



REPUBLIC OF KENYA

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

Divorce Cause 106 of 2004

N.N.NPETITIONER

VERSUS

E.M.KRESPONDENT

J.B.....CO-RESPONDENT

J U D G M E N T

On 13.08.04 the petitioner filed petition praying for the following orders:^{3/4}

- (a) That the marriage between the respondent and petitioner be dissolved.
- (b) That the respondent be ordered to maintain the petitioner and children of the marriage.
- (c) That the respondent and co-respondent be condemned to pay the costs of the cause.
- (d) That petitioner be granted the custody of the children.
- (e) That the court be pleased to grant such other or further order the court may deem fit and just.

The grounds upon which the petition was based are adultery between respondent and co-respondent; cruelty of respondent towards petitioner; and desertion of the petitioner by the respondent.

On 03.09.04 the respondent filed answer to petition denying the adultery, cruelty and desertion pleaded. On the contrary, respondent pleaded that it is the petitioner who has been cruel towards him. The respondent prayed:^{3/4}

- (a) That the marriage between the respondent and petitioner be dissolved.
- (b) That the petitioner's cause be dismissed with costs.
- (c) That respondent be granted custody of the children of the marriage.
- (d) That the petitioner be ordered to maintain the children of the marriage.

The bulk of the hearing of the case took place before the late Mr. Justice P.J. Kamau. Only re-examination of the respondent took place before me.

The petitioner was represented by learned counsel, Mr. L.M. Nyanga'u while the respondent was represented by learned counsel, Mr. N. Kabaru.

Salient facts pertaining to the divorce sought may be summarized as under.

The petitioner and respondent got married on 31.05.96 at the Registrar's Office, Nairobi under the Marriage Act, Cap.150. They had, however, cohabited as husband and wife in South C, Nairobi under Kikuyu Customary Law for over a year prior to contracting the statutory marriage. The Mugoya house was being rented by the petitioner from her father. There are two issues of the marriage:³⁴

(a) I.K.M. – a son, born on 04.11.92.

(b) L.N.M.– also a son, born on 14.10.96.

Both petitioner and respondent are residents of and domiciled in Kenya.

The petitioner holds a B.Com Degree from India and is a businesswoman in Nairobi. She gave her average earnings as being around Kshs.30,000/= per month. She gave the respondent's earnings as Kshs.70,000/= net per month. The respondent was described as a Civil Engineer from the University of Nairobi, working with [particulars withheld]. The respondent himself gave his gross pay per month at between Kshs.90,000/= and Kshs.60,000/= per month.

The parties separated when they were cohabiting before entering into a statutory marriage in 1994 but came together again and formally married. According to the petitioner, the respondent brought a woman called M in the house and the petitioner and the woman kissed there whereupon there was a fracas and the petitioner hit the respondent with a bottle on the head when the respondent threatened the petitioner not to touch the other woman. It was the petitioner's evidence that following that incident, the respondent left the matrimonial home but he returned in 1995. Petitioner and respondent patched up their differences and formalized the association through contracting a statutory marriage on 31.05.96 as already recorded. According to the respondent the lady Engineer called M was a professional colleague and that what the petitioner took for an intimate kiss was just a hug as she left and that he had no love affair with Engineer M.

As regards co-respondent J.B, the petitioner complained that she saw her driving the respondent's car in 2004; that she (petitioner) confronted the respondent about J.B and threatened to divorce the respondent whereupon he said "OK". The petitioner said she had suspected the respondent of having a relationship with J.B way back in 2002. During her cross-examination, the petitioner said of J.B as follows:

"I never abused J.B when I confronted her when I saw her in his car. He was living with her. I never went to his house. I have no evidence except through friends. I have seen her dropping him to work last year. I saw them leaving early in the morning. It was not once."

