



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 86 OF

2008

S.M.N.....PETITIONER

VERSUS

A.O.B.....RESPONDENT

JUDGEMENT

The Petitioner herein moved to the seat of justice vide a petition dated 1st day of August, 2008 and filed the same date.

The salient features of the same are that:-

- The Petitioner and the Respondent celebrated a marriage between them at the Registrar General Office Nairobi evidenced by the annexed marriage certificate.
- After the marriage the two lived and cohabited in Nairobi from 1997-2000 when the Respondent deserted the matrimonial home.
- The couple had one issue by the name M.O.B.

The reason for moving to court, to seek dissolution of the marriage is on two fronts namely cruelty whose particulars are given in paragraph 5 of the petition as:-

- *The Respondent has on several occasions assaulted the Petitioner, deserted the matrimonial home for period of 8 (eight) years, the Respondent is irresponsible, alcoholic and he has on several occasions been violent against the Petitioner especially when he drinks, and even broke the Petitioners door at weird hours"*

There is also reliance on adultery also particularized in paragraph 5 of the petition as:-

"The Respondent having an illicit relationship with women known and unknown to the Petitioner, that him the Respondent has confessed his fact to close relatives, him Respondent has also been in an illicit relationship with one N.B and has begotten an issue named P.O B."

By reason of the afore said complaints, the Petitioner is of the view that the marriage has irretrievably broken down and for this reason she seeks the following reliefs from this court.

- *The exercise of this courts', discretion to grant a decree for the dissolution of the marriage.*
- *Issuance of a restraining order against the Respondent restraining him from accessing the residential premises and work stations of the Petitioner.*
- *The Respondent be compelled to maintain the issue of the marriage by making monthly contribution.*
- *The custody, care and control of the issue of the marriage be given to the Petitioner.*

- *The Respondent be condemned to pay costs of this cause and incidental to these proceedings.*

It is on record that the Petitioner took out a notice of entry of appearance and had it served on to the Respondent along side the petition. The return of service traced on the file reveals that a process server by name Joseph Onyundo Pungah deponed anR/S on 17th day of September 2008, and filed on the 14th day of January 2009, to the effect that he had been directed to the Respondents residence at G[particulars withheld], house No. 450 but found the Respondent out and since the process server had information that the Respondent was leaving for the USA that same night, he decided to leave the papers with a lady who reluctantly identified herself as the sister of the Respondent.

No entry of appearance and filing of Answer to petition was effected prompting the filing of an application for the Registrars certificate dated 17th day of September, 2008, and filed on the same 14th day of January 2009. The Registrars certificate was issued on the 26/2/2009 to the effect that the cause do proceed as an undefended cause.

Trial commenced on the 24/6/2010 and two witnesses gave evidence. The Petitioner gave evidence as PW1. She reiterated the content of her petition and then stressed the following:-

- Confirmed the celebration of the marriage and produced a marriage certificate as exhibit 1.
- Confirmed the birth of the issue of the marriage by production of the birth certificate exhibit 2.
- Confirmed that the Respondent used to provide for the child when they used to reside together but stopped doing so after they stopped residing together.
- The Respondent stopped communicating with her in the year 2000 after moving to the USA.
- The Respondent has committed adultery with another woman as per the documents exhibited in exhibit 4.
- It is her stand that she has placed sufficient facts before the court to earn her the relief sought.
- She also seeks maintenance for the child and her monthly expenditure is as per the receipts produced as exhibit 3.

PW2 is the sister of PW1. It is her testimony that she resided with the sister PW1 for long and was witness to the marriage which took place in 1997.

- Has knowledge that the Respondent moved to the USA in 2000 and since then there has been a communication breakdown between the Petitioner and the Respondent.
- She has knowledge that in the year 2008, the in-law, the Respondent came from the USA and for the period he was around the house, he fought her sister. She took an initiative to find out why he was fighting the sister and yet he had been away and he told her that he had a son.
- She recalls one day before he left for the USA, he came to the Petitioners place broke the door, and told her to look after the daughter.

Due consideration has been made by this court, of both the uncontested pleadings and testimony on the record and in this courts' opinion, these are the own framed questions for determination by this court in the disposal of this petition.

1. Whether the proceedings are procedurally before this court?
2. What reliefs is the Petitioner seeking?
3. Whether there is in existence a marriage capable of being dissolved.
4. What are the ingredients required to be demonstrated or established in order for one to earn those reliefs.?
5. Has the Petitioner's evidence demonstrated the existence of those ingredients?
6. What are the final orders to be granted herein in the disposal of these proceedings.?

