



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CASE 16 OF 2005

P.P.O..... PETITIONER

- Versus -

L.W.L.O RESPONDENT

Coram: Before Hon. Justice Mwera

Njoroge for Petitioner

Ndegwa for Respondent

Court clerk – Kazungu

J U D G M E N T

On 1/3/2005 P.O petitioned this court for a declaration that his marriage to L.O has so irretrievably broken down that it must be dissolved. It was stated that the two married on 25/1/2002 at the office of the registrar of marriages at Mombasa. That they lived in Nyali, Mombasa until about a year later when L deserted the matrimonial home by migrating to Philadelphia, U.S.A., on or about October 2002. That she has remained out there all the time save for a visit in September 2004. And that the couple had no children. Particulars of desertion included the respondent's moving out of the matrimonial bed immediately after the marriage; migrating to the U.S. where she lives and works and that the only time she came back to Kenya she stayed away from the matrimonial home.

In her answer L denied deserting the matrimonial home. That her living and working in the U.S.A. preceded the marriage herein, a proposal P the petitioner agreed to. He had seen himself relocating there later to work for gain and that he paid for the respondent's air ticket to the U.S.A. That as she was there the couple kept in cordial contact. That also in the meantime the petitioner engaged in adulterous activities, and on that account he had already deserted the matrimonial home before the respondent's visit in August 2004. She claimed that she contributed much to the petitioner's motor vehicle maintenance business and purchase of real property in Nairobi and Mtwapa. L insisted that P's claim that she deserted the matrimonial home was baseless and false. But that P committed adultery with J.W and Anjimile Mtila, ending with J having his child. It was added that at some point P was charged with raping one S.M in CMC.R.C 757/2004. That the petitioner had gone ahead to arrange to marry Anjimile when his marriage with L was still subsisting. And that such conduct caused the respondent mental anguish, public embarrassment and the like. To illustrate acts of cruelty, L listed failure by the petitioner to pick her up from the airport when she arrived from the U.S.A.; the said acts of adultery; failure to answer her calls/correspondence, and deserting the matrimonial home without informing the respondent whereupon

she had nowhere to stay. She sought this court to dismiss P's petition with costs. However, later on 7/9/2005 the respondent filed an amended answer to the petition and a cross petition relying on the averments she incorporated in her answer on cruelty and desertion. She prayed that her cross petition be allowed.

In her evidence L told the court that the two married on 25/1/2002 (Exh.P1) after 20 years of friendship. That P proposed to marry her when she was working in the U.S.A. so he always knew this. That after that marriage L returned to the U.S. and even got her lawyer to write to the U.S. Embassy to facilitate P's documents to join her there. That he sold a plot at Mtwapa and L sent him US dollar 1700. But she then heard that he was going out with some woman into whose house he later moved. So when the respondent returned to Kenya in August 2004, she had no matrimonial house to stay in. Therefore she demanded and P returned the money she had sent to him (Exh.P2). That in March that year L got information that her husband was in prison on some sexual offence. She could not contact him but that their bestman confirmed it. When L ultimately got through to P she told her that he had a friend, one J.W with his 2 - year old daughter. That although P was not forthcoming with L when she returned to Kenya she had come by a card in which P was going to marry Anjimile in Malawi (Exh.P3). When she confronted him with this, he admitted. One thing L told the court and which P himself admitted in his own testimony is that the two never consummated the marriage after its celebration. The respondent gave the reason as the petitioner not willing to take an HIV test before consummation. She denied abandoning her matrimonial home and claimed that it was P who deserted in August 2004 when she returned from the U.S. That for all the above, the marriage must just be dissolved.

On his part P told the court that after the marriage L wanted to go to the U.S. where she had a job. While there they communicated via E-mail but he declined to join her there. That the marriage was never consummated and he did not know why L moved out of their matrimonial home at Nyali. Then the petitioner said that he told his wife to go to her job in the U.S. if she so wished. His view is that actually there was never a marriage between the two from day one and it cannot be repaired. He wants a divorce.

