

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Divorce Cause 54 of 2006

D W F.....PETITIONER

VERSUS

N D FRESPONDENT

J U D G M E N T

D W F and N D F being husband and wife respectively celebrated their marriage before the Registrar's office, coast, on the 21st day of November 2003. The husband has now taken this petition to have the marriage dissolved. The wife was served with the petition but did not bother to file an answer in reply hence the petition proceeded for hearing exparte.

When the petition came up for hearing. D W F was the only witness to testify. He produced before this court a copy of the marriage certificate to establish the fact that their marriage was solemnized on 21.11.2003 before the Registrar of marriages, Coast Province. The Petitioner told this court that after the celebration of their marriage they flew to Germany where they cohabited as man and wife. The Petitioner claimed that the Respondent deserted the matrimonial home and has since then failed, to communicate with him. He told this court that it is now two years since the Respondent deserted him. He alleged that the Respondent was alcoholic and unfaithful to him.

I have considered the evidence tendered by the Petitioner. It is clear from the evidence that the Petitioner wants the marriage to be dissolved on the basis that the Respondent is guilty of desertion and adultery. These grounds are also particularized in the petition. Having taken into account the evidence given, the main issue which I must determine is whether or not the Petitioner has established the allegations in support of the petition and if so whether or not he is entitled to the prayers sought.

Let me start by considering the allegation that the Respondent is guilty of adultery. The Petitioner did not state who the Respondent had extra marital affairs with. He merely stated in his petition that the Respondent had associations bordering on adultery and prostitution. The law enjoins the Petitioner under Section 9(1) of the Matrimonial Causes Act to make the adulterer a co-respondent unless he is excused by the court from so doing. It was incumbent upon the petitioner to tender cogent evidence to prove such an allegation to the standards required by law. I find that the Petitioner has failed to discharge the burden of proof in this respect.

The Petitioner has accused the Respondent for desertion. It is the evidence of the Petitioner that the Respondent deserted the Petitioner and the Matrimonial home for 2 years. This actually appears to be the main ground the Petitioner heavily relied upon to agitate for an order for the dissolution of the marriage. Under Section 8(1) (b) of the Matrimonial Causes Act, such a ground can only be relied upon if the accused has deserted the Matrimonial home three years immediately preceding the presentation of the petition. The Petitioner celebrated the marriage on 21.11.2003. It is alleged the Respondent disappeared from the Matrimonial home on 10.05.2005. The petition was filed on 23rd November 2006. It is clear that the petition was prematurely brought before the statutory period lapsed. It means that the Petitioner could be right that the Respondent deserted the matrimonial home but the remedy is only available after the lapse of three years from the date of desertion.

In the end I regret to state that the Petitioner has failed to prove his petition. The same is ordered struck out and dismissed with no order as to costs.

Dated and delivered at Mombasa this 15th day of June 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Odongo h/b for Miss Okumu for the Petitioner.

N/A Respondent.