



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Divorce Cause 74 of 2005

KK..... PETITIONER

VERSUS

F A A G.....RESPONDENT

JUDGMENT

On 10.06.05 the petitioner filed the petition herein dated 03.03.05 for the following orders;-

- a) That her marriage with the respondent be dissolved.
- b) That a judicial separation be granted pending the marriage dissolution.
- c) Costs of this suit with interest thereon.
- d) Any other or further relief that this honourable court may deem fit to grant.

Hearing of the petition came up before me on 21.03.07 whereat the petitioner was represented by learned counsel, Mr. C.M. Midwa while there was no appearance for the respondent.

An affidavit of Nzuki Musyoki, process server sworn on 28.09.05 deposes that he served the respondent with copies of the petition and notice at the Sarit Centre Supermarket in Nairobi and that the respondent asked to be told the petitioner's Advocates' physical address where the respondent intended to go and sign the suit papers. The process server deposes that he left the respondent with the papers on the above understating and that a week later the process server was called to the petitioner's Advocates office where he was shown a copy of the petition sent back to the petitioner's Advocates office bearing handwritten remarks in – between some paragraphs plus a signature at the back ascribed to Fahem Ghani who appears to be the respondent. The endorsement ascribed to Fahem Ghani at the back of the petition is dated 28.09.04. The handwritten remarks ascribed to Fahem Ghani essentially amount to denial of the claims of accusations made by the petitioner against the respondent. No papers appear to have been filed by the respondent in response to the petition, which proceeded as an undefended cause.

The petition is accompanied by the petitioner's affidavit sworn on 02.06.05 deposing that what is contained in the petition is true and within the petitioner's knowledge.

The basic grounds relied upon by the petitioner for the desired dissolution of marriage are desertion and

cruelty. At the hearing of the petition, the petitioner gave oral evidence of the desertion and cruelty alluded to.

The petitioner's evidence is that she works for a company called First Computers Limited as Assistant Logistics Manager while the respondent is a salesman by profession and that the two of them got married on 20.05.98 at the Registrars office, Nairobi under the Marriage Act, Cap.150 Laws of Kenya

petitioner produced her certificate of marriage to the respondent as an exhibit in this case. The substantive aspects of the petitioner's evidence may be summarized as under.

It was the petitioner's case that she and the respondent have never lived together or cohabited as husband and wife since celebration of their marriage and that the two of them have had sex with each other only on and off, the first sexual intercourse between them having taken place one year after their marriage! The respondent lived with his parents at Ukay Nakumatt in Nairobi while the petitioner lived with her parents at Wood Avenue within Kilimani area in Nairobi. The distance between the two homes is about 20 minutes drive away. It was the petitioner's case that the respondent refused to live with her. The two had sex together roughly once in two months either at the respondent's place or in a hotel when the respondent took the petitioner out for lunch. The sexual encounters between them took place during the day. It was the petitioner's further evidence that the respondent never took care of her financial needs and that many times he used to use foul language against her, such as calling her a 'fuckin' bitch', without just cause as the petitioner had not been rude to him. There are no issues of the marriage.

The petitioner's other complaint against the respondent was that in or around March, 2003, the respondent deserted her without any notice or excuse and without her consent and proceeded to live in Manchester, England where he resides to date and he never communicates with the petitioner.

It was the petitioners case that the marriage between her and the respondent has irretrievably broken down, hence the present divorce proceedings. The petitioner abandoned prayers (b), (c) and (d).

I have given due consideration to the petitioner's complaints or accusations against the respondent.

The petitioner's complaints against the respondent have been backed up by affidavit evidence plus oral evidence on oath. The respondent filed no formal response to the petitioner's accusations against him backed up by any evidence on oath. The petitioner's accusations of cruelty and desertion by the respondent remain uncontroverted and I accept the petitioner's evidence on those accusations.

The union entered into between the respondent and petitioner through the statutory marriage of 20.05.98 is a very strange form of marriage indeed. A married couple is expected to live together and establish a matrimonial home. Here each spouse continued to live with his or her parents, within the same city of Nairobi. Sexual intercourse between them was occasional, roughly once in two months during day time, either at the respondent's place or in a hotel. A very strange couple indeed.

The use by the respondent of foul language against the petitioner many times and act of refusing to live with her do constitute the matrimonial offence of cruelty within the meaning of section 8 (1) (c) of the Matrimonial Cause Act, Cap.152. That is enough to earn the petitioner the dissolution of the marriage she seeks.

The petitioner has also accused the respondent of deserting her since March, 2003 and keeping away from her ever since. The divorce petition herein was filed on 10.06.05, i.e. some 2 ¼ years after the respondent left Kenya for England. Section 8 (1) (b) of the Matrimonial Causes Act provides that such departure as the respondent was accused of should have been without cause and have lasted at least 3 years immediately preceding the presentation of the petition. As the 3 – year requirement was not met, the matrimonial offence of desertion has not been proved and the accusation of desertion is dismissed.

The petition succeeds on the ground of cruelty and 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 after expiry of 30 (thirty) days from the date hereof upon application therefor. As the petitioner abandoned all her other prayers, I make no other orders.

Orders accordingly.

Delivered at Nairobi this 19th day of April, 2007.

B.P. KUBO

JUDGE