The petitioner denied that not consummating their marriage was because he declined to go for an AIDS test. That although he did not go to the airport to meet L on her return from the U.S. he was all the time in the matrimonial home. That he had the rape case still pending in the lower court. P said that he knew Anjemile Mtile only as a girlfriend but he was not going to marry her in Malawi at all. That the card L produced here was in fact printed by Anjemile herself. He admitted having a child called B.O with J.W whom they got after the marriage herein. And that his firm indeed paid L's air ticket to the U.S. but then there was a promise to refund.

Both sides submitted. The petitioner opened with a point of law that the amended answer to the petition and the cross petition be struck out because the document was filed on 7/9/2005 after pleadings had closed and without the court's leave. That the respondent deserted the matrimonial home, denying the petitioner his conjugal rights. That the couple never consummated their marriage. That P did not consent to his wife going to live in the U.S.A. and that the petitioner had a child with W as a result of being deserted – rather a novel approach this.

On her part L maintained that even before the marriage P knew that she was working or would be working in the U.S.A. and he agreed to that. He intended to join her there. But that he deserted the matrimonial home and committed adultery with several women.

That the amended pleadings do remain the basis of the respondent's prayers to this court and because no prejudice was caused to the petitioner. That on granting L divorce she should get costs and orders of maintenance and settlement of matrimonial property. To begin with is status of the amended answer to the petition and the cross petition: the petition was filed on 1/3/2005. The registrar's notice to appear was served on or about 8/3/2005 (as per the date at the back). It was dated 28/2/2005 but that is obviously an error because the petition itself was filed on 7/3/2005. Memorandum of appearance was filed on 5/4/2005 followed by the answer to petition on 28/4/2005. No side took issue with the time to enter appearance or file answer to the petition. The pleadings were closed on 24/6/2005 when the registrar certified so. The amended answer and cross petition was filed on 7/9/2005. There appears to have been no leave

sought/granted to this end. Rule 19 (Matrimonial Causes Rules) says:

“19. Any originating summons, notice of an application for ancillary relief, summons, pleading or other document may be amended by leave, subject to any directions as to re-service and as to consequential amendment of pleadings already filed.”

The short answer is that the amended answer to the petition and cross-petition were filed without the court's leave and it is thus expunged from the record. Why the petitioner did not take up this matter early enough is not clear. But the respondent seemed to think that no prejudice was caused to the petitioner by hearing the whole cause as if due leave for the now expunged pleading had been obtained. It is not that simple. The other party ought to know what amended pleadings face him by being notified of that. The only difference here is that the bulk of what should have constituted a crosspetition is contained in the original answer to the petition.

In determining the petition herein, this court is satisfied that the subject couple married after the petitioner knew that the respondent worked or intended to take up a job on the U.S. That is what L told the court and it was believed. P's firm bought her an air ticket but the court was not convinced that L would refund the sum. After all P had agreed that she would go to the U.S. if that was her wish. So it cannot be said that she deserted the matrimonial home. It appeared to have been a family arrangement. And desertion is the only ground that the petitioner relied on and it has failed. Evidence tended towards non-consumation of the marriage. That, as both sides admitted, really characterized their marriage. That forms a ground to declare marriage a nullity (see section 14(1)(b) Matrimonial Causes Act Cap 152). However that is not what this court was asked to do. Indeed allegations of adultery also abound and the petitioner seemed to admit not only having a child with W after he married L, but that he was also going to exchange vows with Anjimile in Malawi. The court did not believe that the card (Exh.P3) was printed by Anjimile on her own and not with the agreement or actual action by P. He said that the lady was his friend. But again there was no pleading before this court to grant divorce on grounds of adultery or even cruelty. The technical approach to divorce matters may end in not allowing for a dissolution. Like here the petitioner has not proved desertion. But where the couple cannot carry on any more and both P and L seem to have gone that far, not granting them a divorce does not automatically reseal or remake a marriage. It is better in such circumstances to dissolve the union and that is granted here. There is no order as to costs. There was no pleading about maintenance or matrimonial property and thus no orders are made here about that. Separate applications may do.

In sum the marriage here is dissolved. Decree nisi to issue to be followed by decree absolute in the usual manner.

Delivered on 28/10/2005.

J.W. MWERA

JUDGE