



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

DIVORCE CASE NO. 2 OF 2019

MKM PETITIONER

VERSUS

PBB RESPONDENT

JUDGMENT

1. This cause was commenced vide a Petition dated 14th February, 2019 wherein the Petitioner sought for the following orders:

i. That the marriage herein be annulled; and

ii. The costs be in the cause.

2. The Respondent filed an Answer to Petition dated 25th January 2019, a Further Answer to Petition dated 4th May, 2019 together with a Witness Statement entitled Supporting Affidavit sworn by Jackson Mwanje Imbusi on the said date.

3. The Petitioner filed Two (2) List of Witnesses dated 26th July, 2019 and 8th August, 2019. She subsequently filed Witness Statements dated 7th August 2019 made by AMO, DOM and WMM and herself.

4. The Respondent filed a List of Documents, a Further Replying Affidavit together with a Witness Statement all dated 12th September, 2019.

5. On 24th November, 2020 the Petitioner testified as PW1, DOM as PW2, AMO as PW3 and WMM as PW 4. The Petitioner's case was then closed. On the same date, the Respondent testified as DW1 and closed his case. The Court directed the parties to file their respective written submissions.

6. The Petitioner filed Two (2) documents entitled Summary Reports on the Court Cause No. 2 of 2019 both dated 7th December, 2020 while the Respondent filed Written Submissions on 3rd March, 2021.

7. The Court scheduled the delivery of its judgment on 2nd June, 2021.

BRIEF FACTS AND EVIDENCE

8. The Petitioner and the Respondent were married under Luhya Customary Law in the year 1980. At the start of the marriage, the Petitioner and the Respondent cohabited as husband and wife at their ancestral home in Lugari District. The Petitioner and the Respondent were blessed with Seven (7) Children.

9. The Petitioner and the Respondent enjoyed marital bliss for approximately Fifteen (15) years before their marriage relationship turned sour.

10. At the time when the Petitioner and the Respondent had a blissful marriage, the Respondent was working as a driver in the [Particulars Withheld] service while the Petitioner was a housewife.

11. According to the Petitioner, when the Respondent retired from employment, he was paid a pension and he used the said pension to get himself a "pension wife" and this made his relationship with the Petitioner to become very hostile. During cross examination, the Petitioner

stated the Respondent used to quarrel her unnecessarily and on numerous occasions, the Respondent brandished a panga, a hammer and a club in threatening her. At one point the Respondent attacked the Petitioner and while she was running away from him she sustained injuries of the leg and had to seek treatment at the local hospital.

12. The Petitioner stated that the Respondent threatened to kill her on a number of occasions but that she finally decided to leave her matrimonial home on 24th December, 2018 when the Respondent pointed out to one of their children the place where he intended to bury the Petitioner.

13. Although PW2, PW3 and PW4 testified that they were aware of the violence meted on the Petitioner at the Respondent's instance, the Respondent in his Submissions disputed the probative value of the statements made by the Petitioner's witnesses on grounds that none of them found witnessed him assaulting the Petitioner and therefore their evidence amounts to hearsay. PW2, PW3 and PW4 testified that they were also aware of the fact that the Respondent failed to attend the meeting scheduled by the chief and the assistant chief in an attempt to help the Petitioner and the Respondent to resolve their issues.

14. The Petitioner stated that the Respondent was not providing school fees and other basic needs to their last-born child who is still a school-going minor.

15. Petitioner's Lists of Documents include, treatment chits from Chekalini Health Care dated 3rd February 2013, 20th April 2007 and 28th September, 2012. The Petitioner as well filed a photograph of herself with a Plaster of Paris on her leg. She also filed numerous letters from the local authorities and human rights organizations summoning the Respondent to attend sessions to help reconcile him with the Petitioner.

16. The Respondent confirmed that he got married to the Petitioner under Luhya Customary Law. He contended that his marriage to the Petitioner was peaceful until the time he retired from employment. According to the Respondent, the Petitioner was not pleased when he did not have as much money as he used to have before retirement.

17. The Respondent averred that when he retired he received a lumpsum pension of Kshs. 700,000/= which he used to acquire a saloon vehicle for family use and for business use, motor bikes for business and a poshomill. The Respondent stated that he knows that the conflicts he had with the Petitioner may have emanated from the fact that the Petitioner thought that he got more money than he actually got for pension and so she kept on making demands for money and when her demands went unmet she lashed out against him. The Respondent was aggrieved by the fact that the Petitioner claimed to have started a business which made her stay away from home and to neglect her duties of care for the Respondent.

