



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Divorce Cause 67 of 2006

EVELYN KAHINJU KAMAU..... PETITIONER

VERSUS

PETER KAMAU MUIGAI..... RESPONDENT

JUDGMENT

On 15.05.06 the petitioner filed petition dated 02.05.06 praying for the following orders:-

- a) That the marriage between the petitioner and respondent be dissolved.
- b) That the respondent be ordered to provide adequate maintenance for the children of the marriage between the parties as this honourable court may deem fit and just to grant.
- c) That the respondent be ordered to pay maintenance or a secured provision to the petitioner.
- d) That the respondent be condemned to bear the costs of this cause.
- e) That such further or other relief be granted as will meet the ends of justice to the case.

The grounds relied upon for the petition are desertion and cruelty.

On 14.08.06 the respondent filed answer to the petition basically denying the wrongdoing ascribed to him by the petitioner.

On 04.09.06 the petitioner filed reply dated 01.09.06 to the answer to the petition essentially reiterating the accusations she had levelled against the respondent.

The petitioner was represented in these divorce proceedings by learned counsel, Mrs J. Thongori while the respondent was represented by learned counsel, Miss E.K. Kyungu at the initial hearing on 05.07.07. At the subsequent hearing on 27.09.07 the petitioner continued to be represented by learned counsel, Mrs J. Thongori while the respondent was represented by learned counsel, Mr M.P. Munge.

The petitioner and respondent testified before this court in support of their respective cases. Neither party called other witnesses.

Salient facts pertaining to the divorce proceedings may be broadly stated as under. The petitioner and respondent got married to each other on 02.01.87 at the Registrar's office, Nairobi under the Marriage Act, Cap.150. They cohabited as follows:-

- a) At Kasuku Road, Kilimani, Nairobi: 1988.
- b) At South C, Nairobi: 1989 – 1993.
- c) At Garden Estate, Nairobi: 1993 – 1998.

Two children, both boys, were born out of the marriage and cohabitation. These are:-

- a) Stephen Ngengi Kamau, born on 01.11.89 (now aged around 18 years).
- b) George Muigai Kamau, born on 14.10.94 (now aged around 13 years).

The petitioner currently works as Sales and Marketing Manager with Kigali Serena Hotel in Rwanda and resides there since October, 2004. Her current earnings are the equivalent of Kshs.105,000/= per month gross. It was the petitioner's evidence before this court that the respondent deserted her by asking her to leave the matrimonial home and that the marriage broke down because of many problems which she did not specify. She said that in May, 1998 the respondent telephoned her at her place of work and asked that they should meet. Both proceeded to Parklands Sports Club, Nairobi where the petitioner used to go for gym. The two of them met at the Club and respondent told her it was a waste for him to pay house rent for their Garden Estate residence as their marriage had broken down. Rent was due in June, 1998 and she had to look for an apartment within two weeks. She left the Garden Estate residence and the petitioner also left the said residence. Respondent never went to see the apartment the petitioner shifted to. Petitioner told the court that she suggested to the respondent that both of them should go to a marriage counselor but that the respondent refused. Petitioner said she and the children of the marriage lived alone in the apartment she found in May, 1998 and where she stayed until July, 2004. Petitioner said her original nationality was Ugandan; that she had come to Kenya with her parents to seek political asylum; that her parents eventually went back to Uganda but she remained behind in Kenya with the respondent whom she had married; that subsequently the respondent deserted her and that the desertion was painful to her. Petitioner reiterated the particulars of desertion contained in paragraph 7 of her petition, i.e. that in May, 1998 the respondent left the matrimonial home for no apparent reason and never resumed cohabitation with her and that the marriage had irretrievably broken down.

The petitioner acknowledged that prayer (b) for the respondent to provide adequate maintenance for the children of the marriage had been settled before the Children's Court. She reiterated prayer (c) that the respondent be ordered to pay maintenance or a secured provision to her. She said she had been married to respondent for 20 years; that she lived with him for 17 years; that she would like to be provided with a home for herself and the two sons in Nairobi, and that she asked for maintenance. Petitioner said that she does not live in Kigali out of choice, that she took up the job in Rwanda because it was difficult to get a job in Kenya as the industry in which she has been trained is very competitive and that if she gets secured provision she would come to live in Kenya immediately as in her view the children need her. It was the petitioner's evidence that in Kigali she stays in a 2 – bedroomed apartment and pays rent of the equivalent of Kshs.32,500/= per month; transport (taxi) equivalent of Kshs.10,500/= per month; food equivalent of Kshs.10,000/= per month; clothes, shoes and uniform equivalent of Kshs.20,000/= per month; telephone to the children in Kenya equivalent of Kshs.12,000/= weekly; and air travel to Kenya equivalent of Kshs.10,000/= per month.

