REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 140 of 2004

BARBRA OTUNGA-MOHAMED ……….................................……………PETITIONER

VERSUS

AHMED MOHAMED ALI ……………..............................………………..RESPONDENT

JUDGMENT

On 11.11.04 the petitioner filed petition praying for the following orders:-

(a) That the marriage between her and the respondent be dissolved.

(b) That the custody of the (2nd) child Ahmed Tajir Mohamed be given to the petitioner until he attains the age of majority.

(c) That the respondent be ordered to provide maintenance for the said child.

(d) That the respondent be ordered to give the petitioner her share of household goods.

(e) That the respondent be ordered to pay alimony and/or maintenance to the petitioner.

(f) That the respondent be condemned to bear the costs of this cause.

(g) That this court grants the petitioner any further or other relief as it deems fit.

The petition is based on grounds of adultery and cruelty and is supported by the petitioner's affidavit sworn on 10.11.04.

On 10.12.2004 the respondent filed answer to petition denying the accusations of adultery and cruelty levelled by the petitioner against him and also cross-petitioned for divorce contending that the petitioner had committed adultery during the subsistence of the marriage; that she has been cruel to him; and also that she deserted him.

On 07.01.05 the petitioner filed reply to the answer to petition and cross-petition denying the accusations of adultery, cruelty and desertion levelled by the respondent against her. It was the petitioner's case that it was the respondent's cruel conduct which drover her out of the matrimonial home.

The cause first came up for hearing before me on 20.01.05 whereat the petitioner was represented by

learned counsel, Mrs. J. Thongori while learned counsel, Miss P.I. Odero held brief for Mrs. Aroni for the respondent. At that session respondent's counsel consented to the granting of prayers 2 and 3 of the petitioner's chamber summons dated 10.11.04. For the record, these prayers were framed in the following terms:-

"**2. That this Honourable court be pleased to restrain the respondent herein and/or his servants and/or agents from going to the petitioner's house and/or office pending the hearing and determination of this cause.**

3. That this honourable court be pleased to restrain the respondent from harassing and/or threatening and/or abusing and/or assaulting and/or intimidating petitioner herein pending the hearing and determination of this cause".

Responding to those prayers on 20.01.05, respondent's counsel told the court that she had no objection to the said prayers being granted but asked for time to sort out issues relating to prayers 4 and 5 in an amicable manner. Here also, for the record, the said prayers were framed in the following terms:

"**4. That this honourable court be pleased to allow the petitioner to collect from the matrimonial home household items more particularly itemized in the affidavit in support of this application pending the hearing and determination of this case.**

5. That the custody of the child Ahmed Tajir Mohamed be granted to the petitioner pending the hearing and determination of this cause."

This court granted prayers 2 and 3 in the summons dated 10.11.04. As for prayers 4 and 5, the court granted the parties 7 days within which to conclude their discussions aimed at amicable settlement of outstanding issues between them, failing which they were to take a hearing date of the cause at the registry.

On 24.10.2005, the parties' representatives appeared before the Deputy Registrar and took 23.02.06 as the hearing date for the cause.

When 23.02.06 came, only the petitioner and her counsel appeared before this court for the hearing. Petitioner's counsel, Mrs. Thongori urged the court to allow her to proceed with the cause as the hearing date had been fixed by consent of the parties. I allowed hearing of the cause to proceed in the absence of the respondent and his counsel.

I pause here to wonder about the non-appearance of the respondent. This is because the pleadings filed by both parties including their respective supporting affidavits depicted the parties as being at serious loggerheads with each other. The petitioner's supporting affidavit was lengthy and biting while the respondent's replying affidavit seemed to give what looked like a blow–by–blow response to the accusations levelled by the petitioner against him, plus his own accusations against the petitioner. A fierce legal battle seemed to be in the offing and one expected a spirited fight by both parties. However, that never came to pass as on hearing day the respondent, for reasons not availed to court, never attended at the hearing. The court wonders whether a deal was struck between the parties during the intervening period not to stage a public fight over their apparently failed marriage.

