shall in the circumstances, issue forthwith, with liberty to apply after 90 days.

Dated and delivered at Nairobi this 7th day of May 2010.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the petitioner- Mr. Mare, holding brief for Mrs. Kinyanjui.

For the respondent- Mr. Kwengu