



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Divorce Cause 27 of 2006**

**PRAGNA SHATILAL .....PETITIONER**

**VERSUS**

**MADOOGAR HARJIWAN ARJAN .....RESPONDENT**

**J U D G M E N T**

In her petition dated 29<sup>th</sup> May 2006, the Petitioner, Pragna Shantilal prayed for six main reliefs against Madoogar Harjiwan Arjan, the Respondent herein. When served with the petition, the Respondent filed an answer to the petition.

The petition came up for hearing on 2/5/2007. During the hearing the petitioner abandoned the rest of her prayers save for two namely:

- (a) *Dissolution of the marriage between her and the Respondent and*
- (b) *Costs of the petition.*

The Petitioner took the witness box without summoning any other witness. She told this court that she will entirely rely on what is contained in the petition and deposed in the affidavit in support or verifying the petition. She told this court that she got married to the Respondent on the 11<sup>th</sup> day of November 2001 when the Respondent was working for gain in Uganda. She said they cohabited together in Uganda and in Kisumu. When she secured a job in Mombasa, the Respondent came to cohabit with her but he was unfortunate because he did not secure any employment. He was forced to go back to Kisumu leaving the Respondent in Mombasa. In essence the Respondent went to live in their matrimonial home in Kisumu when he failed to secure gainful employment in Mombasa city. The respondent said that she saw no need to follow the Respondent to Kisumu whereas he was unable to maintain his family. The Respondent accused the Petitioner of neglecting to pay his debts and failing to meet his obligations. The couple were not to be blessed with children. The petitioner accused the Respondent of desertion since 30<sup>th</sup> March 2003. she urged this court to dissolve the marriage on account of desertion and on the basis that the marriage has irretrievably broken down.

When the Respondent took the witness box he urged this court to dissolve the marriage on the basis that the petitioner deserted him and the matrimonial home on account of his inability to maintain the family. The Respondent said he went back to Kisumu to live in the matrimonial home when he failed to secure any gainful employment in Mombasa. He said the petitioner had agreed to join him shortly but that never happened. The Respondent said that he used to communicate with the petitioner on phone until January 2004 when the petitioner started rejecting his phone calls.

Upon receiving the evidence, the learned advocates on both sides were called upon to make their

submissions. Mr. Shishir Gor, learned advocate for the Petitioner submitted to the effect that it was pointless for the petitioner to go back to the matrimonial home in Kisumu when it was clear that the Respondent was not in a position to maintain her. It is the argument of Mr. Gor that the Petitioner was deserted by the Respondent.

On his part, Mr. Oloo learned advocate for the Respondent urged this court to dismiss the petition but still proceed to dissolve the marriage on the basis that the petitioner deserted the matrimonial home and on the basis that the marriage has irretrievably broken down. The learned advocate urged this court to direct each party to meet its own costs.

I have considered the evidence from both sides. I have also perused the pleadings and the affidavits filed for and against the petition. What comes out clearly from the evidence and the submissions is that each side wants the marriage to be dissolved. I have been urged by the Petitioner to dissolve the marriage on the basis that the Respondent is guilty of desertion. On the other hand the Respondent is in agreement that the marriage should be dissolved but on account that the petitioner has deserted the matrimonial home. Both the petitioner and the Respondent are in agreement that the marriage has irretrievably broken down and hence cannot be salvages. It is not in dispute that the Respondent went back to reside in the matrimonial home at Kisumu when he failed to secure a job in Mombasa He left behind the petitioner as he went to seek for greener pastures elsewhere. It is also not denied that the petitioner has refused to go back to join the petitioner in Kisumu in their matrimonial home. It is conceded by the petitioner that she has failed to join her husband in Kisumu because he is unable to maintain the family. I am of the considered view that the respondent is not guilty of desertion. The evidence appears to indicate that the Respondent was smoked out of the matrimonial rented house in Mombasa when it appeared that he was unable to secure gainful employment to contribute to the couple's daily outgoings and maintenance. The Respondent therefore left Mombasa unwillingly and on the pressure exerted by the petitioner who did not value the Respondent when he was in financial doldrums. I find the Respondent not guilty of desertion. I however find the petitioner guilty of constructive desertion. Unfortunately, the Respondent did not cross-petition for dissolution of the marriage on account of constructive desertion.

I have already stated that both the petitioner and the Respondent are in agreement that the marriage has irretrievably broken down. On this account I am also convinced that what remains in the marriage is a mere shell. There is no use for it to remain in name. The best interest for justice and to the parties is to order for the marriage to be formally dissolved. This will enable the parties pick up the pieces and move on with their lives . In the circumstances of this case I am convinced that a fair order in respect of costs is to direct each party to meet his or her own costs.

In the end the marriage between the petitioner and the Respondent solemnized on 11.11.2001 is dissolved. A decree nisi be issued and be made absolute within a period of 30 days from the date hereof.

Each party to meet its own costs in this petition.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of May 2007.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Shishir Gor for the petition and

N/A for the Respondent.