



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

Divorce Cause 5 of 2005

D.J.K PETITIONER

VERSUS

J.M.K RESPONDENT

JUDGMENT

The Petition for divorce before me was filed by the husband on the ground of desertion on the part of the wife.

The wife filed her answer denying the particulars of desertion and also filed her Cross-petition on the grounds of cruelty on the part of the husband.

I shall for completeness of record set out the particulars of desertion in the petition and those of cruelty enumerated in the cross-petition.

“Particulars of desertion: The Respondent did desert the matrimonial home at Nairobi early 2002 and moved out to stay else where in, Nairobi. It is now three years since desertion.”

Indeed the petition was filed on 7th January, 2005 and in his evidence the husband had testified that they were separated since July, 2001 when the wife moved out of their bed-room and left the Apartment thereafter in 2003.

The particulars of cruelty in cross-petition are:

“(a) The Petitioner has during the subsistence of the marriage failed to provide the Plaintiff with a conducive environment in the matrimonial home as he would wake up the Respondent in the middle of the night and without provocation or warning physically assault the Respondent forcing her to sleep in the sitting room or seek refuge in the children’s bedroom.

(b) The Petitioner has on numerous occasions during the subsistence of the marriage verbally abused the Respondent and has used vulgar and abusive language in the presence of the issues, the Respondent’s past colleagues at the offices, her family and friends with the intention of ridiculing the Respondent.

(c) The Petitioner has during the subsistence of the marriage constantly and without any justifiable cause accused the Respondent of infidelity.

(d) The Petitioner has on numerous occasions during the subsistence of the marriage harassed, harangued and intimidated the Respondent by continuously and menacingly asking her when she would leave the matrimonial home.

(e) The Petitioner has during the subsistence of the marriage continuously engaged in blatant acts of infidelity in the presence of the Respondent and the issues of the marriage to the detriment of the institution of marriage and the psychological welfare of the issues of the marriage.

(f) The Petitioner has during the subsistence of the marriage failed to support the Respondent's economic endeavours when she lost her job in early 2002 and treated her with contempt and ridicule to the detriment of the Respondent's self-esteem."

Those particulars are denied in the reply and answer to the cross-petition.

In his evidence, the Petitioner stated that he is in the Kenya Navy. He married the Petitioner on 23rd March, 1988 and they have two female issues of 21 and 15 years respectively who are staying with him and looked after by him in all respects. They do visit the respondent without any constraint. This part of his testimony is not controverted.

On the issue on hand, he testified that he came back home from an official trip to South Africa on 16th July, 2001 and after two weeks thereof they had a confrontation and the Respondent moved out of their bed room by abusing him that he was violating her human rights. According to him, and also tacitly agreed by the Respondent, they had no marital relationship since that day. She also asked him to move out from the home as it was rented by the company the Respondent was working with. He asked for some time to organize himself. Their communication was bare minimum.

In the meantime the Respondent lost her job and her circumstances changed. She was helped by him to organize her business with a firm in U.S.A. The marriage faced worsening situation when she used to come home as late as 2.00 a.m. Once she came back in the morning and he was forced to ask her to leave for the children's sake. They talked to the children and they showed their intention to stay with him.

He informed the respondent before he filed this petition.

As regards the settlement, he testified that the Respondent asked for Shs.2,000,000 but he paid her in cash Shs.1,100,000 and gave title deed of their Mombasa property. The furniture in the house was given to the Respondent and he kept only bed and microwave.

Nothing much changed during cross-examination. He agreed that apart from the rent paid by her company he used to look after the family needs apart from occasional payment of school fees by the respondent.

This was the evidence led by the Petitioner.

In her evidence the Respondent described the incident of confrontation differently. According to her they had marital problems of disagreement on anything and everything and she suggested separation to have space. She was ready to move out but instead the Petitioner suggested to do so under one roof. During that time, he kept waking her up during night to discuss their problems which behaviour reached an intolerable stage and she moved out of the bed-room.

