



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Divorce Cause 7 of 2010

A.K.N..... PETITIONER

VERSUS

L.W.W..... RESPONDENT

JUDGEMENT

The Petitioner herein **A.K.N** filed this Petition on 25th February 2010 in which he sought the following orders –

- “(a) That this Honourable court be pleased to grant dissolution of the marriage that the Petitioner be no longer bound to cohabit with his wife, the Respondent herein be restrained from assaulting and threatening the Petitioner and interfering with his business.***
- (b) That the court to issue an order to evict the Respondent from the Petitioner’s business premises.***
- (c) That cost be in the cause.***
- (d) That this honourable court be pleased to make any further or other orders as it may deem just and fit to grant”***

The Respondent was duly served with the Petition and Notice to Enter Appearance. Despite being properly served, the Respondent failed to enter appearance and did not file an Answer to the Petition. The hearing of the Petition was set down for 9th July 2010. Once again the Respondent was properly served as evidenced by the Affidavit of Service dated 6th July 2010 sworn by one **MARGARET KIBE**, a process server. The Respondent did acknowledge service by appending her signature to the back of the hearing notice. She failed to come to court on the hearing date thus the matter proceeded in her absence.

The Petitioner in his evidence told the court that he and the Respondent got married at Mangangu **SDA Church** in Maragua District on 13th December 2004. This is evidenced by the original copy of their marriage certificate S/No. 061080 which was produced as an exhibit in court Pexb1. The Petitioner told the court that following their marriage the couple lived in K. Their union was not blessed with any children. They lived together peacefully for five (5) years but after that problems began to arise. The Petitioner tells court that the Respondent became quarrelsome and abusive. She would be rude to the Petitioner even in the presence of customers. He made efforts to bring in her parents to discuss the matter but they re-buffed him. The Petitioner did also seek out church leaders in an attempt to solve their problems but this too was rejected by the Respondent. In 2009 the Respondent left the matrimonial home. The Petitioner claims that the Respondent was cruel to him. He finally decided to file this Petition seeking a divorce.

The law relating to Marriage and Divorce is to be found 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 Petitioner and the Respondent got married in December 2004. It is now July 2010. More than three years have elapsed since the date of their marriage. I therefore find that the petition complies with S. 6(1) and is properly before the court.

The Petitioner claims in his petition that he has suffered both physical and mental cruelty at the hands of the Respondent. He states that the Respondent has been rude and abusive to him even in the presence of his customers. The Petitioner did not call any one of such customer to testify and confirm this allegation to the court. The Petitioner claims that the Respondent began to deny him his conjugal rights in 2007 and from that time they have not had sexual intercourse to date. He states further that the Respondent demanded that he must pay if he wanted to sleep with her. This evidence of the Petitioner would not have a witness since bedroom matters are normally personal to a couple. There is no evidence to controvert the evidence of the Petitioner. The purpose of any marriage is to provide companionship and one aspect of such companionship is sexual intercourse. For one spouse to deliberately and without cause deny another conjugal rights does amount to emotional cruelty. For one to demand money for sex makes a mockery of marriage. It is totally unreasonable for the Respondent to have expected the Petitioner to live without enjoying his conjugal rights for three (3) years. In my view this ground of emotional cruelty is sufficiently proven and I am satisfied that S. 8(1) (c) of Cap. 152 has been satisfied. As such I do allow the petition for divorce. Decree nisi to issue and to be made absolute within a period of three (3) months from today's date.

The Petitioner prayed for orders to evict his wife from his business. Such orders cannot be granted under a matrimonial cause such as this one. The Petitioner must file a civil suit seeking such order. I therefore decline to grant prayer (b).

This being a family matter I find it prudent not to make any orders with respect of costs.

Dated and Delivered in Mombasa this 2nd day of September 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

M. ODERO

JUDGE

2/09/2010