One of the grounds relied upon by each party for wanting the marriage between them, contracted on 14.07.89, dissolved was that each had been involved in an extra-marital love affair with some named individual. Such escapades constitute the matrimonial offence of adultery, which is one of the legally recognized grounds of divorce. Each party made such averment on oath. In the case of the petitioner, the averment was in her affidavit and she repeated it in her oral testimony also under oath. In the case of the respondent, the averment was contained in his replying affidavit only as he never attended at the hearing of the cause. The petitioner named a lady called Ledicia as having had an adulterous association with the respondent in or around 1990. Petitioner never cited Ledicia as co-respondent in her petition. Petitioner's counsel was later to submit before this court that petitioner was not required to cite Ledicia in

the petition as co-respondent on account of section 9(2) of the Matrimonial Causes Act (Cap. 152) which, according to counsel, made such citation subject to leave of the court. I shall address this technical issue shortly. For now, suffice it to say that evidence in the file shows that the petitioner continued to live with respondent as her husband even after discovering his alleged adultery with Ledicia in 1990 until she (petitioner) left the matrimonial home at the end of October, 2004 – some 14 years later. In those circumstances, the petitioner is deemed to have condoned the alleged adultery and that ground of divorce must fail. It is hereby dismissed.

For his part, the respondent accused the petitioner of having committed adultery with her workmate called Stafford Baker. The petitioner is employed as a programme management specialist in the United States Agency for International Development (USAID) at Nairobi. Baker also works there. Respondent deposed in his replying affidavit sworn on 06.12.2004 that on 17.11.2004 he found the petitioner at Baker's residence situated at Kibarage Road, Kyuna Estate, Nairobi, having spent the night there. In her reply to answer to petition, the petitioner conceded having spent the night in question in Baker's residence but contended she merely sought accommodation there after the respondent had chased her away from the matrimonial home. She denied committing adultery with Baker on that night or at all. The respondent never cited Baker as a co-respondent in his answer to petition and cross-petition. Section 9(1) of the Matrimonial Causes Act makes such citation mandatory on the part of a husband petitioner. His failure to cite Baker in the cross-petition is fatal as far as his alleged existence of an adulterous association between Baker and the petitioner is concerned. The adultery ground relied on by the respondent for wishing to divorce the petitioner must fail and it is hereby dismissed.

Let me at this juncture address the technical issue canvassed by petitioner's counsel to the effect that a wife petitioner need not cite in the petition the woman she alleges to be involved in an adulterous association with her husband. Section 9 of the Matrimonial Causes Act provides:

"**9(1) On the petition for divorce presented by the husband or in the answer of a husband praying for divorce, the petitioner or respondent, as the case may be, *shall* make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.**

(2) On a petition for divorce presented by the wife the court *may*, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent."

In my respectful view, the issue of leave applies only with regard to subsection (1) of Section 9 and it relates to exempting a husband petitioner from citing his wife's alleged paramour as co-respondent if special conditions dictate that there should be no such citation. Subsection (2) does not provide that a wife petitioner needs leave of the court to cite the woman she alleges to have an adulterous association with the husband. All the subsection has done is to remain silent on whether the wife petitioner should or should not cite as co-respondent the woman she suspects to have committed adultery with the husband. That is not the same thing as saying leave is required for such citation. Prudence does in my view dictate that there should be such citation. It is, however, open to the court to ignore non-citation in the case of a wife petitioner.

