



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Divorce Cause 63 of 2009

N.S.M..... PETITIONER
VERSUS
S.S.B..... RESPONDENT

JUDGEMENT

The Petitioner herein **N.S.M**, filed this Petition in court on 4th November 2009 seeking the following orders –

- “(i) ***THAT the said marriage be dissolved.***
- (ii) ***THAT the petitioner be awarded the physical care and custody of the child of the marriage with reasonable visiting rights for the respondent.***
- (iii) ***Maintenance of the child in terms of the particulars of paragraph 5(d) of the petition herein.***
- (iv) ***Alimony pending***
- (v) ***Maintenance of the child pending hearing of this cause.***
- (vi) ***Maintenance of your petitioner”***

Having been duly served with the Petition and Notice to enter appearance the Respondent **S.S.B**, did on 9th December 2009 file his **Answer to Petition and Cross-Petition** in which he sought a court order granting him parental responsibility over the child and he sought orders for custody of the child.

The matter came up for hearing before me on 31st May 2010. The Petitioner was represented by **MR. HAMZA** Advocate whilst the Respondent was represented by **Ms. GULIKA**. The Petitioner called four (4) witnesses in support of her case whilst the Respondent called only one witness.

Before I proceed to deal with the merits or otherwise of this Petition, it is worth noting that certain contested issues such as custody, care and maintenance of the child of the marriage were settled of by way of consent entered into by the parties on 1st July 2010. This consent effectively disposed of prayers (ii) (iii) and (v) of the Petition as well as disposing of prayers (a) and (b) of the Respondent’s cross-petition. In addition the Petitioner in her evidence abandoned her prayer for alimony (maintenance) thereby disposing of prayers (iv) and (vi) of her petition. The above matters having been agreed upon by the parties to this cause I will not make any findings and/or decisions on the same.

The last and only matter now pending for determination by this court is the prayer for divorce made by the Petitioner. The bask and undisputed facts of this case are that the Petitioner and Respondent met, made friends and got married at the office of the Registrar on 17th April 2003. This is proved by their marriage certificate S/No. 104302 produced in court as an exhibit **Pexb 1**. The couple cohabited in Nyalı as man and wife. Their union was blessed by one child a daughter **S.C**, born on 25th February 2005 which is evidenced by the production of her birth certificate S/No. [...] **Pexb2**. Initially all was well and the couple were happy. However problems emerged in the year 2002. The couple engaged in frequent quarrels and fights leading to the Petitioner leaving the matrimonial home and moving back to her mother’s home

in 2007. Whilst the couple are agreed that their marriage did take a downward turn they are not agreed as to exactly what led to this downturn. The Petitioner blames the Respondent for being adulterous, irresponsible and uncaring. The Respondent on his part blames the Petitioner for focusing on her career at the expense of the family and their child.

The law governing issues relating to marriage and divorce is contained in the Matrimonial Causes Act Cap 152 Laws of Kenya, S. 6(1) of which provides –

“6(1) No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage”

In this case the couple solemnized their marriage in April 2003 and this Petition was filed in November 2009 a period of six (6) years **after** the solemnization of the marriage. I am therefore satisfied that this petition complies with S. 6(1) of Cap 152 and is properly before this court.

S.8(1) of the Matrimonial Causes Act lays down the five **“Grounds of Petition for divorce”** which a petitioner may rely upon in bringing such a petition. One of these grounds, and one which the Petitioner has relied upon, is that of adultery. S. 8(1) provides as follows –

***“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 ...”***

In her evidence the Petitioner claimed that the Respondent during the subsistence of their marriage was in the habit of picking up prostitutes from night spots and taking them to his house in Nyali for sex. **PW3 JAW** tells the court that he is a private investigator who was hired by the Petitioner to track the movements of the Respondent. He told the court that he did monitor the Respondent’s movements over a period of time and noted that indeed the Respondent had a habit of picking up ladies from Tembo or Florida clubs. **PW4 L.S.**, is what is one of what are often called commercial sex workers. She testifies to the court that the Respondent has been a **‘client’** of hers for about four months. They would meet upon arrangement and the Respondent would take her to his house for sexual favours after which he would pay her. Indeed the fact that **PW4** was able under cross-examination by Ms. Gulika to describe in accurate detail where the Respondent lived and worked as well as the interior of his flat in Nyali as well as the location of his residence opposite Mombasa A[particulars withheld], makes it more than likely that she was telling the truth. Her evidence is the **‘clincher’** so to speak and is proof that the Respondent was indeed guilty of adultery during the subsistence of this marriage. I am satisfied that this ground has been sufficiently proved.

The Respondent did not in his evidence make any answer to the allegation of adultery. Indeed he struck me as one who had had the wind blown out of his sails completely. I do appreciate the fact that the Respondent did not retaliate in kind and made no allegations, insinuations and/or disparaging remarks against the Petitioner. Severally he referred to her as an extremely ambitious, hardworking and successful woman. He expressed regret about the break up of their marriage and only expressed a desire to ensure that his child is well provided for. He too told the court that the marriage has totally broken down and he desires that the divorce be granted to enable each party go their own way. The parties herein had in addition to their statutory marriage contracted an Islamic Union. I note that they obtained a Certificate of Divorce S/No.[...] issued by a Mombasa Kadhi effectively dissolving their union under Islamic law.

From the evidence before me it is quite clear that neither party has any desire to prolong their union. Their marriage has broken down irretrievably. It would serve no purpose for the court to seek to maintain ties which neither party wants to maintain. In addition the allegation of adultery was proved against the Respondent. For the above reasons I find that this petition for divorce succeeds. Decree nisi to issue to be made absolute within three (3) months of today's date.

Dated and Delivered in Mombasa this 3rd day of September 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-

M. ODERO

JUDGE

3/09/2010