



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Divorce Cause 53 of 2008

NKG..... PETITIONER
-VERSUS-
ASM..... RESPONDENT
JUDGEMENT

The Petitioner in this Divorce Cause is one NKG. She filed her petition dated 18th August 2008 in these courts the same date. In her petition the petitioner prays that her marriage to the respondent be dissolved. Secondly the petitioner prays for any other relief the court may deem fit to grant.

The petition as well as notice to appear were both served on the Respondent vide the Affidavit of Service sworn on the 25th August 2008 by Michael Thoya M'bwana a duly authorized Process-Server. The Respondent did sign the same which is a clear acknowledgement of service. Despite having been so served the Respondent failed to either enter any appearance or file any response to the petition. Hearing of the cause was listed for in May 2009. Once again the respondent was served with Notice of hearing vide the affidavit of service dated 19th February 2009. Again the respondent declined to appear in court to defend the petition. The hearing therefore proceeded in his absence.

The Petitioner who gave her name as NKG told the court that she is a resident of Nyali in

Mombasa. She got married to the Respondent ASM through an arranged marriage which was solemnized at the Registrars Office Mombasa on 14th December 2004. She avails her original marriage certificate S/no.as proof of the said marriage **Pexh. 1**. The couple then moved to the UK where they were to make their home on 28th February 2005. They resided in the UK for about 3 ½ years after which the Petitioner returned to live with her parents in Mombasa. Their union was not blessed with any children.

The Petitioner tells the court that after their marriage the Respondent left for the U.K. He returned to Kenya in February 2005 to collect her so that she could join him in the U.K. where they were to live. The Petitioner states that she noticed that the Respondent was behaving strangely or in her terms "**he was acting manic**". The Respondent jumped over their gate and ran away from their home. On 26/2/2005 she took the Respondent to see a Psychiatrist called Dr. Maina who diagnosed him as Schizophrenic which is a mental illness. The report made by the said Dr. Maina has also been availed to the court as an exhibit – **Pexh. 2**. After this diagnosis the Petitioner confronted her father-in-law who had arranged the marriage but the Respondent

family all denied that he suffered any type of mental illness. The couple did go to the U.K. and the Petitioner met a Dr. Ticehurst who had earlier treated the Respondent in 2001. This doctor informed her that the Respondent had been diagnosed with bipolar stress disorder in 2001 and was under medication for the same. The medical report prepared by Birch Hill Hospital in R, U.K where the Respondent had been admitted was produced in court as an exhibit. – **Pexh. 3.**

The Petitioner now complains that the Respondent did not disclose his mental illness to her prior to their marriage. As a result of his condition the Respondent was behaving in a bizarre manner and as a result the Petitioner became stressed and unhappy in the union. She then decided to file this petition seeking the dissolution of their marriage.

In coming to a decision on this matter this court takes into account S.6(i) of the Matrimonial Causes Act Cap. 152 Laws of Kenya which provides as follows:-

“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”

As evidenced by the Certificate of Marriage produced in court the couple got married in December 2004. This petition for divorce was filed in court on 18th August 2008 roughly 3½ years after the marriage. Therefore this petition does meet the time limit set for filing of such petitions by the law.

As stated earlier in this judgment the Respondent was duly served with both the summons to enter appearance as well as the hearing notice but he neglected/refused to respond to either. He neither entered appearance nor filed a response to the petition. As such the evidence tendered by the Petitioner on oath remains uncontroverted in all its material respects.

The Petitioner avers that the Respondent suffered from a mental illness at the time of their marriage, a fact known to the Respondent and a fact which he failed to disclose to the Petitioner prior to the said marriage. Indeed the Petitioner only became aware of the Respondent illness after their union had been solemnized. As proof of these allegations the petitioner has tendered into evidence the report of a Dr. Maina who examined and treated the Respondent on 26/2/05 in

Mombasa. He noted that the Respondent was insomniac, destructive, disinhibited, and had hallucinatory behavior. He made a diagnosis of Schizophrenia and prescribed medication. Dr. Maina's final comments were ***“He is better after treatment, but requires following up by a Psychiatrist”***.

