



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

DIVORCE CAUSE NO. 34 OF 2009

HAB.....PETITIONER

VERSUS

LAO..... RESPONDENT

JUDGMENT

1. By a Petition dated 22.5.09, HAB, the Petitioner seeks the dissolution of his marriage to the Respondent LAO. The Petitioner married the Respondent under Luo customary law as his second wife and they cohabited in Mombasa from 1992 to 2004. They were blessed with 4 children.

2. The grounds for divorce as stated in the Petition are cruelty and adultery. The Petitioner accused the Respondent of treating him with extreme contempt and cruelty. In particular, the Petitioner alleged that the Respondent denied the Petitioner companionship, warmth, care and conjugal rights since 2004. The Petitioner accused the Respondent of deserting the matrimonial home since April 2004. He further accused her of calling him a fool and told him that their 4 children were sired not by him, but by one WBO and even obtained birth certificates and passports bearing his name as their father.

3. On the ground of adultery, the Petitioner alleged that the Respondent committed adultery with several men, including the said WBO. He also accused the Respondent of committing adultery with one RW, manager at the Petitioner's B supermarket. The Petitioner further accused the Respondent of committing adultery with CBK, a Cameroonian, and one TOO and 2 policemen.

4. According to the Petitioner, the Respondent's conduct has led to the irretrievable breakdown of the marriage. The Petitioner prayed for the dissolution of marriage. He also prayed for a declaration that the Respondent has no right under Luo Customary Law to be maintained by the Petitioner.

5. In her Answer to Petition and Cross-Petition dated 15.7.09, the Respondent denied all the allegations of adultery and cruelty and accused the Petitioner of the same. She confirmed that she did move to their apartment at [Particulars Withheld] Apartments, Marcus Garvey Road, off ArgwingsKodhek Road, Nairobi in 2004 but did so with the Petitioner's knowledge and consent and participation. She accused the Petitioner of deserting their matrimonial home in Nairobi where the Respondent lives with the children. She also accused the Petitioner of preventing her from accessing the matrimonial home in Mombasa.

6. The Respondent further accused the Petitioner of subjecting her to cruelty, the particulars of which are emotional and physical abuse, tyranny and deceit. According to her, the Petitioner has violently beaten her while at home and at work on numerous occasions, he has failed to provide for her and their children and has made false claims of adultery and fraud without factual basis. The Respondent also subjected her to dubious cultural practices and rituals, the effect of which was injury to her dignity and also threatened the children's psychological and emotional well-being. He also denied her conjugal rights.

7. The Respondent claimed that she worked in 9 matrimonial enterprises which she listed in her petition and took care of their children. She stated that she would be seeking a share in those enterprises and also a share in what she calls the matrimonial estate consisting of 11 properties in Nairobi and Mombasa.

8. The Respondent accused the Petitioner of committing adultery with his personal secretary at HA Ltd, ZR, BW, PN and former house girls DN and CM. She alleged that the Petitioner developed erectile dysfunction in 2005 but failed to seek medical attention. As a result, he has denied her conjugal rights. He has also become insecure and irrational, always accusing her of adultery and fraud. The Respondent prayed for maintenance for herself and her children and would provide a complete list of assets upon discovery and ascertainment. She also sought dissolution of the marriage, alimony *pendent lite*, custody of the children and costs.

9. In his reply dated 5.8.09, the Petitioner denied the allegations by the Respondent. In particular, he averred that the Respondent is not, under Luo Customary law, entitled to maintenance and further that due to her conduct, she is not entitled to custody of the children.

10. It will be noted that the Respondent who lives and works in Dubai did not attend the hearing in Court to defend the Petition or to prosecute her Cross-Petition in which she sought dissolution of the marriage, maintenance, custody of the children and a share in the matrimonial properties and enterprises.

11. On his part, the Petitioner reiterated the averments in his Petition. He confirmed that the Respondent is one of his 3 wives with whom he has 4 children. She stayed in his house in Nairobi. The eldest graduated and lives on his own. The 2nd born is in Dubai with the Respondent. The last 2 children live on their own in the house in Nairobi after the Respondent left for Dubai. He stated that he provides everything for these children. He also stated that the said house in Nairobi belongs to him and no one can restrict his access thereto. He has availed the house to the children to stay.

12. Parties filed their submissions which I have considered. As stated, the Respondent did not testify or call evidence to support her answer to Petition of Cross Petition. It is trite law that that where a party fails to call evidence in support of its case, that party's pleadings remain unsubstantiated statements of fact.

13. In Linus NgangaKiongo & 3 Others v Town Council of Kikuyu [2012] eKLR, Odunga, J. considered the consequences of failure by a party to adduce evidence and had this to say:

“In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesii, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

14. In this case, the Respondent filed an Answer to Petition and Cross-Petition but failed to adduce any evidence to support the same. The Cross-Petition which remains unsubstantiated, must fail.

15. I now turn to the Petition. The grounds upon which a customary marriage may be dissolved are stipulated in the Marriage Act at Section 69 which provides:

(1) A Party to a marriage celebrated under Part V may petition the court for the dissolution of the marriage on the ground of—

(a) Adultery;

(b) Cruelty;

(c) Desertion;

(d) Exceptional depravity;

(e) irretrievable breakdown of the marriage; or

(f) any valid ground under the customary law of the petitioner.

16. The Petitioner accused the Respondent of treating him with extreme contempt and cruelty. She deserted the matrimonial home in 2004 thereby denying him conjugal rights and even taunted him that her children were sired by another man and not by the Petitioner. He also accused her of adultery with several men.

17. In his testimony however, other than names of some of them, the Petitioner did not give any details of the men the Respondent allegedly committed adultery with. He also did not exhibit the birth certificates and passports of the children allegedly bearing the name of WBO as their father to support his allegations. Further, in his testimony, the Petitioner stated that the apartment in which the Respondent lived in Nairobi, belonged to him and he had unrestricted access thereto. This being the case, it would appear that the Petitioner had access to the Respondent at will. In the premises, I am not persuaded that the Respondent deserted the matrimonial home. Although the allegations by the Petitioner were not challenged by evidence, I find that the grounds of cruelty, adultery and desertion have not been established.

18. Irretrievable breakdown of marriage is a ground of dissolution of marriage, including a customary one. From the evidence, since 2004, the parties have not been together. This Petition was filed in 2009 and no reconciliation has taken place. The long period of separation speaks of a marriage that is irretrievably broken down. In N v. N [2008] 1 KLR [G & F] 16, Madan, J. (as he then was) observed:

“...if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may

appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences.”

19. It is clear that 11 years ago in 1994, the Petitioner reached that point of not being able to live together with the Respondent reasonably happily and filed the Petition herein. Since 2004, the parties have not resumed cohabitation and do not seem interested in the marriage which beyond salvage. Accordingly, the parties are entitled to be released from their matrimonial union.

20. In view of the foregoing, I allow the Petition and hereby pronounce a decree of divorce and order that the marriage between the Petitioner and the Respondent be and is hereby dissolved. Decree nisi to issue and the same to be made absolute within 1 month. This being a matter between parties who were once married, I direct that each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 5th day of May, 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondent**

..... **Court Assistant**