



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE 230 OF 2013

DCM.....PETITIONER

VERSUS

JWCRESPONDENT

JWC.....INTERESTED PARTY

JUDGMENT

BACKGROUND

The Petitioner, DCM filed Petition for divorce on 24th October 2013 against the Respondent JWC for dissolution of marriage contracted between the parties on 25th September 2010 evidenced by the certificate of marriage annexed to the Petition.

On 9th October the Respondent, JWC filed Divorce Petition against the Petitioner DCM in Judicial Separation **219 of 2013** and sought dissolution of their marriage.

Before hearing and determination of the instant cause various applications were filed, heard and determined between parties and interested party.

The Petitioner and Respondent were heard before Justice L. Kimaru on the removal of the Respondent then resident in suit property **L.R.209/[xxxx]** Githuri Road, Highridge Nairobi on allegation of creating disturbance to neighbors by inviting **Akorino sect** who uncontrollably sang songs loudly and conducted forms of rituals. The Petitioner informed the Court that the suit property was acquired and developed before his marriage with the Respondent and she ought to vacate the suit property..

The Court by **Ruling** delivered on **8th May 2014** held that there were other ways to abate the nuisance without removal of the Respondent from the matrimonial home. The application was dismissed with no costs.

The Intended interested party; JWC filed application on 27th April 2014 to be joined to these proceedings as former wife of the Petitioner she contributed to the acquisition of the suit property. This Court by Ruling of 7th November 2014 granted the application by interested party to be joined to these proceedings only with regard to the matrimonial property **L.R.209/[xxxx]** Githuri Road, Highridge Nairobi.

The Interested party by application filed on 6th February 2015 sought injunction issued against the Respondent not to trespass, remain on, but vacate the suit property. By Ruling delivered on 6th November 2015, the Court dismissed the application but ordered consolidation of **Divorce Cause 230 of 2013** by Petitioner, Judicial Separation **213 of 2013** by Respondent and **Divorce Cause 540 of 2010** by the interested party (former wife of the Petitioner) during hearing and determination of division of matrimonial property **L.R.209/[xxxx]** Githuri Road, Highridge Nairobi.

The Petitioner by application filed on 28th July 2016 sought variation, setting aside of Ruling of 8th May 2014 and rectification of Ruling of 6th February 2015. This Court by Ruling of 3rd November 2017 withdrew injunctions granted on 8th May 2014 and 7th November 2014 in default of the consolidated Petition and judicial separation matter being set down for hearing within 90 days from 3rd November 2017. The Respondent was/is to vacate the suit property and move to her residence in Syokimau; as at **2010** when she was married; the suit property was already acquired and developed by the Petitioner.

DIVORCE PROCEEDINGS

On 14th June 2018, Counsel for the Respondent's application to cease acting was granted and Respondent granted opportunity to obtain alternative legal representation. On 29th November 2018, the Petitioner in compliance with Court's Ruling of 3rd November 2017, set down the Divorce Petition for hearing.

The Respondent was served as per last known address as confirmed by Affidavit of service filed on 29th November 2018 and she did not attend court proceedings, nor was she represented by Counsel. The Respondent did not adduce any reasons for her absence or any explanation representation for the Court to consider. The matter proceeded ex parte.

PW1 DCM testified and relied on the Petition filed in Court. He alluded to the fact of marriage between himself and Respondent on 25th September 2010. He adopted the grounds of adultery and cruelty whose particulars are outlined in the Petition.

According to his petition, he states that he married JW and they had 5 children and divorced in 2010 vide **Divorce Cause 540 of 2010**. He married the Respondent who had 4 children. They did not have any issue of the marriage. The Petitioner elaborated on grounds of adultery; the Respondent committed adultery with one DN.

The Petitioner claimed the Respondent threatened him with harm through text messages which he reported to Parklands Police Station. Due to threat to his life and safety he left the matrimonial home **L.R.209/[xxxx] Githuri Road, Highridge Nairobi** and relocated to his rural home in Mbugiti. He is retired and is a small scale farmer.

The Petitioner discovered that the Respondent was married to the late PMN and divorced in **Divorce Cause 11 of 1995**. The Respondent attended his funeral as his widow and sought to inherit deceased's property through one of her sons. All this was during the subsistence of their marriage.

The Respondent denied the Petitioner emotional intimacy and the Petitioner felt humiliated, taken advantage of, betrayed and unable to concentrate on social work and activities in retirement. On these grounds the Petitioner sought dissolution of marriage and permanent injunction against the Respondent from occupying or otherwise trespassing on suit property **L.R.209/[xxxx] Githuri Road, Highridge Nairobi**.

The Respondent did not file any reply to the Petition, nor attend proceedings and the contents of the Petition are uncontroverted or uncontested.

