



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (Milimani Law Courts)

DIVORCE CAUSE 118 OF 2006

N.M..... PETITIONER

VERSUS

V.K..... RESPONDENT

JUDGMENT

On 21.08.06 the petitioner filed petition dated 10.08.06 seeking the following orders:-

- a) That the marriage between the petitioner and respondent be dissolved.
- b) That the petitioner be granted joint custody of the children of the marriage, namely, Ian Silla Mutuku and Lisa Wanza Mutuku.
- c) That the petitioner be granted equal care and control of the children herein.
- d) That the respondent be condemned to bear the costs of this cause.
- e) That this honourable court be pleased to grant any further or other relief that it may deem fit and just to grant in the circumstances.

By affidavit of service sworn on 05.09.06 and filed on 23.10.06, Willy Mwendwa Velle, process server deponed that on 25.08.06 he proceeded to Kenya Pipeline's Department of Planning in Industrial Area, Nairobi where he understood the respondent to be working with a view of serving her with the divorce papers in this cause. It was the process server's affidavit evidence that as he was making enquiries at the reception the respondent appeared from offices upstairs accompanied by a male member of staff. The receptionist called the respondent and told her she had a visitor, i.e. the process server. The process server averred that the respondent enquired from a distance as to who the visitor was, whereupon the process server asked her to confirm her identity, which she did. The process server then made his mission known to the respondent who brushed him off. The process server made three other visits to the respondent's offices, on 26.08.06, 28.08.06 and 30.08.06 with

a view to serving her with the court process but the process server was always told that the respondent was busy in the conference room. Eventually the process server proceeded to the respondent's residence

on 02.09.06 at the Kenya Pipeline Staff Houses in Embakasi, Nairobi House No.7 where she resides. The process server got to the respondent's residence at around 9.00 a.m. and was told by her children that she had left early in the morning saying she would be back after an hour. The process server waited until 11.45 a.m. but the respondent never showed up, whereupon the process server affixed a copy of the divorce petition and notice to appear on the front door of the respondent's house in the presence of her son, S.M and left. The respondent never filed answer to the petition and this matter eventually proceeded as an undefended cause.

The petitioner was represented in these divorce proceedings by learned counsel, Mrs J. Thongori.

Salient facts pertaining to the petition may be summarized as under. The petitioner and respondent got married to each other on 22.08.97 at the office of the Registrar of Marriages, Nairobi under the Marriage Act, Cap.150. They cohabited at Kilimani Estate, Nairobi. Two children were born out of the parties' union as follows:-

- a) I.S.M born in 1992 (now aged about 15 years);
- b) L.W.M, born in 1995 (now aged about 12 years).

The petitioner is an Advocate of the High Court of Kenya and works as a Legal Officer with the City Council of Nairobi. The respondent works as a Planning Officer with the Kenya Pipeline Company Ltd in Nairobi.

Regarding desertion, it was the petitioner's case that on 07.02.98 the respondent, for no reasonable or justifiable cause, deserted the matrimonial home and has not resumed cohabitation or conjugal relations with the petitioner ever since.

On the issue of cruelty, the petitioner's case was as follows:-

- a) That during cohabitation of the parties, the respondent used to drink excessively and would come home late and thereby deny the petitioner and the children consortium.
- b) That the respondent wasted family resources as a result of the excessive drinking.
- c) That the respondent used to verbally and physically abuse the petitioner, especially after her drinking sprees.
- d) That the respondent's said actions have caused the petitioner mental anguish and suffering.

It was the petitioner's case that the marriage between him and the respondent has irretrievably broken down.

Paragraph 6 of the petition discloses the following:

'6. There have been previous proceedings with reference to this marriage being Divorce Cause No.62 of 2001 which was dismissed on 13th December 2002. There has also been a Separation Cause No.57 of 2004 which suit has since been withdrawn.'

All the petitioner in the present cause told this court about the previous proceedings alluded to in paragraph 6 of his petition is that the petitioner in Divorce Cause No.62 of 2001 is the respondent in the petition now before this court while he the present petitioner was the respondent in Divorce Cause No. 62 of 2001. The present petitioner produced a certified copy of the judgment in Divorce Cause No.62 of 2001. It is very brief and does not narrate the facts in that cause. All it does is to remark that the evidence in support of the petition for divorce as adduced by the petitioner is as weak as the evidence

adduced by the respondent in support of his cross-petition for divorce. The learned Judge in Divorce Cause No.62 of 2001 proceeded to dismiss both the petition and the cross-petition in their entirety and ordered each party to bear his or her own costs. The proceedings in divorce Cause No. 62 of 2001 were not produced before this court and I shall say nothing more about them.

