



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**DIVORCE CAUSE 65 OF 2005**

**KH..... PETITIONER**

**VERSUS**

**SWH ..... RESPONDENT**

**JUDGMENT**

The Petition for dissolution of marriage between the parties herein has been filed on 18<sup>th</sup> May, 2005 by the husband.

The petition is based on the grounds of constructive desertion by the Respondent since March, 2002 and on ground of cruelty.

The particulars of cruelty are stated in paragraph 8 of the petition as under:

- (a) The Respondent has on diverse dates confronted the Petitioner with racist accusations and diatribe.**
- (b) The Respondent has continuously inflicted mental torture on the Petitioner by, inter *alia*, denying him access to the issue of their marriage especially to their last born child, Lisa.**
- (c) The Respondent has cut off all communication with the Petitioner which effectively means that the Petitioner has no link with his family at all.**
- (d) The Respondent has negatively influenced the issue of their marriage against the Petitioner.**
- (e) The Respondent has continuously denied the Petitioner consortium in such a way that the Petitioner cannot reasonably be expected to live with her.**
- (f) The Respondent's conduct has over the years become too selfish and materialistic at the cost of their marriage and family.**
- (g) The Respondent is guilty of blatant dishonesty and abuse of trust as she has subversively sold matrimonial property and solely appropriated the proceeds amounting to KShs.3,200,000 to the detriment of the Petitioner and their family.**

**(h) The Respondent has willfully neglected, refused and/or failed to assist in the financial maintenance of the family yet she expects the Petitioner to meet the entire cost of doing the same.**

**(i) That the Respondent is guilty of persistently nagging the Petitioner especially when she is demanding for money to satisfy her growing financial demands.**

**(j) The Respondent has manifested her lack of interest in the welfare of the Petitioner on various occasions as described above.**

It is also averred that the marriage has been irretrievably broken down.

The cause was certified as an undefended cause and the Petitioner testified during the hearing and was duly cross-examined by the learned counsel appearing for the Respondent.

The Petitioner testified about the solemnization of the marriage at Mombasa at the Registrar's officer on 4<sup>th</sup> February, 1978 and that they have three children from their union. He specified that they have cohabited as husband and wife in Mombasa, several places outside the country from 1979 to 1999 and again at Nairobi from 1999 to February, 2002. Out of the three children their 2<sup>nd</sup> and 3<sup>rd</sup> children were born in Kenya. He also testified that after selling his property in Germany he bought a house in Nairobi in May, 2000. He also specified that he was not the biological father of the first born child but admitted that he has adopted her in 1980. According to him the Respondent sold the property at Nyarii, Nairobi on 2<sup>nd</sup> June, 2004. However, during cross-examination he agreed that he had given consent to the Respondent to sell the said property but with an understanding that the proceeds derived be used to pay school fees of their last born daughter which she did not and he ended up paying the same.

He told that initially the marriage was fine but after he finished his study, the Respondent started demanding more money from him alleging that she had suffered during the period when he was studying. Her financial demands grew bigger and became the source of their frequent quarrels. Their separations were ranging from 3 months to 2 years. Their interests also became diverse and their differences widened, along the way.

In 1998 they underwent counseling over his 3 months affairs with a colleague. Although they resumed their cohabitation, she continued being suspicious over his all contacts and their quarrels also became physical by assaults from the Respondent. When he was posted at Nairobi in the year 1999 he hoped to start afresh. But his duties involved lot of traveling and the communication and their common interest between them became lesser and lesser.

It was at his suggestion that they separated in February, 2002 and no attempts to reconcile were coming forth from her. She kept their last born daughter away from him just to take revenge on him. She sold other properties namely, plot in Nyarii (I have mentioned that hereinabove), two plots in Tanzania and kept the proceeds therefrom to herself.

Despite the fact that he was facing financial constraint due to loss of job between 2003 to summer of 2003, the Respondent insisted to keep her life style and refused to move to a cheaper accommodation and further insisted to keep their daughter in German school at Nairobi, instead of sending her to Germany where education is free. He was allowed to visit the daughter only for a day on 24<sup>th</sup> December, 2002.

