



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**DIVORCE CAUSE NO. 30 OF 2005**

**KSS.....PETITIONER**

**VERSUS**

**NAJ .....RESPONDENT**

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

On the 30<sup>th</sup> day of May 1980 **KSS** the Petitioner herein and **NAJ** the Respondent herein got their marriage solemnized at Nairobi under the Marriage Act. The Petitioner has now presented a petition dated 19<sup>th</sup> April 2005 in which she sought for the following orders:-

- (i) Dissolution of the Marriage
- (ii) Custody of the children of the marriage
- (iii) Costs of the proceedings.

The petition did not attract any answer as required by law. A hearing notice of the petition was served upon the Respondent at his residence in Tudor Mombasa but he failed to attend the hearing of the cause hence the petitioner was granted leave to proceed for hearing exparte.

The petitioner produced in evidence a marriage certificate to establish that she and her spouse (Respondent) celebrated their marriage at Nairobi under the Marriage Act on 30<sup>th</sup> May 1980. She gave evidence to the effect that the Marriage was blessed with twin girls namely FA and SM on the 29<sup>th</sup> day of June 1984. she produced their birth certificates to prove that. The Petitioner further told this court that she cohabited with the Respondent at Tudor in Mombasa until the 18<sup>th</sup> day of March 2004 when the Respondent deserted the Matrimonial home leaving the petitioner and the children without contacting her. It was her evidence that the Respondent has no intention of going back to the matrimonial home and that the marriage has irretrievably broken down. The Petitioner has also accused the Respondent of failing to maintain her and the children. The Petitioner claimed that she discovered that the Respondent is living somewhere in Tudor.

The Petitioner presented to this court as exhibits in evidence copies of the result slips, bank statements and copies of the cheques to establish the fact that she has been meeting the school fees of the children now studying at the University. The documents produced by the Petitioner shows that SM is a student at Limkokwing University College of Creative Technology, Malaysia and FA is a student at Rhodes University in South Africa. The Petitioner gave evidence to the effect that both the Petitioner and the Respondent are business people at Mombasa. The Petitioner has accused the Respondent of desertion and neglecting to maintain her. She has urged this court to make an order dissolving the marriage on those grounds.

She has also prayed for an order of the custody of the children.

The evidence tendered by the petitioner beg the following issues to be determined:

- (i) Whether or not there was desertion on the Respondent's part.
- (ii) Whether or not there was willful neglect to maintain the Petitioner on the Respondent's part.
- (iii) Whether or not the petitioner is entitled to the prayers sought.

It is the evidence of the petitioner that their matrimonial home is situated at Tudor in Mombasa City. It is also in her evidence that the Respondent deserted the Matrimonial home on the 18<sup>th</sup> day of March 2004 and has not returned nor contacted the petitioner since then. The Petitioner claimed that the Respondent is still living in Tudor but in another house. Section 8 of the Matrimonial Causes Act gives the grounds on which a party may present a petition for Divorce. Of particular relevance to this petition is section 8(1) (b) which provides as follows:-

*“A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent has deserted the petitioner or without cause for a period of at least three years immediately preceding the presentation of the petition.”*

#### What is desertion?

Let me refer to Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 13 at P.284 at the sub-heading “meaning of desertion”.

*Desertion is defined as the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause.*

It has further been stated that:

*Desertion not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of common obligations of the married.*

Section 8(I)(b) of the Matrimonial Causes Act shows that a spouse can only rely on the ground of desertion to seek for divorce if the offending spouse has deserted the offended spouse for a continuous period of at least three years immediately preceding the presentation of the petition. In this matter it is alleged in the petition and by the oral evidence tendered by the petitioner that the Respondent deserted the Matrimonial home on the 18<sup>th</sup> day of March 2004. The petition for divorce was filed on the 20<sup>th</sup> day of April 2005. What it means is that the petition for divorce was filed before the lapse of three years after the alleged desertion by the petitioner. The burden is on the petitioner to show that desertion without cause subsisted throughout the statutory period. In this matter I am convinced that the Petitioner's petition was prematurely presented. The petition was filed against the provisions of Section 8(1) b of the Matrimonial Causes Act. Even if the petition were to be said to be competently before this court the Petitioner must discharge the burden of proof. In this petition the Petitioner led evidence to the effect that their matrimonial home is situated at Tudor in Mombasa. She has alleged that the Respondent also lives in Tudor. She also claimed that they both do business. She has failed to mention the physical address of her business or matrimonial home. She has also failed to state the physical address of the Respondent's new residence or business. In my mind, I think the petitioner concealed a lot from this court. The matter to me, appears as if there was collusion between the spouses to file these proceedings. The petitioner has not established that her husband left, if at all, the matrimonial home without her consent and with no intention of coming back. She did not also satisfy me that there were reasons which absolved her as being the cause of desertion. I have come to the conclusion that the petitioner's evidence did not raise grave and weighty matters. What came out is that the Petitioner is not happy in her marriage. That is not sufficient in law to dissolve a marriage. On the evidence presented to this court, I am unable to infer that the Respondent intended to bring the matrimonial consortium to an end. I find that desertion was not proved.

The Petitioner has also claimed that the Respondent is guilty of willful neglect to maintain her. In her entire evidence she did not lay any credible evidence to establish that she was neglected. She produced statements of an account which shows that she and her two daughters jointly run that account. There is evidence that the account is active. The source of funds coming into that account is not disclosed. The kind of business run by the petitioner and the Respondent and its turnover are not mentioned. There is no credible evidence that the Respondent has willfully neglected to maintain the Petitioner. The Petitioner has miserably failed to establish her allegation. I entertain some doubt on the veracity of the petitioner's evidence. I am not satisfied beyond reasonable doubt that the Respondent failed to provide for the petitioner and the children of the marriage.

This court has been asked to make an order giving the Petitioner the custody of the issues of the marriage. The Petitioner has tendered the birth certificates in respect of FA and SM. It is shown that they were born on 12<sup>th</sup> July 1984 as twins. They are now aged 21 years 5 months. They cannot qualify to be regarded as children under the law. They are adults.

Again, the petitioner's prayer must fail.

In the final analysis therefore the petition for divorce is ordered struck out and dismissed with no order as to costs.

Dated and delivered at Mombasa this 24<sup>th</sup> Day of February 2006.

J.K. SERGON

J U D G E

In the presence of

Mr. Hamza for the Petitioner.