



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Divorce Cause 28 of 2006**

**C.D.M.....PETITIONER**

**VERSUS**

**N.P.M.....RESPONDENT**

**JUDGMENT**

The petitioner C.D.M filed a petition on 27<sup>th</sup> February 2006 through her counsel Ms. Musyimi & Company advocates. The respondent was named as N.P.M. It was averred in the petition that the petitioner and the respondent got married on 3<sup>rd</sup> May 1997 at St. Austin's Catholic Church Westlands Nairobi. It is also averred that there were two issues of the marriage. The ground for dissolution of the marriage was said in the petition to be desertion.

The respondent entered appearance through his counsel Robson Harris & Company advocates and also filed an answer to the petition through the said advocates. In the answer to the petition the respondent appears to admit the averments in the petition.

The petitioner in her petition asked for orders that –

1. The marriage between the petitioner and the respondent be dissolved.
2. The custody of the children of the marriage be vested jointly in the petitioner and the respondent.
3. The petitioner be granted care and control of the children with the respondent having reasonable access.
4. The respondent be ordered to maintain the children of the marriage.
5. The honourable court do grant any other or further relief that it may deem fit.

Before the matter came to full hearing, the parties through their respective counsel filed a consent on custody of the children, care and control of the children, access to the children, and payment of expenses for the children.

When the case came up for hearing before me, only the petitioner testified. On that day Ms. Kiguatha appeared for the petitioner while Mr. Odongo appeared for the respondent.

The petitioner testified that she was a fund raising officer with UNICEF, and currently working at Khartoum though on 27/2/2006 she was living in Kenya. She had grown up and was educated mainly in Kenya. She was in Kenya since 1994 except for a period of one year between June 1998 to July 1999.

She got married to the respondent in May 1997 at St. Mary's Church Lavinton. She produced the marriage certificate as exhibit 1. After marriage they cohabited in Kenya, then to the US and then back to Kenya. When they came back to Kenya the respondent started spending a lot of time away from home. When asked he said that he was unhappy and that they were not getting on well.

It was her evidence that when she wanted them to move from a house in Lavinton, which had rats to another house in Gigiri, the respondent told her at the last minute that he would not move and that he would remain in the Lavinton house. The respondent said that he wanted some space. They tried counselling, but it did not work. Then the respondent moved to a guest house at Karen. They stopped living together in October 2002.

She testified also that there were two male children of the marriage. She considered that there were no chances of salvaging the marriage because the respondent had made it clear that it was not possible. She asked for dissolution of the marriage and incorporation in the judgment of the consent already recorded.

In cross examination she stated that they had conjugal relationships after October 2002, when he visited them in Khartoum in 2003. She testified that during the counseling sessions they talked on whether she should give the respondent time and whether she should have been more aggressive in the relationship. She did not like some friends of the respondent such as one L.S.

In re-examination she stated that they continued to communicate with the respondent, but it was primarily about the children. She did not want to rely on a ground of adultery because of the requirements of proof.

At the close of the petitioner's case, the respondent neither gave evidence nor called any witnesses. None of the counsel for the parties made any submissions.

I have considered the pleadings filed herein and the evidence tendered before me.

The first issue that I have to decide is whether there is a marriage between the petitioner and the respondent that is capable of being dissolved. From the facts before me, I have no hesitation in finding that there is a marriage between the petitioner and the respondent that is capable of being dissolved.

The second issue that arises is whether the petitioner was domiciled in Kenya at the time of presenting the petition in court. The petition was presented in court on 27/2/2006. At that time the petitioner was resident in Kenya. From her evidence she is an American citizen and, apart from working and residing in Kenya as at the time of presenting the petition, her relatives are actually in Kenya and have been living in Kenya for a long time. The petitioner testified that she takes Kenya to be her home and is merely in Khartoum for work. I find that the petitioner was domiciled in Kenya at the time that she presented the petition in court.

The ground relied upon by the petitioner for dissolution of marriage is desertion. She tendered evidence in court, and though she was cross-examination, her evidence was not challenged. The answer to the petition in fact admits the alleged desertion. According to the evidence of the petitioner the desertion occurred from 2002. The petition for dissolution was filed in February 2006. I find that the requirements of three (3) years period under section 8(i) (b) of the Matrimonial Causes Act (Cap. 152) have been fulfilled. I also find from the facts before me that the petitioner has proved the grounds of desertion against the respondent. It is my finding that the respondent committed the desertion alleged.

I also find that the marriage has broken down irretrievably, as the evidence shows a point of no return, and both the petitioner and the respondent from their pleadings seem to have given up on salvaging the marriage. I also find that the petition was not filed with collusion or connivance of the parties. I find that the marriage has broken down irretrievably. I will therefore have to dissolve the marriage.

The parties filed a consent which I will have to adopt in my judgment.

Consequently, the petitioner succeeds in this action and I enter judgment and order as follows –

1. The marriage between the petitioner and the respondent be and is hereby dissolved. A decree nisi to issue forthwith to be made absolute after the lapse and three (3) months.
2. The petitioner and the respondent do have joint custody of the children of the marriage S.M.M and S.E.M.
3. The care and control of the children to remain with the petitioner.
4. The respondent to have reasonable access to the children of the marriage as shall be agreed between the parties and in default of the said agreement, the parties to agree on a mediator whose decision on access will be binding on the parties.
5. The respondent do pay the petitioner an amount equivalent to Kenya shillings one Hundred and Six Thousand (Kshs.106,000/=) per month being 50% of the children food, school fees, housing, medical insurance and extra-curricular activities reviewed annually in line with the changing circumstances of the children.
6. Both parties at liberty to apply.

I make no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 1<sup>st</sup> March 2007.

**George Dulu**

**Judge**

In the presence of –