



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
DIVORCE CAUSE NO. 10 OF 2009

BETWEEN

PK KPETITIONER

VERSUS

VCK.....RESPONDENT

JUDGMENT

PKK, then a bachelor, married **ViC K**, then a spinster on February 24th, 1998 in the District Commissioner's office in Kericho in the Republic of Kenya. The parties proceeded to establish a matrimonial home in Kericho town after their marriage. However, they did not stay long in Kenya after their marriage for in May, 1998, they both left Kenya for the United States of America. They had hardly settled in the United States of America for three months when **VCK the Respondent**, moved out of the house they were living in and left **P K, the Petitioner**. They have never resumed cohabitation since.

On 9th September, 2009, the Petitioner filed a Divorce Petition in this court seeking dissolution of marriage on the grounds of adultery, desertion and cruelty on the part of the Respondent. The Petition for divorce seems to have been served upon the Respondent by Paul Kiplimo Kogo on 18th September, 2009 together with Notice of the Petition and the verifying affidavit. No appearance or Reply to the Petition was filed in this cause by the Respondent. On 11th November, 2009, the Deputy Registrar certified the pleadings to be in order and in effect confirmed the Petitioner's compliance with the law. The Petitioner attached a copy of the Marriage Certificate to the Petition as required by law and

produced it as exhibit No. P1 during the hearing.

As the Respondent neither appeared nor filed a reply to the Petition, the hearing of the Divorce Petition proceeded ex parte and the evidence of the Petitioner went uncontroverted. It was established that the parties are man and wife having gone through a ceremony of marriage on 24th February, 1998 before the District Commissioner who issued the parties with a Marriage Certificate(exhibit No. P1) under the **Marriage Act, Chapter 150** of the laws of Kenya.

In his evidence, the Petitioner testified that soon after their arrival in the USA, they started having differences which he thought were consistent with normal wear and tear of conjugal life. But he was mistaken. The Respondent did not only move out from the house, but she later left the USA and came back to Kenya around 2007. The Petitioner testified that he did not expel her or give her cause to leave him. Seeing that she was not coming back to him, and as he had to move on with his life, the petitioner filed these divorce proceedings in September of 2009 seeking dissolution of the marriage on the grounds that the Respondent had deserted him and treated him with cruelty and committed adultery. He gave as particulars and evidence of cruelty the fact that when he came to Kenya, the Petitioner met the Respondent who declared to him that she had extra marital affairs. This, the Petitioner said, was cruel and caused him mental anguish. The other two particulars of cruelty were alleged to be (1) the Respondent's constant nagging when the parties cohabited as man and wife and (2) the Respondent's act of moving out of the matrimonial home. The fact that the Petitioner continued to live with the Respondent in Kenya inspite of her nagging and the fact that the Petitioner took the Respondent with him to the USA as he did and settled down with her before she deserted him after only three months of their arrival there would appear to suggest that the Petitioner had forgiven her for the nagging which in law, without more, did not amount to an act of cruelty or to a matrimonial offence. It was consistent with the ordinary wear and tear of conjugal life. As regards the desertion on the part of the Respondent, it cannot in the context of this cause be said to be a particular of cruelty as well as the main ground on which the divorce is sought.

When he came to Kenya from the USA, the Petitioner discovered that the Respondent had given birth to children sired by other men. This confirmed to him that the Respondent had lost interest in him as well as in the marriage and he inferred from that fact that she had no intention of ever returning to him. The Petitioner testified that he had ascertained that the Respondent works in Nairobi and goes to her mother in Molo. She has never returned to Kericho, he said, where the Petitioner hails from. He also testified that there are no issues of the marriage. It is for these reasons that the Petitioner seeks dissolution of the marriage.

The marriage between the parties was a valid marriage under the **Marriage Act, Cap 150**. It was monogamous. The provisions of the **Matrimonial Causes Act (Cap 152)** consolidating and amending the law relating to matrimonial causes which define "marriage as the voluntary union of one man and one woman for life to the exclusion of all others" apply to the marriage in this cause. **Section 8(1)** of the **Matrimonial Causes Act** provides

8(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.

The Petitioner's Petition hinges on the grounds of adultery, cruelty and desertion.

The marriage was solemnized in Kenya on 24th February, 1998 as aforesaid and in his petition, the Petitioner pleaded and later testified that he is domiciled in Kenya and was so domiciled as at the time when the petition was presented in court on his behalf by his advocates. In the circumstances, this court has jurisdiction to order dissolution of the marriage if the Petitioner satisfies the Court that the Respondent is guilty of desertion and/or cruelty and/or adultery. Has the Petitioner proved these grounds of divorce?