It must be pointed out that the matrimonial offence of adultery is equally painful to either spouse. I see no justification in a nation like Kenya which espouses equality between the sexes for the Matrimonial Causes Act to lay different standards of procedure as between spouses for the mounting of divorce proceedings based on adultery. I am aware, of course, that subsection 4(b) of section 82 of the Constitution of Kenya is to the effect that the provisions of subsection (1) of Section 82 outlawing discrimination does not apply, *inter alia,* to divorce. I am of the view that subsection (2) of Section 9 of the Matrimonial Causes Act is discriminatory of men on grounds of sex and that the mere fact of this case being of divorce is not saved by subsection 4(b) of section 82 of the Constitution. I, therefore, hold that in purporting to lay a lower standard of procedure for a wife who seeks to rely on adultery for divorcing her husband, subsection (2) of section 9 of the Matrimonial Causes Act contravenes the constitutional tenet of non-discrimination on grounds of sex; that the said subsection (2) is unconstitutional and I so declare it to be and, therefore, a nullity. Consequently, I hold that the said subsection (2) is not binding.

I would like to complete my consideration of the respondent's cross-petition before reverting to the petitioner's surviving ground of cruelty. Firstly, I wish to refer to an incident of 10.09.04 alluded to by both parties to these proceedings. The petitioner deposed vide paragraph 9 of her supporting affidavit sworn on 10.11.04 that she got home at about 10.30 p.m. and found the respondent had locked the gate; that the watchman said the respondent had taken the gate keys away with him; that the petitioner stayed outside the gate for about one hour before the respondent pulled up and started hurling abuses at her, calling her a prostitute and telling her to go back to the men she had been with; that the respondent then opened the gate and walked in, leaving his car and the petitioner outside the gate; that after about 15 minutes of waiting outside there, the petitioner decided the respondent would not open for her, so she drove to an unnamed girl friend's place at Kileleshwa, Nairobi and spent the night there. The petitioner added that when she returned to the matrimonial home next day, the respondent told her to pack her clothes and leave and that he got kerosene and tried to burn her clothes but the house-help managed to save the clothes before they got burned. The petitioner also complained that the respondent accused her of infidelity, etc. The respondent's rejoinder appears at paragraphs 9 – 15 of his replying affidavit. The gist of the rejoinder is a denial of the allegations made by the petitioner against him.

Respondent deposed that he returned home that day (10.09.04) at about 8.30 p.m. and found the petitioner not at home. He learnt from his son, Ahmed that the petitioner had gone out for drinks with friends. Respondent deposed that he was apprehensive about the petitioner's safety, so he went out in search of her at several places that night and eventually returned at about 1.00 a.m. and found her car parked outside the matrimonial house gate. Respondent said he told the petitioner that her behaviour was unbecoming of a wife and mother and unacceptable, following which she drove off and spent the night away from the matrimonial home. She returned at about 9.30 a.m. next day and said she had spent the night at the house of a lady colleague called Joyce Mukita, which information the respondent later checked and found it to be untrue.

The accusations the parties made against each other in their pleadings and evidence show clearly that they no longer trust each other. Each thinks the other is having extra- marital affairs and mutual trust, if it ever existed, is gone. In accusing the petitioner of cruelty against him, the respondent has complained that prior to moving out of the matrimonial home, she habitually came home late (after 10.00 p.m.) reeking of alcohol and that when he questioned her about her behaviour, she retorted that she could not disclose whom she was with for "*security reasons*". The respondent also accused the petitioner of moving out of the matrimonial home at the end of October, 2004 leaving the respondent with the last born son, Ahmed Tajir (then aged about 14 years) at the matrimonial home and she went to rent another house for herself without prior discussions with the respondent. The respondent added that the petitioner had by so moving out and staying away denied him his conjugal rights. These averments constitute formidal grounds which could easily have carried the day had the respondent attended the hearing to speak to the said grounds and respond to questions, if any, thereon. His non-attendance forces me not to attach too much weight to the said grounds.

The last ground relied on by the respondent in his cross-petition is that of desertion. All I wish to say at this stage is that the mere act of a spouse moving out of the matrimonial home need not necessarily constitute the matrimonial offence of desertion. Whether it amounts to desertion or not depends on who is the cause thereof. I shall come back to this ground later.