She also abused him of being racist against Africans like herself and kept on asking for more and more money. He used to give her 2000 Euros for household which according to him was very generous. He in addition used to repay loans.

He stated that the Respondent is keeping monthly rental income of around Shs.100,000 to Shs.125,000 from the Nairobi Home and she also earns 400 Euros from part time job and gets stipend of 250 Euros from the German government towards child allowance.

Moreover he pays 455 Euros to his daughter for maintenance and shared accommodation. He pays extra allowances for her holidays. He however, stated that he was ready to continue maintaining Respondent and daughter.

He agreed during cross-examination, that he has been working in Accra since June, 2003 and filed the petition on 18<sup>th</sup> May, 2005, when he was not living in Kenya, but has visited Kenya severally. He insisted that his home is Kenya, that the Respondent left Kenya in September, 2005 and the daughter was a student of German school, at Nairobi upto July, 2005. He repeated that her demands for money were for her traveling, furniture etc which were beyond his means, and that even if he would refuse to pay the unpaid bills or to repay her borrowings. He also agreed that the last born daughter has always stayed and still stays with the Respondent and conceded that the Respondent is a good mother.

Then he was asked about his extra marital relation with another woman. He agreed that their relationship started in September, 2003 but they knew each other since end of 2002. He indicated that the separation was suggested by him in February, 2002 which was before he developed their relationship. He also agreed that he has two children from the new relationship and that the first child was born on 18<sup>th</sup> March, 2005 and that thereafter the petition was filed. He stressed that the Respondent is resisting the jurisdiction of this court only to get higher maintenance from German courts, and insisted that otherwise she was not refusing the order of the divorce per se.

He reiterated his financial status and willingness to maintain the Respondent as per Kenyan law. He continues to repay the loan so that the Respondent can enjoy to the benefit of the house. Finally, he agreed he had been the one who was unfaithful in marriage.

This is the evidence before the court.

The learned counsel from both sides filed written submissions and also made oral submissions thereon.

The Respondent has raised an issue of competence of the Petitioner to file this petition because it is alleged that he was not domiciled in Kenya.

Reliance is placed on Section 4 of the Matrimonial Causes Act (Cap 152) which provides:-

**“Nothing in this Act contained shall authorize (a)making of any decree of dissolution of marriage or of nullity of marriage unless the Petitioner is domiciled in Kenya at the time when the petition is presented**

**(b).....”.**

Further provisions are made to allow a wife to file the petition under certain circumstances.

It is not in dispute that the Petitioner is a German National and the Respondent is a Kenyan by birth, though from September 2005, as per the evidence before me, she has left Kenya and that last born daughter was schooling in Nairobi and both are living in Germany. It is also on record that this petition was filed on 18<sup>th</sup> May, 2005.

It is further on record of the court that the Petitioner had bought properties in Kenya after their marriage which was solemnized in Kenya and he had sold his property in Germany to acquire the properties in Kenya. One property has been sold, but the other at Loresho which was the last matrimonial home still exists, even if it is in the joint names of the parties.

I do not have any evidence before me to suggest that the Petitioner who has been deployed in Ghana by his employer has acquired Ghanaian domicile. Only because he lives there in a relation with a woman with the children does not automatically raise a presumption that he has acquired the domicile of that country without further evidence of his intention to establish a permanent residence there.

Similarly I do not have any other evidence to show that he has gone back to his country of origin to regain his domicile in Germany. I gain some support from the legal opinion of a German legal firm as to the German laws regarding country of residence and which country the parties were most closely connected.

Moreover Section 10 of the Law of Domicile Act (Cap 37) is relevant in the circumstances of this cause, which stipulates:

**“10 (1) No person may have more than one domicile at any time and no person shall be deemed to be without a domicile.**

**(2) Notwithstanding that he may have left the country of his domicile with the intention of never returning, a person shall retain such domicile until he acquires a new domicile in accordance with the provisions of this Act.”**

I may also quote the following passage from the case of Hopkins –vs- Hopkins (1950) 2 All E.R.1035, cited with approval in the case of Filed –vs- Field. (1964) E.A.C.A 41 at page 43.

