



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**DIVORCE CAUSE 136 OF 2006**

**G. N. K.....PETITIONER**

**VERSUS**

**J. W. M.....RESPONDENT**

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

On 25.09.06 the petitioner filed petition dated 22.09.06 praying for the following order, namely:

**THAT the marriage between the petitioner and the respondent be dissolved and the petitioner be granted a divorce.**

The grounds upon which the petition is based are cruelty and desertion.

There is in the court file a notice to appear addressed to Jane Wanjiru Mwangi purporting to be dated 28.09.06 but filed on 25.09.06, i.e. some 3 days earlier! There is also an affidavit of service by one Richard K. Wachira sworn on 24.04.07 to the effect that he served the divorce papers on the respondent. The affidavit bears 2 Nairobi High Court rubber stamp impressions, i.e. 26.04.07 and 30.05.07. Such rubber stamp impressions ordinarily signify date of filing. In this case the question arises whether the affidavit was filed on 26.04.07 or 30.05.07. As there is a receipt dated 26.04.07 for fees paid for affidavit of service, I take the earlier date to be the date of filing of the affidavit of service, although the year looks suspect. Paragraph 2 of the affidavit of service depones that on 03.10.07 the process server received Notice to Appear, Petition, Verifying Affidavit and copy of Marriage Certificate between the parties hereto and that the process server served these documents on the respondent, who is a police officer, on 02.04.07. It is not practically possible for the divorce papers served upon the respondent on 02.04.07 to have been received by the process server on 03.10.07, i.e. some 6 months ahead of being received by the process server! I take it that the process server received the divorce papers on 03.10.06 and that he eventually served them upon the respondent on 02.04.07. Paragraph 8 of Richard K. Wachira's affidavit of service is to the effect that when he served the divorce papers upon the respondent on 02.04.07, she accepted service but told him to tender the documents to her advocate and that when the process server insisted on serving the documents on the respondent, she was furious and refused to sign the process server's copies and proceeded to tear the copies the process server had tendered to her. The respondent filed no answer to the petition and this matter subsequently proceeded as an undefended cause. I am satisfied that the respondent was duly served but filed no answer to the petitioner.

Salient facts pertaining to the petition may be summarized as under.

The petitioner and respondent got married to each other on 03.11.95 at the office of the Registrar of

Marriages, Nairobi under the Marriage Act, Cap 150. The parties cohabited at Kasarani Estate, Nairobi. Two children, J. W. and M. W. were born out of the parties' union and cohabitation. The ages of the children have not been given.

As already intimated, the grounds relied on for the divorce sought are cruelty and desertion. With regard to cruelty, it is the petitioner's case that the respondent is a person of uncontrollable temper and rage and that when in such a bout she will hurl insults in all directions without provocation and that she has been abusive and insulting to the petitioner and his parents. The petitioner averred that on various occasions the respondent told him to his face that he is not the father of the two children born out of the marriage, which the petitioner says caused him great mental anguish and distress. The petitioner also averred that at one time after the marriage, the respondent went to the petitioner's father to demand a share of the petitioner's parents' *shamba* in the petitioner's absence and without informing the petitioner, thereby picking a quarrel with the petitioner's parents. The petitioner complained that if he gave the respondent money, for domestic use, she would take it to her parents and if he asked questions about it, she quarrelled with him. It is also the petitioner's case that since the birth of the children, the respondent has forbidden the children from taking food prepared by the petitioner's mother, thereby humiliating both the petitioner and his parents before the children. The petitioner has also averred that when he was hospitalized in or about the year 2002 due to depression, the respondent refused to visit him in hospital and only visited him after 3 days following pressure from the petitioner's friends. Finally, the petitioner complained that the respondent has denied him conjugal rights, thereby causing him great humiliation, pain and mental anguish.

Regarding particulars of desertion, the petitioner, *inter alia*, averred as follows:-

**'a. THAT, since the year 2000 the respondent has denied me her society and companionship as a wife and mother of our children.**

**b. THAT, on or about 2004 while I was on *safari* working at the Coast the respondent deserted the matrimonial home and has not been back since then carrying away all the household goods leaving the house empty.**

**c. THAT, on or about May 2000 the respondent moved all her belongings from our bedroom to the children's bedroom where she spends and or on the sofa set.**

**d. THAT, during subsistence of the marriage the respondent would days on end, desert home and go on drinking sprees with friends.'**

The petitioner's parting shot is that the respondent is a habitual drunkard or of erratic mind and grossly lacking in love and responsibility.

I have given due consideration to the petition, its verifying affidavit and the petitioner's oral evidence tendered before this court.

With regard to the ground of desertion, the petitioner does not seem to have made up his mind as to when it actually took place. While the respondent's alleged 2000 action of denying the petitioner companionship or conjugal rights as pleaded in particular (a) above may constitute cruelty, it does not of itself without more constitute desertion, not even of the constructive kind. At particular (b) above, the petitioner makes a categorical averment that the respondent deserted in or about 2004. He does not state exactly when in 2004 the respondent allegedly committed the act of desertion. Note should be taken that for the matrimonial offence of desertion to be committed, it should by virtue of section 8(1) (b) of the Matrimonial Causes Act, Cap 152 have occurred at least 3 years immediately preceding the presentation of the petition for divorce. The petition for divorce in the present cause was filed on 25.09.06. If we take 2004 as the date of desertion as specifically pleaded, there are only about 2 years to the alleged act of desertion. I have already indicated that the alleged act of 2000 of the respondent denying the petitioner companionship or even conjugal rights does not necessarily constitute desertion. It was incumbent of the petitioner to attach a specific date for the desertion pleaded and provide concrete evidence of its

occurrence and to demonstrate that it occurred at least 3 years immediately preceding the filing of the petition for divorce. The petitioner has failed to establish that the requirements of section 8(1) (b) of the Matrimonial Causes Act have been met. Accordingly, the ground of desertion fails and the same is hereby dismissed.

I now advert to the ground of cruelty. It will be recalled in this regard that the petitioner gave concrete instances of the respondent's acts which if unchallenged would clearly establish legal cruelty. The respondent did not deem it fit to file any answer to the petition and counter the very serious allegations levelled against her. The petitioner's accusations remain uncontroverted and I accept his evidence thereon. The matrimonial offence of cruelty has in my view been proved to the satisfaction of the court. Accordingly, I hereby 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. As no other prayers have been made, no other orders are made.

Orders accordingly.

**Delivered at Nairobi this 14<sup>th</sup> day of December, 2007.**

**B.P. KUBO**

**J U D G E**