In response to the first own questions, the same is answered in the affirmative in that the petition filed is accompanied by a verifying affidavit verifying the correctness of the content of the petition. There is a return of service evidencing that the petition had been served on a sister of the Respondent. It is evident that service on the sister of the Respondent was not after several attempts but only one attempt. The proper procedure that this court, has judicial notice of is that best service should be personal service and substituted service should only be resorted to only after several attempts to effect personal service fail to yield fruits. Herein, it is deponed that service was effected on the sister because the Respondent was leaving the country that same evening but no efforts were made by the process server to obtain any documents evidencing or confirming this facts. This lack of confirmation notwithstanding the learned Deputy Registrar exercised her discretion to allow the service to stand and in view of the fact that the proceedings are exparte and in view of the evidence that the couple only lived together for only three years, have been separated for 10 years ad there is no communication between the couple and also allegation of violence upon a brief encounter in 2008, there is no need to interfere with the Registrars' certificate on the regularity of the proceedings.

The reliefs that the Petitioner is seeking herein are those specified in the petition and already set out herein.

As to whether there is a marriage capable of being dissolved, there is in place a marriage certificate exhibit 1 demonstrating existence of a marriage capable of being dissolved.

As for ingredients required to be established in order to earn the reliefs being sought, the position for each relief is as set out in the matrimonial causes Act cap 152 laws of Kenya. For dissolution of the marriage all that the Petitioner is required to do is to demonstrate existence of any of the following:-

- Adultery
- Cruelty
- Desertion
- Insanity

There is no requirement that all these be demonstrated in any one proceeding. It is sufficient to establish any one of them. Herein the Petitioner relies on the allegation of cruelty and adultery. These were pleaded in the petition and have been confirmed by the oral evidence in court which is uncontroverted. The court finds these established.

As for the Restraint orders this is also available to the Petitioner in view of allegation of violence meted out on her person after the Respondent came back from the United States in the year 2008.

As for custody, care and control of the only issue of the marriage, it is undisputed that the Petitioner has been living and maintaining the child since the Respondent left for the USA. The child is still under age and since there is no corresponding rival claim from the father who has not even bothered to support the child for the last 10 years, there is no justification for this court to deny the mother the right to custody, care and control of the said child as she has dutifully done before.

As for maintenance, all that the Petitioner is required to do is to come within the ambit of the provisions of section 25 (1) of the matrimonial causes Act cap 152 laws of Kenya which provides how the maintenance to be awarded is to be calculated. Where as section 30 (1) of the same Act makes provision that the order for maintenance can be made either before or after the final orders have been made. Unlike the provision in section 4 (c) of the subordinate court, separation and maintenance Act cap 153 of the laws of Kenya which specifies clearly that when making an assessment of the maintenance payable, the court, has to have regard to the income of the wife section 25 (1) of the matrimonial causes Act does not specifically say. However this court,

has judicial notice of the fact that courts of this jurisdiction do consider the income of both sides when making an award of maintenance.

It therefore follows that in order for a fair and just assessment of the award payable is to be made for the maintenance payable to the petitioner, it is only proper to have before the court proof of earnings of both sides. Herein it is only the Petitioner's income which can be accessed by the court. Even if the same has not been provided as at now, it can be called for. A problem will however arise as regards accessing the income of the Respondent. It means that the Petitioner has to make efforts to get access to documents relating to the income of the Respondent before an order for maintenance can be made.

As mentioned, failure to make an order before or at the pronouncement of the final orders on dissolution is not fatal. There is jurisdiction to revisit that issue after the pronouncement of the dissolution orders when the required evidence has been availed.

For the reasons given in the assessment, the final orders of this court in the disposal of this cause are as follows:-

1. An order be and is hereby made that the marriage celebrated herein between the Petitioner and the Respondent on the 18/7/97 at the Registrar General Office Nairobi vide certificate number [...]vide entry number[...] has irretrievably broken down and the same is ordered dissolved.
2. An order be and is hereby made to the effect that the Respondent herein be and is hereby restrained from accessing the Petitioner's premises.
3. The care, control and custody of the issue of the marriage is granted to the Petitioner.
4. The issue of maintenance for the issue of the marriage is hereby deferred till the Petitioner files an affidavit of means demonstrating the income of both sides in order to enable the court make a fair and just assessment of a fair award for a maintenance order.
5. Decree nisi to issue forthwith.
6. Decree absolute to issue 6 months after decree nisi or within such a shorter time upon application by either party.
7. There will be liberty to apply in terms of number 4 above.
8. The Respondent will pay costs of the proceedings.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2010.

R.N. NAMBUYE

JUDGE