



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 147 OF 1996

M M K.....PETITIONER

Versus

H K.....RESPONDENT

J U D G M E N T

The parties in this suit were married in June 1962 in Meru. Thereafter they lived in Meru until 1964 and then moved and lived in Nairobi until 1994.

There are three issues of the marriage who are all adults.

While in Nairobi, the respondent was gainfully employed until his retirement in 1988. In March 1995 he decided to continue with his farming activities in Meru, where in his testimony he intended to settle with his family. He claims that his wife refused to move to Meru and in the circumstances he moved alone, while the petitioner remained in Nairobi.

In December 1996, the wife petitioned for divorce alleging inter alia that the husband had deserted the matrimonial home in 1994.

In his answer to petition and his cross petition, the respondent while seeking to have the petition dismissed also seeks to have the marriage dissolved on the basis of alleged desertion by the petitioner. Both the parties had based their applications on several other grounds, which were abandoned during the hearing of the petition.

Each party alleges that the other deserted the matrimonial home.

As I discern it then, two issues arise herein, namely has the act of desertion occurred, if I were to find in the affirmative, then it would be incumbent upon me to establish who of the two can be said to have deserted the other.

Section 8 (b) of the Matrimonial Causes Act makes it a requirement that where a petitioner bases his or her application on desertion, it must be “desertion without cause for a period of at least three years immediately preceding the presentation of petition.

It must be borne in mind that the burden is on the party who alleges desertion to prove that the other party deserted. That proof must be beyond reasonable doubt. The onus of proof is thus far higher than is in ordinary civil cases.

On the legal burden of proof, Lord Denning L. J. said in *Dunn V Dunn* [1948] 2 All E.R. at page 823.

“The legal burden throughout this case is on the husband as the petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal. She may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself: is the legal burden discharged? Has the husband proved that she deserted him without cause?”

Each party alleges that the other deserted the matrimonial home.

The petitioner alleges that the respondent deserted her in 1994 and has stayed away from her and from the matrimonial home to-date. In his answer and cross petition, the respondent states that it was his wish that the family should move and settle in their home in Meru, upon his retirement from his employment with Kenya Planters Co-operative Union. This, he states, was in order to assume permanent residence there, and to concentrate on farming. He also states that the petitioner had however categorically stated that she would never move from Nairobi to Meru, and that he would have to move without her.

Both the parties who are elderly testified but called no witnesses.

The base of a matrimonial home should be by mutual agreement. However where mutual agreement does not exist, then it becomes a matter of give and take and one party would have to give way for the benefit of the marriage. Otherwise, ordinary good sense demands that the breadwinner’s decision should carry the day. The respondent testified that he wished to concentrate on his farming activities in Meru after his retirement. Although she indicated in her petition that she was a businesswoman and despite the fact that, the respondent in the pleadings had disputed it, she did not state so in her testimony, nor did she adduce any evidence in support thereof. I am inclined to accept the fact as claimed by the husband, that she was a housewife. A wife’s place is by the husband’s side and hence it is my view that, being the bread winner it was upon him to decide where the matrimonial home would be based. By 1995 the issue of the marriage last was thirty years old and the petitioner was the sole companion for husband. Would it have been reasonable for her to remain in Nairobi a housewife while the respondent moved to Meru? I think not. She must have suspected that the mere act of remaining in Nairobi would affect their marital relationship yet she remained behind. In my humble opinion I find that she had no justification to remain in Nairobi.

She did not indicate that she ever visited the home in Meru after 1994, for had she done so and was locked out or told never to return then he would have been guilty of desertion. She chose to remain in Nairobi throughout. I find that her act was unreasonable, and in her state of unreasonableness she frustrated the arrangement to move to Meru and in the instance, it led to the breakdown of the marriage. She deserted the respondent without cause. The respondent impressed me as honest and I found his testimony credible and reliable.

It must be obvious by now that the petition is bound to fail. In the circumstances, the cross petition succeeds and the petition is hereby dismissed. Decree nisi do issue, to be confirmed after three months. Neither party is seeking costs in this suit and nor do I need to determine the issue of maintenance as it has already been resolved.

Dated and delivered at Nairobi this 10th day of May 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in presence of:

Mr. Kimani for the respondent

Mr. Kirundi for the petitioner