



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**DIVORCE CAUSE 28 OF 2004**

**E M N .....PETITIONER**

**VERSUS**

**C S N..... RESPONDENT**

**JUDGMENT**

These Divorce proceedings were initiated by **E M N**, hereinafter referred to as the Petitioner against his wife, **C S N**, hereinafter referred to as the Respondent. The two were married under the Marriage Act on 27<sup>th</sup> August, 1988 at All Saints Cathedral, Nairobi as per the Marriage Certificate tendered in Evidence. The Couple upon marriage cohabited in Toronto, Canada between 1988 and 1992 and Kileleshwa, Nairobi between 1993 and 2000. They were blessed with triplets who were all born on 28<sup>th</sup> March, 1992 in Toronto, Canada. The Petitioner is domiciled in Kenya and although the Respondent now resides in Canada, she is nonetheless domiciled in Kenya as well.

The Petitioner seeks the dissolution of the marriage on the sole ground that the Respondent deserted the Matrimonial home in November, 2000 and since then she has not resumed cohabitation. To the Petitioner therefore the marriage has irretrievably broken down. The Petitioner had also sought the dissolution of the marriage on another ground of cruelty which he abandoned when the petition came up for hearing before me.

When the petition was served on the Respondent, she filed an answer to the petition and cross-petition. She based her cross-petition on cruelty and constructive desertion. She gave particulars of the Petitioner's cruelty and constructive desertion. Both the petitioner and the Respondent confirm that they were not accessory to, connived at nor condoned the desertion and cruelty complained of in the petition and cross-petition.

When the hearing of the petition and cross-petition commenced before me, Mrs. Judy Thongori Learned Counsel for the Petitioner and Mr. Kadima, Learned Counsel for the Respondent agreed that the issue of custody and maintenance had been settled in the Ontario Superior Court of Justice, Family Court, Canada and would not therefore be an issue in these proceedings. They availed to the Court a copy of the Court order in those proceedings and asked me to adopt the same in these proceedings for purposes of custody and maintenance. I so ordered. In the premises of custody and maintenance of the petitioner and children of the marriage was thus settled.

Further Counsel for the Respondent indicated that he had no witnesses to call in support of the cross-petition as the Respondent had not responded to his communication notifying her of the hearing of the

Petition, neither had she turned up for the hearing of the petition from her base in Canada. In a way therefore the Petition for Divorce proceeded to hearing as undefended cause.

In support of the petition for Divorce, the Petitioner testified. In his testimony, he reiterated what was averred in the petition. He specifically testified that the Respondent without just or lawful cause deserted him and the matrimonial home in November, 2000. She surreptitiously left for Canada with the children of the marriage. Since then she has not deemed it necessary to come back home and resume cohabitation. Asked by the Counsel whether he made conditions in the matrimonial home so difficult as to compel the Respondent to desert, the Petitioner vehemently denied the suggestion.

Under Section 8 (1) of the Matrimonial causes Act,

***“A Petition for Divorce may be presented to the Court either by the husband or the wife on the ground that the Respondent:-***

***(a)*** .....

***(b). has deserted the Petitioner without cause for a period of at least three years immediately preceding the presentation of the petitioner; or***

***(c).*** .....

***(d).*** .....

For the Petitioner to succeed on the ground of desertion, the Respondent must prove that the Respondent had deserted the Petitioner for a period of at least three (3) years before the presentation of the petition for divorce. In the instant proceedings I note that the petition was filed on 8<sup>th</sup> March, 2004. There is uncontroverted and or unchallenged evidence of the petitioner that the Respondent deserted him sometimes in November, 2000. It is clear therefore that he Respondent has for a period of more than three (3) years preceding the presentation of this petition deserted the Petitioner. Since then there has been no resumption of cohabitation. The Petitioner has denied constructive desertion. In the absence of any other evidence to the contrary, I hold that the Petitioner has proved to the satisfaction of this Court that the Respondent is guilty of desertion. It would appear as correctly submitted by Counsel for the Petitioner that the marriage between the Petitioner and the Respondent has irretrievably broken down.

I would in the circumstances allow the petition for divorce on the ground of desertion with no order as to costs. A decree nisi shall issue forthwith and to be made absolute in the normal manner. Since there was no evidence tendered in support of the cross-petition, the same stands dismissed with no orders as to costs as well.

Dated at Nairobi this 1<sup>st</sup> day of March, 2006.

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**MAKHANDIA**

**JUDGE**