



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Divorce Cause 129 of 2005

A W N PETITIONER

VERSUS

J W W.....RESPONDENT

JUDGMENT

This is a petition dated 5th September 2005 filed by Ombeta & Company Advocates on behalf of the petitioner A W N. The respondent is named as J W W. The petition seeks for the following orders, that –

- (a) The marriage between the parties be dissolved.
- (b) The legal custody of the issue of the marriage B W be granted to the petitioner.
- (c) The respondent be ordered to pay for maintenance and education of the issue of marriage B W.
- (d) The respondent do bear the costs of this cause.
- (e) The Honourable Court do grant any other order and or relief it may deem fit and just to grant in the circumstances.

The petition was filed with a verifying affidavit sworn by the petitioner on 5th October, 2005 confirming the correctness of the contents of the petition. Also filed with the petition is a certified copy of a marriage entry for a marriage between J W W and A W celebrated at PCEA [*particulars withheld*] church Nyeri on 28.11.1992.

In the petition, it is averred that both parties are domiciled in Kenya. The grounds for seeking dissolution of marriage are given as adultery and cruelty. No particulars of the said two allegations were given. It is also stated in the petition that the parties have been separated since 1993.

The respondent entered appearance through his counsel G.M Waweru & Company advocates. The same firm of advocates also filed an answer to petition and cross-petition. The answer to the petition and cross-petition denies the allegations in the petition and that it was the respondent who was guilty of desertion, cruelty and adultery. Particulars of cruelty and adultery were given. The respondent asked for the following reliefs –

1. The petition filed by the petitioner be dismissed.

2. The respondent's cross petition be allowed and the marriage solemnized between the petitioner and the respondent be dissolved.
3. The costs of the cross petition and the incidentals thereto be borne by the petitioner.

During the hearing of the petition Mr. Oonge appeared for the petitioner, while Mr. Makumi appeared for the respondent.

The petitioner gave evidence. It was her evidence that she got married to the respondent on 28.11.1992 at **[particulars withheld]** PCEA church. She then cohabited with the respondent at Karatina. The two got a son who was now in standard 8. In late 1993, they separated.

It was her evidence that the respondent had committed adultery and was very violent. She testified that in fact the respondent committed adultery on the date of marriage to a woman with whom he later got two children. She stated that the marriage had broken down since 1993. She was therefore asking for a divorce, maintenance for the child and payment of school fees and other expenses by the respondent.

In cross-examination she testified that the two had in fact separated on the 1st day of the marriage but came together after 4 days. However, thereafter the respondent again committed adultery and even brought other women into the house. The two lived together until she gave birth. She testified that she did not know that she was required to serve court documents on the woman who committed adultery with the respondent. It was her testimony that the respondent used to precipitate a situation for disagreement and abuse her and assault her but that she did not get a P3 form. She contended that she had been taking care of the child from her farming and business and with the assistance of her parents, but that the respondent should also shoulder responsibilities for bringing up the child. She denied being domineering and seeking to break up the marriage. She denied refusing to have sexual intercourse with the respondent and also denied committing adultery.

The respondent also testified in court. It was his evidence that he had been married to the petitioner in 1992. He testified that the petitioner went to the UK from October 1994 after the birth of the child B for about 4 to 5 years to look for work. The petitioner left the child with her mother. He contended that the petitioner went to the UK without his permission. He denied that he was with another woman on the day of the wedding. He testified that the petitioner was living with another man and was pregnant. He testified that he was not married to another woman, however, they had irreconcilable differences with the respondent as they used to quarrel often when the petitioner got drunk. The petitioner even threw the ring into the swimming pool on the night before the wedding. It was also his evidence that their biological child was now in form one, but his attempts to contact the mother and the child had not been successful.

In cross-examination he stated that he was a social drinker and could control himself. He stated that he did not have anything to prove that the petitioner had gone to the UK after their marriage. He admitted having two children one born in 1996 and one in 1996 with another woman with whom he had undergone a traditional marriage ceremony, during the substance of the statutory marriage with the petitioner. He stated that though he did not know where the child of his marriage with the petitioner was currently schooling, he used to pay school fees for the child and was even at one time taken to the Children Court for delays in remitting payments for the child. He also stated that it was his brother who told him that the petitioner was pregnant.

After the close of the petitioner's and respondent's cases none of the counsel made submissions before me.

