



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

MATRIMONIAL CAUSE NO. 57 OF 2009

SARIT JITENDRA BHANJI

GOHIL.....PETITIONER

-VERSUS-

KHEELNA PRAKASH

GOHIL.....RESPONDENT

JUDGMENT

In his petition dated **16th October, 2009** and filed on **26th October, 2009** the petitioner pleads that he underwent a ceremony of marriage to the respondent at the District Registry in Mombasa, on **8th June, 2007**, but the married couple did not come to live together or cohabit; the marriage remained unconsummated, due to wilful refusal by the respondent. There is no issue of the marriage. In the particulars set out in the pleadings, the petitioner says that since the date of the marriage ceremony, the respondent has not gone to the matrimonial home; she has lived separate and apart from the petitioner, and consequently the marriage has never been consummated. The petitioner pleads that “all attempts to get the respondent to come to the matrimonial home have proved fruitless”, and that the failure to consummate the marriage has been occasioned by the wilful refusal of the respondent. The Petitioner pleads that the petition is not presented or prosecuted in collusion with the respondent. **Alexander Kaluve Musembi**, the Court process server, filed an affidavit of service on **2nd June, 2010** deponing that he had, on **24th May, 2010** at 9.00 a.m. served hearing notice upon the respondent; the respondent had not entered appearance, and was absent at the scheduled hearing of **28th June, 2010**.

On the occasion of hearing, learned counsel **Ms. Matara** introduced the petitioner, who gave evidence as PW1. The Petitioner testified that cohabitation did not take place between himself and the respondent, following the marriage ceremony which took place on **8th June, 2007**, and that the marriage was never consummated.

Despite PW1’s entreaty, the respondent refusal to come and stay with him. The petitioner was working in Nairobi at the material times while his parents lived in Mombasa, and the respondent also resided in Mombasa. The respondent would not accede to the petitioner’s invitation to come and live with him in Nairobi. What reason was given? In the Petitioner’s words, “she just refused”; she answered: “I don’t want to stay with you”. Even when, in 2009 the petitioner came to stay in Mombasa, the petitioner still refused to come and stay with him.

After the respondent had been served with hearing notice on **24th May, 2010** she wrote a letter on **8th June, 2010** which the petitioner produced as an exhibit. It is a terse averment, the complete content of

which is as follows:

“I, Kheelna Prakash Gohil, Id NO. 27713430, got married to Sarit Jitendra Bhanji on 8th June, 2007. From that day [to-date] we have never consummated the marriage nor stayed together. Thus I don’t want to stay with him.”

The averment is duly signed.

PW1 expressed his utter frustration: “I don’t want to be told I am someone’s husband, [when] I don’t know where she is”. He pleaded: “I don’t want to continue with the marriage”.

Learned counsel, **Ms. Matara**, submitted that this was a straightforward case: a case of wilful refusal by the respondent to consummate the marriage. Counsel urged that the respondent’s indifference was obvious: She received service of petition papers, but chose not to enter appearance. Counsel submitted that, there being no collusion between the petitioner and the respondent, this was a fit case for grant of orders of nullity.

From the evidence, it appears that the main initiative in the marriage ceremony of **8th June, 2007** came from the petitioner’s side, but the accompanying hopes of a blissful marriage were rudely nipped in the bud; the respondent has no apologies, and has expressed her repudiation of the marriage. As the said marriage has not been consummated, it lacks the essential intimacy that makes it a marriage, and it remains no more than an abstract record on paper. The law as applied by this Court must approach reality as closely as possible, and this is more particularly the case in the domain of **matrimony**, where relations are governed by profound private commitments in the first place.

On the foregoing principles, this Court has a legal and moral obligation to declare the marriage in question null and void. The petition is allowed, and the marriage is declared a nullity with effect from the date hereof.

Decree accordingly.

DATED and DELIVERED at MOMBASA this 26th day of November, 2010.

J. B. OJWANG

JUDGE