



**Republic of Kenya**

**In the High Court of Kenya**

**at Mombasa**

**Divorce Cause No 2 of 2006**

**M.N ..... PETITIONER**

**- Versus -**

**R.M.O ..... RESPONDENT**

**Coram: Before Hon. Justice L. Njagi**

**Mr. Magolo for the Petitioner**

**Mr. Njoroge for the Respondent**

**Court clerk – Kinyua**

**J U D G M E N T**

By this divorce petition dated 29<sup>th</sup> December, 2005 and filed in court on 11<sup>th</sup> January, 2006, the petitioner prays that her marriage to the respondent be dissolved; that the petitioner be granted the custody of the children of the marriage; that the respondent be condemned to pay the costs of this petition; and any other relief that this court may deem fit and just to grant. The petitioner's case is that the respondent has, since the celebration of the marriage, treated the petitioner with cruelty; that he has ignored and neglected the welfare of the petitioner and the children of the marriage.

In his answer to the petition, the respondent denies having been cruel to the petitioner. He admits, however, that prior to 2001, he lived with one R.W.M as a wife who he married in 1987 under the Luhya customary laws of marriage. He also admits that since 2001, he continues to live with her and states that this act has been condoned and continues to be condoned by the petitioner. On his own part, the respondent's case is that the union between him and the petitioner was a happy one until the respondent's fortunes changed and he closed down his business sometimes between 1997 and 1998. Thereafter, the petitioner's character and demeanour towards the respondent completely changed and she became openly hostile and disrespectful to the respondent. The petitioner denied the respondent conjugal rights, moved away from the bedroom, started sleeping out and coming home very late without any reason or explanation and became very hostile and abusive when questioned by the respondent. The respondent also accuses the petitioner of committing various acts of adultery and openly carried out an affair with an employee of Kenya Ports Authority. The respondent's attempts at a reconciliation drew a blank, and he is always ready for reconciliation for the sake of the children. He contends that a judicial separation would best serve the parties in order to facilitate reconciliation rather than a divorce which would destroy the

marriage.

At the hearing of the petition, Mr. Magolo appeared for the petitioner while Mr. Njoroge appeared for the respondent. The petitioner gave evidence on oath and said that she lives in Mombasa. On 3<sup>rd</sup> April, 1996, she married R.M.O, the respondent herein, in the Office of the Registrar of Marriages. Their union was blessed with two issues, G.O and W.K now aged 10 and 9 years, respectively. The couple lived as husband and wife until 2000 and then separated in 2001 because the respondent became cruel and abusive. After the separation, the respondent has settled in Mombasa with another wife with whom they have children.

The petitioner further testified that the respondent tried a reconciliation but it was not acceptable to her. The marriage is completely broken down and there can be no reconciliation. She therefore prayed that the marriage be dissolved and the children remain in her custody.

The petitioner was not cross examined on this evidence. I must express my uneasiness about that turn of events, as I was expecting some challenge especially on the grounds of cruelty and adultery. However, the petitioner's evidence went unchallenged.

Considering her evidence in the context of the pleadings, I find that the petitioner was very economical with her language. A few issues needed clarification, but no clarification was forthcoming. One such issue related to the marriage itself. A marriage certificate is the surest means of establishing that a marriage was contracted between the parties. In the instant case, a copy thereof was not attached to the petition. In her petition, the petitioner alleged that the respondent had custody of the original marriage certificate and that the petitioner had a copy thereof. That copy was not exhibited. In his answer to the petition, the respondent admitted that he married the petitioner in 1996. That dispels any doubts there may have been as to whether or not there was a marriage between the parties.

The two grounds upon which the petitioner relies for the dissolution of this marriage are adultery and cruelty. In paragraph 10(h) of the petition, she states that the respondent has openly committed acts of adultery with ladies known to the petitioner and the respondent has never apologized.. She did not name the other woman or women. In his answer, the respondent states that he married one R.W.M in 1987 in accordance with the Luhya customary law of marriage. This was a good nine years before he contracted the marriage with the petitioner in 1996 in the Office of the Registrar of Marriages. According to the statement of the respondent in paragraph 9 of his answer to the petition, the petitioner was always aware of the fact that the respondent had another wife under customary law. After the marriage with the respondent, the petitioner was accepted as a co-wife in the respondent's rural home, and she lived in harmony with the respondent's customary law wife. The respondent built two houses for his two wives in the rural home, where he travelled with the two wives for the 1996 Christmas holidays, and lived with both of them in the same compound.

In her evidence in court, the petitioner testified that since the parties separated in 2001, the respondent has settled with another wife and that they have children. If the other wife alluded to is R.W.M and the respondent admits that R.W.M is his wife duly married under Luhya customary law, then the issue arises as to whether there has been condonation. This court is alive to the provisions of section 49 of the Marriage Act under which the parties to this petition were married. It states –

**“Whoever contracts a marriage under this act being at the time married in accordance with native law or custom to any person other than the person with whom such marriage is contracted shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.”**

I don't consider it wise to take the route mapped out in section 49 in order to critique the validity of this marriage. To do so would be to bury our heads in the sand and pretend to be blind to the social realities in this country. These realities include the fact that section 49 is among those sections which are dead letters in the laws of this country. It is obeyed more in breach than observance. As this fact is not denied, the truth of the matter is that the petitioner married the respondent knowing well that the respondent had another wife married under customary law. The petitioner herself cohabited with the respondent for two

years before they married. The respondent remained married to that other wife throughout his marriage with the petitioner. The petitioner never raised an eyebrow. She condoned the other relationship during her entire marriage with the respondent, and it is too late in the day for her to do so now. She has lost the right to cast the first stone. I therefore find that any alleged adultery with R.W.M was duly condoned by the petitioner and cannot be relied upon to dissolve this marriage.

In her petition, the petitioner alleges that the respondent never showed love to the petitioner's children and on several occasions he threatened to rape the children born to the petitioner during an earlier marriage. She further states that on several occasions, the respondent insulted her calling her a prostitute, a dog, a moving toilet, among other insults, in the presence of the children and neighbours. Although in his answer the respondent denies having done so, his denial is not convincing. The petitioner repeated the charges of cruelty in her oral evidence, stating that the spouses separated because the respondent became cruel and abusive. This seems to have pushed the petitioner against the wall, so much so that even when the respondent tried a reconciliation, she was simply not for it. Of course it is not practicable to promote any effective reconciliation at the instance of one party against the wishes of another. In total, for what she considers to be extreme cruelty, the petitioner has hardened her stance in this matter to the point where this marriage remains a marriage by name only. To borrow her own words in evidence, their "marriage is completely broken down and there can be no reconciliation." This puts to rest any lingering hopes the respondent may have entertained when he said in his answer that the marriage had not irretrievably broken down and could be salvaged. To use a phrase from Shakespeare, he is dealing with a "stony adversary." And any hopes of a reconciliation are non-existent.

I don't think that it pays to force two adults to live together where anyone of them is not willing to do so. The marriage between the petitioner and the respondent herein is burnt out. I accordingly make the following orders –

- 1. That the marriage celebrated in the Registrar's Office in Mombasa on 4<sup>th</sup> April, 1996, between the petitioner and the respondent be and is hereby dissolved. Decree nisi to issue.**
- 2. Parties be at liberty to apply in respect of custody of the children of the marriage.**
- 3. Each party to bear its own costs.**

Dated and delivered at Mombasa this 18<sup>th</sup> day of September, 2006.

L. NJAGI

JUDGE