This Court on 6th November 2015 consolidated the Divorce petition and Judicial Separation Petition. The Respondent's Petition filed on 9th October 2018 sought decree of judicial separation of Petitioner and Respondent. Her claim is based on cruelty, desertion and willful neglect by Petitioner to the Respondent.

The Respondent stated that the Petitioner failed to be a companion, failed to show love and affection and was psychologically tortured as the Petitioner accused her of being adulterous and finally left the matrimonial home on 18th September 2013. The Petitioner sent 4 men on 26th September 2013 to take her back to her home. The Petitioner neglected to support her and the minor he acquired parental responsibility over. The Respondent pleaded that the Petitioner took away motor vehicle **Reg. KQP [xxxx] Pajero** from her.

The Respondent therefore sought permanent injunction restraining the Petitioner from residing in the matrimonial home **L.R.209/[xxxx] Githuri Road, Highridge Nairobi**. She also sought mandatory injunction to allow her collect rent from the suit property for maintenance and that of the minor.

DETERMINATION

The grounds to dissolve the marriage herein are under **Section 66** of the **Marriage Act 2014** which provides:

"(1) A party to a marriage celebrated under Part IV may petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

(2) A party to a marriage celebrated under Part IV may only petition to court for the separation of the parties or the dissolution of the marriage on the following grounds-

- a) ***adultery by the other spouse;***
- b) ***cruelty by the other spouse;***
- c) ***Exceptional depravity by the other spouse***
- d) ***Desertion by the other spouse for at least three years; or***
- e) ***The irretrievable breakdown of the marriage."***

From the testimony of the Petitioner he relied on particulars of cruelty and adultery by the Respondent. The Respondent did not controvert these facts and therefore this Court considers them to be true and direct cause of the breakdown of the marriage between the parties.

In ALEXANDER KAMWERU v ANNE WANJIRU KAMWERU (2000) eKLR, it was stated:

“Certainly, cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”

In N vs N 2008 1 KLR 16, Madan J (as he then was) held:

“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 them, they are entitled to be released from their matrimonial union.....”

The Petitioner stated and confirmed that these acts of cruelty caused him anguish and humiliation and he left the Respondent in the matrimonial home **6 years** ago and moved to his rural home. They have not since reconciled or had talks towards salvaging the union. Instead each party has gone separate ways. Clearly there is irretrievable breakdown of the marriage. The Court cannot force or impose on the parties to remain in the marriage if from the evidence available; the reunion is not a possibility. This Court is satisfied from the Petitioner’s Petition and Respondent’s Judicial Separation Petition that there are grounds that culminate to cruelty to and from each party to the other. Therefore the marriage ought to be dissolved.

The Respondent claimed reasonable and adequate maintenance for herself and the child whom the Petitioner acquired parental responsibility. The Respondent did not attend Court and/or adduce evidence in Court despite being served. Therefore the claim for maintenance was not substantiated or proved by evidence in Court.

Justice GBM Kariuki (as he then was) in the case of WMM VS BML [2012] eKLR, stated thus:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce”. (Emphasis added)

The issue of the matrimonial property/home **L.R.209/[xxxx] Githuri Road, Highridge Nairobi** that is sought, claimed and pursued by the Petitioner, Respondent and Interested Party shall not be determined in these proceedings but in a division of matrimonial property claim lodged in the High Court and heard and determined on who owns what, what each party contributed directly or indirectly to the acquisition and/or development of the suit property and therefore what share if at all or any or a party is entitled to in the said property.

For now until the final determination of the division of matrimonial property suit, pursuant to this Court ‘s Ruling of 3rd November 2017 which has not been reviewed, set aside or appealed against, the occupation, use and/or development of **L.R.209/[xxxx] Githuri Road, Highridge Nairobi** shall be by the Petitioner; **DANIEL CHEGE MWANGI**, his agents ,servants or representatives only.

DISPOSITION

- 1. The marriage solemnized on 25th September 2010 between the Petitioner and Respondent is hereby dissolved**
- 2. The decree nisi to issue forthwith and decree absolute in 30 days.**
- 3. The Petition is allowed and judicial separation Petition dismissed for want of prosecution.**
- 4. L.R.209/[xxxx] Githuri Road, Highridge Nairobi shall be occupied, developed or used by the Petitioner; DCM his agents ,servants or representatives only until hearing and determination of division of matrimonial property suit filed in High Court.**
- 5. Any aggrieved party to lodge appeal in Court of Appeal.**
- 6. Each party to bear own costs.**

DELIVERED, SIGNED & DATED IN OPEN COURT ON 6TH FEBRUARY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

.....for the petitioner

.....for the Respondent

.....for the Interested Party

Langat Court Clerk