

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT DIVORCE CASE NO. 38 OF 2000

D M NPETITIONER

V E R S U S

R M N.....RESPONDENT

R U L I N G

By a petition dated 2nd March, 2000 and filed in this Court on 7th March, 2000, D M N (hereinafter referred to as the “Petitioner”) seeks the dissolution of his marriage to R M N (hereinafter referred to as the “Respondent”) on two main grounds of desertion and cruelty. He further prays that the custody of the children of the marriage be given to him. The facts of this matter may be summarized as follows.

The parties were married on 4th September, 1971 while both were undertaking different medical courses. Out of this marriage there are four issues namely:-

- (a) A M N born in 1975;
- (b) P N N born in 1977;
- (c) S W N born in 1981; and
- (d) C M N born in 1986.

All the children are living with the Respondent who no doubt meets all their educational and daily expenses. The parties seem to have lived harmoniously until around 1985 when the Respondent left the matrimonial home for a period of one week. This was followed by her moving out of the marital bedroom and into their children’s room in 1992. Finally, the Respondent left the matrimonial home on 29/4/1996 together with all the children and took their personal effects with her. The Petitioner made several attempts at resolving whatever disputes they had through emissaries and especially through his elder brother in law, Mr. Kisusya Mulwa.

However, the wife was irreconcilable and thereupon this petition was filed. The Respondent then filed an answer to the Petition on 19/5/2000 in which she also cross-petitioned for divorce on the grounds of adultery and cruelty. At this point, it may be stated that although the Respondent gave the names of five women whom the Petitioner is alleged to have committed adultery with, she never served or caused them to be served with her Answer and Cross-Petition. Indeed, none of these grave allegations were proved at all. On the same note, there is very little evidence to show that the Petitioner was cruel to the Respondent and most of the evidence is to the contrary.

Let me examine the Petitioner’s case. In order to prove desertion, the Petitioner must meet certain legal requirements. In its essence desertion means the “intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent and without reasonable cause” – **Halsbury’s Statutes of England Vol. 17 (third Edition) at p. 160.** In the words of Sir Raymond Evershed M.R. in **Perry v. Perry [1952] ALL ER 1076 at p. 1082** it implies “a rejection of all the obligations of marriage.”

The constituent elements of the fact of physical separation and the intention of bringing the cohabitation permanently to an end must be proved. It is common ground that the Respondent left the

matrimonial home on 29-4-1996 with the children and has never returned thereto. She had not intimated her intention to leave nor was there evidence of any quarrel or conflict preceding her departure. Section 8 (1) (b) of the Matrimonial Causes Act (Cap. 152 of the Laws of Kenya) requires that the Petitioner must have been deserted "without cause for a period of at least three years immediately preceding the presentation of the petition." With the intention of proving the cause of her leaving the matrimonial home for a period of over four years, the Respondent alleges constant harassment, adultery, lack of maintenance for herself and the children, being infected with venereal diseases by the Petitioner and cruelty among other specifics. In short, the Respondent is alleging the existence of circumstances and conduct that she would not reasonably have put up with. As stated earlier, adultery of the petitioner has not been proved mainly because the Respondent did not join the alleged adulteresses nor produce medical reports of her being infected with a venereal disease by the husband. The operation carried out on the cervix was due to a cancerous condition and not an infection with a venereal disease. Further, there is no evidence to show the petitioner had a child with another woman which could be proved by a birth certificate with the petitioner's name on it as the father or by a paternal test. Not even the name of the child was given. There is no report to the Police of any incident of a beating as alleged or a medical report to that effect. The Petitioner has convinced the court that he did not fail to maintain his family. He paid school fees for the children as evidenced by various cheques for instance cheque No. 776153 for the amount of K.shs. 10,600/= issued on 15/8/98 to Strathmore College / School and a payment to Kianda School for shs. 11,240 (Exh. 7) on 31/3/95 for one of his daughters. He also paid a hospital bill of shs. 28,627/50 for the wife after she had left on 21/6/96 (Exh. 3). Various receipts for telephone bills, electricity and other items of a domestic nature were produced by the Petitioner in this Court. He did also assist his estranged wife, the Respondent, settle some of her business loans. The Petitioner comes out as a caring father and husband. The husband made some attempts at reconciliation as evidenced by his letter to the wife (Exh. 12) inviting her to discuss their marital problems and Exh. 13 which was a letter to his brother in law Kisusya Mulwa. He also sent emissaries to his wife and consulted his in laws family. In all these, the Respondent was adamant in her refusal to reconcile and return to the matrimonial home. He was denied access to the children and also barred from paying their school fees.

It is the finding of this Court that the Petitioner has proved his Petition as required by law and his marriage to the Respondent is hereby brought to an end. The Cross – Petition has not been proved and must, therefore, fail.

The Court further orders that the children for the time being continue living with the Respondent but the Petitioner be afforded reasonable means of access to them till the issue of custody and maintenance is resolved. The costs shall be in the cause.

DATED and DELIVERED at NAIROBI this 12th day of July, 2001.

ALNASHIR VISRAM

JUDGE.