With regard to Separation Cause No.57 of 2004, the petitioner in the present cause told this court that he filed that separation cause and later withdrew it vide his notice dated 08.08.06 which he produced as Petitioner Exhibit 3. It shows that he as petitioner had cited Victoria Kitundu, i.e. respondent in the present cause, as the 1st respondent and one C.M as the 2nd respondent. That implies that he, Newtown Mung'alla as the petitioner in Separation Cause No.57 of 2004 had accused the 1st respondent and the 2nd respondent in that separation cause of committing adultery between themselves. The petitioner in the present cause did not tell this court why he withdrew Separation Cause No.57 of 2004 and I shall say nothing more about it.

The present petitioner told this court that since the dismissal of Divorce Cause No.62 of 2001 in December, 2002, he and the present respondent have never lived together.

I asked petitioner's counsel in the present cause to address the issue whether the principles of *re judicata* might apply to the present divorce proceedings in view of the dismissed previous proceedings in Divorce Cause No.62 of 2001 between the same parties, although their roles have been reversed in the present cause. Petitioner's counsel in the present cause submitted, firstly, that the parties' previous attempts to have their marriage dissolved exhibits that the marriage has completely broken down. Secondly, that dismissal of both the petition and cross-petition in Divorce Cause No.62 of 2001 is no bar to the present divorce proceedings. In support of that position, the present petitioner's counsel cited paragraph 686 of Halbury's Law of England, 14th Edition, Volume 13 sub-titled 'Estoppel and duty of the court.' Counsel also cited Bernard -vs- Bernard [1958] 1 W.L.R. 1275 in support of her same position.

I have given due consideration to the petition in the present cause, the evidence adduced and the authorities cited.

I note from Bernard's case (*supra*) that in February, 1956, the wife filed a petition for divorce on the ground of the husband's adultery with two named women and sought the exercise of the court's discretion in her favour. The husband, by his answer, repeated the charges of adultery and desertion made in his previous petition and also asked for the exercise of the court's discretion. At the hearing of an issue to determine whether the husband was estopped from repeating the charges contained in his petition, and whether the wife was precluded from denying desertion prior to that petition, the Probate Divisional Court held:-

'That the principle that once a matrimonial offence had been litigated and decided by a competent court neither party could claim as of right to re-open the issue, did not prevent a party repeating a charge in which he had already been successful; the husband was, therefore, entitled to repeat the charge of adultery in his answer. As to the charge of desertion, no adjudication which would support a plea of estoppel had been made and the husband could, therefore, repeat that charge in his answer and the wife deny it in her reply.'

In the present divorce proceedings, no evidence was formally adduced as to what the charges in Divorce Cause No.62 of 2001 between the same parties, in reverse order, were. This court does not, therefore, know whether the charges in Divorce Cause No. 62 of 2001 are or are not comparable to the charges in the present Divorce Cause No.118 pf 2006. Therefore Bernard's case is of no specific assistance to this court in the present cause.

With regard to the subject of estoppel and the duty of the court in relation thereto, I take due note of the following observations in paragraph 686 of Halbury's Laws of England (*supra*):

‘686. Estoppel and duty of the court. The principles of *res judicata* apply to matrimonial causes subject to the qualification that it is the statutory duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner, and into facts alleged by respondent which are properly before it; and no doctrine of estoppel by *res judicata* can abrogate that duty. The court has the right, and indeed the duty in a proper case, to re-open the issue of a matrimonial allegation even though it has been litigated between the parties and decided by a competent court, and even though one of the parties objects to such re-opening... Whether the court should re-open the issue depends on the circumstances, but if it is re-opened, each party can go into the matter afresh. A party who has successfully alleged facts in one suit may repeat those facts in later proceedings between the parties. If an allegation made in a suit between the parties is not adjudicated upon, it may be alleged in later proceedings, and the other party is entitled to deny it, for the new issue has never been tried; indeed, if the party propounding the charge in the later proceedings failed in the earlier suit, he may nevertheless in that earlier suit have told the truth as to the facts, and it would be wrong to prevent him from putting forward true facts in a later case.’

