

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Divorce Cause 27 of 2007

A.I.W..... PETITIONER

-VERSUS-

H.J.K..... RESPONDENT

JUDGMENT

A.I.W, who was up to then a bachelor, married *H.J.K* under the provisions of the Marriage Act (Cap. 150, Laws of Kenya) on 2nd September, 2005. This marriage was solemnized at the office of the Registrar of Marriages, Mombasa, a marriage certificate being issued bearing the number, [.....] The petitioner, a German citizen domiciled in Kenya, lived and cohabited with the respondent at Mombasa; but the respondent would not allow the petitioner access to conjugal rights, “unless and until she was taken to Germany”. The respondent, however, is a Kenyan citizen, to the knowledge, information and belief of the petitioner, employed and domiciled in Kenya. It is pleaded that the petitioner responded by moving with the respondent to Germany; but he was still not allowed his conjugal rights, for “the respondent herein absconded the matrimonial home without having granted” the same; and it is pleaded that, in consequence, there is no issue of the marriage. The petitioner pleads that the marriage to the respondent has never been consummated, and he perceives this as cruelty on the part of the petitioner.

The particulars of cruelty are, firstly, that the respondent has unilaterally denied the petitioner his conjugal rights and, in consequence, the marriage has never been consummated. Secondly it is stated that the respondent has “systematically and totally abdicated her matrimonial, domestic and financial duties to the petitioner, with the specific intention of causing the petitioner to suffer mental and emotional anguish”. Thirdly it is stated that the respondent did, early in 2006, abandon the matrimonial home in Germany, and did “move out of the matrimonial home for parts unknown”, and as at today’s date, the petitioner has been denied consortium by the respondent, right from the date when she had left; and there is no expectation of the respondent’s immediate return to the matrimonial home.

The Petitioner pleads that he has not been an accessory to, nor connived at or condoned the said cruelty by the respondent and/or the abdication of her matrimonial, domestic and maternal duties by the respondent. He states that the petition has not been presented or prosecuted in collusion with the respondent.

The petitioner’s prayer is that his marriage to the respondent be dissolved.

The petitioner gave evidence as PW1 and confirmed the statement in his pleadings that he had married the respondent by formal ceremony on 2nd September, 2005. PW1 and his newly-wed wife had gone to Germany, where a misunderstanding arose, with the respondent making a violent demand for money, upon the petitioner; and when the petitioner could not produce the money, she left the matrimonial home and did not return. PW1 said it was now some three years since the respondent left the matrimonial home; and he perceived that it was no longer possible for him to operate as her husband. It had not been possible even to reach the respondent for the purpose of service of the petition, and, with the leave of the Court given on 21st July, 2009, service had been effected by way of publication as a notice in the *Daily*

Nation of 13th August, 2009 (page 58).

The evidence shows that the marriage which took place between the petitioner and the respondent on 2nd September, 2005 was mere play on documentary formalities, without any live relationship giving context to the paper-work. Since the respondent did not enter appearance, made no answer, and gave no evidence, it is not known to the Court what kind of relationship culminated in the solemnization of the marriage under the Marriage Act. The evidence before the Court shows that the natural and legal obligations of consortium between the parties, just did not take place after Marriage Certificate No. [.....] was issued on 2nd September, 2005. It is an established principle at common law that it takes a mutual rendering of conjugal rights, between the partners in marriage, to consummate the celebration of a marriage. But in the instant case, celebration of the marriage took place and the solemnities of paperwork were done, but there was no affirmation of the nuptial bond through the conjugal act. In law, therefore, the marriage, in operational terms, remained no more than inchoate: and in these circumstances, the petitioner has the opportunity in law to move this Court to declare it null, and to order it dissolved. The evidence before the Court makes a case for the aforesaid marriage to be dissolved.

I hereby order the dissolution of the marriage solemnized between the petitioner and the respondent on 2nd September, 2005.

Decree accordingly.

DATED and DELIVERED at MOMBASA this 30th day of October, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang*

Court Clerk: *Ibrahim*

For the Petitioner: *Mr. Kithi*

Respondent : *Absent and unrepresented*