



NHS v TSS (Divorce Cause 2 of 2020) [2024] KEHC 4675 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
DIVORCE CAUSE 2 OF 2020
SM MOHOCHI, J
APRIL 18, 2024**

BETWEEN

NHS PETITIONER

AND

TSS RESPONDENT

JUDGMENT

1. The Petitioner filed this petition on July 2, 2020 seeking the dissolution of his marriage to the Respondent in which he sought orders as follows:
 - a. Dissolution of the marriage and decree issued;
 - b. Custody of the issue of the marriage be granted to the Respondent and continues living in the Petitioner’s house jointly owned by his late father and he be granted visitation rights whenever he so requires;
 - c. Costs of the Petition be borne by the Respondent; and
 - d. Any other relief that this Court may deem just fit to grant.
2. In summary, that the Petitioner and the Respondent got married on July 21, 2002 in accordance with Hindu Marriage and Divorce Act (now repealed) . Out of the union they were blessed with one issue born on February 20, 2006. Both parties are domiciled in Kenya. The particulars of the grounds for divorce are outlined paragraphs 7-9 of the Petition. That reconciliation and mediation has failed.
3. On her part, the Respondent, filed a Reply to Petition dated July 16, 2020, on July 21, 2020. She later filed on September 17, 2020 an Amended Reply to Petition and Cross-Petition dated September 7, 2020 she basically denied all the allegations contained in the Petition and she prayed for orders that the marriage be dissolved with costs. The facts of her case are as contained in paragraphs 1-24 of her reply and cross-petition. She nevertheless in paragraph 12 stated that she believed they were still compatible and that the marriage can be salvaged should the Petitioner mend his ways.



4. The Petitioner filed an answer to the Cross Petition on November 9, 2020 denying the allegations leveled against him.
5. On November 14, 2023, the matter proceeded by way of *viva voce* evidence.

Petitioner's Case

6. In his testimony, the Petitioner adopted his witness statement dated February 23, 2021 he also produced his supplementary bundle of documents dated February 23, 2020 as P-Exh 1-5. He stated that the parties have been married for 21 years but has since separated with the Respondent since May 18, 2020 due to drama, shouting, arguments and abuses from the Respondent.
7. He denied assaulting the Respondent either physically or emotionally or forcefully removing her from the house. He also denied having extra marital affairs. He also denied denying the Respondent conjugal rights. He testified that he has been providing for the family during the marriage and after leaving he has been paying upkeep and medical.
8. It was the Petitioner testimony that when he came from Mombasa there was gold. The Respondent had one key to the safety deposit box and the other was with the bank. That the Respondent had the custody until 2009 when he found out that she was borrowing from people and he also found out that she took all the gold in the locker belonging to their family despite him giving her money to run the house. He prayed that the Court does grant the divorce and order for the Respondent to return the gold as it never belonged to her that according to Hindu customs, upon divorce the same should be returned.
9. He stated that the gold issue has never been settled and not in the Children's Court. He added that he paid her 15 million plus 10 million that the Petitioner's dad had left her before his death. He intends to transfer the house to their daughter when she turns 18.

Respondent's Case

10. The Respondent testified that she was a house wife and that the Petitioner has not been providing, has been having an affair and was violent. She stated that he only paid house rent and Kshs. 30,000 for 3 staff, food for the family and dogs. That he would get violent whenever they did a budget. She adopted her response to the petition as well as the Affidavit in response to Petitioner's witness statement sworn on March 11, 2021.
11. She added that the Petitioner has been living with a third party and had been doing so six months prior to their separation. She admitted to receiving 25 million though the house has not been transferred. The 10 million was a gift from her father-in-law and the 15 million is for herself not for her daughter. That the Petitioner is supposed to transfer the house to a trust in compliance with the Ruling and not when the child turns 18. That as for the gold the Petitioner had said they would not look into it but was now demanding it. That it was more of hers than theirs and she took it to cater for her needs and maintenance.
12. She added that there was a children's case that was ongoing and that the transfer of the house was never raised in the children's court but it ought to be. She admitted to taking the gold only that it belonged to her family and the sister had taken half of the gold. That what they gifted her was fake gold.
13. The Court directed parties to file written submissions.
14. The Petitioner in his submission filed on December 19, 2023 raised 3 issues on whether the marriage has irretrievably broken down, whether the Petitioner was adulterous or cruel toward the Respondent



and whether the marriage should be dissolved. On the other hand, the Respondent in her submissions filed on February 12, 2024 also raised 3 issues for determination as to whether the Petitioner was cruel and adulterous and whether the marriage should be dissolved. Each party submitted in support of their case and in support of dissolution of the marriage.

Analysis and Determination

15. From the Petition and cross-petition the following issues arise for Court's determination.
 - a. Whether or not the petitioner has satisfied the criteria under the Marriage Act for the marriage with the respondent to be dissolved.
 - b. Whether the other remedies prayed for by both parties are available at this juncture.
16. The petition as deduced from the pleadings and evidence is grounded on cruelty and desertion. As a response to the petition, it is clear from the Respondent that he also alleges cruelty on the part of the petitioner. In the first instance has the petitioner discharged the burden of proof to be granted divorce.

The Law

17. It is notable that the kind of marriage being acknowledged by the parties may fall within the scope of Section 68 of the Marriage Act. The threshold for dissolution of such a marriage takes the ambit of the following grounds; -
 - a) Adultery
 - b) Cruelty
 - c) Desertion
 - d) Exception depravity
 - e) Irretrievably break down of the marriage
18. The Court has considered the particulars of the evidence on record and the pleadings filed and how they have contributed to the irretrievable breakdown of the marriage. The parties have been separated since 2020 and have been living separately since then.
19. The parties herein have both postured that their marriage has irretrievably broken down, adultery, denial of conjugal rights and cruelty have been laid in counter accusation.
20. No man and woman can be bound by law or religion, where no love and feelings exist in holding the union of marriage together.
21. This Court accordingly allows the Petition dated July 2, 2020 and Cross-Petition dated September 7, 2020, the Hindu marriage between the Petitioner and the Respondent is hereby dissolved.
22. The Respondent shall have custody for the next one (1) year of R R after which attaining her age of majority, she shall be at liberty to decide how she relates with her parent or where she may reside.
23. The Petitioner shall have visitation rights to see R R
24. The Petitioner shall transfer All that house described as XXXXXXXX-Nakuru into the name of R R upon her attaining the age of 18 years old or within the next twelve (12) months from the date hereof.



25. *Decree Nisi* to issue and to be made absolute within thirty (30) days.

26. Parties shall bear their respective costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU THIS 18TH DAY OF APRIL, 2024.

MOHOCHI S.M

JUDGE

