



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

Divorce Cause 86 of 2003

A N S.....PETITIONER

AND

M R.....RESPONDENT

M W.....CO-RESPONDENT

JUDGEMENT

This is a petition filed by the petitioner E. N. S. against M. R. and M. W. as respondent and co-respondent, respectively. The case is dated 12th June 2003 and was filed on behalf of the Petitioner by Muhanji Kasango Advocates. The case was later taken over by Kotua and Company Advocates, on behalf of the Petitioner.. The petition seeks for orders that-

- (a) the petitioner be granted an order of divorce
- (b) the petitioner be granted custody care and control of the children of the marriage.
- (c) the respondent be ordered to pay for the maintenance of the children of the marriage
- (d) the respondent be ordered to pay costs of this suit
- (e) such further or other relief be granted as will meet the ends of justice to the case.

The grounds for divorce are firstly, cruelty, secondly, desertion, and thirdly on adultery. The respondent Mugambi Rinkanya filed an answer to the petition through Muriuki Njagagua and Company Advocates. He denied the alleged cruelty, desertion, and adultery. He averred that the petitioner herself deserted the matrimonial home since 2002, and had since then been cohabiting with a Russian man. He also averred that the marriage had broken down irretrievably and there was no real chance of reconciliation or resumption of cohabitation.

At the hearing of the petitioner, on 2/2/2006, only the petitioner gave evidence. She testified that she got married to the respondent in Leningrad, which is now St Petersburg, Russia on 22nd June 1980. Thereafter they came to Kenya. They initially cohabited in a rented house at Banana Hill. Then they moved to Racecourse Nairobi, then Upper Hill Nairobi, and lastly Wodley Nairobi.

They lived in Russia together before marriage for 5 to 6 years. They lived in Russia together for a short while after marriage, before coming to Kenya. The respondent came to Kenya one year earlier, and the petitioner joined him in 1981. In 1983, the petitioner secured a part time job with the United Nations

and worked there upto 1996. In 1985 the petitioner was appointed as part time lecturer with the University of Nairobi. She was now a Senior Lecturer at the U of N. She became a Kenya citizen in 1990.

There are two children of the marriage. They are A R, a boy who was born on 12th April 1992. The second child is A M, a daughter born in 1992. She produced certified copies of the birth certificates for the children and a certified copy of the Marriage Certificate which is in Russian language plus a translation in English. The documents produced as exhibits were with consent of parties counsel.

She testified that the respondent had a job and was working with an organization called SITA. He was initially in Nairobi and was thereafter transferred to Mombasa in 1988/89. He was later transferred back to Nairobi then again to Mombasa. The marriage the problems started in 1992. Ordinarily the respondent used to come to Nairobi twice or up to four times a week. However, he started staying late, disappearing for whole weekends, and drinking excessively. She later got information that the respondent had someone else who was staying with called M N. The two were staying together at Hamisi Estate in Mombasa. At one time, the respondent took the petitioner to the house at Hamisi Estate, and left her there overnight and went out. M W N was there. The respondent forced to stay in the sitting room overnight while M W N slept in the master bedroom. It was her evidence, that the respondent was now building a house at Hamisi Estate Mombasa. The last time that the petitioner and the respondent shared a matrimonial home was in 1996.

In 1996 the petitioner went for sabbatical leave to do her PhD. She went for studies to St Petersburg, Russia. She later came back to Kenya and then went against to Russia to continue with her PhD to continue with her PhD from 1998 to 2002. During her studies, the petitioner initially left her ATM card with the respondent. When she came back she realized that the respondent used the money to entertain other people. She took away her ATM card

She used to be covered in the respondent's medical scheme with SITA. However, she later discovered that her name was deleted and the names of M N and D were included. The respondent was otherwise was a good father, and used to take care of the children, even in her absence.

The petitioner and the respondent tried to acquire a house together at Dam Estate Nairobi. They also acquired 12 acres of land at Kajiado. The petitioner paid the mortgage for the Dam Estate house for 9 years, and then the respondent took over. She also testified that even the house that the respondent was constructing at Hamisi Estate Mombasa was matrimonial property.

It was her position that, since the respondent was not objecting to the divorce, the divorce should be granted with costs. The marriage has broken down irretrievably due to the behaviour of the respondent. Her attempts at reconciliation has been in vain.