**“Held:**

**(i) Where a wife in her petition for divorce, alleged that the husband was domiciled in England, the onus was on her to make out a prima facie case in support of the allegation, but if, through no fault of hers, the evidence was scanty, she had discharged her burden provided that the facts proved tended rather to show that the court had jurisdiction, than that it had not.”**

In my considered opinion, in the premises aforesaid and in view of the facts before the court, the Petitioner was most closely associated with Kenya, at the time of presenting the petition, and thus he can be considered as domiciled in Kenya and do find so.

Moreover, the Respondent has not sought for a separate trial to determine on any issue of fact or any question as to the jurisdiction of this court as per Rule 27 of the Matrimonial Causes Rules, except by way of submissions which any event, I have considered along with the facts of the case and have made my finding as aforesaid.

Having found as aforesaid, I shall now deal with the merits of the case.

I have adequately stated the evidence before me. It is not in doubt that the Petitioner has not divulged his adulterous relation with another woman after the separation which was at his own suggestion as by way of discretionary statement as provided under Rule 28 of the Matrimonial Causes Rules. He did not disclose it also during examination in chief. Of course, when he was confronted with that fact, he then admitted the said relation during cross-examination and also accepted that this petition was filed after the birth of the 1<sup>st</sup> child of that relation.

The petition is filed on the ground of cruelty meted out to him by the Respondent. His averments made in the pleadings are not controverted but his evidence was tested by way of cross-examination. The main grounds were her excessive demands for money and abuses after the Respondent found out about his previous extra marital relation with a colleague. He stated that even after counseling and after resumption of cohabitation by the Respondent, she continued to be suspicious and started being abusive and violent. Due to frequent quarrels on demands of more money beyond his means and abuses they grew apart which led him to move out. His testimony that after the separation there was no communication from the Respondent and that he was also kept away from the last born (who was a common factor in their life) has not been controverted. They seem to be living their own separate lives. The Petitioner did not lose time and started his life with another woman. Now, their common factor the daughter is almost attaining the age of majority. There is no indication from the Respondent’s side that she intends to come back to the Petitioner either. She has settled in Germany. It is also not disputed that she keeps the rental income of Nairobi Home and has been maintained by the Respondent as averred by

him. Thus since 2002, the parties are not together.

I do frown on the actions of the Respondent of having extra marital relation and not divulging the same to the court when coming before it to seek dissolution of the marriage. I am also aware that the matrimonial offences are by nature quasi-criminal and onus to prove the same is in between beyond reasonable doubt and balance of probability.

The Respondent, from what can be seen through the evidence, has never condoned by her actions the extra-marital relation of the Petitioner although she resumed cohabitation. During their separation, her acts of cutting all the ties with the Petitioner, are indicative of her resentment and unwillingness to continue the marital relations with the Petitioner. Their connection was and is only financial and that is not an adequate indicator of her willingness to stay united.

Considering the facts before me, it is apparent that the relation of the parties centered around finance and that was the cause of their frequent quarrels. They started being apart and a rift was created which culminated in their separation since 2002.

What would this court do under the circumstances?

I am satisfied that since long, the party have created gap in their marital relation and by now their marriage is irretrievably broken down, which factor the court should consider while exercising its judicial discretion.

The Respondent's life shall not be much different if the decree nisi of dissolution of marriage would be granted, mainly so, when the Petitioner has categorically accepted to continue to maintain her and the last born of the marriage, others being adult and settled in their lives.

I would thus exercise my discretion and grant the order of dissolution of the marriage solemnized between the parties and further direct that this decree nisi be made absolute after 90 days of the date hereof.

The Petitioner shall pay all the costs of the Respondent.

Dated signed and delivered at Nairobi this 4<sup>th</sup> day of June, 2009.

**K.H. RAWAL**

**JUDGE**

**4.6.09 HhHe**