18. The Respondent also stated that the Petitioner was aware that he had Two (2) other wives. Dating as far back as the year 2016, when the Respondent's mother died, he had already married his 3rd wife and that all his wives attended family functions with him and they were known to the Petitioner.

19. The Respondent stated that he did not see why his marriage to the Petitioner should end and that he did not send the Petitioner away from their matrimonial home. However, in his Witness Statement dated 12th September, 2019 at Paragraph 29, and in his Further Replying Affidavit sworn on the said date at Paragraph 24, the Respondent states that he has no objection to the Court granting the orders sought by the Petitioner.

ANALYSIS AND DETERMINATION

20. It is worth noting that the Petitioner and the Respondent were acting in person and had no benefit of counsel at the commencement of this matter. Subsequently, the Respondent retained an advocate to represent him. I find that most of the pleadings filed in this claim can be referred to as "home – made" since they have been drafted by laymen and as such they do not have the form and substance that would be attained had they been represented by seasoned legal practitioners. As such, the Petitioner is disadvantaged as she failed to expressly mention in her Petition that she seeks to have the Court make a determination as to her entitlement to the assets acquired during the subsistence of her marriage to the Respondent. This prayer was only made in her Witness Statement filed on 7th August, 2019.

21. I have considered the Petition and the Answer to Petition thereto, together with all the pleadings, and I find that the following issues arising for determination:

- i. Whether the petitioner has made out a case warranting granting the sought for order of annulment; and
- ii. Whether the Court can make a determination of the Petitioner's entitlement to the matrimonial property.

22. Section 73 of the *Marriage Act* provides the grounds for annulment of marriage as follows:

1. A party to a marriage may petition the court to annul the marriage on the ground that –

- a) The marriage has not been consummated since its celebration;
- b) At the time of the marriage and without the knowledge of either party, the parties were in a prohibited relationship;
- c) In the case of a monogamous marriage, at the time of the marriage one of the parties was married to another person;
- d) The petitioner's consent was not freely given;

e) A party to the marriage was absent at the time of the celebration of the marriage;

f) At the time of the marriage and without the knowledge of the husband, the wife was pregnant and that the husband was not responsible for the pregnancy; or

g) At the time of the marriage and without the knowledge of the petitioner, the other party suffered recurrent bouts of insanity.

2. The court shall only grant a decree of annulment if –

a) the petition is made within one year of the celebration of the marriage;

b) at the date of the marriage and regarding subsections (1) (b) and (c), the petitioner was ignorant of the facts alleged in the petition; and

c) the marriage has not been consummated since the petition was made to the court.

23. None of the grounds outlined in Section 73 (1) (a) to (g) of the Marriage Act are applicable to the Petitioner's claim herein. The Petitioner's claim does not also fall within the parameters provided in Section 73(2)(a) to (e) of the Marriage Act.

24. It is trite that a fundamental difference exists between annulment of a marriage and divorce. Although this Court appreciates the fact that the Petitioner may not be able to tell the difference, ignorance of the law is no excuse. I therefore find that the Petitioner's marriage to the Respondent is incapable of being annulled.

25. The High Court has jurisdiction to conduct division of matrimonial property on the basis of the provisions of Section 3A of the Civil Procedure Act and Article 165(3)(a) of the Constitution of Kenya, 2010.

26. The operative law when it comes to division of matrimonial property in Kenya is the Matrimonial Property Act, 2013 which provides as follows in Section 7:

Ownership of matrimonial property:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

27. In ENN v SNK [2021] eKLR the Court made the following observation:

The Constitution of Kenya 2010 provides for the jurisdiction of this court in Article 165 (3) that Subject to clause (5), the High Court shall have:

(a) Unlimited original jurisdiction in criminal and civil matters.

That is to say that this court has jurisdiction to hear all civil matters including divorce petitions. However, with the giving of jurisdiction to the subordinate court, this Court has only been left with jurisdiction to handle matrimonial property issues and act as an appellate court in cases like the one before this court.

On that limb, I find that the matter should have been filed at the lower court and the issue of matrimonial property be filed in the High Court. This is also supported by Section 7 and 17 of the Matrimonial Property Act that has been cited by the Petitioner in support of her case. The said sections provide for division of matrimonial property upon divorce and/or dissolution of the marriage.

28. The Petitioner's claim for her share of the matrimonial property held by the Respondent has therefore no merit as the marriage is not dissolved and or divorce granted. The petition is therefore dismissed.

29. This being a matter involving family members, each party shall bear their own costs.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED VIRTUALLY at ELDORET this 2nd day of June, 2021.

In the presence of:-

Mrs Oyugi for the petitioner and in absence of the respondent

Ms Abigael - Court assistant