



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

DIVORCE CAUSE NO. 125 OF 1996

JPM K.....PETITIONER

AND

MWM.....RESPONDENT

JUDGMENT

This is the husbands petition for dissolution of the marriage solemnized at the office of the Registrar General Nairobi on 21.5.80 on the ground of wife's desertion. Petitioner also prays that the custody of the children be given to him.

The wife has filed an Answer to the petition She denies that she is guilty of desertion and avers that it is the petitioner who cruelly ejected her from the matrimonial home in November 1991 and again from petitioners parents house in March 1992. She further avers that petitioner subjected her to mental cruelty and assault and denied her maintenance during the subsistence of the marriage. She prays that the petition be dismissed with costs; that she be granted custody of the children of the marriage and maintenance for herself and the children of the marriage.

There are four children of the marriage namely; AMM born on 18.11.80, RWM born on 26.4.82; HMM born on 18.6.84 and DWM born on 2.12.86. The first three children are over 16 years old and cannot be subject to a custody order. The last born is over 14 years old and is subject to a custody order. The respondent was returned to her parents on 10.3.92. She left with the last two children but her parents later returned them to the petitioner. The petitioner then placed the four children in boarding schools and the children have been in the custody of the petitioner ever since. The respondent abandoned her prayer for the custody of the children in the course of the proceedings. She instead asked that the custody of the children be given to the petitioner but that she be granted reasonable access.

The petitioner has disclosed in paragraph 5 of the petition that he had previously filed Divorce Cause No. [...] in the Resident Magistrates court by error as that court had no jurisdiction but that the case was withdrawn for want of jurisdiction. Petitioner said in his evidence that he abandoned the petition in the subordinate court and filed this petition. The Respondents counsel has taken an issue on this. She submits that the petition in the subordinate court is still pending.

The marriage was under the Marriage Act (Cap 150). Under that Act it is only the High court, which has jurisdiction over this marriage.

Neither of the parties produced a certified copy of the proceedings in that cause. So, there is no certainty whether or not the divorce cause in the lower court has been withdrawn. But, in my view, the fact that

Divorce proceedings are pending in a court without jurisdiction does not debar the court with jurisdiction from entertaining a fresh petition. Even if the petition in the lower court has not been formally withdrawn it has been abandoned. In any case, the lower court has no jurisdiction to grant any party any relief in respect of the marriage.

When the petition came for hearing on 18.9.98, the respondent counsel put it on record that respondent would not be opposing the dissolution of the marriage on condition that the issue of custody and her own maintenance and alimony are resolved before the marriage is dissolved.

The respondents counsel also put on record that respondent has no objection to the petitioner getting custody of the children on condition that she gets reasonable access. The petitioner's counsel then asked for time to allow the discussion on those conditions. Affidavits of means were filed in the meantime. Eventually on 24.11.98. Respondent's counsel informed the court that respondent wanted the petition fully heard including her answer. Before hearing of the petition was concluded the respondent filed civil case no. 128/2000 under the Married Women Property Act 1882 claiming a share of properties acquired during marriage.

According to the petitioner the respondent left the matrimonial home in Gatanga Muranga in October 1991 and went to live with petitioners stepmother in the same land. The elders met in March 1991 and after hearing both parties they decided that Respondent do take whatever she wanted from the petitioner's house and then return to her parents. The respondent then left on 10.3.92 and since then she has not returned to the matrimonial home.

The respondents case is that, it is the petitioner who insisted that she goes back to her parents and parked her things. She called three witnesses Henry Kamure (DW1) Njoroge Kabebe (DW2) and Philis Munjiri – her Mother DW4 who all testified that, it is the petitioner who returned respondent to her parents. It is her evidence that she would like to return to the matrimonial home but that she cannot do so without petitioners permissions as he would do harm to her. This has been a stormy marriage since 1986. The Respondent concedes that she and petitioner have not shared a bed since November 1991 and that she left the matrimonial home and started living with petitioners step mother in November 1991. It is conceded that there have been several unsuccessful attempts to reconcile the parties. The church has failed. The parents have failed Respondent gave long evidence describing the state of the marriage and petitioners conduct. She has been beaten by petitioners two brothers and their wives without any protection by the petitioner. Petitioner has accused her of disobedience and adultery with petitioners brothers. The petitioners says that the marriage is irretrievably broken down. Respondent concedes that she cannot return to the matrimonial home.

The parties have not lived together for about 10 years now. There is no hope of reconciliation. The marriage exists only in paper. The respondent complains that petitioner has subjected her to grave cruelty but she has not cross petitioned for the dissolution of the marriage. The step she has taken to file a suit to claim a share of matrimonial property is an indication that she has no intention of living with the petitioner and that she does not have faith in this marriage. She indicated through her counsel on 18.9.98 that she would not oppose the dissolution of the marriage on some conditions, the main one being that, her present and future maintenance be provided It is only when parties failed to agree on the maintenance that she insisted on the petition being fully prosecuted and that she be fully heard in her Answer. It is apparent from the foregoing that her main motive for resisting the dissolution of the marriage and for calling lengthy evidence is not to save the marriage but either to punish the petitioner or to get a favorable determination on the issue of maintenance.

On consideration of the evidence in its entirety, I find that although it is the petitioner who initially returned the respondent to her parents she ultimately made a firm decision not to return to the matrimonial home. She then decided to go to business and live independently of her husband. Thus is why she says that she cannot return to the matrimonial home without her husband permission. This is also why she has filed a suit to get a share of the matrimonial properties. The petitioner has proved the respondents animus descrendi.

I have already found that the respondents motive in fighting the petition is not to save the marriage. The proceedings have become protracted because of the respondents conduct. It is my view that she does not deserve the costs of the petition.

On the issue of maintenance, she has filed a suit for a share of the matrimonial properties. Until that suit is decided the court cannot decide her future financial needs and make a just provision. It may be that after the determination of the pending suit she may not require any future maintenance.

For above reasons I allow the petition with no order as to costs. I dissolve the marriage solemnized on 2.4.80 on grounds of wife's desertion and order that a decree Nisi do issue. I give the custody of DWM to the petitioner but give respondent reasonable access. There will be no orders as to maintenance of the respondent but I give her liberty to apply after the determination of HCCC NO. 1281/2000.

E. M. Githinji

Judge

4.4.2000

Mrs Gulenywa holding brief for Mrs Kamau present

Mr. Kamiro present