



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

**Matrimonial Case 20 of 2006**

**P.S.H.....PETITIONER**

**-VERSUS-**

**R.W.H.....RESPONDENT**

**JUDGMENT**

The petitioner stated in the pleadings (petition dated 4<sup>th</sup> March, 2006) that he had married the respondent, then known as **R.W** at a ceremony conducted at the Registrar's office at Kempen in Germany, on **8<sup>th</sup> July, 1988**; and that the couple thereafter cohabited and resided at various homes in the Diani area. There are no children of the marriage.

The petitioner, a deep-sea fisherman, resides and is domiciled in Kenya, whereas the respondent has, since 2000, resided at Kempen in Germany, where she is domiciled.

The petitioner pleads that the respondent is in desertion, and has been in desertion from the matrimonial union for a period longer than three years prior to the filing of this petition. The petitioner pleads that some time in February, 2000 the respondent asked him to leave the matrimonial home; and he left, and the two did not again cohabit; the respondent soon thereafter, took up residence in Germany, occasionally returning to Kenya and living separately at her own property located at Diani.

The petitioner pleads that he has not, in filing this petition, acted in collusion with the respondent.

The petitioner states that the respondent had filed Maintenance Cause No[...] under the Subordinate Courts (Separation and Maintenance) Act, at the Kwale Senior Resident Magistrate's Court, and the same is still pending.

The petitioner prays for dissolution of the marriage between him and the respondent.

The respondent filed a notice of appearance through the firm of M/s. Bowyer Mahihu & Co. Advocates, on 20<sup>th</sup> March, 2008, and an answer to petition and cross-petition on 18<sup>th</sup> April, 2008.

The respondent states that she has, since 2000, been spending six months of each year at Kempen in Germany and the other six months at her home at Diani.

The respondent pleads that the petitioner himself left the matrimonial home, of his own volition, in February, 2000, and for no cause at all. She pleads that it is the petitioner who is in desertion, and that after he deserted, he started "cohabiting with other women in Diani, women unknown to the respondent"; that it is "not true that the respondent has refused to cohabit with the petitioner", but it is the petitioner who has no interest in the respondent; that the respondent spends much time in Kenya and it is the petitioner who has deserted and denied her conjugal rights.

The respondent pleads that "it is the petitioner who has neglected....the welfare of the respondent, subjecting the respondent to frustrations and mental torture": and that this is what led the respondent to file proceedings against the petitioner at the Kwale Law Courts, in SRMCC No.[...]

The respondent states that the petitioner has sold most of the matrimonial property, which was obtained during the subsistence of the marriage; that he did not share the proceeds equally with the respondent; and that when she raised the issue of such property, the

petitioner would get “moody and extremely volatile” and scaring to the respondent.

The respondent pleads that she has not in any manner been an accessory to, or connived at, or condoned the matrimonial offences she complains of; and that this answer and cross-petition is not filed in collusion with the petitioner. The respondent states that the marriage has irretrievably broken down and cannot be salvaged, all on account of the wrong-doing of the petitioner.

The respondent asks that the petition be dismissed with costs to the respondent; that the marriage be dissolved; that the Court do issue a declaration that “the respondent is entitled to an equal share of the matrimonial property acquired during the subsistence of the marriage and the same be settled”; that an order be made that the said matrimonial property be valued, and half the value be paid to the respondent.

The respondent, on 12<sup>th</sup> November, 2008 filed a notice under order III, rule 9 of the Civil Procedure Rules, that she would henceforth be acting in person.

Counsel for the petitioner invited the respondent (on 1<sup>st</sup> February, 2010) to the High Court Registry for the taking of a hearing date, but the respondent was unrepresented. The taking of a hearing date had proved difficult for quite some time; and on 12<sup>th</sup> May, 2009 the respondent had thus written to the petitioner’s advocates:

**“Because now I stay more in Germany to nurse my 99-year-old mother, please send the correspondence to my German postal address, to my fax No. and/or to my e-mail address (.....)@ cityweb.de) in future.**

**“Should it be necessary for me to be present at the Court in person, then please let me have the notice three months in advance”.**

The petitioner’s advocates, M/s. Ndegwa Muthama & Katisya Associates Advocates, communicated with the respondent on 13<sup>th</sup> April, 2010 as follows:

