



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA (MOMBASA LAW COURTS)**  
**Divorce Cause 76 of 2008**

GW..... PETITIONER

VERSUS

AZK..... RESPONDENT

\*\*\*\*\*

**JUDGEMENT**

The Petitioner GW filed this petition for divorce dated 3<sup>rd</sup> November 2008 on 4<sup>th</sup> November 2008. In the petition herein the following prayers have been made:-

1. **THAT** the marriage of your petitioner and the Respondent be dissolved.
2. **THAT** this Honourable Court does exercise its discretion to grant a **decree nisi** to the petitioner.
3. **THAT** the matrimonial property be apportioned on the basis of contribution to its acquisition
4. **THAT** the Respondent be ordered to pay the costs of these proceedings.
5. **THAT** the petitioner may have such further or other relief as to this court may deem fit.

The Petition as well as a summons to enter appearance were served upon the Respondent one AZK on 26<sup>th</sup> November 2008 and she duly signed the same. This is evidenced by the affidavit of service sworn by Henry M. Mwakudua an authorized court process server on 26<sup>th</sup> January 2009 and filed in court on the same date. The Respondent neither entered appearance nor filed any reply to the petition. On 23<sup>rd</sup> January 2009 the Petitioner applied to the court for directions as to the ***“mode and place of hearing”*** in line with Rule 29(1) of the Matrimonial Causes Act and Rules (Cap 152). On 12<sup>th</sup> February 2009 Hon. Kizito Senior Resident Magistrate gave directions that the matter be heard at the Mombasa High Court. Thereafter by their letter dated 17<sup>th</sup> February 2009 M.K. Mullei & Company Advocates for the Petitioner invited the Respondent to appear in the Court Registry on 24<sup>th</sup> February 2009 to fix a hearing date in the matter. The Respondent failed to comply and on 26<sup>th</sup> March 2009 the hearing date of 2<sup>nd</sup> July 2009 was taken ex-parte. Notice of the hearing date was duly served on the Respondent as evidenced by the Affidavit of Service sworn by one Abelazo Mutua, an authorized court process server on 1<sup>st</sup> July 2009 and filed in court on the same day. On the scheduled hearing date the Respondent failed to appear either in person or by counsel. I did satisfy myself that the Respondent had notice of this divorce cause and had been served with hearing notice as required by law. In her absence the hearing proceeded ex-parte.

In his evidence the Petitioner GW told the court that he is a German national who after his retirement in Germany re-located to Kenya. He met and befriended the Respondent in 2004. They got married on 15<sup>th</sup> September 2006. The Petitioner produces in court a copy of their

marriage certificate Serial No. *[particulars withheld]* **Pexb1** as evidence of the marriage conducted at the District Commissioner's Office in Kilifi. The Petitioner built a house in Mtwapa which the couple moved into in March 2004 and resided therein as man and wife. There were however no children of the union. The Petitioner tells the court that in 2007 the Respondent's behaviour changed. She would come home drunk in the wee hours of the morning and would assault the Petitioner. She made unauthorized withdrawals from the Petitioner's account amounting to Kshs.970,000/-. The Petitioner reported this fact to the Tourist Police in Mtwapa. Finally the Petitioner accuses the Respondent of adultery with an unknown African man for whom she bore a daughter. As a result of all this the Petitioner did file this present petition seeking a divorce from the Respondent.

The law governing divorce is to be found in the Matrimonial Causes Act Cap 152 Laws of Kenya. S.6(1) thereof provides –

***“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 the present case the evidence of the Petitioner is that the couple celebrated their marriage on 15<sup>th</sup> September 2006. This is clearly evidenced by the marriage certificate produced as an exhibit **Pexb1**. Likewise it is clear that from the date of that marriage to 4<sup>th</sup> November 2008 the date when this petition was filed in court three years have not elapsed. It would appear therefore that the petition does not comply with S.6(1) of Cap 152. However I do note that by Miscellaneous Application No. 357 of 2008 this Petitioner applied for and was granted leave to file his petition notwithstanding the three year time limit provided for by statute. In view of that application I do find that despite the provisions of S.6(1) this petition is properly before court.

