



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Divorce Cause 146 of 2007

H.M.T.....PETITINER

VERSUS

M.M.W.....RESPONDENT

JUDGEMENT

The petitioner moved to the seat of justice vide a petition dated the 1st day of November 2007, and filed the same date. The salient features of the same are as follows:-

- That the disputants first lived as a man and wife under Kikuyu customary law before solemnizing the same under the African Christian marriage Act, on the 2nd day of April 1988, at St. [particulars withheld]Catholic church Kangemi.
- Both of them are domiciled in Kenya.
- That there are two issues of the marriage between them who are all adults.
- The petitioner became aggrieved and moved to this court seeking relief because:-
 - (i) Since the celebration of the marriage under Kikuyu customary law, both have been living with a lot of hatred against each other as they are constantly quarreling and fighting, thus rendering the marriage unbearable.

- That the differences are so serious that the parents of both parties are unable to reconcile them.
- By reason of what has been stated above, it is his stand that the marriage is beyond repair and it should be dismissed.
- In his bid for resolution of the marriage, he relies on cruelty and constructive desertion and unfaithfulness whose particulars are given in paragraph 13 as follows:-

- (i) *Showed disrespect to the petitioner and treated with utter contempt.*
- (ii) *Constantly quarreling, fighting and nagging the petitioner.*
- (iii) *Denying the petitioner conjugal rights.*
- (iv) *Lack of interest in the petitioner.*
- (v) *Irreconcilable differences.*
- (vi) *No companionship and loving was from each other since 2007.*
- (vii) *Engaging in sexual relationships with another man known to the petitioner personally and in 2005, the Respondent openly admitted having had sex with him.*

By reason of the afore said complaints, the petitioner seeks an order for the dissolution of the said marriage, and any other relief that the court, will deem fit to grant. It is on record that the petition was served on to the Respondent who filed an answer to petition and cross petition dated 10th day of January 2008, and filed on the 22nd day of January 2008. The salient features of the same are as follows:-

- She admitted paragraph 1-5 of the petition.
- Denied the content of paragraph 6 of the petition.
- Admitted paragraph 8 and 12 of the petition.

- Denies particulars given in paragraph 9, 10, 11 and 13 of the petition.

In her cross petition, she asserted the following:-

- The petitioner has failed to take care of the family since 2002 leaving that task to be solely performed by the Respondent. Cross petitioner.
- Assert that since the celebration of the marriage, the petitioner has failed to supply the Respondent and the children of the marriage with reasonable maintenance despite him being a senior secondary school teacher earning handsomely and is also engaged in businesses from which he gets income.
- That the petitioner has abandoned his marital duties and has been committing adultery with a woman called J.T. with whom they have a daughter by the name H.N.
- That during subsistence of the marriage, the Respondent purchased plot No. [particulars withheld] residential Ongata Rongai. T.C. and had it registered in the name of the petitioner.
- Concedes the two sons are now over 18 years of age, but they are not yet independent and they will need college fees.

By reason of what has been stated in the Answer, and cross petition above,

“the Respondent to make such reasonable monthly payments for the maintenance of the Respondent and the children,

an order for the transfer of the mentioned property to the Respondent, custody of the children be given to her, costs be paid to her and any other such further relief that the court may deem fit to grant.

The cross petition attracted an answer to it which is undated but signed and filed on the 27th day of February 2008. The salient features of the same are as follows:-

- Denied failing to provide for his family, and asserts that he has been paying fees, both secondary and college fees for both his sons and for this reason, he will demand proof that the Respondent has been paying fees.
- The answer and cross petition are defective and the court, will be moved at an appropriate time to have them struck out.
- Asserts that he has been a loving, caring, and responsible father all along and will adduce evidence to that effect.
- That the subject plot mentioned is the only plot registered in the name of the Petitioner as the rest were registered in the name of the respondent, among them plot . . Ongata Rongai, a matter the Respondent has failed to disclose to the court.
- That the Respondent needs no maintenance as she is in gainful employment and also collects rent from the mentioned plot.

