



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

Divorce Cause 31 of 2006

FRANK MWANGI GATHAARA PETITIONER

VERSUS

FAITH WARUGURU MWANGI..... RESPONDENT

JUDGMENT

On 06.03.06 the petitioner filed petition praying for the following orders:-

- a) That the marriage between the parties (petitioner and respondent) be dissolved.
- b) That the petitioner be granted custody of the children of the marriage.
- c) That the respondent pays the costs of this petition.

The petitioner was represented in these divorce proceedings by learned counsel, Mr. F.O. Okeyo of Otieno Okeyo and Co. Advocates of P.O. Box 9684 – 00100, Nairobi, Kenya. There was no appearance for the respondent.

Salient facts on which the petition is based, as established by documents in the court file, may be summarized as under.

The petitioner and respondent are husband and wife, respectively, having contracted a statutory marriage under Kenya's Marriage Act, Cap.150 at the Registrar's Office, Nairobi on 30.05.97. The petitioner, who testified before this court, produced the certificate of his marriage to the respondent as Exhibit 1.

The petition, which the petitioner adopted in *toto* when he testified before this court, avers that both the petitioner and respondent are domiciled in Kenya and that after their marriage in Kenya they cohabited at the following places:-

- a) Zimmerman, Nairobi, Kenya: from the year 1996* [*The court pauses here to note that if the parties got married on 30.05.97 as shown in Exhibit 1 but started living together in 1996, they must have started living together before getting married] to the year 2000.

- b) Nyeri Town, Kenya: from the year 2001 to the year 2001.
- c) Zimmerman, Nairobi, Kenya: from the year 2004 to the year 2004.
- d) Oxford, U.K.: from the year 2005 to-date.

The petition also avers that the parties have two biological children and one adopted child. The petitioner tendered oral evidence on the matter in which he gave the following particulars of the children:-

- a) Malcolm Ngumbu Njururi: biological child born on 11.12.97 as per birth certificate Exhibit 2 – now aged around 9¼ ears.
- b) Victoria Wanjiru Njururi: biological child born on 24.02.99 as per birth certificate Exhibit 3 – now aged around 8 years.
- c) Tracy Wamuyu Mwangi: adopted child – aged about 12 years.

The petitioner testified that he works in the U.K. According to the petition the respondent's status is unknown to him.

It is the petitioner's case that the respondent has committed the matrimonial offences of desertion and cruelty. I shall address the alleged offences in reverse order.

With regard to desertion, the petitioner averred that the respondent deserted the matrimonial home since December, 2005 to an unknown destination without any justification whatsoever. As already stated, the petition herein was filed on 06.03.06. The attention of the petitioner is drawn to section 8 (1) (b) of the Matrimonial Causes Act, Cap.152 Laws of Kenya

is to the effect that for the act of desertion complained of to be complete, it has to have taken place without cause for a period of at least 3 years immediately preceding the presentation of the petition. In the present case, the period involved is about 1½ years only. The statutory requirement of a minimum of 3 years has not been met, neither has any sufficient reason been given why the 3 – year requirement should be waived. Accordingly, the ground of desertion is dismissed.

As regards cruelty, the petitioner averred that the respondent not only left the matrimonial home without justification but that she also took the children of the marriage with her to an unknown location without the petitioner's authority, consent and knowledge in December, 2005, thereby denying the petitioner access to the children to-date. It was the petitioner's case that the act of the respondent so taking away the children has caused him anxiety, mental anguish and torture in that the petitioner is unaware of the children's safety, health and basic provisions. The petitioner also averred that the respondent has now accused the petitioner of abandoning his children and she (respondent) is demanding weekly payment of £100 from the petitioner while in fact each time the petitioner gives the respondent money for the upkeep of the house and the children, she ends up spending the money on herself. It was also the petitioner's case that the respondent has on several occasions made malicious, false and unjustified disparaging remarks against him with the aim of having him unlawfully incarcerated. The petitioner has additionally averred that the respondent has broken into the petitioner's private compartment and taken away the petitioner's important documents and that the respondent has constantly shouted at him in the presence of the children, abused and physically threatened him. It was the petitioner's case that his marriage to the respondent has irretrievably broken down, hence these divorce proceedings.

The record shows that the respondent was served with the petition and supporting documents by one Kevin James Dawson, process server of P.O. Box 443, Headington OX3 9HR in the County of Oxfordshire on 24.04.06. The respondent was supposed to enter appearance within 30 days of service but she had not entered appearance by the time the petitioner filed his petition on 06.03.06, neither has she filed any answer to the petition.

I am satisfied on evidence tendered before court that the respondent was duly served but she failed and/or neglected to file answer to petition. The respondent's failure to enter appearance and file answer to petition leaves the petitioner's case against her uncontroverted. I accept the petitioner's averments against the respondent. The particulars narrated by the petitioner against the defendant amount to the matrimonial offence of cruelty and I find the said offence duly proved. Accordingly, I hereby pronounce a decree of divorce and order that the marriage between the petitioner and respondent be and is hereby dissolved. *Decree nisi* shall issue forthwith, the same to be made absolute within 30 days of the date hereof, upon application therefor. The petitioner is granted custody of the biological children, M N N aged about 9¼ years and Victoria V N N aged about 8 years. The respondent is ordered to pay the plaintiff's costs of these divorce proceedings.

Orders accordingly.

Delivered at Nairobi this 22nd day of March, 2007.

B.P. KUBO

JUDGE