



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Divorce Cause 60 of 2005

K.T.S PETITIONER

VERSUS

H.K.S RESPONDENT

JUDGMENT

The petition herein was properly certified as a defended cause by the Learned Deputy Registrar.

Petition for divorce was filed by the husband on the ground of an order of judicial separation issued on 4th December 1996, being in force for many years and the parties herein having lived separately since then. The Respondent filed her answer admitting the Petitioner's averments as regards the order of judicial separation and also filed her cross-petition reiterating particulars of acts of cruelty by the Respondent as averred in a Separation and Maintenance Cause No.46 of 1996. The Petitioner, however, denied the particulars of cruelty in his answer to the cross-petition.

In his evidence the Petitioner testified that he married the Respondent on 5th August, 1990 as per the certificate of marriage annexed to the petition herein. The said marriage was blessed with a female issue namely J.K.S born on 26th December 1992.

On the issue at hand, he testified that the Respondent took out a Separation and Maintenance Cause No.46 of 1996 and subsequently a judicial separation order was issued on 4th December, 1996. From his evidence it is evident that the parties had separated since September, 1995 and have not cohabited or stayed together since the said order was issued. This was the evidence led by the Petitioner.

In her evidence the Respondent admitted paragraph 1 to 8 of the petition and she did reiterate her particulars of cruelty alleged in her said Separation and Maintenance Cause to sustain her ground for divorce in her cross-petition. These averments are not disputed by the Respondent in her cross-examination. The Respondent does not seek costs of the suit, maintenance and custody of the minor as the same has been settled by a consent order dated 22nd June, 2006 signed by both parties and their respective Advocates.

Both parties concede that their marriage is irretrievably broken and allege their own grounds for the dissolution of the marriage. They both testified that there has been no collusion in prosecuting the petition or the cross-petition.

From the evidence led, it is clear that the parties have been separated for over 9 years now following

an order of judicial separation issued on 4th December 1996. It is clearly on record that it was the Respondent who filed a Separation and Maintenance Cause order issued wherein fortified their separation which had already commenced almost a year prior to issuance of the judicial separation order.

It is undisputed that this cause is filed relying on the provisions of Section 7 of the Matrimonial Cause Act (Cap.152 Laws of Kenya).

For the sake of clarity I quote the aforesaid provision.

“7: (1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a decree of judicial separation under this Act under any Act repealed by this Act or an order under the Subordinate Courts (separation and maintenance) Act upon the or substantially the same facts as those proved in support of the petition for divorce.

2. On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the Petitioner.

3. For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Act having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.”

The said section is somehow cumbersome and could have been made simpler and clearer. But I am faced with the said provision so as to interpret the same.

I have repeatedly and closely read the said provision and do find that the only party who can take shelter thereunder is the Petitioner who had filed the Separation and Maintenance Cause under Subordinate Courts (Separation and Maintenance) Act (Cap 153 Laws of Kenya). After filing the divorce cause, the Petitioner shall not be required to prove the allegations if they are similar to those alleged and proved in the Separation cause and the court shall regard the order in the Separation cause as sufficient proof of such allegation. The only requirement is that the Petitioner has to give evidence.

Although the petition herein has been filed by the husband who was the Respondent in the earlier Separation Cause, the Respondent wife herein has also filed the cross-petition on the grounds of cruelty on the part of the Respondent and has admitted the fact of the separation order issued on the grounds of cruelty.

Thus I have a cross-petition filed by the Respondent herein who was the Petitioner in the earlier separation cause.

Both parties are in one mind on the fact that before and since the issuance of the separation order, the separation has been continuously in force and they have not resumed cohabitation.

With these facts before me, I allow the cross-petition filed by the Respondent and grant the order that the marriage in fact solemnized between the parties herein be dissolved.

As all other issues like custody of the child of marriage, maintenance and costs of these proceedings are either agreed or conceded, I do not make any order as regards them.

I only direct further that the decree nisi issued be made absolute within 30 days from the date hereof.

Dated and signed at Nairobi this 7th day of July, 2006.

K.H. RAWAL

JUDGE

7.7.06