I now advert to the petitioner's surviving ground of cruelty levelled against the respondent. The petitioner accused the respondent of not just habitually coming home late but daily since his marriage to her, on 14.07.89. Let me record here that the parties started cohabiting in 1982; got their first child, Alvin Mohamed (a son) on 06.07.84 before they married; and they eventually contracted a statutory marriage under the Marriage Act (Cap. 150) on 14.07.89. They got their second and last child, Ahmed Tajir Mohamed (also a son) on 25.01.90. It was the petitioner's evidence that the respondent beat her with slaps and kicks when she questioned him about his late coming. She called no other evidence apart from her own statement bout the alleged assaults.

Petitioner also accused respondent of infecting her with "*sexually transmitted infections for quite a while*". She did not, however, call medical evidence to substantiate the accusation.

It was also petitioner's case that the respondent practised black magic on her – a very controversial subject. She did not define black magic but said she came to that conclusion from two occurrences at the matrimonial home. Her story went thus: On the night of 24.10.04, she woke up at 1.00 a.m. and found all the house lights on, which was unusual. She tip-toed from her bedroom (she had previously indicated that she had in September, 2004 moved out of the bedroom she shared with the respondent out of fear for her safety arising from respondent's threats) to the kitchen and found the external door to the kitchen wide open. Something small covered in cotton wool was burning in the kitchen, while the respondent stood by the garage outside, smoking. Petitioner asked the respondent what was burning and he replied that those were his personal things, adding : "*Ain't I supposed to burn them*?" Petitioner said the respondent asked her to leave him alone. She added that she did not find the respondent's answer satisfactory but she went back to sleep.

The petitioner continued to narrate that next day (25.10.04) she went to work. Upon return from work, she found the white bath tab covered with something like soot, which was not there in the morning. She also found a folded small piece of paper on the soap dish above the bath tab and that the following was written on the piece of paper:

"Before you have a bath, apply the powder on your body and call out her name and say "I am your husband – whatever I say goes"'.

Petitioner told the court that she collected the piece of paper and put it in her handbag. She added that subsequently, on 31.12.2004, the respondent attacked her, took away her handbag plus its contents and never returned them to her. Petitioner said she concluded from the foregoing that the respondent was practising black magic on her. She did not say where the attack took place.

I pose here to observe that the petitioner's other evidence is that she left the matrimonial home on 31.10.2004 and that she had been living away eversince. If the respondent attacked her and took away her handbag plus the black magic paraphernalia on 31.12.2004, the alleged attack must have occurred while she was already living apart from the respondent – in fact after she had filed the present divorce proceedings. The petition for divorce herein was filed on 11.11.04. In such a scenario, one would have expected the alleged attack on the petitioner to have been reported to someone – a family member, friend, or the police. The plaintiff called nobody to testify before this court on the attack she alluded to. This is a puzzling omission!

As I have already pointed out, the respondent denied the allegation that he practised black magic. This is not surprising. What is black magic? Some people have equated it with witchcraft while others contend the two are different. I give below excerpts from a couple or so authors to give a general idea about the thing called black magic. In his book, *The Black Art*, Rollo Ahmed observes, *inter alia*, as follows (page 13): "Not all magic was black, but all magic did eventually develop an evil tendency, and magic as a whole grew to imply that which was dark and dubious if not actually evil."

Another author, W.B. Crow says of magic, in his book, *A History of Magic, Witchcraft and Occultism* (pages 12 – 13) as follows: "The word magic comes to us, through Latin and Greek, from a Persian word meaning the work of the priests or wise men. Such activity was and is done for the benefit of mankind. <u>But the word has altered its significance, and is now usually applied to acts of selfish or even harmful kind. Many authors distinguish such as black magic</u>……

It was not a question of upholding a different religion to the prevailing, but a deliberate perverting of this religion, a sort of turning it upside down. In most cases they (practitioners) made, or imagined <u>they made, some sort of impact with a devil, and went about deliberately in pursuit of mischief."</u>

For his part, Moutague Summers, in his book, *Witchcraft and Black Magic*, says of witchcraft (at the foreward) as follows: "Witchcraft – the religion of wickedness, malice and mischief – as old as the world, and as wide as the world, is as keenly active today as ever it was in bygone centuries when the wisest and best in Europe legislated and fought against <u>the evil thing</u>."