Directions were given and the matter proceeded to hearing. Only the petitioner gave evidence as the Respondent and her counsel, did not turned up for the hearing and the court, being satisfied that they had due notice of the hearing date, allowed PW1 to proceed exparte.

PW1s evidence is largely a reiteration of the content of the petition but the following were stressed:-

- They were lawfully married to each other under Kikuyu customary law as the traditional rights had been performed and complied with.
- They later converted it to an African Christian marriage.
- Confirms that all the issues of the marriage are adults and one of them is independent.
- Both have been in gainful employment with the Respondent working with Icipe

while petitioner is a full time teacher.

- It is his evidence that their marriage has never been harmonious but became worse in 1982 when, the Respondent started comparing the petitioner with her boss who had a good salary.
- It is his evidence that neither exercised his/her conjugal rights with the other since the year 1995 and him petitioner was relegated to the status of an employee.
- At one time the petitioners' clothes and documents were set ablaze by the Respondent which action forced the petitioner to seek accommodation elsewhere.
- Since he moved out, the Respondent's boss has become the regular visitor there. He comes and parks openly outside the house.
- It is his testimony that, the Respondent's conduct left him traumatized and his self esteem and manhood had suffered.
- He was humiliated before his children and he is thus unable to guide them.
- According to him, the marriage exists only on paper. It has irretrievably broken down and cannot be salvaged.
- He concedes he has a lady he resides with since 2005 as he could not stay alone.
- It is his testimony, that the Respondent needs no maintenance from him as she collects rent from the premises mentioned.
- Maintains he is the one who purchased the two plots.
- Maintains he paid fees for the sons and medical care was taken care of by the Respondent's employers.

At the close of the evidence, the petitioners' counsel put in written submissions and the salient features of the same are:-

- Reiterated the content of the petition and oral testimony of the petitioner which

go to confirm that the disputants in the first instance contracted an informal marriage followed by a formal one.

- The marriage has not been harmonious and the two have been living away from each other since 2005, and neither has an intention to resume cohabitation.
- The court is invited to treat the proceedings herein as being undefended as the answer to petition and cross petition were signed by the counsel instead of the Respondent contrary to the provisions of section 4(5) of the matrimonial causes act cap 152 laws of Kenya.
- The court, is invited to hold that the petition has been proved and grant the orders sought.

On the court's assessment of the facts herein, it is clear that the following facts do not seem to be in dispute namely:-

1. That there is a valid marriage between the disputants by reason of which the proceedings have been brought within the ambit of the provisions of the matrimonial causes Act cap 152 laws of Kenya.
2. The picture portrayed in the petition is one of a marriage which has been existing on paper only for a long time.
3. There is the issue of property raised herein and issue will arise if these can be dealt with in these proceedings or in another.
4. A perusal of the court, record, reveals that there is no entry of appearance by the Respondent, cross petitioner, whose answer to petition and cross petition were signed by counsel and issue will arise as regards the competence of those papers.
5. The response to cross petition, is not dated and issue will arise as to whether

the same is competent.

6. The issues of the marriage are adults, the Respondent is in gainful employment and an issue will arise as to whether maintenance issue can be entertained herein.

Due consideration has been made by this court, of the afore set out undisputed facts and the same considered in the light of the content of the pleadings and the oral testimony of the petitioner, and the court, is of the opinion that the following issues have arisen for determination.

1. Whether the papers filed by the Respondent are competent or incompetent.
2. Whether issues of maintenance and property rights can be entertained herein.
3. Whether the petitioner or cross petitioner have earned the relief sought.

In response to the first question as regards the competence of the papers filed by the Respondent, the court, was referred to the provisions of section 4 (5) of the matrimonial causes Act cap 152 of the laws of Kenya. But upon perusal of the same the court, has found that it is not section 4 (5) which is the applicable provision but rule 4 (5) of the matrimonial causes rules which reads:-

“Rule 4 (5) every petition shall unless otherwise directed be signed by the petitioner or in the case of an infant or person of unsound mind, by his next friend”. The command in this provision is the word “**shall**” meaning that it is mandatory. A perusal of the record does not reveal any direction given by the court, that the answer to petition and cross-petition be signed by counsel. For this reason, the respondents Answer to petition and cross petition have been faulted.

