

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

Divorce Cause 95 of 2005

B.M.S..... PETITIONER

VERSUS

A.B.S..... RESPONDENT

JUDGMENT

On 18.07.05 the petitioner filed petition praying for the following orders:-

- a) That the marriage between the petitioner and respondent be declared null and void.
- b) That the marriage between the petitioner and respondent be dissolved.
- c) That the costs of this petition be awarded to the petitioner.
- d) Any other or further relief this honourable court deems fit to grant.

The petition is supported by the petitioner's verifying affidavit sworn on 18.07.05.

On 15.09.05, N.P. Sheth, Advocate filed a Memorandum of Appearance on behalf of the respondent. The court record shows that the respondent never filed answer to the petition thereafter and that this cause proceeded as an undefended cause.

Hearing of the cause proceeded before me on 09.03.06 whereat the petitioner was represented by learned counsel, Mr. B.O. Ong'ondi. The respondent never attended the hearing either in person or through an advocate. Two witnesses gave evidence for the petitioner, i.e. the petitioner himself (P.W.1) and his father, M.P.S (P.W.2). The evidence on record may be summarized as under.

The petitioner, a Hindu, told this court that he is an administrator with [PARTICULARS WITHHELD] Industries in Mombasa. He got married to the respondent on 10.07.04 at Shree Visa Oshwal Community, Nairobi. After the marriage, the petitioner and respondent lived in Mombasa. It was the petitioner's evidence that on 31.12.04 the respondent left the matrimonial home saying she did not want to have a child. Petitioner added that he never had sexual intercourse with the respondent as she refused to consummate the marriage despite the fact that she went into the marriage voluntarily and lived with the petitioner for approximately five (5) months. Petitioner said that whenever he asked respondent for sex, she always gave excuses for not to have sex with him. She would, for instance, say she was tired, not in the mood, had a headache, etc. Petitioner told the court that respondent even asked him to look for someone else and set her free. Petitioner raised the matter with his parents and a family meeting was convened with a view of resolving the problem. Petitioner told the court that those who attended the meeting were the petitioner, respondent and the petitioner's parents and that the respondent declined to answer questions as to why she was declining to have sex with the petitioner. The petitioner also told this court that the respondent's parents, who live in Nairobi, were not involved in the attempts to resolve the problem between him and the respondent but he (petitioner) did not know why respondent's parents were not so involved.

Petitioner told this court that there is no possibility of him and respondent resuming or continuing with

the marriage. He reiterated the prayers in his petition.

M.P.S gave evidence as the 2nd petitioner's witness (P.W.2). He told this court that he was a retired banker and that the petitioner was his son. P.W.2 confirmed that the petitioner got married to the respondent on 10.07.04 in Nairobi and that thereafter the petitioner and respondent lived with him (P.W.2) and his wife at the family residence in Mombasa. P.W.2 repeated that the respondent left the matrimonial home as narrated by the petitioner. He (P.W.2) recalled that he and his wife attended one family meeting convened to reconcile the petitioner and respondent following the petitioner's complaints that the respondent had refused to consummate the marriage. The meeting was around November, 2004 and the respondent told the petitioner to look for someone else and set her free. P.W.2 who said he is 69 years old felt very bad about the respondent's behaviour as it dashed his hopes of getting grandchildren. He (P.W.2) said the respondent's parents live in Nairobi, that he contacted them when the children's matrimonial problems arose and the respondent's parents said they would talk to their daughter. P.W.2 added that the respondent used to travel to Nairobi and he hoped the respondent's parents would convince her to stay with the petitioner and discharge her obligations as a wife but she still refused to consummate the marriage and eventually left the matrimonial home after five months.

It was P.W.2's further evidence that the petitioner introduced to him and his wife the subject of his (petitioner's) desire to marry the respondent and that thereafter P.W. 2 and his wife travelled to Nairobi to arrange with the respondent's parents for the petitioner and respondent to marry. P.W.2 said he was shocked by the respondent's behaviour of refusing to consummate the marriage. He saw no chances of the petitioner and respondent reconciling.

I have given due consideration to the pleadings and supporting evidence in this cause. The evidence tendered by the petitioner and his father stands uncontroverted, the respondent having elected only to file a Memorandum of Appearance through N.P. Sheth, Advocate but took no further steps in defence of her inexplicable behaviour. On the evidence availed to court, there is only one logical course for the court to take, i.e. to declare the marriage a nullity, the same not having been consummated. The respondent must shoulder the blame. Accordingly, I make the following orders:-

1. I grant prayer 1 and declare the marriage between the petitioner and respondent null and void. Having declared the marriage a nullity, there remains nothing to dissolve. This renders prayer 2 redundant and I make no order relating thereto.
2. I award the petitioner the costs of these proceedings.

Orders accordingly.

Delivered at Nairobi this 3rd day of July, 2006.

B.P. KUBO

JUDGE