In cross examination, the Petitioner stated that, during her studies in Russia she used to come to Kenya for 3 months during summer holidays. That the cohabitation of the respondent with the other woman started either in 1999/2000. That she went to Russia for PhD studies, partly as a caution to get settled in Kenya as she was now old and a Kenya citizen. She insisted that she was not running away from problems at home. She at times used to pay Nairobi Club bills, when the respondent, who was the subscriber, failed to pay. She stated that she paid the deposit for the Nairobi Dam Estate House, and paid the mortgage for about 10 years. She was however not current as to whether the mortgage had now been cleared, as she was now not paying since 1996/97. She admitted that she did not have tangible evidence that the properties she had mentioned were in the actual names of the respondent. She confirmed that the respondent had been paying school fees and taking care of the children.

This is a divorce case. Though some evidence has been tendered about properties acquired during marriage, no issues arise from that evidence as there are no prayers in respect of property. The prayers sought are with respect to the dissolution of the marriage, custody and care of the children, maintenance of the children and costs of the suit.

The first issue is to determine whether there is a marriage between the petitioner and the respondent which is capable of being dissolved. The petitioner produced a copy of an English translation of a marriage certificate, for a marriage celebrated in Leningrad Russia on 22.6.1980 as exhibit 2(a). She also produced a copy of the marriage certificate written in Russian language as exhibit 2(b) The documents are not disputed. The respondent does not dispute the marriage. According to the marriage certificate, the petitioner, then a citizen of Russia, got married to the respondent, a citizen of Kenya, on 22.6.1980.

It is my finding, from the evidence before me that the petitioner and the respondent were legally married in Russia. It is also my finding that, as at the time of filing the petition before this court, there was a valid marriage between the petitioner and the respondent which was capable of being dissolved.

The petitioner has sought for divorce or dissolution of marriage on grounds of cruelty, desertion and adultery. In terms of section 8 of the Matrimonial Causes Act (cap 152) each of the three grounds is enough to sustain a case for dissolution of a marriage. The burden is always on the petitioner to prove the grounds of divorce alleged.

On cruelty, the petitioner has stated that the respondent once left her in the house at Hamisi Estate for a whole night in the sitting room. There was another woman sleeping in the master bedroom. The petitioner disappeared for the whole night. He refused to discuss the issue. In my view, this amounts to cruelty. The respondent has not denied this. I find that the petitioner has proved cruelty against the respondent.

On the ground of adultery, there is the evidence of the petitioner that the respondent has been cohabiting with another woman at Hamisi Estate in Mombasa. The two appear to have had even a child. Again the respondent does not controvert this. He only alleges, in his answer to the petition, that the petitioner was having an affair with a Russian man. The respondent did not tender any evidence to establish that allegation. The petitioner knows the other woman by name. She is sued as co-respondent. She knows the child of the woman by name. She knows where the petitioner and respondent are cohabiting. She has seen the other women in that house at Hamisi Estate Mombasa and the other woman sleeps in the master bedroom. I find that the petitioner has established the grounds of adultery. She has proved that the respondent has committed adultery.

On the grounds of desertion, the petitioner appears to rely on the fact that the respondent has been away from her from 1997. However, it is clear from the petitioner's evidence, that the respondent went to Mombasa because of a transfer. The petitioner herself was in Russia for studies during this period up to 2002. It appears to be that official engagements kept them apart. The petitioner did not give evidence to establish and which was the matrimonial home, that the respondent deserted, and whether there was no cause for desertion. A transfer cannot be desertion. I find that the ground of desertion has not been proved.

On the totality of the evidence, I find that the grounds of cruelty and adultery have been proved. There was no collusion or convenience on the part of the petitioner. The marriage has, broken down irretrievably. The marriage will therefore have to be dissolved on that account.

I now turn to the prayer by the petitioner for custody control and maintenance of the children. The petitioner testified that the respondent is a good father. He has been taking care of the children and paying their school fees all this time. She has not testified to any unfitness of the respondent in taking care of the children. She testified that she had already been granted custody of the children. The respondent has not controverted this. In matters of children, the welfare of the child is of paramount importance, not the interest of the parents. I grant the custody, care and control of the children to both the petitioner and the respondent to be shared equally as will be agreed between the petitioner and the respondent.

In the result, I allow the petition, and make the following orders –

1. The marriage between the petitioner and the respondent is hereby dissolved and a decree for

divorce nisi be and is hereby issued to be made absolute after six (6) months.

2. The custody, care and control of the children of the marriage is granted to both parents to be shared equally by agreement and in default either of the petitioner and the respondent is at liberty to apply.

3. The respondent will continue paying for the upkeep and education of the children, but the responsibility for maintenance and education costs of the children is for both parents, and, if there arises a dispute, either the petitioner or the respondent will be at liberty to apply.

As this is a family matter, each of the petitioner and the respondent will be their own costs of the suit.

Dated and delivered at Nairobi on this 12th day of May 2006.

George Dulu

Ag. Judge