Further it is to be noted that there is no entry of appearance by the Respondent. In the absence of an entry of appearance on the record, there was no locus standi to file the

Answer to petition and cross petition.

As for the petitioners response to the Respondents papers, the same is found to be invalid by reason of it being undated. However since the papers it was responding to have been found to be invalid too, its invalidity will have no bearing on the main petition which now stands out as being undefended.

As regards issues of maintenance, and property ownership, these were introduced by the respondents faulted papers and once these papers are struck out, there is no basis upon which these can be entertained in the first instance. In the second instance, the courts', jurisdiction under the marriage causes Act cap 152 laws of Kenya is limited to the following.

- (i). Dissolution of the marriage.*
- (ii). Declaration of the marriage to be a nullity.*
- (iii). Judicial separation.*
- (iv). Maintenance for either spouse and the children of the marriage either during the marriage or after the dissolution of the marriage.*
- (v). Custody, care and control of the children of the marriage.*

There is thus no jurisdiction to entertain issues touching on matrimonial property. This court, has judicial notice of the fact that these can safely be dealt with under another forum namely the 1882 married women property Act of England procedures.

As regards the relief sought herein, all that the petitioner is required to do in order to earn the relief is a demonstration that he has brought himself within the ambit of the provisions of section 8 of the matrimonial causes Act.

It is on record that a reading of the petition, reveals that the petitioners' in

compatibility of the marriage, cruelty, unfaithfulness of the Respondent, these stand to be uncontroverted as there is no contrary pleadings from the respondent opposing the same. These were fortified by the oral testimony which was not also challenged. The court, is satisfied that the marriage of the disputants which is capable of being dissolved has irretrievably broken down, parties have lost interest in each other. They have paired elsewhere and as such it exists only on paper. The court, has no doubt that the law of divorce was put in place not for cosmetic value, but to come to the aid of such situations to server the yolk and disharmony and misery to those who need it.

The petitioner herein has demonstrated such a need and there is no justification to withhold that assistance and the court proceeds to make the following orders:-

1. The marriage between the petitioner and the Respondent initially celebrated instantly under Kikuyu customary law and later familiarized under the African Christian and marriage Act. Vide marriage certificate No. . . .and celebrated at St. [particulars withheld]Catholic church on 2/4/88 be and is hereby ordered to be dissolved.
2. The Answer to petition and cross petition filed herein by the Respondent be and is hereby ordered to be struck out for the reasons that:-
 - (a) The Respondent did not enter appearance either in person or through counsel and for this reason, she had no locus standi to file an Answer and cross-petition in these proceedings.
 - (b) The document filed offended the provisions of rule 4 (5) of the matrimonial causes rules in that it was signed by counsel instead of the Respondent and yet there was no directions otherwise made by the court.
3. The Petitioners Answer to cross petition has also been faulted because:-

- (a) It is undated
- (b) It was an exercise in futility since it was responding to invalid papers.
4. The invalidity of the petitioners answer to Respondents faulted cross petition, will not operate to affect the otherwise valid and competent originating petition.
 5. There will be no finding made on the issues of maintenance and property introduced by the Respondents struck out Answer to petition and cross petition.
 6. By reason of what has been stated in number 5 above, those issues can be pursued in another forum.
 7. Decree nisi shall issue forthwith.
 8. Decree absolute to issue 6 months after issuance of the decree nisi or within such a shorter period upon application by the petitioner.
 9. There will be liberty to apply.
 10. The petitioner will have costs of the struck out cross petition.
 11. The petitioner will bear own costs of his petition.

**DATED, READ AND ELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY
2009.**

R.N. NAMBUYE

JUDGE