This is a matrimonial case seeking for dissolution of a marriage. The first issue that I have to decide is whether at the time of filing the petition for dissolution of marriage there was a valid marriage between the petitioner and the respondents.

Both parties agree that there was a marriage between them. I have seen the certified copy of an entry of a marriage which was filed with the petition. It clearly shows that there was a statutory marriage

celebrated between the petitioner and the respondent at PCEA [particulars withheld] church on 28.11.1992. It is my finding that, indeed, at the time of filing the petition herein for dissolution of marriage, there was a valid marriage subsisting between the petitioner and the respondent which was capable of being dissolved.

The petitioner has alleged that the respondent has committed adultery as one of the grounds for seeking dissolution of marriage. The respondent has denied committing adultery, and has alleged that it is the petitioner who has committed adultery and was currently pregnant. The respondent's evidence on the pregnancy of the petitioner is that he was informed by his brother. That is hearsay evidence. It is not admissible in court as that brother of his did not come to court to testify. I will disregard that evidence.

As for the allegation of adultery against the respondent, the petitioner has not named the adulteress in the petition or in evidence. It has been suggested in cross-examination that the adulteress should have been served. In my view, there is no such legal requirement that the adulteress should be served by a wife who petitions for divorce on the ground of adultery. The legal position in Kenya is clearly stated in Section 9(2) of the Matrimonial Causes Act (Cap. 152), which provides

“9(2) On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person whom the husband is alleged to have committed adultery be made a respondent”.

There was no court's directive that the adulteress be made a respondent and therefore there would be no need for service.

The above aside, the respondent himself has admitted in cross-examination that he has had a liaison with another woman and they in fact have two children. He even claims to have undergone a customary marriage ceremony. That is adequate evidence of adultery, as he did not have the capacity to go into another marriage during the subsistence of the monogamous marriage. I will not go into the issue of legality of the customary marriage, but clearly the respondent committed adultery. It is therefore my finding that adultery has been proved, and on that ground alone, the marriage could be dissolved.

The petitioner has alleged cruelty as the other ground for dissolution of the marriage. There is evidence on both sides of quarrels and drunkenness of both parties. Both appear to be people who take alcohol, and people of strong views. They seem to have quarreled even on the wedding day itself, which in my view is quite unusual. The petitioner did not give any particulars of the abusive words allegedly used by the respondent as well as the alleged physical assaults. From the evidence on record I find that the petitioner has not given facts to establish cruelty against the respondent.

In my view, from the facts before me, the marriage has broken down irretrievably as the parties have not cohabited since 1993 and do not appear able and willing to reconcile. As I have said, adultery has been proved, and the respondent has even committed himself to another woman and they have two children. I will therefore dissolve the marriage.

The petitioner has asked for orders that the respondent pays for maintenance and education of the child of the marriage B W. There is no dispute that the child is the child of the marriage between the petitioner and the respondent. The petitioner has not given the particulars of the maintenance and education required for the child of the marriage. Clearly, the parental responsibility of a child during marriage is for both the father and the mother. This is the position as spelt out under Section 24(1) of the Children Act No. 8 of 2001, which provides –

“24(1) where a child's father and mother were married to each other at the time of his birth, they should have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.”

In my view, therefore, both the petitioner and the respondent have responsibility towards the child. However, as none of the parties has disclosed any particulars of their income and the requirements of the child, I will rely on section 30(1) of the Matrimonial Causes Act (Cap. 152) to order that a proper

application with disclosures be made for the court's consideration.

The petitioner has asked for costs of the proceedings. Though the respondent has defended himself through an answer and cross petition, I find no basis to order that any of the parties pay the other party's costs. I will not award costs to the petitioner.

For the above reasons, I allow the petition and order as follows –

1. The marriage between the petitioner and the respondent be and is hereby dissolved.
2. A decree nisi to issue forthwith, to be made absolute after the lapse of three months.
3. Legal custody of the child the marriage is granted to the petitioner.
4. Both the petitioner and the respondent have parental responsibility towards the child B W. A formal application giving all necessary disclosures of incomes of the parties as well as the requirements of the child may be filed for the court to consider and make appropriate orders for the maintenance and education of the child.
5. Each of the petitioner and the respondent will bear their own costs of the proceedings.

It is so ordered.

Dated and delivered at Nairobi this 18th day of June 2007.

George Dulu

Judge