



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**DIVORCE CAUSE 131 of 2006**

**SUSAN WANGECI KIRAGU..... PETITIONER**

**VERSUS**

**JAMES KENNETH MUHORO NDUNGU.....RESPONDENT**

**JUDGMENT**

On 20.09.06 the petitioner filed petition dated 20.09.06 praying for the following orders:-

- a) That the marriage between the petitioner and respondent be dissolved.
- b) That there be an order for joint custody of the children but the day to day care and control be granted to the petitioner.
- c) That the respondent continues to provide maintenance for the children.
- d) That other or further relief be granted.

The petitioner was represented in the divorce proceedings by learned counsel, Miss A.A. Okuta.

An affidavit by Denis Guto Masese sworn on 16.01.07 depones that on 26.09.06 he served the respondent with the divorce petition and he duly acknowledged service. The court record shows that the respondent did not file any answer to the petition and eventually the case herein proceeded as an undefended cause.

Only the petitioner testified before me in this case. This was on 27.09.07. She essentially reiterated the averments in her petition. She essentially reiterated the averments in her petition. There was no appearance for the respondent.

Salient facts pertaining to the cause may be summarized as under. The petitioner and respondent got married to each other on 24.08.99 at the Registrar's office, Nairobi under the Marriage Act, Cap.150. The parties then cohabited at Riaru Villas, in Nairobi. There were the following issues of the marriage:-

- a) Ndungu Muhoro aged 7 years as at 20.09.06.
- b) Kiragu Muhoro aged 5 years as at 20.09.06.

It was the petitioner's case that in July, 2003 the respondent left the matrimonial home without cause and has never returned to cohabit with her there. The petitioner invited the court to find that the respondent

has committed the matrimonial offence of desertion. The petitioner added that after the respondent's departure, she (petitioner) continued to live at the matrimonial home, i.e. Riara Villas but it later became a bit too expensive for her as she no longer had the benefit of the respondent's support towards maintenance of the home, so she moved to Hatheru apartments, also in Nairobi. From the time the respondent left the matrimonial home in July, 2003, he never got in touch with the petitioner at the said home until around the beginning of 2004 and that all he wanted was to find out how the children were. Thereafter the petitioner shifted to Hatheru apartments and the respondent went there only once, picked and took the children away for the day and returned them the same day. The petitioner told this court that on the day the respondent picked the children from Hatheru apartments, she asked him why he had deserted and he said he was not interested in discussing the subject with her and made it clear that all he was interested in was how the children were. Petitioner added that the respondent never spent a night at the Hatheru apartments and that she and respondent have had no sexual relationship since the respondent deserted; that she (petitioner) has not condoned or connived with or been accessory to the respondent's desertion. Petitioner also told the court that her petition has not been presented or prosecuted in collusion with the respondent and reiterated her prayers as reproduced hereinabove. It was the petitioner's belief that the respondent, who now works as a Consultant with the World Bank in Yemen, cannot come back and continue with the marriage. The petitioner said she is a Project Manager with UNICEF, Nairobi and earns Kshs.280,000/= per month and that all she wants the respondent to do is to continue paying school fees for the children while she has the day-to-day care of the children and to have joint custody of them with the respondent since he continues to pay their school fees.

I have given due consideration to the petitioner's case.

Section 8 of the Matrimonial Causes Act, Cap.152 provides in relation to desertion as follows:

**'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 desertion ascribed to the respondent started in July, 2003 while the present petition for divorce was filed on 20.09.06, i.e. after the 3 – year statutory period had elapsed. I find on the uncontroverted evidence of the petitioner, which I accept, that the offence of desertion has been duly proved and that the petitioner is entitled to the orders sought in her petition. Accordingly, I hereby pronounce a decree of divorce and order that the marriage between the petitioner and defendant be and is hereby dissolved. *Decree nisi* shall issue forthwith, the same to be made absolute after expiry of the statutory period of 3 months upon application therefor. The petitioner and respondent shall have joint legal custody of the children of their marriage but the petitioner shall have the day-to-day care and control of the children of the marriage. The respondent shall continue to pay fees for the children's education while the petitioner shall provide for their maintenance.

Orders accordingly.

**Delivered at Nairobi this 30<sup>th</sup> day of October, 2007.**

**B.P. KUBO**

**JUDGE**