



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
DIVORCE CAUSE 1 OF 2006

L.N.G.....PETITIONER

VERSUS

S.M.M.....RESPONDENT

J U D G M E N T

On 8th February, 1975, the petitioner and respondent herein celebrated a civil marriage before the District Commissioner, Nakuru District. Following the marriage the petitioner and the respondent established their matrimonial home in Kericho town. They were blessed with four children namely; **B.W.M, C.W.M, W.M.M** and **J.K.M** aged 34, 31, 25 and 15 years respectively. All the aforesaid siblings are gainfully employed save for **J.K.M**, the last born who is a student at B[...]. Both the petitioner and respondents are involved in business of one form or another.

Since 1988, there has been no peace and tranquility in the marriage. According to the petitioner the respondent has been cruel to her by constantly assaulting her, committing adultery with various women and deserting the matrimonial home. On one occasion he disappeared from the matrimonial home without notice leaving the petitioner pregnant. The final straw that broke the camel's back was in 1997 when the respondent surreptitiously left the matrimonial home. The next time she heard about the respondent, he was esconced in the United Kingdom. This information was filtered to her by her brother in law, **P.M.M** Following that disappearance, the parents of the respondent chased the petitioner with her children from their matrimonial home in Kiambu where they had relocated following land clashes in Kericho. It was in April, 1998 when she was sent packing as aforesaid. Since then she has been putting up with her parents. Since 1997 the petitioner and respondent have not resumed cohabitation. The petitioner maintains that she did not make the conditions in the matrimonial home so difficult as to compel the respondent to desert. He has not rendered any assistance to the petitioner whatsoever since then. In the result the petitioner has single handedly brought up the children of the marriage. The marriage according to the petitioner has irretrievably broken down and cannot be salvaged. Hence this petition for Divorce based on adultery, cruelty and desertion.

In answer to the petition, the respondent took the view that the petitioner was of unsound mind and has been undergoing treatment under **Dr. Samuel Gatere**, Consultant Psychiatrist. He denied acts of

cruelty complained of by the petitioner. He denied committing adultery with one, **A.K** and **W.K**. He averred that the latter was a widow of his brother who passed on in a road traffic accident in 1994 and he took over the responsibility of providing for the upkeep of his children. That the respondent has always treated the petitioner with love and affection whereas the petitioner has been quite irrational resisting psychiatric treatment for her mental disorders consisting of paranoia, inconsistency and delusions. He denied having deserted the matrimonial home for United Kingdom in 1997. Rather he went to the United Kingdom to look for means to support his family since his business had collapsed. Whilst in United Kingdom he had maintained the entire family until his stay was terminated after he had overstayed his visa. Contrary to the allegation of the petitioner, the respondent maintained that he had been the sole breadwinner of the family and had given the family total and exclusive support at all material times of the marriage. For all the foregoing reasons, the respondent prayed that the petition for divorce was unmerited and ought to be dismissed with costs.

These then were contrasting positions taken by the parties to this petition that this court was required to resolve. When the petition was called for hearing, neither the respondent nor his advocate were present in court. The petitioner was. Being satisfied that the respondent's lawyer, **P.N. Mbugua Advocate**, had been served with the hearing notice and no explanation had been tendered to me as to the reason behind his absence and or the respondent, I ordered the petition to proceed to hearing the absence of the respondent and or his lawyer notwithstanding.

Only the petitioner testified in support of the petition. Her evidence is captioned in detail in the first two pages of this judgment. I do not think therefore that it is necessary to regurgitate the same here again, suffice to say that at the hearing of the petition, the petitioner opted to pursue the petition for divorce on the ground of desertion alone thereby abandoning cruelty and Adultery as grounds in the petition.

The evidence of the petitioner on the question of desertion was uncontroverted and unchallenged. It can only be believed. It is the contention of the petitioner that the respondent deserted the matrimonial home in December, 1997 for United Kingdom and since then there has been no resumption of cohabitation. The petitioner had no hand in the desertion. It was without her knowledge, consultation or consent. She was not in constructive desertion therefor. She never knew about the respondent's flight to United Kingdom until she was informed about it by her brother in law **P.M.M**. Following the respondent's disappearing act aforesaid, the petitioner and her children were sent packing by the respondent's parents to her parents where they have remained since. They now hear that the respondent is back in town since May 2006 when he was deported from United Kingdom. Throughout his sojourn in the United Kingdom he never rendered any assistance to the family.

Section 8 (1) of the Matrimonial Causes Act provides that;

“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 period of at least three years immediately preceding the presentation of the petition; or

(c).....

(d).....”

So that for a marriage to be dissolved on the ground of desertion the petitioner must either be a wife or husband, one of them must have deserted the other without cause and it must be for a period of at least three years immediately preceding the presentation of the petition for divorce. In this case there is common ground that the petitioner and respondent were wife and husband. There is also unchallenged evidence that the respondent disappeared without notice to the petitioner from the matrimonial home. She did not cause him to flee. That was in December, 1997. He left for United Kingdom and lost touch

completely with the family. The petitioner filed this petition on 22nd September, 2006, almost nine years after the disappearance of the respondent. Taking all the foregoing into account, I have no doubt that the petitioner has tendered sufficient evidence that would lead this court to grant her the divorce on the ground of desertion.

The respondent resurfaced from United Kingdom sometimes in 2006 and wanted to force himself into the life of the petitioner. He could not condone her resistance. He went to the extent of hijacking the petitioner and forcing her into a mental institution under the guise and excuse that she required psychiatric treatment. He has repeated his prognosis of the petitioner's mental condition in his answer to the petition. However I have seen a medical report prepared by **Dr. M.A. Makanyenga**, Consultant Psychiatrist from Avenue Healthcare tendered in evidence by the petitioner and I am satisfied that the respondent's story about the mental condition of the petitioner is a make belief story. The doctor is of the opinion that the petitioner is an elderly lady who feels threatened by her husband who she reports is trying to force her to return to the matrimonial home. It is not lost on me that the doctor making the report is from the same institution that the respondent had forced the petitioner to attend claiming that she was mentally ill. She was accordingly discharged from the institution.

The case for the dissolution of the marriage has been made out by the petitioner. I am satisfied that the petitioner did not condone, connive and or was she accessory to the respondents actions and that the petition has not been presented or prosecuted in collusion with the respondent. Accordingly, I now dissolve the marriage hitherto subsisting between the petitioner and the respondent as it cannot be redeemed or salvaged. A decree Nisi shall forthwith issue to the petitioner to be made absolute within the stipulated period of time. Since the petitioner did not ask for custody, maintenance and or costs of the petition no such orders shall issue.

Dated and delivered at Nyeri this 30th day of June, 2008.

M.S.A. MAKHANDIA

JUDGE

Delivered by:

MARY KASANGO

JUDGE