As regards the incident which according to her was the last straw on the camel's back, was when she came back home around 10.00 to 11.00 p.m. from her sister's home. When she came out from the bath, the Petitioner came out holding her underpants asking her where she had been. She could not tolerate that.

She also agreed the fact of her losing job, and her decision to go to U.S.A. to seek a franchise. According to her the Petitioner gave her U.S \$200 but stated that she was not aware of him guaranteeing

her loan taken from her sister.

She then described mental abuses meted her by the Petitioner which was abuses against her womanhood and in front of the children and asking her when she would start contributing when she lost her job. She said that they used to maintain the home jointly. She was ready to move out in March, 2003 and it was her choice not to go with the children. She also stated that the furniture chosen by the Petitioner to be given to her was not in usable condition and she did not take anything.

As regards Mombasa property she testified that it was bought for Shs.600,000 and agreement was that he would pay for the property and she would maintain the home. From the Certificate of Title, it is apparent that the property was bought in the year 1998. He also has not paid rates for the property although he agreed to do so.

As regards the flat in Nairobi she said it was purchased in the year 2002 before she moved out and she used to talk to the estate agent to look for tenants. She did not specify who that estate agent was and when the flat was rented. She also agreed that during that period she used to pay only Shs.3,000 for the maid.

She thus asked for 50 per cent share in the said property over and above what has been given to her by the Petitioner claiming she had contributed more towards the family for the longer part of their marriage.

She however agreed that Shs.1,100,000 given to her was invested by her which gives her income and she is settled in her business.

As against her claim that the purchase price of the Flat was Shs.6,500,000 the Petitioner testified (after being recalled as the parties had agreed that the court should determine the issue of settlement of marital property), that it was bought by him by paying Shs.4,700,000. The flat was acquired on 28th April, 2003.

Both parties herein concede that their marriage has been irretrievably broken. They allege their own grounds for the dissolution of the marriage.

From the evidence led, it is clear that the Respondent moved out of their marital relation by abandoning their bed room around August, 2001. I accept it as a constructive desertion. Even if I agree with, which I have difficulty to believe, her side of the evidence that she moved out as she was asked during night about their marital problems, this allegation again she has not sufficiently proved, and I would not accept that reason as reasonable cause to snap the marital relations. I am also fortified in my observation as the Respondent herself has stated that she had asked for separation to give them space. But due to the loss of her job she could not fulfill her desire and eventually she did that, when she was ready, in March, 2003. I also note that the two adolescent daughters were left by her under the care and custody of the Petitioner which he still does. The Respondent has not applied for any variation of the arrangement despite the fact that she is now well settled.

I also note that despite their serious disagreement, the Petitioner settled her in business without much resistance and gave her one property to complete her demand of Shs.2,000,000.

The upshot of all the above is that I do not accept the particulars of cruelty alleged by the Respondent and grant the dissolution of the marriage solemnized between the parties on the ground of constructive desertion on the part of the Respondent and I give the order accordingly.

Now I shall dwell on the issue of settlement of properties.

It is abundantly clear that the only property in dispute is the flat in Nairobi which was acquired on 28th April, 2003. The Respondent seeks 50 per cent share in that property which according to the Petitioner was bought for Shs.4,700,000. It is agreed that the sale agreement was entered into around three months prior to the actual transfer. Thus it is not, and cannot be, in dispute that the Respondent was

living under one roof although both agree that they did not have any marital relation and the Respondent was waiting for appropriate time to move out of that home. She was according to her, also paying Shs.3000 to the maid.

It is also agreed that the respondent was paid Shs.1,100,000 in cash and Mombasa property worth currently approximately Shs.750,000 voluntarily by the Petitioner. I must confess, I do not understand the submissions made by the respondent that the said payments cannot be considered as settlement as the same was not asked for or agreed by her. On my part, I would consider that as a good and humane gesture by a husband to see that the wife does not move out without anything despite the bitterness.