The petitioner addressed next an issue raised by the respondent about a trip she made to the USA with the children of the marriage. The said issue was reflected at (b) under the sub-heading 'Desertion' in the respondent's answer to petition as follows:

'(b) The petitioner left the country for the United States of America together with the issues of the marriage and misled the respondent that they would return after a family reunion only to call from

the said country and indicate that they would not return causing the respondent to take the earliest flight available to the said country for the issues of the marriage hence causing the respondent untold loss, suffering and pain.'

The petitioner's response was basically that in July, 2004 her brother in the USA was marrying; that the petitioner, respondent and other family members were invited for the wedding; that the petitioner sought the respondent's assistance in getting a Visa to go to the USA; that she did not run away; that the respondent telephoned the children while in the USA on weekly basis and that his mother and sister did likewise.

The petitioner said in her evidence-in-chief that when she and the respondent lived together, the respondent met household needs; that after the two of them separated, the respondent agreed to pay rent for the apartment she and the children lived in at Kshs.28,000/= per month; that the respondent gave her Kshs.40,000/= per month; and that the respondent paid for the children's education. It was the petitioner's evidence that the respondent's family owns Blueshield Insurance and Cameo Cinema in Nairobi and that the respondent is part and parcel of the family business.

The petitioner reiterated her prayer for costs.

The following may be highlighted from the petitioner's evidence during her cross-examination by respondent's counsel. The petitioner took a Certificate Course in Tours and Travel Agency Operations at the Kenya Utalii College and graduated in 1985. She took up jobs with different private institutions here in Kenya. The first job was in 1987 with the United Touring Company (UTC) where she was earning Kshs.12,000/= per month. She was in that job until 1995 when she joined Safari Park Hotel at Kshs.12,000/= per month. She was laid off in June 1998 when she separated with the respondent. In August, 1998 she joined Sarova Hotels at Kshs.30,000/= per month gross and stayed there until 2001 when she joined Grand Regency Hotel at Kshs.50,000/= per month until the end of 2002 when she joined Regional Air at Kshs.85,000/= per month. She was laid off by Regional Air one year after joining when Regional Air closed down. Thereafter she started small business, e.g. buying and selling clothes and shoes. In October, 2004 she went to work in Kigali as already recorded. She acknowledged that the respondent took care of rent, maintained and educated the children, paid house rent and other household expenses; and that her earnings went into her own expenses, i.e. that she spent her salary on herself. Petitioner acknowledged having contributed to the breakdown of the marriage. During her re-examination by her own counsel, the petitioner clarified that she contributed towards the breakdown of the marriage in that she was not insistent enough in seeking help from outsiders, e.g. family members and marriage counsellors.

The respondent also testified in these proceedings and confirmed that he and the petitioner got married on 02.01.87 and that the two of them got two children as stated by the petitioner. He and the petitioner separated in 1998 and that he has stayed with the children without their mother for the last 2 – 3 years and that the petitioner does not assist in meeting the basic needs of the children but he (respondent) meets all the needs of the children. The first son is in Form 5 as a boarder at Brookhouse High School in Langata, Nairobi where the respondent pays school fees of Kshs.480,000/= per term for him. The boy plans to go to University, probably in the United Kingdom (UK), to study Law and that he (respondent) is working hard to enable the son realize his dream. The second son is in the same school in his eighth year and is a day scholar. Respondent pays Shs.290,000/= per term for him and he is equally committed to ensuring this son also realizes his dream. The respondent reiterated that he does not recall the petitioner offering any financial assistance towards the children's education. The respondent told the court that the petitioner was working when she and him were living together; that she would buy things needed for the home but that he met the bulk of all expenses and that after the petitioner left, the whole burden fell on him. The respondent confirmed that the issue of custody was determined at the Children's Court, Nairobi and that both himself and the petitioner were given joint legal custody. He stays with the children in Nairobi while the petitioner works and resides in Kigali, Rwanda. Petitioner's mother was Rwandese married to a Ugandan. Petitioner has aunties in Rwanda. Respondent did not see any possibility of the

marriage between him and petitioner coming back together.

