



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Divorce Cause 97 of 2006

DHIMIT UMEDBHAI CHAUHAN.....PETITIONER

VERSUS

FALGUNI DHIMIT CHAUHAN.....RESPONDENT

JUDGMENT

Before me is a petition filed by Paurvi Rawal advocate on behalf of the petitioner DHIMIT UMEDBHAI CHAUHAN. The petition was filed on 11/7/2006 and the respondent is named as FALGUNI DHIMIT CHAUHAN.

It is averred in the petition that the petitioner and the respondent got married before the Registrar in Nairobi on 19th June 2001. That after the marriage they cohabited with the petitioner's parents at the family house at Dr. Heda apartments, 3rd Parklands, Nairobi for 10 days. Thereafter they proceeded to Australia. That there was no child of the marriage and that the respondent currently resided in Perth Australia. It is also averred that the petitioner is a banker and domiciled in Kenya. It is further averred that on 9th May 2003, the respondent left the matrimonial home taking with her all the personal belongings and telling the petitioner that she no longer wished to continue with the marriage.

The respondent is said to have been served with the petition and notice. However, she neither entered appearance nor filed an answer to the petition. The matter therefore proceeded as an undefended petition.

At the hearing, only the petitioner testified. It was his evidence that he got married to the respondent on 13/6/2001. They cohabited at Dr. Heda flats for 10 days and then proceeded to Australia. The petitioner went to Australia first, and then respondent joined him after about 6 months. They do not have children and the respondent currently resided in Australia. It was his testimony that the respondent deserted the matrimonial home on 9/5/2003, because of an argument over petty issues.

I have considered the pleadings filed as well as the evidence tendered before me. The evidence of the petitioner is not controverted. However he still had the burden to prove his case to the required standards.

From the documents filed and the evidence on record, I am satisfied that, indeed, as at the time of filing the petition, there was in existence a marriage subsisting between the petitioner and the respondent. The marriage was celebrated in Kenya before the Registrar of Marriages in Nairobi on 19/6/2001.

The petitioner has stated in his petition that he is domiciled in Kenya. The evidence is that he got married in Kenya and cohabited with the respondent at Dr. Heda apartments for only 10 days before he proceeded to Australia. According to him his parents are in Kenya. He did not mention, in the petition, what he went to do in Australia from 2001. He did not clarify as to when he came back to Kenya. Section 4(a) of the Matrimonial Causes Act (Cap. 152) provides –

“4. Nothing in this Act contained shall authorise –

(a) the making of any decree of dissolution of marriage or of nullity of marriage unless the petitioner is domiciled in Kenya at the time when the petition is presented”

The burden was on the petitioner to establish that he was domiciled in Kenya at the time of presenting the petition. The fact that ones parents live or are domiciled in Kenya does not mean than an adult child of those parents is also domiciled in Kenya. Section 10 of the Law of Domicil Act (Cap. 37) provides –

“10(1) No person may have more than on domicile at any time and no person shall be deemed to be without a domicile

(2) Notwithstanding that he may have left the country with the intention of never returning, a person shall retain such domicile until he acquires a new domicile in accordance with the provisions of this Act.”

With the above provisions of the law in my mind, I will give the benefit of the doubt to the petitioner as he appears to have been domiciled in Kenya because his parents have been in Kenya.

The petitioner has sought dissolution of the marriage on account of desertion by the respondent. That is a ground for dissolution of a marriage under 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 petitioner stated in the petition that they cohabited with the respondent at UNIT 7, 1-5 Toms Court, BaysWater, 6053 and that the respondent now resides at 5/14 Conroy Street, Maylands, 6051 Perth Australia. He also stated that the respondent deserted the matrimonial home (not described) on 9th May 2003. The petitioner does not himself say when and why he came to Kenya. He does not say that the desertion is without cause. He does not say why he had to file for divorce in Kenya while he and the respondent have been cohabiting in Australia, except for ten (10) days. He said that the respondent left the matrimonial home because they argued over petty issues, which he did not disclose.

The burden was on the petitioner to show that the respondent deserted the matrimonial home without cause. Merely stating that the two argued over petty issues, in my view, falls short of proving lack of cause for the desertion. The petitioner should have highlighted those issues for the court to determine whether or not there was no cause for the desertion. Even assuming for argument’s sake that the respondent deserted the matrimonial home, I am left in grave doubt as to whether there was no cause for that desertion. If there was a just cause for the respondent deserting the matrimonial home, that cannot be good legal reason to grant a divorce.

In my humble view, the petitioner has not discharged his burden of proving to this court that the respondent deserted the matrimonial home without cause. Infact, the arguments between the spouses, which he call minor and petty, of which he did not disclose particulars to this court, might as well be a justifiable cause.

For the reason that the petitioner has not established that the respondent deserted without cause, I have to dismiss the petition.

Consequently, I dismiss the petition and decline to dissolve the marriage between the petitioner and the respondent. I order that the petitioner will bear his own costs of these proceedings.

Dated and delivered at Nairobi this 7th May 2007.

GEORGE DULU

JUDGE