The only direct evidence availed to this court regarding the parties’ marriage was provided by the petitioner herein. He said of the respondent that she deserted the matrimonial home on 07.02.98 without reasonable or justifiable cause and has not resumed cohabitation or conjugal relations with him. The divorce petition herein was filed on 21.08.06. From 07.02.98 when the desertion pleaded is said to have occurred to 21.08.06 when the petition for divorce was filed is approximately 8 years. The respondent was served on 02.09.06 with the divorce petition but she did not deem it fit to file any answer to the petition, which in the result remains uncontroverted. Section 8 of the Matrimonial Causes Act, Cap.152 provides, *inter alia*, as under;

‘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’.

I find the matrimonial offence of desertion duly proved against the respondent.

With regard to cruelty, it was also the petitioner’s case in this cause that during his cohabitation with the respondent, the latter used to drink excessively and come home late, thereby denying the petitioner and the children consortium; that the respondent wasted family resources as a result of her excessive drinking habits; that the respondent used to verbally and physically abuse the petitioner, especially after her drinking sprees; and that the respondent’s aforesaid actions have caused the petitioner mental anguish and suffering. These are serious accusations. As found earlier, the respondent was duly served with the divorce petition but she did not deem it fit to file any answer to it. I find the aforementioned impugned acts of the respondent to constitute legal cruelty within the meaning of section 8 (c) of the Matrimonial Causes Act and that the said cruelty has been duly proved against the respondent.

No plea of *res judicata* was raised by the respondent in this cause. This court, of its own motion, enquired about the possibility of *res judicata* being a bar to the present divorce proceedings. The passage from Halsbury’s Laws of England quoted above relating to estoppel and duty of the court makes it clear that no doctrine of estoppel by *res judicata* can abrogate the court’s right and duty, in an appropriate case, to inquire into facts alleged by a petitioner or respondent pertaining to an alleged matrimonial offence. In the present case, the petitioner levelled accusations of desertion and cruelty against the respondent, the petitioner confronted the respondent with those accusations and the respondent decided not to respond to the accusations. In this court’s view this is an appropriate case for the court to have exercised its statutory duty under section 10 (1) of the Matrimonial Causes Act to inquire into the facts of the matrimonial offences alleged. Having so inquired, the court has found both accusations uncontroverted and duly proved. This court additionally finds that the previous divorce proceedings between the same parties, in reverse order, vide Divorce Cause No.62 of 2001 constitute no bar to the present divorce proceedings as

the grounds upon which the previous Divorce Cause No.62 of 2001 have not been disclosed to this court and therefore the court cannot tell whether they are directly and substantially the same or different. In any event, even if the previous divorce proceedings had been disclosed and shown to have been premised on directly and substantially the same grounds between the same parties, it would still have been open to this court, in exercise of its discretion, to re-open the matter if the court found the circumstance to so warrant.

As I see it, the union called marriage is an extremely delicate entity premised as it is on presumed oneness of two different and distinct natural individuals notionally regarded as one because of their mutually agreeable chemistry and their action of volunteering to be so united. The oneness can genuinely survive and be sustained only if the two individuals' chemistry continues to be harmonious. However, when the harmony irretrievably fails, no amount of pretence of the continued existence of the broken oneness will make such oneness a reality. In short, once the individuals who once formed the marital union themselves irretrievably fall apart, no outsider, not even the court, can reconstitute genuine and harmonious union between the two disagreeable individuals. This is the harsh reality of life.

The upshot is that I find both matrimonial offences of desertion and cruelty duly proved against the respondent. Each of the two offences entitles the petitioner to have his marriage to the respondent dissolved. 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 three months, upon application therefor. The petitioner is granted joint custody, together with the respondent, of the children of the marriage, namely, I.S.M and L.W.M (particulars withheld) Likewise the petitioner is granted equal care and control, together with the respondent, of the said children of the marriage. The respondent is condemned to bear the petitioner's costs of this cause.

Orders accordingly.

Delivered at Nairobi this 13th day of December, 2007.

B.P. KUBO

JUDGE