



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 36 of 2005

G A O M.....PETITIONER

VERSUS

E T M.....DEFENDANT

JUDGMENT

G A O M petitioned the court to dissolve her marriage to E T M, on the ground of cruelty, whose particulars she gave in paragraph 7 of her petition. She also prayed for custody of the only child of the marriage, I. O. M. There was a further request to the court, to condemn the respondent with the costs of the petition.

The respondent was served with the petition and all other relevant documents. He entered appearance through Messrs Ochieng, Onyango, Kibet and Ohaga advocates, but subsequently filed no answer.

The Deputy Registrar certified the cause “**undefended**” on 15th February 2007. The petitioner, a make up artist who also works in film production and print media, got married to the respondent on 28th June 2001 at the Office of the Registrar General in Sheria House, Nairobi.

A certified copy of the Marriage Certificate was annexed to the petition. The couple lived and cohabited as shown in para 2 of the petition, and they had one child, whose name and details appear in para 3 of the petition. The respondent is a citizen of the United States of America, who previously resided and worked in Kenya, but now resides and works in Mali.

Apart from the case involving the custody of Isaac the child herein, which was filed in the Children’s court in Nairobi, the couple have not had any divorce proceedings in this country, though the respondent filed such proceedings in the USA, which were subsequently dismissed.

G A O M does not live with her husband any more since sometime in 2003, and wants the marriage dissolved. In court during the hearing of the petition, she recalled that sometime in 2003, she had an assignment, a film shoot in Tsavo East. She had been gone from the matrimonial home for ten weeks,

with the permission of her husband, the respondent who remained with the baby.

G A O M had left one of the friends with a key to her house so that she could be checking on the baby during the day when her husband was at work. It was this friend who called G A O M and informed her that she was unable to get into the house as she was stopped by security guards at the entrance.

G A O M found this unusual and immediately traveled back to Nairobi, arriving at about 9.00 p.m. on 9th March 2003. She got into the house and was shocked to find it empty! Both her husband, the baby and the house girl were not present. She learnt that they had left on a Sunday evening about 3 or 4 days before she arrived. She noticed that her husband's personal belongings plus those of the baby were missing, as well as her own passport. She immediately suspected that they might have gone to the USA, his homeland.

G A O M called the respondent's mother in USA, and informed her of what had happened. To her surprise, her mother in law simply said that she did not want to get involved. G A O M suspected that she knew where her son and the baby were, so she sought legal advice, and in the meantime, her husband called her after 11 days to confirm that he was indeed in the USA with the baby. She asked for the phone contact, which he gave her, and from then onwards, she used to call every now and then to find out about the baby. This went on for about 3 months by which time, her lawyer in Kenya filed a case in the Nairobi Children's court, seeking custody of the baby. The court gave her temporary custody, though the baby was not physically in Kenya. She produced the court order in court as a exhibit.

The respondent's home is in San Francisco, in California. G A O M checked a website in that city, acting on information she had received from her sister and discovered that her husband had filed a case against her and the same was to be heard within the course of that week, yet she had not been served with any documents. She nevertheless managed to identify and engage a lawyer, who appeared for her in that court in San Francisco, California.

G A O M was finally served, through Daly and Figgis advocates in Nairobi, with a petition for Divorce filed by her husband in San Francisco. He was also praying for custody of Baby I. The Divorce Cause was filed in that court on 27.3.2003 she produced a copy to summons as an Exhibit.

The cause proceeded for hearing in the San Franciscan court, and a decision was pronounced by a Judge on 3.7.2003. The orders of the court read,

- 1. The Summons issued in dissolution action FDI – 03 – 753336 shall be quashed as the Court does not have personal jurisdiction over G A O M.**
- 2. The Petition for Dissolution filed herein on March 27, 2003 is dismissed. Pursuant to Code of Civil Procedure Section 418.10, California is an inconvenient forum and Kenya is the more appropriate forum.**
- 3. The Court declines to take emergency jurisdiction under the UCCJEA regarding custody of the minor child, I. O. M. (born February 22,2002) for purposes of entering temporary emergency custody order.**
- 4. The June 25, 2003 Order from the Children's Court at Nairobi, Children's Case No. 58 of 2003 is registered and is to be enforced as an Order of this Court.**
- 5. E T M is ordered to appear and to produce the minor child, I. O. M. in Children's Court at Nairobi, Republic of Kenya**

July 7, 2003.