This examination took place in February 2005 after the

Union. However the Petitioner did also avail to court a medical report from Birch Hill Hospital in the U.K. dated 15th

October 2001 about three years prior to their marriage. **PEXh. 3.** This report made by a Dr. H.M. Ticehurst a Consultant Psychiatrist indicates that the Respondent had been admitted at that medical facility from 10th September 2001 to 8th October 2001 a period of about one month. He was said to have been found by police on East lances road behaving bizarrely and without a top on. The diagnosis was manic episode and he was placed on medication. From the evidence of these two reports it is clear to the court that the respondent does suffer from a mental illness. Further more there is no doubt that his mental state became apparent in 2001 three years before his marriage to the Petitioner. Therefore it is a fact hat the respondent and his family were fully aware that the Respondent suffered from a mental illness before he married the Petitioner. The Petitioner was not informed of this. S.8 of the MCA Cap 152 provides as follows:-

8 (i) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent –

(c) has since the celebration of the marriage treated the Petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the Petition."

S. 8(2) of the same Act goes on to provide thus:-

(2) For purposes of sub section (1) of this section, a person of unsound mind shall be deemed to be under care and treatment while he is detained. Whether in Kenya or else – where, in an institution for the care and treatment insane persons, lunatics or mental defectives"

Bipolar disorder, Schizophrenia, and depression are all varying degree's of mental illness. Fortunately with advances in modern medicine there are conditions which can be diagnosed and treated. However in most cases it is a lifelong illness and most patients require to be continually on medication in order to manage the illness. This kind of condition cannot be likened with a cold or a fever which one may not need to inform ones' spouse about. Due to the manifestation of the illness it is imperative that anyone suffering a mental illness must disclose this to his intended spouse. This is because the spouse will need to be vigilant in order to identify the symptoms and to ensure that medical advice is followed to the letter. Indeed this court opines that it is exactly due to the seriousness and consequences of mental illness in a marriage that failure to disclose it that was included in clause 8 1(d) as a grounds for divorce. It is imperative that anyone intending to marry must have full disclosure of such illness to enable them make an informed decision on whether or not they would be willing to live with such a spouse. S 8 (g) talks of a spouse having been continuously under care and treatment for a period of at least five years prior to the presentation of a petition for divorce. In this case the Respondent had been under medial treatment since August 2001 a period or 3 ½ years prior to the couples marriage in 2004 December. Indeed the respondent was in actual fact detained in a medical institution in the

U.K. which detention expired in October 2001. Thus it is clear that the Respondent suffered from a severe form of mental illness which no doubt would cause tension and misunderstanding in the marriage. Although the 5 year period referred to in S 81 (d) has not been met, this court feels that failure to disclose his mental condition to the petitioner prior to their

marriage amounted to cruelty on the Respondent part. There was a deliberate and malicious concealing of a material fact, a fact which may have prevented the petitioner consenting to the marriage had it been disclosed to her. If the Respondent and his family were genuine they would have disclosed all relevant and material facts to the Petitioner and given her the choice of whether or not to accept the marriage. As it was this marriage was contracted under false pretences so to speak. The Petitioner was unaware of the Respondent mental diagnosis and as such was ill prepared to deal with the consequences of his condition. Some of these consequences would include, manic or bizarre behaviours, hallucinations, violence, and the fact that the Respondent probably had to be on constant medication. One could argue that a loving wife would accept her husband for better or worse and work to help him manage such a condition . That is all very well but the “*loving wife*” must be allowed the opportunity to reach such a decision for herself. By denying the petitioner her right to make this decision the Respondent subjected her to Psychological cruelty. She had to observe the symptoms exhibited by Respondent such as running away, jumping over the gate, denial of conjugal rights etc without knowing what the problem was. The Respondent on his part with full knowledge of his mental condition concealed from the Petitioner a very material fact about himself. The Respondent symptoms did cause strain in their marriage as a result the Petitioner was full of stress and unhappiness in her union. She eventually returned to her parents in Kenya.. The fact that the Respondent has not come to court or filed any papers to oppose this petition is a clear indicator that he too has no interest in preserving the marriage.

Based on the foregoing this court is satisfied that the ground of cruelty as psychological cruelty has been proven. The court also finds that this was a marriage by deception as a material fact was deliberately withheld from the Petitioner by the Respondent. This petition for dissolution of the marriage is hereby allowed.

Dated and delivered at

Mombasa this 27th May 2009.

M. ODERO

JUDGE

27.5.09

Read in open court in presence of Ms. Muthuri holding brief for Mr. Chebukati for petition. No appearance by respondent.

