



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Divorce Cause 4 of 2004

J.O.....PETITIONER

VERSUS

R.M.N.....RESPONDENT

JUDGMENT

The petitioner filed a divorce petition against the respondent on 28/5/2004. He stated that in January 1992 he got married to the petitioner in a church at Kisii but the marriage certificate was with the respondent who did not attend court nor file any reply to the petition, having been served with the petition. The petition was therefore listed for formal proof after the Deputy Registrar issued a certificate that the pleadings were correct as required under Rule 29(2) of the Matrimonial Causes Rules.

The petitioner stated that after the said marriage they lived together as husband and wife at Kaptembwa estate in Nakuru and they got one child by the name E.O in September 1993. The petitioner claimed that since celebration of the said marriage, the respondent had treated him with cruelty. The particulars of cruelty which he listed down included:-

- (a) Using abusive language.
- (b) Neglecting and being disinterested with the petitioner.
- (c) Leaving the petitioner to be the sole provider for the family.
- (d) Spying on the petitioner.
- (e) Subjecting the petitioner to cook and clean utensils for himself.

I may observe that items (a) to (e) above are strictly not complaints which may be said to amount to acts of cruelty. According to **“RAYDEN ON DIVORCE”** 13th Edition Pg. 226, cruel conduct is behaviour that makes it unreasonable for the petitioner to be expected to live with the respondent. The old definition of cruelty was conduct of such character as would cause danger to life, limb or health (bodily or mental) or as would give rise to a reasonable apprehension of such danger.

The petitioner said that in April or May 1996 the respondent deserted the matrimonial home and since then she never went back. The petitioner is currently residing in the United States of America where he is working as a security officer. He said that since 2001 he had been maintaining their son and he took the boy to a boarding primary school but the respondent removed him from there. The child was currently

staying with the respondent. The petitioner urged the court to dissolve the marriage, saying that it had broken down irretrievably. He also urged the court to grant him custody of the child, saying that he would take him back to a boarding school and during the school holidays, the boy could stay with the petitioner's mother. He also told the court that in the year 2000 the respondent filed Divorce Cause No. 21 of 2000 but she withdrew the same.

I have considered the issues raised by the petitioner herein. In my view, the petitioner did not prove that the respondent was guilty of cruelty as alleged and if that was the only ground for seeking dissolution of the marriage I would have declined to allow the same. However, it has been shown that the petitioner and the respondent have separated since sometimes in 1996. The petitioner told the court that he had made all the effort to reconcile with the respondent but he had failed. I believe the marriage is irretrievably broken down and in the circumstances I dissolve the marriage and order that a decree nisi do issue.

The petitioner prayed for custody of the child, Emmanuel Onyando. The boy is now about 13 years old and is living with the respondent, his mother. The petitioner is working and residing in the United States of America. He says that he will enroll the child in a boarding school and during the school holidays the child would be staying with the petitioner's mother at their rural home in Kisii. It is evident that the petitioner is not interested in actual custody of the child but legal custody.

Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relate to the person of the child including the place and manner in which his time is spent. [see **"RAYDEN ON DIVORCE"** (supra) Page 1077 and **Children Act 2001**, Section 81].

The petitioner did not explain to the court why he believed he was entitled to custody of the child as opposed to the respondent. the court is enjoined to apply the principles stipulated under **Section 83** of the **Children Act** in making a custody order in respect of a child.

Considering that the petitioner is not intending to live with the child as he is living out of the Country, it would not be in the best interest of the child to grant the petitioner custody of the child as prayed. The respondent will therefore continue to have custody of the child. The petitioner shall nevertheless have right of access to the child at such times whenever he is in Kenya but with prior arrangements with the respondent.

The petitioner will bear his own costs for the petition.

DATED, SIGNED & DELIVERED at Nakuru this 29th day of June, 2005.

D. MUSINGA JUDGE

29/6/2005