Fortunately for G A O M, the Court in San Francisco decided the case in her favour, and the Baby was finally returned to Kenya on 7.7.2003 at 2.30 p.m., and given to her at the 680 hotel in Nairobi.

G A O M stated that the process of her child being abducted by her husband, and being taken away to the USA without her knowledge or consent affected her adversely and emotionally. She described it as a “traumatic experience” as “her child learnt how to walk”, and she did not see him take those first steps. She described this as “most painful”.

Again, she missed her baby. Apart from the emotional feelings, the whole exercise of trying to get her baby back was very expensive as she had to pay for court litigation both in Kenya and in the USA! The case in California cost her almost Kshs.2.5 million. She had to raise funds through a fundraising exercise. She also had to sell her car to raise further funds for the court battles to get the baby back.

G A O M described her husband’s behaviour in abducting the baby as “**sudden**”. She did not see it coming and had not prepared for it. She was forced to work long periods of time away from home because her husband was not supporting her and the baby. His taking the baby and returning to the USA, came to her as a complete “**shock**”, and even today, he has never explained why he acted the way he did.

The Children’s Court in Nairobi recorded consent orders between the parties on 2nd April 2007, before Mrs. Judy E. Ragot, Senior Resident Magistrate, as she was then.

One of the orders recorded was that, “**Defendant (E T M) shall undertake to pay school fees, transport, medical and Kshs.15,000/= towards child maintenance**”.

Since the above orders were made, the respondent has been paying the Child’s school fees regularly, not before that. G A O M stated that since the respondent abducted the Baby in March, 2003, returned him in July 2003, through a court order, he has never resumed cohabitation with her. She recalled that he used to abuse her verbally during the marriage calling her a prostitute in front of her mother. He also alleged that she was ignorant and could not look after the Baby.

The insults were painful and degrading, to say the least, according to Gillianne, and she has not condoned the cruelty suffered at her husband’s hands, neither has she connived or been accessory to it. She lamented that her marriage to the respondent has broken down due to his cruel behaviour and conduct, and she would not want to resume cohabitation with him, hence her prayer for dissolution of the said marriage.

Before concluding her evidence G A O M withdrew the prayer for alimony in the petition, as she said she can support herself.

M/s Judy Thongori filed written submissions which now form part of the proceedings herein. I have read and considered them along side the petitioner’s oral evidence.

From all this I have come to the considered conclusion that indeed this marriage has irretrievably broken down due to the respondent’s cruelty shown in the most callous manner by “**abducting**” a barely one year old Baby from his mother and running off with him to his homeland (USA) with no information to the Baby’s mother! As evidence shows, Gillianne got the Baby back to Kenya at a considerable expense, fighting court battles both in San Francisco, USA and Nairobi, Kenya. I admire G A O M’s courage and determination as a mother! She showed her great love for the Baby and the court’s in both countries appreciated this and awarded her custody.

Her evidence in this divorce cause remains unchallenged and I believe it and accept it as the truth.

By that evidence I am satisfied that she proved her case on a balance of probabilities and I proceed to grant an order dissolving the marriage solemnized on 28th June, 2001 at the Registrar General’s office, Sheria House, Nairobi, between **G A O M** and **E T M**.

Further, I order the respondent to pay the costs occasioned by this divorce cause.

And further still, I hereby proceed to adopt the terms of the consent order recorded on 2.4.2007 by Hon. J.E Ragot (Mrs) Senior Resident Magistrate, in the Children's Court, Children's Case No. 58 of 2003, as the orders in this case as concerns the issues of custody and maintenance on Baby I. O. M.

The consent order reads,

1. THAT custody of the child I O M herein, be and is hereby granted to both the plaintiff and the defendant.

2. THAT care and control of the child herein I O M be and is hereby given to the plaintiff with access to the defendant as follows:-

(a) Half of the school holidays and two weekends and one school week a month.

3. THAT the child should not be taken out of the jurisdiction of the court without consent of both parties or leave of the court.

4. THAT maintenance be as follows:-

(a) Defendant shall undertake to pay school fees, transport, medical and Kshs.15,000/= towards child maintenance.

(b) The plaintiff will take up rest of the child's maintenance.

5. THAT the defendant to pay the plaintiff costs as agreed in the sum of Kshs.185,000 within 60 days.

6. THAT each party be at liberty to apply.

Finally, I direct that the decree nisi for divorce do issue straight away today, and the same will be made absolute within a period of 30 days from today.

Dated at Nairobi this 19th day of July 2007.

JOYCE ALUOCH

JUDGE