



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

Divorce Cause 178 of 2002

A.N.K..... **PETITIONER**

VERSUS

P.N.M..... **RESPONDENT**

JUDGMENT

On 09.10.02 the petitioner filed petition praying for the following orders:-

- a) That the marriage between her and the respondent be dissolved and the parties be divorced.
- b) That there be an order that the petitioner be the custodian of the child of the marriage, Miss M.W
- c) That the respondent be condemned to pay the costs of this petition.
- d) That such other and/or further relief be granted as will meet the ends of justice in this cause.

The petitioner is accompanied by a verifying affidavit sworn by the petitioner on 26.09.02 to the effect that what is stated in the petitioner is true.

Desertion is the ground relied upon by the petitioner as a basis for seeking dissolution of the marriage. What the petitioner stated in her petition and subsequently repeated in her oral evidence before this court may be summarized as under.

The petitioner and respondent are Kenyans domiciled in Kenya. The petitioner is a businesswoman in Nairobi while the respondent also earns a living in Nairobi. The two started cohabiting in Nairobi in 1995 and eventually got married at the Registrar's office, Nairobi on 19.02.99 under the Marriage Act (Cap. 150). There is one issue of the marriage, a girl called M.W born on 24.01.2000. Petitioner produced her certificate of marriage to the respondent.

It is the petitioner's case that in August, 1999 the respondent deserted the petitioner at the matrimonial home in Githurai 45, has never returned and has shown no intention of returning. Petitioner adds that the respondent has abandoned the matrimonial home, denied the petitioner conjugal rights and failed to take care of the petitioner and the child. Petitioner also accused respondent of living with another woman away from the matrimonial home between him and the petitioner.

On 31.10.02 the respondent filed answer to petition basically denying deserting the petitioner and countering that the petitioner is a person of ungovernable and wild temper who has on several occasions exhibited hostility and cruelty towards the respondent. Respondent adds in his answer to petition that the petitioner is a woman of loose morals and he gives certain particulars to illustrate his claim in this regard. The respondent's answer to petition is not made on oath and the respondent did not appear at the hearing of these divorce proceedings on 21.09.06.

When this cause came up for hearing on 21.09.06, the petitioner was represented by learned counsel, Mr N.O. Sumba. There was no appearance for the respondent. Petitioner's counsel told the court that the respondent was served with hearing notice through his lawyers, Messrs George N. Kimani & Co. Advocates. There is an affidavit of service by Martin Mwaniki, process server to the effect that he served Messrs George N. Kimani & Co. Advocates, Nairobi on 27.04.06 with hearing notice for 21.09.06 and that they duly acknowledged service. There is evidence to that effect in the nature of the latter firm's rubber stamp plus endorsement of receipt of the hearing notice. I accept the evidence of service and find that no reason has been given to court for the absence of the respondent or his advocates at the hearing. As the

respondent's counter – allegations against the petitioner were not supported by an oath and in view of the respondent's unexplained failure to attend the hearing hereof, I accept the petitioner's claim that the respondent deserted the matrimonial home, the petitioner and the child, M.W without cause.

Section 8 of the Matrimonial Causes Act (Cap.152) 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 –

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition'.

The petitioner's evidence, which I accept, is that the respondent deserted her in August, 1999. The petition herein was filed on 09.10.02. The three – year requirement prescribed by law has been met. I find the ground of desertion as pleaded by the petitioner has been proved to the satisfaction of the court. 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. I grant the petitioner legal custody of the child, M.W now aged nearly 6 years, but the respondent shall have right of access to the said child. The respondent shall meet the petitioner's costs of these divorce proceedings.

Orders accordingly.

Delivered at Nairobi this 12th day of October, 2006.

B.P. KUBO

JUDGE