**“The matter is coming up for hearing on 15<sup>th</sup> April, 2010. I delivered the hearing notice dated 5<sup>th</sup> February, 2010 (copy attached) [to] your caretaker [at Diani] Mr. Ali Salim on 16<sup>th</sup> February, 2010. He confirmed to me that you authorized him to receive the hearing notice on your behalf.**

**“Though we have done our part by delivering the hearing notice to your caretaker at Diani, we are going an extra mile to remind you to attend Court on the said 15<sup>th</sup> April, 2010 as indicated on the hearing notice”.**

The process server, one **Terrence Omondi**, filed an affidavit of service on 14<sup>th</sup> April, 2010 deponing that he had been to the respondent’s Diani home on 16<sup>th</sup> February, 2010, for the purpose of serving the hearing notice, which was dated 5<sup>th</sup> February, 2010; he found **Mr. Ali Salim**, the caretaker and guard; **Mr. Ali Salim** called the respondent on telephone and got authority to receive service; the deponent thereupon tendered to **Mr. Ali Salim** a copy of the hearing notice dated 5<sup>th</sup> February, 2010; **Mr. Ali Salim** received the same, though declining to sign at the back of the master copy for the deponent’s retention.

On the scheduled occasion of hearing (15<sup>th</sup> April, 2010), learned counsel for the petitioner, **Mr. Ndegwa**, stated that hearing date had been duly served, and in addition, an e-mail message had been sent to the respondent’s address in Germany. Counsel asked that the matter be heard, considering the actions taken in effecting service of hearing date, and taking into account the rather advanced age of the petitioner (from the documentation on file, this would be about 70 years).

Considering the context and the manner in which service of hearing date had been effected, and having in mind the object of ensuring there is an end to litigation, the Court directed that hearing should proceed.

After **Mr. Ndegwa** introduced his client’s case, the petitioner was sworn, and gave evidence as follows. The petitioner and the respondent got married on 8<sup>th</sup> July, 1988 at Kempen in Germany, and thereafter they lived in a rented cottage at Diani, before moving into the respondent’s house, in the same area.

It was the petitioner’s evidence that clashes had taken place among the local population in 1997, and this caused uncertainty and loss of business, so his enterprises were negatively affected, as revenues fell. Consequently, the petitioner said, it was no longer possible for him to take holidays together with his wife, and “the marriage started breaking up”. The last time the petitioner and the respondent lived together was in February, 2000: the respondent asked him on that occasion to leave; and he moved over to his mother’s house, still in the Diani area. The petitioner said he did not know where the respondent was, and he had expected he would find her in Court. He said the respondent has not kept in touch with him; and in his view, there was no hope of salvaging the marriage. The petitioner said he had not deserted the respondent; it was the respondent who asked him to leave, and thereafter, did not contact him any more. The petitioner was, therefore, asking for divorce.

On the basis of the brief testimony, **Mr. Ndegwa** submitted that the petitioner had given uncontradicted evidence of constructive desertion and cruelty; and so he asked that the prayers be granted.

To the petition, there was an answer and cross-petition. Owing to the respondent's failure to turn up in Court, no evidence had been adduced in proof of the pleadings in the answer and cross-petition, which, however, by its design, has the character of a serious document of pleadings.

Although the petitioner's evidence, in my assessment, was cursory and shed only limited light on the circumstances in which the separation between him and the respondent took place, the Court has to determine the question on the basis of the balance of probabilities; and the probability is in favour of the only side that tendered evidence. That evidence, moreover, tallies with an important pleading of the respondent: that the marriage has irretrievably broken down.

The Court has found no evidence of connivance at, or condonation of matrimonial wrongs, nor of collusion between the parties to secure a decree of divorce.

I will, in these circumstances, grant a decree *nisi* of divorce, which may be made absolute subsequently, upon a suitable application.

The parties shall bear their own respective costs.

***Orders accordingly.***

**DATED and DELIVERED at**

**MOMBASA** this 11<sup>th</sup> day of June, 2010.

.....

**J. B. OJWANG**

**JUDGE**

Coram: *Ojwang, J*

Court Clerk: *Ibrahim*

For the Petitioner: *Mr. Ndegwa*

Respondent: unrepresented