In this divorce cause, the Petitioner has not proved cruelty. To prove cruelty, he was enjoined to show to the satisfaction of the court that the Respondent was guilty of misconduct of a grave and weighty nature that posed real injury to the Petitioner's health or caused the Petitioner reasonable apprehension of such injury and that the Respondent's conduct and acts of cruelty were so grave and weighty that they went beyond the ordinary wear and tear of conjugal life (see **Meme v. Meme (1976) KLR 13**). It is my finding that there was no evidence of cruelty.

The Petitioner's allegations of adultery against the Respondent were not supported by evidence. Courts of law determine disputes on the basis of facts proved by evidence and law applied to such facts. Even where it is rightly and generally believed that a party has engaged in adultery, the party at fault cannot be condemned without evidence to prove it. The Petitioner testified that the Respondent has had children with other men because they were not sired by him. He did not furnish any further evidence to buttress and prove the allegation that the Respondent had children by other men. He did not tell the court how many children there are and when or where they were born. In short, the Petitioner did not show by evidence that the Respondent had in fact given birth to a child or children not sired by him years after cohabitation had ceased between them. The Petitioner generally believed, it seems, that the Respondent was committing adultery and he suspected she had several men in her life with whom she was doing so. But he adduced no solid evidence from which the court could infer that adultery had taken place. Normally, it is not always necessary in cases of adultery that a spouse be caught **in flagrante delicto** or red-handed. After all, sexual encounters and sexual escapades are done so clandestinely. But a woman who becomes pregnant otherwise than through sexual intercourse by her husband can be presumed to have committed adultery (although modern medical scientific advancement makes it possible today for a woman in sophisticated societies to be pregnant without sexual intercourse, as where there is introduction of sperms from a Sperm Bank, a factor that may give rise to cruelty rather than adultery). It is my finding that the Petitioner did not prove the allegation of adultery. It is unlikely that it has not taken place but there is no evidence to prove it. Mere suspicion is not sufficient to justify a finding of adultery (see **Beer v. Beer (1948) P10, 13**).

In his evidence on desertion, the Petitioner testified that the Respondent left him and went away without saying why or where she was going. She has never returned. As of the year 2009 when the Petitioner came to Court to present the Petition for divorce, she had not returned. That was a cool eleven years. She seems to have severed all links with the Petitioner and his family. It is not difficult to infer in these circumstances that she had no intention of ever returning to the Respondent, much less cohabiting with him. In short, the marriage is as dead as a dodo. It is patent that the desertion has been continuous since May 1998. It is clear that the withdrawal by the Respondent was unjustified and was without the consent of the Petitioner and it is clear that the intention of the Respondent to remain separated permanently can be inferred. It is also clear that the marriage between the parties has broken down irretrievably and the marriage exists only in name and on paper. The conduct of the Respondent has demonstrated beyond any doubt that she has no interest in the marriage and does not want the Petitioner in her life. If the Petitioner had any lingering doubts, the Respondent went so far as to tell him that she had had children not sired by him (the Petitioner). In effect, the Respondent was merely telling the Petitioner that she had moved on with her life and did not want him.

The evidence of desertion was cogent showing as it did that the Respondent had without cause, and either

in a flash of anger or following a well calculated and premeditated move, withdrawn from the matrimonial home. It is my finding that the Respondent left the Petitioner of her own volition and without any justification or sufficient cause. It seems that she was fed up with the life she had with the Petitioner. The desertion was not condoned by the Petitioner and prior to the institution of this cause it had run for a period of over ten years.

If the Petitioner had failed to prove desertion, his petition would have failed. Once again I lament the fact that the Law Reform Commission and the Office of the Attorney General continue to ignore the need for legislation to amplify grounds for divorce. While other jurisdictions have continued to review their law in this branch so as to keep it in tandem with societal changes and values, Kenya continues to lag behind in this area of our laws. As a result, the only grounds for divorce are the traditional three, namely adultery, cruelty and desertion and by the wife on the ground of rape, sodomy or bestiality on the part of the husband. This is not good enough. In other jurisdictions grounds such as irreconcilable differences and circumstances that make marriage untenable have been brought into the vortex of grounds for divorce. We ought to be a forward-looking jurisdiction and to set pace in development of our law to keep abreast with changes in our society.

It is my finding that the desertion by the Respondent which commenced in May of 1998 was without cause. It is also my finding that a period of more than three years immediately preceding the date of presentation of the Petition in court had elapsed. I am satisfied that the Petitioner has proved his case. I so find. I am also satisfied that the petition has not been presented or prosecuted in collusion with the Respondent. I accordingly pronounce a decree of divorce and hereby dissolve the marriage between the Petitioner and the Respondent on the ground of desertion on the part of the Respondent.

In this first instance, a decree nisi shall issue forthwith and subject to the provisions of **Section 15** of the **Matrimonial Causes Act Cap 150** the decree nisi shall be made absolute after the expiry of three months after this pronouncement. It is so ordered. There shall be no order as at costs.

DATED at **KERICHO** this 8th day of July, 2010

G.B.M. KARIUKI, SC
RESIDENT JUDGE