The law as to distribution of marital properties acquired has been well settled and expanded by our courts. Although most of the cases were determined under the provisions of Sec.17 of the Married Women's Property Act 1882, in my humble view the same principles shall have to be observed in the settlement of marital properties under the Matrimonial Causes Act (Cap152 Laws of Kenya).

The concept of trust evolved by the English Courts in *Pettitt V. Pettitt* (1970) A.C. 777 & *Gissing V. Gissing* (1970) 2 All.E.R. 750, have been adopted and amply expanded by our courts since 1976 (see *Karanja V. Karanja* (1976) KLR 307 and *Kivuitu V. Kivuitu* 2 KAR 241).

Underpinning of the inference of Trust in the matrimonial property is the cohabitation between the parties.

Furthermore it is evident and so held that the direct and indirect contribution is a matter of fact and that the indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis just like a financial contribution. It is also an established principle that the burden is on the applicant to prove, upon the balance of probability, that she made a contribution of the property in dispute. (see **Fathiya Essa V. Mohammed Alibhai Essa Court of Appeal No.101 of 1995 unreported**).

Apart from the above referred principles, there is an interesting point raised by Mrs. Kamau, the Learned Counsel for the Respondent to the effect that despite the breakage in marital relation between the party since around August 2001, as the Respondent was still living in the same home with the Petitioner, the same has to be assumed as their cohabitation and thus the property in dispute should be considered as having been purchased during such cohabitation giving right to the Respondent to seek her share. She emphasized that their separation under one roof does not change anything. She relied on the legal definition of coverture which states inter alia that it is a state of a man and woman married together.

The Learned Counsel Mr. Nyandede simply emphasized that their cohabitation ceased as from the date when the Respondent moved out of their bedroom which was in 2001 and there is no evidence by the Respondent to show that she contributed to the welfare of the family either directly or indirectly after that. He relied on the case of **Kamore V. Kamore (2000), EACAK page 80 and Muthembwa V. Muthembwa (2002) EACAK page 186 at page 188.**

In the latter case it was held and I quote: ***"In order to determine the respective shares and liabilities of the parties the date to be used by the court as a point of reference was the date on which cohabitation ceased"***.

The determination by the court would have been easier if the parties had started living separately but this is not the case before me.

The question to be determined by me in the circumstances is whether the parties were cohabiting after the break in the marital relation and/or whether despite that fact only because the parties for individual personal problems, were living under one roof could be considered to be cohabiting?

Simple dictionary meaning of cohabiting is, to live together as a husband and wife. Coverture in law should also mean being under protection of a husband as a wife.

This relation was snapped between the parties since August 2001. It does not matter it was so at whose behest. The fact remains the same.

I would also consider that, despite the absence of marital relations, whether the Respondent has contributed to the welfare of the family either directly or indirectly. On the direct contribution, I have the evidence of her paying Shs.3,000. I do not have any evidence of indirect contribution. What I have is the Petitioner's almost uncontroverted evidence that she used to come very late and was not there for the family. The daughters, when the push came to the shove, opted to stay with him.

It will be thus very difficult for me to conclude, as the Respondent have me to do, that in the purchase of flat at Rhapshta Road she had contributed anything.

I also note that I do not have concrete proof that the Petitioner was not contributing anything when he bought the Mombasa property. Further the value of the said property, at present even according to the Respondent is around Shs.750,000.

Doing best, under the circumstances, I order that:

- 1. The Petitioner to pay rates and rents due as of today on the Mombasa property being Title No [particulars withheld]**
- 2. The Petitioner also shall pay further Shs.250,000 to the Respondent to arrive at Shs.2,000,000 indicated by the Petitioner.**
- 3. The Petitioner shall pay costs of this suit.**
- 4. I have already granted decree nisi on the ground of desertion by the Respondent which shall be made absolute within 3 months from the date hereof.**

Dated and Signed at Nairobi this 8th day of June, 2006.

K.H. RAWAL

JUDGE

8.6.06