



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Divorce Case 5 of 2005

L.K.K.....PETITIONER

VERSUS

R.C.E.....RESPONDENT

JUDGEMENT

The Petitioner and the respondent got married on the 7th June, 1991 at the District Commissioner's Office in Nandi District under the provisions of the marriage Act, chapter 150 of the Laws of Kenya.

The Petitioner lodged this petition for divorce in this court on 20th April, 2005 seeking orders for dissolution of the marriage and custody of the children of the marriage. the petition was based on grounds of desertion and cruelty in the following terms:-

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PARTICULARS OF DECERTION BY THE RESPONDENT

- i. **Abandoning the matrimonial home**
- ii. **Abandoning the Petitioner for a period of over 10 years.**
- iii. **Deserting with the children of the marriage.**

PARTICULARS OF CRUELTY BY THE RESPONDENT

- i. **Denying the petitioner consortium and conjugal rights.**
- ii. **Running away with the children of the marriage**
- iii. **Failing to keep in touch with the petitioner.**
- iv. **Harassing and issuing threats to the petitioner and his relatives.”**

Of very great interest to the court was the averment in the petition that since the celebration of the said marriage the Petitioner and the Respondent have never cohabited together as husband and wife in any place.

The petitioner and the Respondent have two children out the marriage, namely:-

1. A.K, born in 1992 boy.
2. A.J, born in September, 1993, girl.

The Respondent denied the alleged acts of desertion and cruelty, and while she did not cross-petition for the dissolution of the marriage, she prayed for custody of the children and an order for maintenance, education or provision of medical care for the children against the Petitioner. She otherwise asked that the petition be dismissed.

After hearing the testimonies of both the Petitioner and the Respondent, I do hereby find as a matter of fact as follows:-

After the marriage on 7th June, 1991, the Petitioner and the Respondent stayed together for three weeks at his parents home in Nandi District. During the same month of June, 1991, the Petitioner left for the U.S.A where he was studying. He came back to Kenya in December, 1992. By this time, the Respondent had given birth to the couple's first child. The Petitioner stayed with the Respondent for a period of one week only. During this period, the Petitioner questioned the paternity of the first child. He said that the boy did not look like him or his family. The Respondent left the Petitioner at his parents' home when he suggested or alleged that the child could not be his.

On the 18th January, 1993, the Petitioner filed for divorce in this court. However, he went back to the U.S.A. before the case was heard. He did not come until the year 2000, seven years later. He stayed for two months in Kenya and went back to the U.S.A. He made no contact with the Respondent. By this time, she had given birth to their second child in September, 1993. The next time he came was in September, 2004 but the Respondent did not see him. The Respondent saw him in February, 2005, twelve years after their last encounter for a week.

In the course of 2005, the Petitioner caused a DNA test to be carried out to ascertain the parentage of the two children. He still doubted that the first child belonged to him or his. The blood samples were bled in Eldoret and Nairobi and sent to South Africa for the DNA tests. The petitioner underwrote the costs of these tests. The results revealed that he was the father of both of the children.

The Petitioner has not to date established a matrimonial home for the Respondent and the children. He went to the U.S.A as a student and has not returned to live with his wife and children. The Respondent did not see him for twelve years. He came back to Kenya on one occasion and did not see the Respondent and the children. The Petitioner had a house at his parents homestead but he demolished this on 12th April, 2006 claiming that he intended to put up a new and modern building.

The Petitioner has not provided for the maintenance of the Respondent or the children. With the exception of one occasion in 2004, the Petitioner did not provide or send any school fees for the children. The Petitioner has not provided for any food, clothes or medical care for the Respondent and the two children of the marriage.

In the course of this year, he demolished the only possible matrimonial home and chased away the Respondent and the two children. He accused her of beating his family members and stealing blankets and utensils. The Respondent has single-handedly brought up the children and provides for all their needs to the extent of her ability. She has to pay for the children's school fees. Apart from a few occasions when he spent time with the children after he came back, the Petitioner has not been having custody of the children. The Respondent has had the custody at all material times.

The Petitioner testified that he is not presently working. He resides in the U.S.A and is a citizen of the said country. He is undergoing specialized medical treatment. He claims that he is disabled on the right-hand side to the extent of 77%. He claims that he sustained injuries in the course of his employment in the U.S.A. He was a youth Administrator and Counsellor and he dealt with violent kids. He says that he suffers from a disease called astrophy due to stress on the body. He does not have a house in his parents homestead and now stays with his brother.

In his petition, and during the trial, the petitioner asked to be given custody of the children. In his submissions through Counsel he abandoned the prayer for custody in the interest of the welfare of the children provided he was given visitation rights. The Respondent or her part asked for the dismissal of the petition. She submitted that the marriage has not broken down beyond reconciliation as she is willing and ready to live with the petitioner as husband. She claims that the Petitioner is simply under the influence of some family members who are against the marriage.

Upon consideration of the evidence and testimonies of the parties and witness called by the Petitioner, I do hereby find that the Respondent never deserted the Petitioner or the children of the marriage. It is the Petitioner who in fact deserted his wife and children. He did not provide for them a home as required of a husband. He did not establish a matrimonial home. There was therefore nothing to abandon or desert from. He is the one who left the Respondent all alone to feed for the children for virtually from the date of the marriage. There was no cohabitation whatsoever in this said marriage. The Petitioner only had opportunities to have brief moments with the Respondent through which the children of the marriage were conceived. I do not agree that the Respondent denied the Petitioner consortium and conjugal rights. To the contrary, it is the Petitioner who made sure that the Respondent and himself could not enjoy these rights of marriage. This is because he did not establish a matrimonial home for the Respondent and secondly, he went to the U.S.A for a period of 15 years without communicating with the Respondent and without providing for his family. The Petitioner totally abandoned his young family.

I find that the Respondent is a loving loyal and kind wife and mother. Despite being denied a matrimonial home, conjugal rights consortium and maintenance for herself and the children. The Respondent still believes in the marriage and wants reconciliation. Despite being accused of disloyalty and adultery and put through the humiliating DNA tests by the Petitioner, she has remained steadfast and still wants the marriage to be given a chance.

This court finds that the Respondent is a patient, resilient and forgiving soul whom the Petitioner perhaps does not deserve. The Petitioner is an ungrateful and arrogant person. An egoist and full of himself. The Petitioner from his conduct believes that he is a gift to the Respondent and possibly the world. Thus, he is not this.

The Petitioner is an irresponsible and uncaring husband and father. He was either a spoilt young man or a fairly sick person who may need psychiatric treatment and counseling. Perhaps the Respondent recognizes that her husband may need help hence her tenacious loyalty to an otherwise undeserving husband.

This court hopes that the Petitioner shall realize what a gift of a wife he has in the Respondent and reciprocates in trying to reconcile with the Respondent and saving this Fragile marriage which has survived purely due to the Respondent's wish to have a family and a father for her

children.

This Petition is therefore dismissed as it has no merits whatsoever. The Respondent shall have the custody of the two children of the marriage. The Petitioner as the father of the children is entitled to reasonable visitation rights in respect of the children. He shall have access to have and for the children to be with him upon making reasonable arrangements to be with the children until such time he shall provide a proper and switch matrimonial home for his family.

The Petitioner is ordered to provide maintenance for the Respondent and the children of his marriage and to pay for their education and medical case until they are of age.

The Petitioner shall pay the costs of the Petition to the Respondent.

DATED AND DELIVERED AT ELDORET ON THE 9TH DAY OF NOVEMBER,2006

M.K. IBRAHIM

JUDGE