My message in citing the above literature is simply to emphasize that accusing anyone of practising black magic or witchcraft, as the petitioner has done, is a serious matter. So serious in fact that the Witchcraft Act (Cap. 67) makes it criminal offence (vide section 6) to accuse or threaten to accuse any person with being a witch or with practising witchcraft, unless such accusation is made to a district commissioner, a police officer, a chief or any other person in authority. The purpose would be for purposes of having the matter investigated and appropriate action taken thereon. The thing called black magic or witchcraft is a belief system. It evokes controversy and strong emotions. Geoffrey Parrinder, in his book, *Witchcraft: European and African*, records (page 13) that Evans-Pritchard defines witchcraft as "an imaginary offence because it is impossible. A witch cannot do what he is supposed to do and has in fact no real existence." On the other hand, Doreen Irvine, in her book, *From Witchcraft to Christ*, confesses to having practised witchcraft and doing horrible things before her conversion to Christianity.

Allegations of witchcraft ought, in my view, to be proved with concrete evidence. The standard of proof is high. Nothing was produced before this court to prove the petitioner's allegation of black magic and I dismiss the allegation.

It was the petitioner's further evidence that in January, 2004, the respondent tried to hit her and their son, Alvin intervened to separate the respondent from the petitioner. Following Alvin's intervention, the respondent fell down and asked Alvin how he could beat his own father. Petitioner added that the respondent told Alvin he would not make it in life and that he, Alvin would go licking the respondent's toes. Petitioner said she understood those remarks by the respondent to be a father's curse upon Alvin. Petitioner did not call Alvin, although he is above 18 years old.

Petitioner also told the court that the respondent refused to pay school fees for the children and left her to carry to burden alone. She said, for instance, that she had single-handedly to support Alvin who was training in South Africa to be a pilot. She produced applications for foreign exchange transfer by herself to Alvin in South Africa to support her case.

The respondent denied the accusations of not contributing towards the children's fees or towards maintenance of the matrimonial home. Respondent said paying fees for and maintenance of the children was always a joint venture. He made his contribution even in those cases where receipts showed petitioner as making payments. He also annexed to his replying affidavit documents to show that he too sent money to Alvin in South Africa and also annexed documents to show he has been paying rent for the matrimonial home in Loresho, Nairobi.

The petitioner told this court that as late as a week before the hearing of this cause, the respondent telephoned her on her cellphone and called her a prostitute, a public toilet and a dustbin. She denied having been cruel to the respondent.

The petitioner asked the court to dissolve the marriage on her own terms and condemn the respondent to costs. For his part, the respondent also asked the court to dissolve the marriage on his own terms and condemn the petitioner to costs.

The petitioner amended the following of her prayers as under:-

(i) ***Maintenance of Tajir [prayer (c)]***

Petitioner asked that respondent only pays Tajir's fees and that she will do the rest of his maintenance. Petitioner acknowledged that Tajir, who is 16 years old, lives with the respondent in the matrimonial home; that she does not want to separate him from the respondent; and that all she wants is access to him, e.g. during week-ends – to participate in his life.

(ii) ***Share of household goods [prayer (d)]***

Petitioner asked for 50% of the household goods, although she said she bought 99% of them with her own money.

Respondent's rejoinder was that the respondent moved out without lawful cause, that she took some household effects and deserves no more. Regarding maintenance of Tajir, respondent said he lives with the boy and takes care of him, so the question of his maintenance is a non-issue.

The respondent is a Quantity Surveyor.

Both parties are Kenyans and are domiciled in Kenya.

