



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 83 of 2008

MJAO.....PETITIONER

V E R S U S

FO..... RESPONDENT

J U D G E M E N T

Before me is a petition dated 30th July, 2008 filed by M/s Kosgei & Masese advocates on behalf of the Petitioner MJAO. The respondent is named as FO.

What is sought in the petition is dissolution of the marriage, custody, care and control of the child of the marriage, maintenance and child support for the children of the marriage including school fees, medical expenses amounting to Kshs.40,000/= per month being half maintenance, as well as costs of the petition.

The petition was filed with a certified copy of the marriage certificate which shows that the petitioner and the respondent were married under the Marriage Act (**Cap. 150**) at the office of the Registrar of Marriages on 4th May, 2004. The petition was not contested and was heard as an undefended petition. Only the petitioner testified.

The grounds for seeking dissolution of the marriage are cruelty and desertion. The particulars of same were given in the petition. The cruelty hinges on an alleged failure of the petitioner to behave responsibly and to bear his financial obligations to his family. On desertion, the petitioner is said to have deserted the matrimonial home since 2nd July, 2007.

The ground of desertion cannot succeed. Desertion can be a ground for dissolution of marriage only if there is compliance with requirements of section 8(1) (b) of the Matrimonial Causes Act (**Cap. 152**), which 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)

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

The desertion herein is said to have occurred on 2nd July, 2007. The petition was presented to court on 31st July, 2008. The period of at least 3 years had not lapsed. Therefore, desertion cannot be a ground for dissolution of the marriage herein.

Cruelty has no time limit, as provided for under section 8(1) (c) of the Act. The particulars of cruelty given in the petition are those that I can call borderline. However, since the respondent has not bothered to respond to the petition, the petitioner will have her day. I find that the petitioner has proved the ground of cruelty. On that ground, I will dissolve the marriage. As for custody of the child, I will grant it to the petitioner.

The petitioner has asked for maintenance for the child in the petition, but did not give any evidence to support the request. I will not grant maintenance as requested. The reasons are firstly, that the petitioner has not given any documentary proof of the birth of the child, and whether the child is a child of the marriage. Secondly, there is no evidence filed regarding the petitioner’s own means and the means of the respondent. If the petitioner wants maintenance for the child, she can file appropriate proceedings giving all the particulars for the court’s consideration.

Lastly, the petitioner in evidence, stated that she is not pursuing the issue of costs. I will therefore make no order as to costs.

Consequently, and for the above reasons, I order as follows-

- 1. I issue a decree nisi for the dissolution of the marriage between the petitioner and the respondent, which will be made absolute after the lapse of 6 months.*
- 2. I grant the custody, care and control of the child to the petitioner.*
- 3. The petitioner will bear her own costs of the proceedings.*

Dated and delivered at Nairobi this 12th day of November, 2009.

George Dulu

Judge.

In the presence of

Mr. Momanyi holding brief for Mr. Kosgei for the Petitioner

David – Court clerk.