



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**DIVORCE CAUSE NO. 15 OF 2010**

**S.M.D.....PETITIONER**

**VERSUS**

**H.D.S.....RESPONDENT**

**JUDGMENT**

The Petitioner and the Respondent were married on 26<sup>th</sup> August 2007 under Hindu Law (*at the Shree Navnat Vanik Mahajan*) and were issued with a certificate of marriage of that date.

According to both the Petition dated 28<sup>th</sup> September 2010 and filed in court on 29<sup>th</sup> September 2010, and the evidence of the Petitioner tendered before me on 1<sup>st</sup> December, 2010 the Respondent committed several acts and omissions that made the said marriage irretrievably broken down, and made it practically impossible for the Petitioner and the Respondent to live together as husband and wife.

According to the Petitioner's evidence, she and the Respondent immediately after the marriage travelled to the far East on a honey-moon, for three weeks. The Petitioner and the Respondent travelled to Malaysia Singapore, and Thailand. The Petitioner testified that during that entire period of their honey-moon, the Respondent neglected and never showed any love and affection to her. She never enjoyed the honey-moon at all.

Despite Petitioner's demands, the Respondent denied the Petitioner her conjugal rights, and that as a result to-date, the Respondent has never had sex with the Petitioner and that hence the marriage has never been consummated.

When asked why he would not have sex with the Petitioner the Respondent explained to her that he would suffer a lot of pain if he had sex with a woman, and he never tried having any sex with the Petitioner. The Petitioner further testified that despite assurances at her prompting that he would seek medical help, to her knowledge the Respondent has never sought any medical help.

The Petitioner also testified that upon their return from the honeymoon, and after staying for about three weeks in the Respondent's parents' home differences emerged between her, the father-in-law, the mother-in-law (*the Respondent's parents*) and her sister-in-law (*the Respondent's sister*). As a result the Petitioner requested the Respondent to find their own accommodation but the Respondent declined her request. Thereafter the Respondent who earns approximately US 5,000=00 p.m. from his film-making business refused to support her financially and the Petitioner was obliged by the conditions to look for work for her own upkeep. With luck she found employment with a Forex Bureau from 1<sup>st</sup> October, 2007 and was able to start supporting herself financially.

The petitioner testified that despite the frosty conditions, she managed to stay with the petitioner for one year wondering within herself why the Petitioner showed no love and affection to her. Using the house computer one day she discovered several e-mails which the Respondent sent, and received various addresses seeking among others adventures, companionship while at work in India to places like Rajasthan. This clearly showed the Petitioner that the Respondent was interested more in extra marital companionship than with the Petitioner.

The Petitioner also discovered that the Respondent ran a joint account with his mother (*my mother-in-law*) at I & M Bank, Nairobi, and which was perhaps the reason for the lack of financial support to her.

Finally the Petitioner testified that both her and the Respondent's family and the community tried to reconcile them. It was not successful so the Petitioner moved out and now lives with her sister, with a hope that the Respondent might change but this has not happened.

So on 25<sup>th</sup> July 2010, the Petitioner and the Respondent surrendered to the Shree Navnat Vanik Mahajan, the original Certificate of Marriage thereby signifying dissolution of their marriage under Hindu Law and Custom. The said Marriage Certificate was cancelled on 23<sup>rd</sup> August, 2010 by endorsement at the foot of the surrender document releasing the parties' Certificate of Marriage. The Petitioner however seeks a judicial divorce under the statute law of Kenya, hence the petition herein.

As the marriage was not consummated, there are no children of the union, the Petitioner and the Respondent have therefore no issue tying them together.

Under the Matrimonial Cause Act, (*Cap. 150, Laws of Kenya*) a marriage may be declared a nullity on any of the several grounds set out in Section 14(1) of the Act. These grounds include, that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage (S. 14(1)(a) or that the marriage had not been consummated owing to the willful refusal of the Respondent to consummate the marriage (S.14(1)(b)).

It was the evidence of the Petitioner that the Respondent has refused to seek medical assistance on his condition (*if such condition exists*). It was also the Petitioner's evidence that the Respondent has through correspondence by e-mail sought ex-marital love, elsewhere outside Kenya, and so it is difficult to say that the Respondent is or has been permanently impotent. From the testimony of the Petitioner, it is more likely that the marriage has not been consummated due to the willful refusal of the Respondent to

consummate the marriage.

In the circumstances a marriage which has not been consummated, is not a marriage at all, it is a nullity, for one purpose of marriage is to legitimise sexual intercourse between one man and one woman as an act of love, but also to procreate and perpetuate the human race. When one party, a Respondent declines to participate in that ultimate act, and couples that refusal with other acts of neglect such as denial of financial support to his wife, that marriage or union, is said to be irretrievably broken down.

In the circumstances therefore, and in exercise of the discretion conferred upon this court by Section 10(2)(a) of the Matrimonial Causes Act, (*Cap. 150, Laws of Kenya*) there shall issue in accordance with Section 15 thereof a **decree nisi** dissolving the Petitioner's Marriage with the Respondent and to be made absolute after six months or such shorter period as the court may by special order direct.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 3<sup>rd</sup> day of December 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**