I have given anxious consideration to the pleadings and evidence on record. Petitioner's counsel filed written submissions and adopted them in court, on 02.03.06. She drew the court's attention to **BUYA – vs – MAKORAIN & ANOTHER [1990] KLR 232** in which the High Court (Bosire, J – as he then was) held that it is not necessary to prove an act of adultery in time and place, nor is it essential to name the person with whom the act of adultery was committed, etc. With regard to the latter point, the position in Buya's case appears to be that the petition indicated there was a second respondent although no name appears to have been specified in the citation. That seems to be the context for the statement that it is not essential to name the person with whom the act of adultery was committed. Buya's case is distinguishable on facts from the present case in that regard. As regards the holding that it is not necessary to prove an act of adultery in time and place, first of all no issue of adultery arises in the present case since I have dismissed that ground as against both parties.

In any event Buya's case had peculiar circumstances attendant upon it. Buya the husband petitioner found in his wife respondent's box a love letter addressed to "Dear Rossy". The wife's first name was Rose. Attached to the letter was a map giving directions on how to get from Mombasa to the writer's residence at Tiwi in Kwale District. There was evidence, which the learned Judge accepted, that the only relationship between the wife respondent and the writer of the letter, one Muzungu C John was that the two were at one time students at Rib Secondary School. Muzungu was two years ahead of the wife respondent. There was evidence, also accepted by the Judge, that the wife respondent visited Muzungu, a bachelor, at his residence at least twice while she was already married to Buya. The Judge agreed with Buya's conclusion that his wife's visits to Mzungu were for purposes of adultery. Those were the peculiar facts in Buya's case, so the holding that it is not necessary to prove the act of adultery in time and place ought to be construed in those peculiar circumstances, not as a general rule. On this score also, Buya's case is distinguishable on facts.

It emerges clearly in the present case that the parties have had enough of each other. Each suspects the other of having extra-marital affairs. There is no mutual trust between them. I sensed some exaggeration in some of the accusations the parties leveled against each other. No marriage can thrive in such circumstances. It is clear each spouse wants to get out of the marriage contract but on his or her own terms. I formed the vivid impression that each was bent on painting the other in as negative a light as possible. This is unfortunate.

There is no marriage worth the name to talk about in this case. It has irretrievably broken down, it is dead and in need of a decent burial. I shall dissolve it but not on the exclusive terms of either party, but before doing so, let me dispose of the issue of desertion.

Earlier on I touched on the ground of desertion pleaded by the respondent/cross-petitioner against the petitioner. I find that the parties developed intolerance of each other to the extent of them becoming incompatible and apparently incapable of living under one roof. The evidence tendered leads me to the conclusion that each has contributed to that unhappy state of affairs. To the extent that the respondent/cross petitioner shares the blame for the petitioner's act of moving out of the matrimonial home, the ground of desertion he pleaded against the petitioner cannot endure to his sole benefit and the said ground is hereby dismissed.

I find that each party is guilty of contributory cruelty to the other. Accordingly, I 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 upon expiry of the statutory period of three (3) months upon application therefor.

The respondent who already has custody of the only minor child, Ahmed Tajir Mohamed is hereby granted legal custody of the said child until the child, now aged 16, attains majority age. The petitioner shall, however, have reasonable access to the said child during some week-ends as suggested by the petitioner, again until the child attains majority age. As far as the court is aware, the child has nothing to do with the parties' disharmony. He is still the child of both of them. It will be a shame if either parent cannot contribute towards the child's maintenance without a court order. The parties are educated people. Let common sense and parental instinct prevail among them.

The petitioner may have 50% of the household goods if she must.

The parties shall bear their own respective costs. I do not consider it necessary to make any other orders regarding the parties and I make none.

I order that the Attorney General be served with a certified copy of this judgment to enable him to consider taking appropriate remedial measures regarding the unconstitutionality of subsection (2) of section 9 of the Matrimonial Causes Act.

Orders accordingly.

Delivered at Nairobi this 18th day of April, 2006.

B.P KUBO

JUDGE