



1. Family Law
2. Divorce
 - a) Marriage between two African adults (15.1.93) under the Marriage Act.
 - b) Petitioner's husband sues/petitions for divorce on grounds that Respondent No. 1 has
 - i) Committed adultery.
 - ii) Is cruel to him.
 - c) Respondent No. 2 alleged adulterer.
 - d) Child born to Respondent No. 1 did not belong to petitioner but to 2nd Respondent
 - e) House built with funds from petition.
3. **In reply**
 - a) Respondent No.1 cross petition.
 - i) Denied conjugal rights.
 - ii) Abandoned when petitioner went to the United States of America.
 - iii) Petition already kept a woman.
 - iv) Respondent No. was the one who constructed house.
 - b) Respondent No. 2
 - i) At time of alleged adultery he was a student
 - ii) Application for DNA test declined by Hon. Judge (Musinga J 15.5.07)
4. **Held**

Divorce cause dismissed
 Divorce granted to the Respondent No. 1 together with maintenance and share of estate
 Case dismissed against Respondent No. 2.
5. **Case Law** - Nil.
6. **Advocates**

S.K. Oboso advocate from M/S Oboso & Co. advocates instructed to hold brief for M/S Migiro & Co. advocates for the Petitioner – present
 J.K. Kirui advocate instructed by M/S J.K. Kirui & Co. advocates for the 2nd Respondent – present
 M/S Tarus & Co. advocates for the 1st Respondent - absent

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
DIVORCE CAUSE NO. 1 OF 2002

P.M.K. PETITIONER
 VERSUS
 J.C.K. 1ST RESPONDENT
 A.B. 2ND RESPONDENT

JUDGMENT

I: Procedure

1. The Petitioner, a male adult married the Respondent No. 1 a female adult on the 15th January, 1993 under the Marriage Act at the District Officer's registry.
2. A child was born on 11th December, 2001. The Petitioner, a resident of the United States of America stated it was physically impossible that the child was his. He filed this Divorce Cause on the 21st May, 2002 on grounds of adultery and cruelty.
3. On 13th April, 2007 he filed a suit in the Magistrate's Court at Kericho and obtained orders of injunction that was issued by a magistrate that in effect evicted the Respondent No. 1 from the premises. He used another

advocate M/S Nyaingiri & Co. advocate to obtain these orders which in effect was illegal and during the pendency of the Divorce Cause.

4. The Divorce Cause was filed in person but Migiro & Co. advocates took over the conduct of the case. He managed to have the matter heard urgently at the High Court of Kenya at Nakuru on grounds that the Petitioner resided in the United States of America and required to leave the country soon.
5. The Petitioner's Divorce Cause was heard by Musinga J from 30th May, 2007 to 2nd October, 2007 but only the evidence of the Petitioner and his brother was taken. A Resident judge was then posted to this station and on 8th October, 2008 (*Kariuki J*) the evidence of the Petitioner was recalled to produce receipt amounting to almost Kshs. 300,000/= to prove that he constructed the matrimonial home.
6. By now the advocate for the 1st Respondent M/S Tarus advocate had his brief held by M/S Kirui & Co. advocates who also represented the 2nd Respondent.
7. The trial judge fixed the case for hearing on 19th January, 2009 for the defence/Respondent 1 and 2's hearing. This was heard before me under **Order 17 r 10 Cpr** and the proceedings continued from where it was left off. Further hearing was conducted on the 27th January, 2009.

