



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Divorce Cause 9 of 2005

S A R S..... PETITIONER

VERSUS

A R M S RESPONDENT

F SCO-RESPONDENT

JUDGMENT

The petitioner S A R S [particulars withheld], sought an order for divorce from her husband A R M S [particulars withheld], on grounds of her husband's adultery with one F S [particulars withheld], who was named in the petition. It is however, not clear whether she was served with the petition but the affidavit of service shows that she was with the respondent when he was served with the petition. The respondent introduced her to the process server as "**F S [particulars withheld], his fiancée's**".

The respondent was served on 26th February, 2005, but he did not enter appearance or file a replying affidavit.

Both the petitioner and respondent are domiciled in Kenya. There has never been any proceedings between them before this Divorce Petition.

The Registrar certified the Divorce as "**undefended**" and issued a Certificate to that effect, when the respondent failed to enter appearance within the stipulated period. The certificate was issued on 28th April, 2005.

The petitioner and respondent were married on 4th August 1991, at the Shree Visa Oshwal Community in Nairobi. The petitioner produced the original marriage certificate. They have 2 sons K [particulars withheld] and K [particulars withheld], born in 1997, and 2000, respectively.

Giving evidence in court, the petitioner confirmed that she lived and cohabited with her husband the respondent on Brookside Drive, Westlands, Nairobi in a joint family household, until December, 2002, when they disagreed and she moved back to her father's house.

Recalling the reason for their disagreements, the petitioner stated that from about June, 2001, she started suspecting the movements of her husband who started coming home late, or not at all, and would also talk very suspiciously on telephone. By that time, the husband worked as a partner in the running of BP Petrol Station along Waiyaki way in Nairobi. The woman named F S [particulars withheld] worked in the same petrol station as a secretary and lived in a flat opposite the petrol station.

Acting on information received, the petitioner decided to follow her husband one Sunday afternoon in an effort to establish his suspicious movements. She found both her husband and F [particulars withheld] in

a flat, opposite the petrol station. She confronted him questioning why he was in F's[particulars withheld] flat. He freely admitted that he loved F[particulars withheld] and wanted to be with her. She demanded that he stops seeing her but he did not, and later he even admitted that he had rented the flat for her.

The petitioner found from the records kept at the petrol station that the respondent paid rent of about Kshs.22,000/= for the flat. The petitioner requested her father to find her husband an alternative job, which he did with United Millers in Kisumu. Before the respondent moved to take up the new job in Kisumu, he had already moved out of the family house to live with F[particulars withheld], but nevertheless when he moved to Kisumu, the petitioner moved to join him in an effort to reconcile.

She took the children with her, but to her amazement her husband told her that F[particulars withheld] too would be coming and when she (F)[particulars withheld] arrived, the respondent spent the night away from the house. The petitioner realized that her husband would not give up F[particulars withheld], so she decided to return to Nairobi, after staying with him in Kisumu for only one week. She went back to her father's house in Kitisuru, Nairobi, and never resumed cohabitation with the respondent. Later she learnt that he lost the job in Kisumu and returned to Nairobi but she did not bother to look for him. Instead she decided to petition for divorce.

During the hearing, she prayed the court to allow her to take the children with her to Britain where she has relatives who can assist her educate them as her husband stopped paying school fees for the children in June 2001. Her father who used to assist her died last year (2004) and her mother who is very old is not employed. The petitioner is currently working as an administrator at Oshwal Primary School, but the salary she gets cannot assist her to provide for the children fully. At the conclusion of the oral evidence, counsel on record, Mr. A.B Shah advocate made brief submissions and prayed the court to grant divorce and also allow her to take the 2 children to Britain. He quoted a decided case the case of **MEHRUNNISSA v PARVEZ CIVIL APPEAL NO. 11 OF 1979**, the Judgment of Madan, Law and Potter JJA(as they were).

On the issue of leave to take a child or children out of the court's jurisdiction, the court adopted the words of Lord Scaman in **DUVORT STEELS LTD v SIRS [1980] 1 WLR 142**,

“My basic criticism of the learned judge is that in his desire to do justice he failed to do justice according to law”.

The court went a head to grant leave to the wife to take children out of jurisdiction and considered certain factors as appears in that judgment.

In this case, the petitioner's evidence of her “charge” of adultery against her husband was not “opposed” as the respondent failed and or neglected to reply to the petition after it had been served on him. From this, I find that the allegation of adultery against him “must be true”, in the circumstances.

As for the request for leave to take the child out of the jurisdiction of this court, I note that this was not specifically pleaded, but that notwithstanding, as the respondent did not reply to the petition in which his wife sought custody of the children of the marriage, I take it that he is not interested in their welfare, more so, because he has neither given money for their maintenance, nor paid school fees for them, since June, 2001. The petitioner has therefore been left in a situation where she has to fend for herself and the children. Her father who used to support her died last year. Her mother is unemployed. She has a job which does not fetch sufficient money for the maintenance of the children, as well as payment of their school fees. She has uncles living in the United Kingdom who are willing to assist her, with the children so she wants to leave the country and indeed the jurisdiction of this court and join them. I consider this a reasonable request and I will allow it, as I find that it will be in the best interest of the children.

I am satisfied from evidence on record that the petitioner has proved that her husband did and is still committing adultery with Fatma, with whom he lives in a house in Lavington, Nairobi. I therefore proceed to grant an order dissolving the marriage between the petitioner and respondent. I also award the petitioner the custody of the 2 children of the marriage namely K[particulars withheld], born on 17th

March, 1997, and K[particulars withheld], born on 11th August 2000. I also grant leave to the petitioner to remove the two children out of the jurisdiction of this court and to travel with them to the United Kingdom, where she intends to settle.

Finally, I direct that the “decree nisi” will issue straight-away and the same will be made absolute within a period of one month from today. The respondent will bear the costs occasioned by this Divorce Petition.

DATED at NAIROBI this 28th day of July, 2005.

JOYCE ALUOCH

JUDGE