The evidence relied upon by the petitioner to prove adultery between the respondent and co-respondent J.B seems sketchy and based principally on what the petitioner gathered from friends who never testified before the court. The co-respondent did not come to testify before the court. Service on her was purported to be effected through the respondent who merely received the summons and never bothered to inform her that she was party to the case. The respondent denied having a love affair with J.B and that he knew her as a friend only. The standard of proof in adultery, and indeed in other matrimonial offences, is high. In High Court Divorce Cause No. 65 of 2003, Charles Irungu Kioi –vs- Susan Wanjiru Irungu, I came to the conclusion after reviewing the authorities on the matter that the standard is somewhere between beyond reasonable doubt and balance of probability. I reiterate that view and hold that the petitioner has not discharged the onus of proof placed on her to the required high standard as far as adultery is concerned. The adultery ground fails and is dismissed.

As regards the ground of cruelty, the petitioner complained that the respondent took to excessive drinking, to the extent of rendering himself a non-performer sexually *vis-à-vis* the petitioner. The petitioner said she loved the respondent and got him medicine to energise him but he never completed the treatment and she gave up. As at the time the petitioner gave evidence in this cause in April, 2005, she complained that the last time the respondent had had sex with her was way back in 2001. It was the petitioner's evidence that the respondent eventually left the matrimonial home in 2002 and that even before he left, she and the respondent had virtually ceased to have anything in common, apart from talking about the children. The respondent complained that the petitioner was domineering and that he detested it. He admitted that he used to go out for drinks with friends and be late about twice a week but denied being an excessive drinker. He also complained that the petitioner made him feel inadequate and useless; that she told him to move from the house she was paying rent for; and that he eventually left. He acknowledged that his sexual performance went down, reducing its frequency. He admitted not having had sex with the Petitioner for a long time, as long as six months, as he had no desire. He said he tried to take medicine but it did not work and he gave up. He too expressed desire for divorce.

The petitioner has acknowledged that the respondent has been assisting financially by paying her about Kshs.10,000/= per month and that he was paying school fees for the children. The petitioner said she was not asking for maintenance.

It is common ground between the parties that they separated in 2002 and that the respondent left the matrimonial home and the two have not resumed cohabitation since. Each party blames the other for the breakdown of the marriage.

I have given due consideration to the submissions of the parties and the evidence in support thereof.

The major problem between the petitioner and respondent seems to be lack of trust by the petitioner in the respondent, apparently fuelled by the respondent's drinking habits plus his unsatisfactory sexual performance. The court proceedings show, for instance, that the petitioner went to see the respondent in Botswana when he was working there in 1999. She stayed with him for a month but the respondent never had sex with her. Arising therefrom, the petitioner said in her evidence before the late Mr. Justice Kamau that she suspected the respondent was having extra-marital affairs. But this is the same man whose sexuality the petitioner had previously attempted to revitalize by even getting medicine for him without success!

Both the petitioner and respondent agree that their marriage has ceased to have meaning and each wants it dissolved. Where they differ is:

Which of them should take the blame?

It seems to me that the petitioner and respondent are incompatible and have not made adequate efforts to understand each other. The petitioner blames the respondent for taking to excessive drinking and apparently adversely affecting his sexual performance. The respondent blames the petitioner for being domineering and making him feel as if he is nothing. I find each to have contributed in some measure to the domestic strife but that the respondent is the more blameworthy. Each has been cruel to the other and I apportion the parties' respective contributory cruelty as follows: The respondent has contributed 70% cruelty while the petitioner has contributed 30% cruelty.

There is no doubt in my mind that the marriage under consideration is no longer viable. 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 respondent seems to earn about double what the petitioner earns, he shall contribute twice as much as the petitioner towards the maintenance, education and health of the children. Custody of the children is granted to the petitioner but the respondent shall have reasonable access to and visitation rights over the children. The respondent shall meet 2/3 (two-thirds) of the petitioner's costs of these divorce proceedings.

Orders accordingly.

Delivered at Nairobi this 14th day of December, 2006.

B.P. KUBO

J U D G E