

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Divorce Cause 62 of 2004

P A C PETITIONER

VERSUS

D J C..... RESPONDENT

Coram: Before Hon. Justice Mwera

Mrs. Gudka for Petitioner
Mrs. Deche for Respondent
Court clerk -Kazungu

JUDGEMENT

By her petition dated 15th December 2004, Patricia prayed for a dissolution of her marriage to the respondent, DC. That the 2 married at Nakuru on 28th December 1997 when the petitioner was a teacher there. The couple cohabited at Nakuru, Kibwezi, Nairobi, Vipingo Estate and lastly at Nyali, Mombasa. They were blessed with 2 children, N and N. As P and D continued to cohabit there arose what is termed in matrimonial causes “constructive desertion” whereby although the couple lived under one roof, their relationship could pass as one of two strangers. That the respondent began by keeping distance between himself and the petitioner. It ended with withdrawal completely of any kind of contact between them whereby now the petitioner took on the role of bringing up the children all by herself – taking them out, attending their school activities etc. That as a result the petitioner considered and left the matrimonial home to live separately with the children. So she laid the prayer of dissolution of the marriage, and asked for the custody of the 2 children, alimony and maintenance.

The respondent answered the petition and also cross – petitioned. It was admitted that the two had two children, issues of the marriage, but constructive desertion was denied. The ground was termed baseless, unsubstantiated untrue and even unknown in law. Further that the petitioner had in fact admitted to having moved out of the matrimonial home. The respondent in turn accused the petitioner of cruelty for responding to the former with what was called “silent treatment” and socializing with male friends – a thing that caused mental anguish to the respondent. It was added that the petitioner undertook overseas trips and spent holidays there without the respondent. That she treated the respondent’s family indifferently, took the children abroad without his knowledge and more. He too prayed that the marriage be dissolved because their marriage had broken down to an extent beyond repair. That any attempts at reconciliation had borne no fruit. While asking that the petition herein be dismissed the respondent desired that their marriage be dissolved on the strength of his cross – petition. Alimony was denied but that the issue of custody and maintenance of the children could be determined at the Children’s Court. And that the petitioner bears costs in her petition as well as the cross petition. In an aside on this issue of costs, in the good old days it can be remembered that it was the husband who bore any costs whatever the outcome of a divorce and no matter who the petitioner was. Probably that has changed with the times.

Before hearing the petitioner, the two had arrived at some agreement in a 9 – paragraph letter filed in court which was endorsed. In paraphrase, the petitioner did not maintain her prayers for alimony or maintenance but got custody of the children. They provided for unlimited access to the children by the respondent and that the respondent would pay N’s fees while the respondent would pay that of N – both going to schools in the UK. They are agreed on the respondent maintaining the children in the UK – the sum payable per month and how. Each party agreed to pay his / her own costs in these proceedings.

Having agreed to those aspects, the petitioner testified in the manner laid out in the petition. That having been noted above the same need not be reproduced here, save to add that she denied ever having been cruel to D. There was no cross examination. Mrs. Deche for the respondent conveyed to the court her client's desire to abandon his cross – petition and Mrs. Gudka concluded that constructive desertion had been proved and so the sought dissolution should be granted.

Having heard all the above this court is satisfied that on the basis of constructive desertion, the marriage herein be and is hereby dissolved. On terms set out in the consent letter of 20th July 2005 whose broad aspects are set out above, decree nisi to issue, to be followed with the other processes in due course.

In sum, the marriage of the petitioner and the respondent stands dissolved. Decree nisi to issue. The cross petition having been abandoned is dismissed.

Judgement delivered on 2nd August 2005.

J.W. MWERA

JUDGE