The following highlights may be given of the respondent's testimony during his cross-examination. He lives in a 4 – bedrooled rented house with the children in Kileleshwa, Nairobi for which he pays rent of Kshs.100,000/= per month. He acknowledged also living with a lady friend called Wangari. He is in the business of buying and selling commodities and also prospects, i.e. buys and sells shares on the stock market. He trades under a business name and drives a V W Passat. He believes his responsibility is the future of the children and that the children's future is more important than his own present or the present of the petitioner. He pointed out that the petitioner works for gain but she does not assist him in securing the children's future. It was his belief that the petitioner should not curtail whatever he is doing to secure the future of the children. Respondent said the petitioner comes to visit the children in Nairobi from time to time and the respondent did not see any need to facilitate the petitioner's coming to Nairobi by paying her maintenance. While the respondent acknowledged that the children would benefit if they spent more time with the petitioner, he maintained that the responsibility for the children to spend more time with the petitioner is hers. He said he is already struggling to cater for the needs of the children and to add another burden on him, i.e. maintaining the petitioner, would curtail his efforts to secure the children's future.

The respondent acknowledged that before the children joined Brookhouse School they were attending Mount Kenya Academy in Nyeri. There the respondent was paying fees of Kshs.180,000/= per term for the first son and Kshs.90,000/= per term for the second son. The sons were boarders. Respondent said he moved the children from Mount Kenya Academy in Nyeri, which was cheaper, to Brookhouse School in Nairobi, which is more expensive, because they were quite unhappy at Mount Kenya Academy. The respondent said he could not deny that his fortunes are improving but maintained that he is struggling to improve. Respondent said he tries to take holidays with the children when he can; that during August 2007 school holidays the second son was invited to the UK by his aunt, i.e. respondent's sister married there, and the respondent paid for the boy's air travel. About the same time the first son traveled to Rwanda to see his mother (petitioner) and the respondent paid for this son's air travel also. Asked whether he had asked the petitioner for maintenance expenses for the family, the respondent answered:

'I have never asked petitioner since we separated to help me with maintenance expenses for the family. It is a responsibility for both of us, neither of us should wait to be asked by the other to help.'

The respondent confirmed that he asked the petitioner that the two of them should separate around 1998 as they were having problems and the respondent felt it was good for them to separate. Like the petitioner, the respondent did not give details in his oral testimony of the problems he was alluding to but the court notes from paragraph 6 of his answer to petition that he alluded to the petitioner's adultery, desertion, cruelty and denying him conjugal rights, among other actions. The petitioner denied the accusations and it is not lost on the court that petitioner's counsel in cross-examining the respondent got him to acknowledge, which he did readily, that he is living with another woman.

The last matter to be highlighted with regard to the respondent's testimony during his cross-examination relates to the petitioner's trip to the USA. The respondent told the court on 27.09.07 that about 3 - 4 years back, the petitioner left Kenya with the children to go and visit her siblings whom the children had not known. The respondent consented to the visit. Petitioner and the children stayed in the USA for about 3 weeks during the visit. Towards the end of the 3 weeks the petitioner telephoned the respondent from the USA to announce that she and the children were not returning to Kenya and that the petitioner's brothers would take care of the children. That prompted the respondent to take the next flight to the USA to get the children. It was the respondent's evidence that the petitioner had not made known to him before leaving Kenya with the children for the USA trip that she (petitioner) had no intention of coming back to Kenya with the children. The respondent said the trip to the USA was very expensive and that he travelled there with the single purpose of getting the children back to Kenya. He said that although the petitioner's siblings were hospitable to him while he was in the USA, which visit lasted some 3 – 4 nights, they made him sign an agreement that he should take care of the petitioner, buy her a

house in Nairobi and pay her a lot of money – more money than he was earning. Respondent said he could not remember the figure demanded as he was not paying much attention to what was being demanded of him. His recollection of the demand as at the time he was testifying before this court was that he was required to buy the petitioner a house and pay her maintenance in the region of about Kshs.200,000/= per month. Respondent said that he was made to sign the agreement in some Bank and that he signed it to be able to take the children back to Kenya, otherwise he had no intention of complying with its requirements as it was in his view in bad faith and also unaffordable. It was the respondent's case that he signed the agreement under duress to enable him to bring the children back to Kenya, which he did after signing the said agreement. The agreement was not availed by the petitioner to this court.

During the re-examination, the respondent told the court that the petitioner never consulted him about going to work in Rwanda. Respondent said the petitioner's father is Ugandan while her mother, who has since died, was Rwandese and that the petitioner's mothers sisters are in Rwanda. Respondent told the court that when his children wanted to move out of Mount Kenya Academy, he had no reason to deny them their wish to change schools as they were unhappy at Mount Kenya Academy. It is the children themselves who asked to change to Brookhouse School in Nairobi and the respondent granted them their wish. The respondent's concluding remarks were as follows:

'I signed the agreement in us to make sure my children would come back to Kenya with me. I could not afford the terms of the agreement. I had no intention of complying with the terms; it was made in bad faith on the petitioner's part; no goodwill on petitioner's part; and I could not afford its terms. Before petitioner left for US with the children, for her brother's wedding, I never knew she had no intention of coming back, all her intentions made known to me was (sic) for her to come back. I left very bad when she telephoned to announce she and our children were not coming back.'

