

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Divorce Cause 4 of 2000

AWM.....PETITIONER

VERSUS

JMN.....RESPONDENT

JUDGMENT

This is a petition for divorce. Assumptah Wambui Mwathi (the Petitioner) claims in her petition that she married James Mwathi Nguri (the Respondent) in 1987 under Kikuyu Customary Law. On the 20th of October 1990, their marriage was converted into a Christian one and solemnised at the Cathedral of Christ the King Church in Nakuru. After the marriage the couple lived and cohabited in Nakuru. They were blessed with 3 children: A N M born in 1987, A W M born in 1990 and F N born in 1992 but is now deceased.

The petition is based on the grounds of cruelty and adultery. The Petitioner claims that on the 26th November 1992, and on other dates thereafter the Respondent has consistently beaten her. In 1999, he chased her from their matrimonial home and she has since lived away from home. On adultery she claims that the Respondent is cohabiting with one C W W in their former matrimonial home. She therefore prays for divorce, that the properties they acquired together during coverture be distributed between them and that she be granted custody of the children of the marriage and the Respondent be ordered to maintain them.

In his answer to petition and cross petition, the Respondent denies all the allegations of cruelty and adultery made against him and states that this petition has been brought in bad faith for purposes of acquiring an interest in his properties the acquisition of which the Petitioner did not contribute to. By way of cross petition, the Respondent claims that the Petitioner has since marriage been guilty of desertion and has treated him with cruelty. He states that since 4th of May 1998 the Petitioner has deserted the matrimonial home. He has given, in his cross petition, several instances of cruelty. He therefore prays that the petition be dismissed with costs and his cross petition be allowed and he be granted the custody of the children.

When the matter came for hearing before me on 28th July 2008, though served, neither the Petitioner nor her advocate appeared in court. At the request of the Respondent, and there being no reason for the Petitioner's absence, I dismissed the petition and allowed the Respondent to formally prove his cross petition.

In his evidence, the Respondent stated that in 1990 his sick uncle visited them so that he could see a doctor the following day. When the Respondent asked if the Petitioner had given him any food, she said she was not a donkey to cook for people. That obviously hurt the Respondent. From 1992 she, for one reason or the other, denied the Respondent his conjugal rights. In 1994 he gave her Kshs.40,000/- to keep so that they could use in the construction of a house at Race Track. When he later asked for it she told him that she had given it to her brother and she was not willing to get it back. In 1997 she told his sick mother that she was not willing to go visiting her as the Respondent was always on her side. That hurt both the Respondent and his sick mother.

On 4th May 1998, when he returned home from his place of work, the respondent found the house open and stripped off everything except his clothes, which were scattered on the floor, and the matrimonial bed with its mattress. On enquiry he was told that the Petitioner had, with the assistance of her brother, taken everything out of the house and gone with the children to Race Track. They have since not lived together but the children always visit him during the school vacations. He therefore prays that his cross petition be allowed and he be granted the custody of the children.

Having considered the uncontroverted evidence of the Respondent, I am satisfied that the Petitioner has been guilty of cruelty and desertion. She has not been kind to the Respondent's sick relatives and particularly his mother. Since 1998 she has deserted the matrimonial home. As the parties have not lived together for now about 10 years there is not much left of their marriage. In the circumstances I find that their marriage has irretrievably broken down. I therefore grant the Respondent's cross petition on the grounds of cruelty and desertion and order the dissolution of their marriage. A decree nisi shall issue forthwith to be made absolute after the statutory period of 6 months.

As the Petitioner did not oppose the cross petition I order that each party bears its own costs.

DATED and DELIVERED at Nakuru this 29th day of September, 2008.

D. K. MARAGA

JUDGE