II: The trial

8. It was the evidence of the Petitioner that he married the Respondent No. 1 on the 15th January, 1993. They lived together for two weeks and left for the United States of America where he was a resident. There he remained and would return for visits. According to his evidence sometime in the year 2001 his mother passed away. He came for her funeral and was informed that the Respondent No. 1 had committed adultery with the Respondent No. 2 and had a child. The child was not his as he was in Kenya in January, 2001 and the child was born prematurely in December, 2001. It was therefore not possible for the child to belong to him. He further stated that he wished to have a divorce and have his marriage dissolved.
9. In his Petition he also prayed for cruelty. That the Petitioner was cruel to him by taking away utensils and soft furniture and attempting to set vehicles on fire. He did not elaborate his point during his evidence.
10. He nonetheless called his relatives to give evidence whereby they stated that the 2nd Respondent was a regular visitor to the home. He was the father of the child.
11. During the trial the Hon. Judge (*Musinga J (15.5.07)*) declined to have DNA testing of the minor child as this would have delayed the trial.
12. In reply to this Petition and cross petition the Respondent No. 1 stated that at no time did the Petitioner inform her that he had been previously married. When they were married and lived together for two weeks the Petitioner went to the States and said he would send for her. She lived with her mother-in-law at all times the Respondent No.1 waited. Attempts to obtain a visa from the Embassy of the United States of America proved futile. She then was allocated land where she cultivated and built her residence when the Petitioner came for visits he was impressed at her industry. They would cohabit together during these visits. The child was therefore that of the Petitioner.

13. The 2nd Respondent denied fathering the child at the time. The incident of adultery is alleged to have occurred, the Respondent was indeed a student. He did admit attending to the Respondent No. 1 at the hospital where he later worked as a Clinical Officer.
14. The Petitioner stated that he was unable to have any relationship with the Petitioner due to the diseases that affected his skin known as psoriasis that began in 1991 two years before he married the Petitioner. He therefore claimed that it was physically impossible for him to father a child and if he did the child would be deformed.
15. It was further disclosed by the Petitioner that he had supported the Respondent No. 1 with funds from America through Western Union. The Respondent No. 1 denied this on grounds that his support was minimal. It was through her hard work that she was able to build the house and have the farm active. She also nonetheless agreed that he had sent her to a Secretarial Course.
16. The Petitioner admitted having been married to an African American and has a child with her. He said he was divorced from her in 1986. This is unclear exactly when the divorce occurred and could explain why visa to the Respondent No. 1 may have been denied. The Petitioner admitted having a second child with a woman whom he had not married.

III: Opinion

17. I have read proceedings of my fellow brother Judges and heard the defence. I wish to begin by stating that it was unfortunate a Plaint was filed in 2007 by M/S Nyaingiri and Co. advocates for the Petitioner in the subsistence of this divorce cause in the Magistrate's Court. The magistrate had no jurisdiction to issue an injunction that in effect was mandatory, thereby evicting the Respondent from the land. This indeed was unfortunate and miscarriage of justice.
18. M/S Migiro & Co. advocates who has conduct of the Divorce Cause before me was not party to that cause.
19. My opinion herein is that the Petitioner having had two relationship prior to his marriage to the Respondent No. 1 without disclosing this fact to her was unfortunate. That he left her alone after their marriage and made no effort to take her to the State amounts to cruelty. The allegation that the child did not belong to the Petitioner required proof by way of DNA Test and that the Respondent No. 2 was responsible for this child.
20. I find that the Petitioner's conduct towards the Respondent was worse and in effect subjected her to cruelty and anguish. I find that the Petitioner's case has not been established and thereby dismiss his Petition. I find that due to the divorce case before court that the marriage would not be able to return to a normal relationship between the parties. I nonetheless allow the cross petition for the Respondent No. 1 and grant her prayers. I would grant her a divorce and maintenance for her and the child accordingly granted.
21. I dismiss the Petition against the 2nd Respondent with costs.
22. As for the matrimonial home I hold that the Respondent No. 1 is entitled to 50% share of the property which is to be assessed and paid to her in cash.
23. I award costs to this matter to the Respondent 1 and 2.

DATED this 4th day of February, 2009 at **KERICHO**

M.A. ANG'AWA
JUDGE

Advocates

S.K. Oboso advocate from M/S Oboso & Co. advocates instructed to hold brief for M/S Migiro & Co. advocates for the Petitioner – present

J.K. Kirui advocate instructed by M/S J.K. Kirui & Co. advocates for the 2nd Respondent – present
M/S Tarus & Co. advocates for the 1st Respondent - absent