The Petitioner in his petition relied on two main grounds for divorce namely –

- Cruelty
- Adultery

Once again the grounds upon which a court in Kenya may grant a divorce are contained in the Matrimonial Causes Act Cap 152, Laws of Kenya. S. 8 of the said Act provides:-

***“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) has since the celebration of the marriage committed adultery or***
- (b) .....***
- (c) has since the celebration of the marriage treated the petitioner with cruelty; or***
- (d) .....***

In his petition the allegations about cruelty are contained in paragraphs (5), (6), (7) and (8) thereof which reads as follows:-

***“5 THAT on the 3<sup>rd</sup> day of November 2007 the Respondent who has taken to the habit of heavy drinking and coming home late and has assaulted your Petitioner by knocking him and breaking his glasses.***

***6. THAT your Petitioner fearing assault has had to move from the matrimonial home under police protection to live with friends. This has not stopped the Respondent from sending threats to your Petitioner and generally harassing your Petitioner forcing him to seek leave to divorce.***

***7. THAT the Respondent has developed thieving tendencies and had six weeks starting from the 10<sup>th</sup> of December 2007 to February 2008 withdrawn the sum of Kshs.963,000 (Nine Hundred & Sixty Three Thousand) from your Petitioner's account secretly to fund her extravagant and immoral lifestyle.***

***8. THAT your Petitioner currently resides in a rented house in Mtwapa, Kilifi District and the Respondent is living in the matrimonial house in Mtwapa.”***

In his evidence before the court the Petitioner stated that after his marriage to the Respondent in September 2006 they lived in the matrimonial home which he had constructed in Mtwapa. From 2007 the Respondent's behaviour changed. She developed a habit of coming home very late and whilst drunk. When the Petitioner questioned this behaviour she would assault him. On 3<sup>rd</sup> November 2007 the Respondent assaulted the Petitioner by hitting him on the head with a heavy candle-holder, breaking his eye-glasses and causing him to bleed from the nose. The Petitioner had to call in the police who escorted him out of the house. The Petitioner reported this incident to police vide OB No. 9 of 3<sup>rd</sup> November 2009. The Petitioner further states that the Respondent would go out and lock him in the house which of course was of grave danger to his person in case of a fire break-out. Finally the Petitioner had to move out of the matrimonial home for his own safety. All this is evidence which has been given by the Petitioner on oath. I was able to observe the demeanour of the Petitioner as he gave his evidence. He was an elderly gentleman and in my view had no reason to fabricate evidence. In my view he was an honest witness. Despite having been given several opportunities, the Respondent chose to make no reply to the Petition. As such the Petitioner's evidence remains uncontroverted in all material aspects.

Without a doubt the behaviour and attitude of the Respondent towards the Petitioner was cruel and contemptuous. To go out drinking until the wee hours of the morning and to lock up her spouse in the house is in my view cruel. Not to mention that hitting an elderly man on the head with a heavy object is a cruel act that could even result in a fatality. By her actions the Respondent effectively ejected the Petitioner from their matrimonial home as under those circumstances as he could not continue to live with her there.

The Petitioner also stated under oath that the Respondent siphoned a total sum of Kshs.970,000/- from his bank account which money she used to purchase for herself a plot in Mtwapa. The Petitioner reported this theft to the Tourist Police in Mtwapa. Again this is evidence which remains uncontroverted. To steal such large sums from ones spouse can only be described as cruel. All in all I find that the Respondent treated the Petitioner with utter contempt. She did not accord him the respect due to a husband. Her behaviour certainly subjected the Petitioner to mental anguish and emotional trauma. I am satisfied that this ground of cruelty has been proven sufficiently.

The Petitioner also accuses the Respondent of adultery. Paragraphs (3) and (4) of his Petition the Petitioner states as follows:-

***“THAT after the said marriage your petitioner lived and cohabited with the Respondent at Mtwapa from the year 2006 to November 2007 when your petitioner who underwent a vasectomy operation 10 years ago realized that the Respondent was pregnant.***

**4. *THAT when your petitioner asked about the pregnancy the Respondent resorted to violence and started to assault the Petitioner.***

In his evidence the Petitioner told the court that at the age of 50 and whilst still living in Germany he underwent a vasectomy. This meant that from that time the Petitioner could not sire any more children. He married the Respondent at the age of 66 (as is indicated in the marriage certificate **Pexb1**) a full sixteen years after his vasectomy. To his utter surprise the Respondent fell pregnant whilst they cohabited as man and wife. Whilst I do not claim to have any medical expertise I would not hesitate to state that barring some medical miracle the child the Respondent was carrying could not have been fathered by the Petitioner. The Petitioner confirms this by telling the court that the Respondent later delivered a very beautiful **African** child. Clearly that child was fathered by an **African** man. The Petitioner was in court and was undoubtedly a gentleman of Caucasian extraction. The only way that the Respondent could have conceived this child during the subsistence of her marriage to the Petitioner was through committing adultery. This is in fact the only explanation for the birth of this child – it is unequivocal evidence of her adultery. Once again this was evidence given by the Petitioner on oath which evidence is not controverted at all. As stated earlier I found the Petitioner to be an honest and convincing witness. He gave his evidence in clear, concise and simple terms. The fact that the Respondent fell pregnant with a child fathered by a man other than the Petitioner who was her lawful spouse is clear proof of the fact of her adultery. In addition for a woman to conceive a child with one man during the subsistence of her marriage to another in my view amounts to the ultimate act of betrayal and cruelty. I am satisfied that this ground of adultery has been sufficiently proven.

