



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

Misc Appli 61 of 2005

R N N V..... APPLICANT

VERSUS

M S J..... RESPONDENT

RULING

On 29.09.05 the applicant filed originating summons vide which she applied for leave to file a petition for dissolution of her marriage to the respondent solemnized on 15.05.04 notwithstanding that three years have not passed since the date of the marriage. The application was stated to have been brought under rule 2 (1) and (2) of the Matrimonial Causes Rules made under the Matrimonial Causes Act, Cap. 152 as well as under section 3A of the Civil procedure Act, Cap. 21. However, at the court session of 15.06.06 whereat the applicant was represented by learned counsel, Mrs J.N. Okulo while the respondent was represented by learned counsel, Mr G. Imende, applicant's counsel applied to correct and replace the reference to rule 2 (1) and (2) of the Matrimonial Causes Rules with a reference to rule 6 (1) and (2) of the Matrimonial Cause Rules and amendment was approved by the court. The application is accompanied by a supporting affidavit by the applicant sworn on 26.09.05 as provided by rule 6 (1) and (2) of the Matrimonial Causes Rules verifying the facts relied on by the applicant in bringing the application.

It is the applicant's case that both she and the respondent are domiciled in Kenya; that there are no issues of marriage; that the marriage between her and the respondent has irretrievably broken down owing to the respondent's extreme cruelty towards her (applicant); that the purported extreme cruelty of the respondent has caused the applicant extreme hardship; and that, therefore, the court should grant the applicant leave to file proceedings for dissolution of the marriage although the marriage is under 3 (three) years old.

Section 6 (1) of the Matrimonial Causes Act provides as follows:

'6. (1) No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have elapsed since the date of marriage'.

There is, however, a proviso to the effect that the court may grant leave for a divorce petition to be brought before three years elapse on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.

Instances have been cited by the applicant in support of the case that the respondent has engaged in acts of extreme cruelty towards her. They are to the effect that the respondent, who runs a public house, has since the marriage taken to excessive consumption of alcohol; that such consumption of alcohol has always been followed by wild, extreme and sadistic anger directed at the applicant for no reason; that the respondent, who owns a firearm, has during the purported episodes of drunkenness and anger threatened to shoot the applicant; that the respondent is paranoid, insecure and has time and again accused the applicant of having or intending to have adulterous liaisons with men unknown to the applicant and also hurled obscenities at her; that on 13.04.05 the applicant went to the matrimonial home and found a new lock had been used and the house-help plus the dog had been left stranded outside and the house-help informed the applicant that the respondent had left a message with her (house-help) that the applicant should not return to the house; that when the applicant enquired from the respondent as to why he had used a new lock, the respondent told the applicant that he would not avail himself to open the padlock despite being aware that the applicant had no place to stay the night; and that on 01.05.05 the respondent again locked the applicant out, prompting the applicant to move out of the home and find a house of her own to rent. According to the applicant, there have been several attempts at reconciliation which have not borne fruit. She cites the example of she and respondent having taken a ten-day holiday to South Africa in a bid to save the marriage but the said holiday did not help. Applicant added that after she moved out of the matrimonial house, she and respondent had a meeting to iron out their differences but no reconciliation was reached. The applicant concludes from the foregoing that her marriage to the respondent has irretrievably broken down, hence her present application.

In response to the applicant's above complaints, the respondent filed a replying affidavit on 28.02.06 sworn on the same date. In the replying affidavit, the respondent denies the accusations of alcoholism and threatened violence narrated by the applicant. Respondent acknowledges the existence of marital problems between the applicant and himself but he describes them as minor and capable of resolution. Respondent states that the applicant deserted the matrimonial home on 01.05.05 and acknowledges that there have since been reconciliation attempts for the applicant and himself to iron out their differences, which have apparently not been successful.

Respondent declares his readiness and willingness to take a step and seek professional counseling in a bid to save the marriage. He avers that he married the applicant out of love and still loves her as a wife, adding that the applicant is still using his Barclays Bank Credit Card and that he believes he and applicant can reconcile and that their marriage has not irretrievably broken down.

I have given due consideration to the application and the grounds it is based on *vis a vis* the affidavit response of the respondent. It emerges from the evidence on record that the applicant and respondent have had marital problems which they have so far not been able to resolve. It appears they have so far tried to resolve their problems or differences on their own but not explored the option of involving independent parties to help them in addressing those differences. Marriage is a revered human institution, which should not be entered into or got out of lightly, but it has of late come under severe test and threat. All people of goodwill should endeavour to give it support and help to make it work, being the basic foundation for family life and the family being the fundamental group unit of society.

The court's attention was drawn to Latey on Divorce the Law and Practice, 4th Edition pages 69 – 73 and applicant's counsel urged the court to find this case to be one of exceptional hardship, not of an economic nature, suffered by the applicant and that the case is one of exceptional depravity on the part of the respondent. The court's attention was also drawn to Rayden's Law and Practice in Divorce and Family Matters, 12th Edition Volume 1 Text wherein it is stated at page 309 that to justify the obtaining of leave to present a petition within three years of the marriage, it is not sufficient merely to prove that the marriage has broken down irretrievably. The author states that before the court can exercise its discretion to grant leave to present a petition, it must first determine as a provisional finding of fact that the case is one of exceptional depravity or exceptional hardship by looking at the facts from the point of view of both parties.

In the present case, it is common ground that the applicant left the matrimonial home on 01.05.05. The applicant contends that she was forced out of the home by the respondent's conduct and that the

marriage had irretrievably broken down and she has taken to living on her own. The respondent maintains on the other hand that the applicant deserted on the said date of 01.05.05 but he feels there is a chance for the marriage to be saved and he has expressed readiness and willingness to take a step in that direction and give professional counseling a chance to achieve that objective. He even declares that he married the applicant out of love and that he still loves her as a wife.

I find that the parties hereto have not mutually and collectively made adequate attempts to resolve their marital differences and that the applicant has not shown sufficient cause to warrant being allowed to bring divorce proceedings before the statutory 3 (three) years have elapsed. The parties are living apart. There is less than 1 (one) year to go before the required statutory period of 3 (three) years elapses. There may be wisdom in the parties utilizing that period in mutual attempts to explore reconciliation, assisted by independent parties.

The application for leave to file divorce proceedings before the statutory period of 3 (three) years has elapsed since the marriage was contracted on 15.05.04 is refused.

Delivered at Nairobi this 25th day of September, 2006.

B.P. KUBO

JUDGE