



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS
Divorce Cause 58 of 2006

P.S..... PETITIONER

VERSUS

L.S..... RESPONDENT

R.H..... CO-RESPONDENT

JUDGMENT

On 25.04.06 the petitioner filed petition praying for the following orders:-

1. That the marriage between the petitioner and respondent be dissolved.
2. That each party bear their own costs.

Salient facts pertaining to these divorce proceedings may be summarized as under.

The petitioner is a British citizen and an Accountant by profession. He has lived and worked for gain in Kenya since August, 1994. The respondent is a Kenyan and a Teacher by profession.

The petitioner and respondent got married on 17.03.98 at Sheria House, Nairobi under the Marriage Act, Cap.150 Laws of Kenya. The petitioner produced the certificate of marriage between him and the respondent as Exhibit 1. After the marriage, petitioner and respondent lived and cohabited as follows:-

- a) Between March – September, 1999: at, Nairobi.
- b) Between September, 1999 – April, 2006: at, Nairobi.

There are two issues of the marriage, namely:-

- a) S.A.S– a boy born on 01.12.99.
- b) S.I.S – a girl born on 21.05.01.

It was the petitioner's further evidence that around January, 2005 the respondent, for no apparent reason, told him that she no longer loved and wanted to leave him. Petitioner begged respondent to give the marriage a chance but the latter was not interested. Petitioner then wanted respondent to leave the matrimonial home but she resisted, for fear of endangering her right to custody of the children. In September, 2005 the petitioner learnt through the wife of the co-respondent that the co-respondent was having a love affair with the respondent. This is something the petitioner had previously suspected and about which he had confronted the respondent but the latter had repeatedly denied having an affair with the co-respondent. The co-respondent and his wife are acquaintances of the petitioner. Upon getting the revelation, petitioner once again confronted the respondent on the matter and this time round the respondent admitted she had been having a love affair with the co-respondent since March, 2005. At that point petitioner decided he no longer wanted the marriage to continue. He asked respondent to leave the matrimonial home but she refused, again for fear of endangering her right to custody of the children. Petitioner and respondent then entered into a Deed of Separation on 31.03.06 which petitioner produced as Exhibit 2. The essence of the Deed Separation is that the petitioner and respondent would share custody of the children in alternate weeks; that the petitioner would contribute towards maintenance, education and medical expenses of the children; and that the petitioner would cater for certain interests of the respondent. The petitioner and respondent also filed a Consent Order on 05.10.06 pursuant to the Deed of Separation.

Between September, 2005 and end of March, 2006, the petitioner and respondent lived in the same house but in separate bedrooms until they entered into the Deed of Separation alluded to earlier. Petitioner and respondent started living apart after entering into the Deed of Separation.

Petitioner told this court at the hearing of his petition that he never confronted the co-respondent over his love affair with respondent. However, a day after respondent admitted to petitioner her love affair with co-respondent, the co-respondent himself telephoned petitioner and reported that the respondent had previously told him that her marriage to the petitioner was over and that the co-respondent was under the impression that the petitioner had accepted that the marriage was indeed over. Petitioner told this court that his decision to bring the marriage to an end came after getting the respondent's admission of her adulterous association with co-respondent, not before as the co-respondent suggested.

On the basis of the foregoing, the petitioner reiterated the prayers in his petition.

Hearing of the petition took place on 05.10.06 whereat the petitioner was represented by learned counsel, Miss M.M. Njuguna. There was no appearance for either the respondent or co-respondent. Petitioner's counsel informed the court that both the respondent and co-respondent were duly served with the petition and requisite notice but neither entered appearance nor filed answer to the petition. There are in the court file affidavits of service sworn by Anthony Frederick Gross, Advocate for the petitioner that he duly served the petition and notice on the respondent on 09.05.06 and on the co-respondent on 10.05.06 and that each acknowledged service. There is no evidence in the court file to show that either the respondent or co-respondent filed any papers in answer to the petition. This cause, therefore, proceeded as an undefended cause.

I have given due consideration to the petition and evidence tendered in support thereof. The petitioner's evidence against the respondent and co-respondent remains uncontroverted and it establishes that the respondent and co-respondent have committed the matrimonial offence of adultery. Section 8 of the Matrimonial Causes Act, Cap. 152 Laws of Kenya provides, *inter alia*, as follows:

- '8. (1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent –
- (a) has since the celebration of the marriage committed adultery'.

The petitioner has, correctly, cited his wife's paramour as a co-respondent as provided for under section 9 (1) of the Matrimonial Causes Act.

I am satisfied on the evidence tendered before court that the petitioner has proved against the respondent and co-respondent to the required standard that they have committed the matrimonial offence of adultery; that the petitioner has not condoned the adultery; and that he the petitioner is entitled to the divorce he seeks. Accordingly, I hereby pronounce a decree of divorce and order that the marriage between the petitioner and respondent be and is hereby dissolved. *Decree nisi* shall issue forthwith, the same to be made absolute after expiry of the statutory period of 3 (three) months, upon application therefor. As the parties on their own entered into a Deed of Separation spelling out their shared rights of custody over the children of the marriage and other matters pertaining to the welfare of the said children and also covering matters pertaining to the petitioner and respondent *inter se* and filed a Consent Order to govern the above matters, the said Consent Order is incorporated into and made part of this Judgment. Each party shall bear his or her own costs of these divorce proceedings, if any.

Orders accordingly.

Delivered at Nairobi this 26th day of October, 2006.

B.P. KUBO

JUDGE