



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL SEPARATION CAUSE NO.3 OF 2000

J G A D W.....PETITIONER

=V E R S U S

M M N.....RESPONDENT

JUDGMENT OF THE COURT

The Petitioner is the husband of the Respondent. The two got lawfully married to each other on 29.9.1997 under the Marriage Act (Cap.150). The Certificate of Marriage is annexed to the Petition herein. They lived and cohabited in Diani, South Coast of Mombasa in a house constructed by the Petitioner on a plot of land owned by a company owned majorly by him. They have one child adopted by the family. The Petitioner who originally is Dutch carries on business whereas the Respondent is also a business woman.

The Petitioner herein seeks for a Judicial Separation on the grounds therein specified but which can be summarised into two, that is to say – adultery and cruelty by the Respondent. When the petition was served upon the Respondent, the latter filed her answer denying both grounds. The petition was filed on 20.1.2000. Between the date of filing the Petition and the hearing several interim applications were filed between the parties and the final orders of this court concerned certain consent orders settling the couple's properties as well as providing certain moneys as maintenance to the Respondent. This court was during the hearing of this cause, invited to consider and take into account the provisions of the said financial agreement. The said agreement also appears to have adequately provided for the child's maintenance and upkeep. Access of the Petitioner to the child is also adequately provided for therein.

Turning to the Petition, the Petitioner gave evidence that the Respondent left him in December 1999 accompanied with the child of the marriage. She just drove away and has never returned to the matrimonial home again. He claimed that thereafter on 31.12.1999 he met her at the beach at Tiwi in South Coast. She was in company of a man called S C. On questioning them both, they according to the Petitioner, confirmed that they were lovers and that they were living together. Respondent seemed to have confirmed to the Petitioner that she will never come back to live with him since she intended to marry the said S C. He further stated in his evidence that even after the financial agreement aforesaid had been made, he, the Petitioner, got information that the two now resided somewhere at Nakuru where he made a point to visit them to confirm. He indeed found the couple's new home and established that they were cohabiting as husband wife. The said C gave the Petitioner a personal card and also confirmed that the two were cohabiting. Petitioner argued accordingly, that adultery was being committed by the two since they were cohabiting and that the court should presume the commission of adultery.

The Petitioner also in his evidence stated that he believed that the Respondent at one time or other committed adultery with another man called A J whose love letters the Petitioner intercepted.

In his further evidence also, the Petitioner gave evidence to prove cruelty by the Respondent on him. He described an incident when she tried to hit Petitioner with a panga because he tried to find out why she habitually came home late and being totally drunk. At another time he went to collect his car she had used out during her drinking sprees but when they arrived home together he once again took up a panga to cut him but the Petitioner avoided a blow and disarmed her. And yet again another time she held their child by the legs, with the child facing down which was cruel to the child but the purpose of which was to injure Petitioner's feelings. When he intervened, she again took up a panga to cut him but he avoided.

On 25th December, 1999 when the Petitioner came home from a Zanzibar trip, he found she had emptied their residential house of everything inclusive of residential gargets like T.V., fridges, etc., and had disappeared. He went to the bank the next day and found she had withdrawn Kshs.300,000/-.

This distressed him a great deal and created fear as to what else she may have done or do near. These actions on her part, according to the Petitioner, totally removed the trust he had built on her and replaced it with fear, even for his life, he complained.

And for the above reasons the Petitioner sought for a Judicial Separation and stating that they cannot presently live together.

As earlier indicated in this judgment the Respondent filed an answer to this Petition denying all the above allegations. During the hearing of this cause, however, she failed to turn up and defend the cause. Instead the hearing started with her counsel present, but having recorded the consent orders on finances and maintenance aforementioned, he chose to leave the court. So the proceedings were conducted ex-parte.

The evidence adduced by the Petitioner goes unchallenged. There is no evidence of condonation or collusion. I accordingly accept the evidence of the Petitioner as credible and accordingly true. On that basis I do find that the Respondent committed adultery in the course of their marriage and committed acts of cruelty against the Petitioner. These two do entitle the Petitioner the relief of Judicial Separation as prayed. There is a financial agreement signed between the Petitioner and the Respondent that takes care of the maintainance of the Respondent and the child of the couple. There is also a settlement of the family property as contained in the aforementioned financial agreement. This court hereby takes the said agreement into account and incorporates it into this judgment. The terms and conditions of the said agreement are hereby ordered to be orders of this judgment to the extent they provide.

The final orders of this court are therefore as follows:-

- a) The Petitioner is hereby granted a Judicial Separation as prayed.
- b) The agreements, terms and conditions of the Agreement dated 8th December, 2000 are hereby reduced into an order of this court.
- c) There is no order as to costs.

Dated and delivered at Mombasa this 20th day of February, 2002.

D.A. ONYANCHA

J U D G E