The parties' Advocates compiled and filed written submissions which they adopted.

I have given due consideration to the parties' rival pleadings, evidence and submissions. I have recorded highlights of the evidence adduced in considerable detail and this last part will concern itself only with findings arising from the evidence and my appreciation of the parties that testified before me.

This is a sad case and the court has the unenviable task of making hard decisions.

For starters, I accept the respondent's evidence that he signed the purported agreement in the USA under duress. I find that he had either to sign the said agreement or risk having to resort to expensive litigation there for release of the children to him. That is blackmail of a high order I discard the purported agreement.

The petitioner told this court that the respondent just decided one day in May, 1998 to telephone her at her place of work and arranged a meeting with her at Parklands Sports Club and there the respondent announced that he and the petitioner should separate. No evidence was adduced before this court that the respondent gave reasons for his announcement. The petitioner told the court that she asked the respondent that both of them should go to a marriage counselor but that the respondent refused. The two duly separated in May, 1998 and have lived apart ever since. I accept the petitioner's evidence on this point, which in any case was confirmed by the respondent, and find that the respondent committed constructive desertion. It appears that the petitioner is treating the same act of desertion also to prove cruelty. Since one matrimonial offence is sufficient for purposes of dissolution of marriage, I find it unnecessary in this case to get involved in considerations of the matrimonial offence of cruelty.

As between the petitioner and the respondent, I am of the clear view that the petitioner is more concerned about her own comfort than that of the children of the marriage between her and the respondent. She conceded that her own earnings were directed towards her own expenses. The respondent told this court, in fairness to the petitioner, that although the petitioner would buy some things needed for the home when the two of them live together, the bulk of all expenses were met by him. The petitioner would do well to remember the Kiswahili saying:

‘Kutoa ni moyo, si utajiri’

which may loosely be translated to mean: giving takes a big or generous heart, not wealth.

It seems clear that the petitioner and respondent had marital problems. The parties did not come out with details of their problems but the fact that they parted ways in 1998 and have not been able to patch up their differences and come together all these years indicates that their marriage has irretrievably broken down. From the evidence on record, the respondent has been shouldering the entire responsibility of catering for the needs of the children. The petitioner contributes nothing. What she earns is for herself only. I note that after the respondent and petitioner parted ways in 1998 and while the petitioner stayed with the children in a Nairobi apartment, the respondent paid the rent of Kshs.28,000/= per month for the apartment and gave the petitioner Kshs.40,000/= per month, in addition to him (respondent) meeting the children’s educational needs. Now the respondent caters for the entire needs of the children, plus his own needs, of course. I agree with the respondent that the future of the children should be central to the aspirations of both parents. As between the two warring parties, I find the respondent to be more genuinely concerned than the petitioner about the future of the children and that the respondent is struggling to improve his own financial status so that he can in turn also cater for a better future for the children. The respondent’s efforts deserve to be supported and encouraged, not to be curtailed by selfish interests. No evidence has been adduced to establish actual earnings of the respondent. The only indication is that he is doing well, judged by the high fees he pays for the two children of the marriage, the high rent he pays for his Kileleshwa, Nairobi residence and the trips he has financed to enable the second child to visit the UK and the first child to visit the Rwanda during the August, 2007 school holidays. But the respondent has told the court essentially that he has been struggling to improve his financial status so that he can also secure an improved future for the children. That is as it should be .

Having regard to all the foregoing, I am of the considered view that only a token maintenance figure payable by the respondent to the petitioner would meet the ends of justice in this case. I note that the issue of maintenance of the children raised vide prayer (b) of the petition has already been settled at the Children’s Court. I make the following orders:-

1. Prayer (a) is granted and I pronounce a decree of divorce and order that the marriage between the petitioner and respondent be and is hereby dissolved. Decree nisi shall issue forthwith, the same to be made absolute after expiry of the statutory period of 3 (three) months upon application therefor.
2. Prayer (b) for provision of maintenance of the children is declared as spent.
3. Prayer © is granted to the extent that the respondent is ordered to pay maintenance to the petitioner in the sum of Kshs.45,00/= (forty – five thousand) per month.
4. Prayer (d) for costs is granted and the respondent ordered to pay the petitioner’s costs of these divorce proceedings.

Orders accordingly.

Delivered at Nairobi this 30th day of November, 2007.

B.P. KUBO

JUDGE