



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Divorce Cause 68 of 2006

M.K.....PETITIONER

VERSUS

M.N.K.....RESPONDENT

JUDGMENT

The petitioner M.K filed a petition dated 15th May 2006 through his counsel M/S Gichuki King'ara & Co advocates. The respondent is described as M.N.K

According to the petition the petitioner and the respondent were married under Kikuyu customary law in December 1995. They converted their marriage to a statutory marriage under the Marriage Act (Cap. 150) on 27th March 2002. The petitioner avers in the petition that the two cohabited in Nairobi and that there was one issue of the Marriage B.K Jr. born on 2nd. July 2003. The petitioner is a medical doctor practicing in Nairobi while the respondent is a Guest Relations Officers at [PARTICULARS WITHHELD]. The petitioner alleged cruelty and desertion in the petition. He listed the particulars of cruelty and desertion. He contended that the respondent had withheld conjugal rights and caused the petitioner immense emotional and mental torture. He also contended that the respondent on 12th May 2006 left or deserted the matrimonial home and had never come back again. It was also his contention that the respondent had neglected the issue of the marriage and exposed him to severe mental and emotional torture. He sought for orders that –

- (a) The marriage between the petitioner and the respondent be dissolved.
- (b) The custody of the child of the marriage be granted to the petitioner.
- (c) The respondent bears the costs of this cause
- (d) Any other or further relief this Honourable court may deem just and fit to grant in the circumstances.

Though the respondent is said to have been served with the petition and the Notice to Appear, she neither entered appearance nor filed any answer to the petition. The Deputy Registrar therefore certified that the case should proceed to hearing as an undefended case. The respondent was however also served with a hearing notice for the hearing that was scheduled for 2nd November 2006. She neither came to court nor sent counsel.

At the hearing of the petition only the petitioner gave evidence. It was his evidence that he was a medical practitioner in Nairobi and was married to the respondent. They cohabited with the respondent and had one son named B.K Jr.

He testified that he was seeking for dissolution of marriage as well as custody of the child. His grounds for seeking dissolution of marriage was that the respondent left the matrimonial home without prior discussions on 12/05/2006, and had not come back since then. His other ground was that the respondent had committed acts of cruelty both to him and the issue of the marriage in that she would come home late at night and claim to be at work, which checks would show that she was not at work. He also discovered that the respondent had on two instances procured abortions at Eastleigh Marie Stopes Hospital. She also used to embarrass him at his place of work by taking his cell phones and calling his female clients affecting his private medical practice. He asserted that the marriage had broken down irretrievably and needed to be dissolved.

The evidence of the petitioner is not controverted at all as the respondent did not file any reply to the petition nor appear at the hearing of the case.

The first ground for seeking dissolution of the marriage is desertion. The petitioner claims that the respondent deserted the matrimonial

home on 12th May 2006 without cause and has not come back again. The petition which was dated 15th May 2006 was filed on 16th May 2006. This ground for dissolution of marriage cannot succeed. For desertion to be a good ground for dissolution of marriage it has to occur at least three years before the date of presentation of the petition in court. This is the legal requirement under the provisions 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 –

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

The respondent is said to have deserted the petitioner on 12th May 2006. The petition having been filed or presented to court on 15th May 2006 does not satisfy the requirements of the law that the desertion has to be for a period of at least three years before the presentation of the petition. I therefore find that desertion has not been proved.

The second ground for dissolution of marriage is cruelty. This is a ground for dissolution of marriage in terms of section 8(1) (c) of the Matrimonial Causes Act (Cap. 152). The section 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 –

(c) has since celebration of the marriage treated the petitioner with cruelty,”

The petitioner has stated in evidence that the respondent has been cruel both to him and to the child of the marriage. She has had the habit of coming home late and giving false reasons; she has neglected welfare of the child. She has taken the petitioner’s cell phones and called his female clients, thus disrupting and interfering with his private medical practice. That evidence is not controverted. It is apparent from the evidence that communication and trust between the petitioner and the respondent has broken down. From the uncontroverted evidence, it is clear to me that the cause of that breakdown of communication is the conduct of the respondent. I find that the conduct of the respondent amounts to cruelty as it has resulted in mental and emotional torture on the petitioner. I find that the ground of cruelty has been proved. That is enough reason to dissolve the marriage, and I will dissolve the marriage on that ground.

The petitioner has asked for the custody of the child of the marriage. The evidence on record is that the respondent has left the matrimonial home and also left the child of the marriage with the petitioner. The child is a young child having been born in 2003. The respondent is the biological mother of the child, but who does not appear to care about the well being of the child. I find no reason to refuse to grant the custody of the child to the petitioner. Therefore I grant the custody of the child to the petitioner.

The petitioner has asked for costs of these proceedings. The respondent did not file an answer to the petition, nor did she appear in court to defend the cause. In those circumstances I will not grant costs to the petitioner.

For the above reasons, I allow the petition for dissolution of marriage and grant orders that –

1. The marriage between the petitioner and the respondent herein be and is hereby dissolved. A decree nisi for divorce to issue forthwith to be made absolute after the lapse of three (3) months.
2. The custody of the child of the marriage B.K JNR. is hereby granted to the petitioner.
3. The petitioner will bear his own costs of these proceedings.

Dated and delivered at Nairobi this 1st day of February 2007

George Dulu

Judge

In the absence of counsel for the parties, as the date for judgment was taken/given in the presence of Mrs. Njiriani for the petitioner.

George Dulu

Judge

1st February 2007