



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

**DIVORCE CAUSE 49 OF 2006**

**P B..... PETITIONER**

**VERSUS**

**S P..... RESPONDENT**

**JUDGMENT**

On 03.04.06 the petitioner filed petition praying for the following orders, namely, that:-

- a) The marriage between the petitioner and respondent be dissolved on grounds of irreconcilable differences.
- b) The costs of this petition be in the cause.
- c) Any other or further relief this honourable Court may deem fit and just to grant.

At the hearing of the petition, the petitioner was represented by learned counsel, Mr S. Migdad while learned counsel, Mr M. Otieno held a watching brief for the respondent who had not filed answer to the petition.

The petitioner gave evidence in support of his petition. His evidence may be summarized as under.

The petitioner is a British Muslim while the respondent is an Indian Christian. The two met at University in Dublin, Ireland where they were studying. The duration of their stay there was one year. The respondent told the Court that during the one year of their relationship the respondent gave birth to his child, a boy born on 30.10.2000. The petitioner testified that he and the respondent were not ready to get married. They preferred to 'wait and see' but the respondent's family insisted that the petitioner and respondent should get married and the two of them obliged and got married in Mumbai, India on 29.12.2000 'to give legitimacy to the son'. They consummated the marriage after its celebration. Thereafter the petitioner returned to Nairobi, Kenya where he was based and worked as a Consultant for Holistic Trauma Healing Company. The respondent joined him in Nairobi after 6 months, i.e. in May, 2001. The respondent stayed with the petitioner in his apartment for 2 weeks, then went into her own apartment where she resided with their son.

It was the petitioner's evidence that he and the respondent never stayed together after the marriage; that every 10 or so days he travelled internationally and the respondent failed to trust him; that the petitioner stayed in his own apartment in Nairobi when he came back from his travels; and that during his stay in Kenya he would visit the respondent for about 2 days a week. The Court sought to know why the

petitioner and respondent had separate apartments where each stayed in the same city and the petitioner answered:

‘We just agreed that each of us has his or her apartment.’

It was the petitioner’s further evidence that he and the respondent had numerous conflicts arising from his absences; that the conflicts resulted in a rift in their relationship and breakdown in communication between them; that their relationship has broken down completely; and that reconciliation attempts have been unsuccessful. The petitioner did not specify the reconciliation attempts made. The petitioner told the Court that he never told his mother (his father apparently died quite sometime back) or his brothers about his marriage to the respondent until after it took place and that they were disappointed that he did not discuss the matter with them. The petitioner reiterated his prayer for dissolution of the marriage on the basis of irreconcilable differences.

There is in the Court file a notice dated 03.04.06 requiring the respondent to enter appearance within 8 days of service of the petition upon her and to file answer to the petition. An affidavit by Swaleh Uledi Kanyeki, Advocate of Nairobi sworn on 12.07.06 deposes that his firm sought to effect personal service of the Petition and Notice to Appear but the firm could not do so immediately; that subsequently Kanyeki’s firm was served with notice of appointment of advocates for the respondent; that Kanyeki’s firm then effected service upon the respondent’s advocates but they never filed any papers in answer or response to the petition herein; and that it became apparent that the respondent was not keen to defend or interested in defending the petition. This matter, therefore, proceeded as an undefended cause. According to the petition the respondent was at the time the petition was filed resident in Mbita, Suba District of South Nyanza in Kenya where she was working for gain as a Programme Manager for Concern Ireland. Both the petitioner and respondent are said to have taken Kenya as their domicile of choice for more than 5 years.

I have given due consideration to the petition and the evidence tendered in support thereof.

The grounds of divorce recognized in Kenya are stipulated in section 8 of the Matrimonial Causes Act, Cap. 152. They are: adultery, desertion; cruelty; or being incurably of unsound mind. In the present case the ground sought to be relied upon is ‘irreconcilable differences’. Such ground is unknown to Kenyan law. The petitioner’s and respondent’s approach to the institution of marriage seems to have been casual from inception and all the way through. The petitioner has come to Court seeking dissolution of the marriage on the basis of a ground alien to Kenyan law. The respondent never bothered to respond to the petition. There is an air of mystery about the marriage but the bottomline is that the Court is being invited to invent a new ground of divorce. While it may be tempting for the Court to want to do that, it seems to me that taking such action would be tantamount to venturing into legislation, a function which by virtue of section 30 of the Constitution of Kenya

is reserved to Parliament. I have come to the conclusion that the petition is incompetent and the same is hereby struck out. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 7<sup>th</sup> day of June, 2007.

**B.P. KUBO**

**JUDGE**