

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Divorce Cause 52 of 2004

H.F PETITIONER

VERSUS

M.B. K RESPONDENT

Coram: Before Hon. Justice J.W. Mwera

Lughanje for the Petitioner

No appearance for the Respondent

Court clerk – Sango

JUDGMENT

In a petition filed here on 9-6-04 Dr. F (the petitioner) prayed this court to dissolve his marriage to M.B.K (the respondent) on grounds of desertion and cruelty. It was pleaded that the two married on 29-5-79 at the civil registry at Kwale, Coast Province. That they cohabited at a house in Nyali Mombasa and were blessed with children of whom four (4) are living adults. Further that the petitioner did not know the respondents' contact address but seemingly he got orders for substituted service and the petition was served (going by the record). And more, that the respondent deserted the said matrimonial home on 30-11-99 never to return. That she crossed over to Uganda and did not heed to return even after the petitioner contacted her there by a letter of 31-12-99. And for some 3 years, by the time of filing this petition, the respondent had not returned to the matrimonial home.

As regards cruelty the petitioner pleaded that on 7-12-99 the respondent induced three of the children of their marriage (V, C. D and C. H) to leave the Nyali home where they were living with the petitioner, and proceed to Uganda. That that act caused the petitioner much mental anguish and pain as his parental rights over these children was interfered with. That the children suffered deprivation and exposure in Uganda ending in Victoria's death. And that besides this the respondent committed acts of cruelty by depriving the petitioner of conjugal rights and consortium. So he sought this court's orders dissolving the marriage, awarding damages and that the respondent be condemned in costs.

The record has it that on 14-7-04 the petitioner was granted orders to serve the respondent by affixing the petition on the notice boards at Mombasa, Kilifi and Malindi Law Courts. And also to advertise in the Daily Nation newspaper. This was done after the process server was not able to trace the respondent at the last known address at Loreto Convent, Mombasa. The substituted served was effected but the respondent did not appear or answer the petition. So the registrar certified the petition as ripe for hearing – undefended.

The petitioner then gave evidence in line with his petition and produced both the marriage certificate (Ex. P1) and the letter of 31-12-99 by which he unsuccessfully sought the respondent to return home (Exh. P2). He went over the aspect of desertion and told the court that for over 4 years the respondent has remained away from the matrimonial home with no hope of her returning. He then testified about the cruelty and asked the court to dissolve the marriage. He abandoned the prayer for damages saying that he would litigate it elsewhere. But the petitioner asked for costs.

Having gone over the pleadings and heard the petitioner this court is satisfied that the respondent has

deserted the matrimonial home and there is no prospect of returning to it. Some five years are gone.

As for cruelty, yes, the respondent is said to have unlawfully induced the 3 children of the marriage to follow her to Uganda. The petitioner said that he was ill in hospital. That that act by the respondent caused him mental anguish particularly that even one child died out there. That at constituted cruelty.

On those findings the marriage herein is declared dissolved. Due decrees to follow.

In the traditional practice of family law, costs were/are never ordered against the wife in any event. We are told that with gender equality or whatever the status of men and women as perceived to be nowadays, the two are equal and should enjoy benefits and shoulder burdens equally. May that be so. But for this court, it has granted dissolution sought but the respondent will not bear the costs. The petitioner will suffer them.

Judgment accordingly.

Delivered on 24th February 2005.

J.W. MWERA

JUDGE