



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

**Divorce Cause 2 of 2006**

**SM.....PETITIONER**

*versus*

**DWM alias DWMM .....RESPONDENT**

**J U D G M E N T**

By an amended petition dated 14<sup>th</sup> September, 2007 and filed in court on 17<sup>th</sup> September, 2007, the petitioner **SM** seeks the dissolution of his marriage to the respondent **DWM** alias **DWMM** on the grounds of cruelty and desertion. The petitioner and the respondent were apparently married in Tlokweng court in South East District of Botswana on 28<sup>th</sup> October, 1993 by virtue of the marriage proclamation, Cap 144 Laws of the Republic of Botswana. The petitioner is Ugandan whereas the respondent is Kenyan. Both after the celebration of the marriage lived and cohabited in Botswana until January, 2001 when the petition relocated to Kenya. Indeed at the time of presenting this petition the petitioner had his usual residence in Kenya and was indeed domiciled in Kenya, as a teacher at [PARTICULARS WITHELD] in Nyeri District. There is only one issue of the marriage though namely **HMN** born in 1995.

When the petition was filed and subsequent thereto served on the respondent, the respondent did not bother to enter appearance nor file an answer to the same. Accordingly the petition proceeded to hearing before me as uncontested.

Indeed directions in that regard were given by this court on 5<sup>th</sup> March 2007. In support of the petition, the petitioner testified as follows: That he was a Ugandan. He is the head teacher at Mt Kenya academy by virtue of an entry permit No.845945. That he was now domiciled in Kenya since 2001. That the respondent was his wife having married her in Botswana on 28<sup>th</sup> October, 1993. He seeks dissolution of the marriage on the grounds that since October 2004, the respondent deserted him and proceeded to Botswana and have never met and or cohabited as man and wife since then.

Further the petitioner testified that the respondent has been cruel to him. She does not talk to him and that the fact that she surreptitiously left the matrimonial home for Botswana without his permission or consent is cruel enough. To the petitioner the marriage has irretrievably broken down and cannot be salvaged. Finally the petitioner testified that since 2004, he has been denied by the respondent his conjugal rights. In bringing this petition, it was the evidence of the petitioner that he did not connive and or collude with the respondent.

As already stated, this cause was heard as uncontested. Accordingly the evidence tendered by the petitioner in support thereof is largely unchallenged and uncontroverted. I have nothing to lead me to doubt the evidence. It is credible. For a petitioner to successfully dissolve a marriage on the ground of desertion, he must satisfy the court that the respondent deserted him without cause for a period of at least three years immediately preceding the presentation of the petition.

In this case there is uncontroverted evidence that the respondent deserted the petitioner sometimes in October, 2004. This petition for divorce was however presented in court on 6<sup>th</sup> October, 2006. That is hardly three years. Infact it is exactly 2 years. That being the case, the petitioner cannot succeed on this ground.

How about cruelty? I think for a wife to relocate to another country without the permission and consent of her husband is certainly cruelty of the highest order. In the circumstances of this case, the respondent surreptitiously left for Botswana without as much as telling her husband her intentions. She left with the only child of the marriage and since then she has never talked to him. Obviously the petitioner must be undergoing serious mental torture. For one to be unable to talk to her loved ones for years on end smacks of deliberate and unmitigated mental torture. It is certainly too cruel. I am aware that the standard of proof in a petition for divorce based on the ground of cruelty is higher than on the balance of probability but is not as high as in criminal cases i.e. proof beyond reasonable doubt. In the circumstances of this case and on the unchallenged evidence of the petitioner I am prepared to believe and to hold that he has been able to prove to the required standard that the respondent has been cruel to him by escaping to Botswana with the only child of the marriage against his wishes and without his permission or consent. That happened 2 years ago. I believe that the marriage has irretrievably broken down. It is now a shell. It is only fair that the petitioner be released from his anxiety of pretending to preserve a non-existent marriage.

Accordingly, I would allow the petition for divorce on the ground of cruelty. A decree Nisi shall forthwith issue to be made absolute in the normal manner. There shall be no order as to costs. The issue of custody was not canvassed before me and that being the case I will not make any orders as regards the same.

**Dated and delivered at Nyeri this 5<sup>th</sup> day of November 2007.**

**M.S.A. MAKHANDIA**

**JUDGE**