The Petitioner testified that efforts at reconciliation have borne no fruit. He currently lives in a rented flat in Mtwapa whilst the Respondent continues to reside in the matrimonial home with another man's child. The Respondents' total lack of interest in saving this marriage is manifested by her total lack of interest in these proceedings and in her failure to put in any reply to the Petition for divorce. It is clear that this is a marriage which has irretrievably broken down. I am satisfied that the Petitioner has proved the grounds of cruelty and adultery as alleged in his Petition. This Petition succeeds and the marriage between the two is dissolved. Decree nisi to issue and to be confirmed upon the expiry of three (3) months from today's date.

Lastly the Petitioner did at paragraph (3) of his Petition pray for apportionment of the matrimonial property on the basis of contribution to its acquisition. The said matrimonial property is a house in Mtwapa. The Petitioner in his evidence told the court that although he paid for the construction of the said house it is registered in the name of the Respondent (his wife). The couple moved into this house in March 2004 and lived there together until February 2008 when the Petitioner moved out. There is no doubt that the couple were married as is evidenced by the marriage certificate **Pexb1**. The house in Mtwapa was occupied by both as their matrimonial home. In his evidence to the court the Petitioner states that he purchased the plot upon which the house is built for Kshs.300,000/-. Thereafter he paid for the construction of the said house to the tune of Kshs.1.6 million. The money would be forwarded from the Petitioner's bank account in Germany and he would then make payments to the contractor known as D. The Petitioner did produce as evidence his bank statement from Sparkasse Gieben Bank in Germany indicating the sums withdrawn from that account.

The Petitioner's evidence in this respect is confirmed by **PW2 DGM**. He tells the court that he is a contractor based in Mtwapa. He met the Petitioner through a German man known as J for whom he had earlier constructed a house. **PW2** tells the court that upon a request from the Petitioner he did proceed to construct a house in Mtwapa for the Petitioner. They agreed on a total cost of Kshs.1.6 million. The Petitioner first paid to **PW2** a deposit of Kshs.300,000/-. The money was sent from Germany to the account of the Respondent held at Barclays Bank. **PW2** says that at all times it was the Petitioner who made the payments to him. He completed the project, was paid in full and the two parted company on good terms. The Petitioner now seeks division of this matrimonial property on the basis of his contribution thereto. In the case of **Muthembwa –vs- Muthembwa Civil Appeal No. 74 of 2002** the Court of Appeal sitting in Nairobi held inter alia that:-

***“6. In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness”***

The fact that the Petitioner made substantial contribution towards the acquisition of this house in Mtwapa is not in any doubt. **PW2** the contractor has confirmed that he at all times dealt with the Petitioner who paid him in full the sum of Kshs.1.6 million for his work. The Petitioner has told the court that all this money came from his funds in Germany. He availed as an exhibit his bank statement from Germany showing various debits to his account. I note that the said debits were effected during the years 2004 to 2005 which corresponds with the period when the Petitioner told the court that he was engaged in constructing the said house. The statement bears the name of the Petitioner **GW** which is sufficient proof that the funds were debited from his own account. The Petitioner is a German national and it is entirely logical that he would have personal funds available for his use in Germany. The Petitioner has been honest enough and conceded that the house is registered in the name of his wife the Respondent. Once again the Respondent's failure to respond to this Petition means there

exists no challenge to the Petitioner's claim that he utilized Kshs.1.6 million of his own funds to put up the house. In any event when the Petitioner met the Respondent she was working first as a househelp and then as a masseuse. It is highly unlikely that this employment would have enabled the Respondent to raise sufficient funds to put up a house no matter how good she may have been at those respective jobs. I am satisfied from the evidence before me that the Petitioner made substantial and indeed made the greater contribution towards the acquisition of this matrimonial home. There is no evidence of any contribution by the Respondent towards the acquisition of the house. I will nevertheless allow that as a wife she must have made some contribution however minimal towards its acquisition. Despite the Respondent holding Title to this house I find that the Petitioner has proved substantial contribution towards its acquisition and in my view the Petitioner made the greater contribution to that end. He no doubt envisaged that the two would enjoy joint possession of this house but this alas is not the case at the present time. I feel that it is only just and fair that the Petitioner's financial contribution towards the construction of the house, which contribution he has proved in court be recognized by apportionment. I do therefore order that the interest in the said house be apportioned on a 70 : 30 basis in favour of the Petitioner. As such I rule that the Petitioner herein is entitled to a 70% interest in the house whilst the Respondent will be entitled to a 30% share of the matrimonial home in Mtwapa. Since this is a family matter I deem it prudent not to make any orders as to costs.

**Dated and Delivered at Mombasa this 23<sup>rd</sup> day of October 2009.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Mr. Munzu for Petitioner

**M. ODERO**

**JUDGE**

**23/10.2009**