



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Divorce Cause 43 of 2006

M.M.M..... PETITIONER

VERSUS

M.L.M..... RESPONDENT

JUDGEMENT

This divorce petition dated 30th May 2006 filed by the Petitioner M.M.M seeking the dissolution of his marriage to the Respondent one M.L.M. The Respondent in her answer to the petition dated 15th December 2006 denied the allegations of cruelty made in the petition.

The basic facts of the case are that this couple met and became friends in the year 1998. In the year 2003 they celebrated their marriage at HC in Mombasa. A copy of the Marriage Certificate was produced by the Petitioner **Pexb1**. The marriage was blessed with one child a daughter born on 18th November 2004. The Childs name is O.W. In December 2005 the couple separated and have not resumed cohabitation to date. As a result the Petitioner filed this present petition. S. 6(1) of the Matrimonial Causes Act Cap 152 Laws of Kenya provides that:-

“6(1) 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”.

In this case the marriage was conducted on 3/5/2003. The petition for divorce was filed on 31/8/2006 which is about three and a half years after the marriage. I am therefore satisfied that this petition has been brought in compliance with S. 6(1) of Cap 152 and therefore it is properly before court. In his petition for divorce the Petitioner has alleged that during the subsistence of the marriage the Respondent committed various acts of cruelty against him. S. 8(1)(b) and (c) of Cap 152 provide that –

“8(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the Respondent

a)

(a)

(b) *has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition or*

(b) *has since the celebration of the marriage treated the petitioner with cruelty, or ...”*

The Petitioner alleges that the Respondent failed to cook or serve him with food and neglected her duties of a housewife. In his evidence the Petitioner has not elaborated on exactly which duties of a housewife the Respondent neglected to perform. There is no claim that the Respondent ever went hungry due to her failure to cook. There is no claim that the Respondent neglected to clean the house, wash clothes, iron clothes or take care of the child. I find these allegations to be totally unsubstantiated and unproven and I dismiss these allegations in their entirety.

Secondly the Petitioner alleges that the Respondent in December 2005 deserted the matrimonial home and had not returned by the date of filing of this petition. In clause 8 of his petition the Petitioner avers that:-

“8 *THAT the Petitioner has not in any manner been an accessory to or connived at or condoned the act of cruelty and desertion complained of in this petition”.*

S. 8(b) of the Matrimonial Causes Act talks of desertion from

the matrimonial home for three years “*without cause*”. It is necessary to establish just why the Respondent left the matrimonial home. In her evidence the Respondent said that she left after discovering that the Petitioner who was her husband was involved in a love affair with a lady called M. Under cross examination by Mr. Owino for the Respondent the Petitioner admitted that he was having a love affair with the said M during the pendency of his marriage to the Respondent. The Respondent claimed that the Petitioner often traveled to their rural home with his lover and that they even spent one Christmas there. The Petitioner did not deny nor controvert these allegations. Indeed the Petitioner admitted under cross examination that he and the said M now cohabit and have a child born in 2007. The Petitioner cannot expect that in this day and age he should conduct a love affair openly and then claim not to have condoned the desertion of his wife. It is common knowledge that extra-marital affairs amongst married couples allows the HIV pandemic to spread like bushfire. By his actions the Petitioner caused psychological abuse to his wife such as would traumatize any woman. The Respondent action in leaving the matrimonial home was probably the only way she could protect herself from risk of HIV infection. The Petitioner in his evidence claimed that he can no longer live with the Respondent as he feared for his life due to her threats. He has not told the court exactly what threats the Respondent made against him. On her part the Respondent claimed that the Petitioner assaulted her and chased her out of the house. She did not report the matter as her parents prevailed upon her not to do so. In his evidence in chief the Petitioner denies that he ever assaulted the Respondent. However under cross examination he admits that he did assault the Respondent with reason. Exactly what this reason was the court is not told. Again I find that the Petitioner cannot claim not to have “*condoned*” the Respondent desertion yet he admits having assaulted her. No reasonable woman would remain in a home or environment where she is subject to physical abuse. The Respondent obviously had no option but to leave for her own safety.

From the evidence in court I find that the Petitioner was not an innocent victim of the Respondent desertion as he tries to portray himself. This is far from the truth. Infact the Petitioner is the one who actively pushed the Respondent to leave by his openly admitted love affair with M and by his assault on her. S. 8(1)(b) makes it a ground for divorce if one spouse deserts the matrimonial home “*without good cause*”. That was not the case here. The Respondent had no option but to leave the home as a result of the Petitioner's behaviour. She had to act to save herself. The law provides that one should not benefit from their own wrongful acts. The Petitioner cannot commit adultery, assault the Respondent and then come to court to portray himself as a victim of unprovoked and unwarranted desertion by his wife. I find that although the Respondent did desert the home in December 2005 she only did so due to extreme provocation by the Petitioner himself. As such I find that this ground of desertion unproven and I dismiss the same.

Although the Petitioner's behaviour in my view amounted to grounds under S. 8(1) of Cap 152 the Respondent has not filed any cross-petition for divorce. All the Respondent told the court is that she has been unable to return to her matrimonial home because the Petitioner does not want her. In addition by his own admission the Petitioner is now living with his lover. The fact that the Petitioner does not want the Respondent back is not a ground for divorce. The law in Kenya does not provide for divorce on the basis of irreconcilable differences. Cap 152 clearly provides the five grounds upon which divorce may be granted. The Petitioner relied on the grounds of cruelty and desertion which as discussed earlier I find he has failed to prove. As such his petition must fail. I hereby dismiss the same in its entirety. No order as to costs.

Dated and delivered in Mombasa on this 6th day of August 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Ms. Ngugi holding brief for Mr. Owino for Respondent

No appearance for Petitioner

M. ODERO

JUDGE

6.8.2009