



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 42 OF 2015

IN THE MATTER OF THE MARRIAGE ACT 2014 OF THE LAWS OF KENYA

NOO.....PETITIONER

VERSUS

ACCO.....RESPONDENT

JUDGMENT

1. The Petitioner herein NOO has petitioned ACCO for divorce on the following grounds of desertion, cruelty and adultery.

2. The Particulars of desertion are as follows.

(i) THAT on the 15th day of October 2010 at 9.00am the Respondent deserted the Matrimonial Home by walking away with some paper bags in which she carried unknown property taken from the house.

(ii) THAT the same day 15th October,2010 the House maid (HELLEN) called the Petitioner and told the Petitioner that the Respondent had left the Matrimonial Home and had carried all the baby's clothes and personal effects and that the Respondent had left a message that she had gone with the Baby to TARAKWA FARM in Eldoret.

(iii) THAT on 23rd October 2010 at 1.00 p.m. when the Petitioner had gone to Eldoret to see the Respondent's mother and when the Respondent knew about it, the Respondent violently and physically broke into the Matrimonial home and carried away most of the household goods belonging to the Petitioner and all the Property belonging to the Respondent and went away with the property which was transported in a lorry/van. The Respondent also maliciously took away Certificates of Title lands and other personal documents of the Petitioner.

3. The Particulars of Cruelty are stated as follows in the Petition;

(i) THAT The Respondent has been cruel to the Petitioner and has demonstrated and deliberately exhibited such acts of cruelty in behavior, deeds and repeated or persistent acts of unreasonable, depraved and unruly conduct.

(ii) THAT such repeated acts of cruel and depraved conduct had been repeated by the Respondent on so many occasions in the matrimonial home that it became obvious that the Respondent willfully and deliberately intended, designed and calculated her actions to annoy the Petitioner and to cause him stress and pain regardless whether or not such actions would ultimately result in the break-up of the marriage.

(iii) THAT the Respondent is a habitual drunkard who spent a lot of her time in bars drinking at the expense of caring for the baby and also neglected her household.

(iv) THAT the Respondent is a person of ungovernable tempers particularly after she returned home late at night drunk when she did not tolerate any questions from the Petitioner where she had been and why she returned home so late and with whom she was.

(v) THAT the Respondent had the intolerable habit of using abusive language at the Petitioner in the presence of the child and exhibiting and repeating similar conduct to the petitioner's relatives and friends.

4. The particulars of Adultery are as follows:

(i) THAT The Respondent has committed adultery with various persons both unknown and known to the Petitioner at various and diverse times and on numerous occasions and particulars thereof are well known to the Respondent.

(ii) THAT As a result of her several adulterous adventures, the Respondent has a child named "AKC" whose father is definitely well known to the respondent and A was born at Nairobi on 11th June 2012.

5. The Petitioner is seeking the following orders:

(i) THAT the marriage celebrated between the Petitioner and the Respondent be dissolved.

(ii) THAT the legal custody of AOO Being the biological issue of the marriage be granted to the Petitioner.

6. The Petition proceeded as an undefended cause since the Respondent did not file any Response or appear in court for the hearing of the Petition.

7. The Petitioner stated in his evidence in Court that he got married to the Respondent on 3.2.2009 at the Registrar of Marriage's Office at Sheria House.

8. After the Celebration of the marriage, the couple lived and cohabited at Mariakani Estate.

9. The marriage was blessed with one issue AOO born on 7.4.2009

10. The Petitioner said the Respondent deserted the marriage on 15.10.2010 and the Petitioner does not know where she lives.

11. The Petitioner said the child stays with a sister to the Respondent and visits him from time to time.

12. The Petitioner also said the Respondent committed adultery and gave birth on 11.6.2012 to a child called AKC several years after she deserted the matrimonial home.

13. I have considered the Petition filed herein together with the Supporting Affidavit and also the evidence adduced by the Petitioner. Dissolution of marriages is governed by the marriage Act. Section 65 provides for the grounds of dissolution as follows;

S. 65. Grounds for dissolution of a Christian marriage

A party to a marriage celebrated under Part III may petition the court for a decree for the dissolution of the marriage on the ground of—

(a) One or more acts of adultery committed by the other party;

(b) Cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or

(c) Desertion by either party for at least three years immediately preceding the date of presentation of the petition;

(d) Exceptional depravity by either party;

(e) The irretrievable breakdown of the marriage.

14. In his petition for divorce, the petitioner accused the respondent of committing the matrimonial offences of adultery, desertion and cruelty. He provided testimony in support of his claim. I rely on the following cases;

In **DIVORCE CAUSE APPEAL BETWEEN AK VS. AWK (2000) e KLR** being an appeal from a Judgment of the **HIGH COURT OF KENYA DIVORCE CAUSE NO. 75 OF 1992**, the Court of Appeal gave guidelines on the applicable burden of proof as:-

"Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. 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."

15. On cruelty in **DM -VS- TM (2008) 1 KLR, 5**, Chesoni, J. as he then was, said:-

"To establish cruelty the complainant must show to the satisfaction of the court:-

(i) misconduct of a grave and weighty nature

(ii) real injury to the complainant's health and reasonable apprehension of such injury

(iii) that the injury was caused by misconduct on the part of the Respondent, and

(iv) that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.”

16. The establishment by a court of law of the existence of cruelty depends on the circumstances of each case. In the present case, in order to prove the allegation of cruelty, this Court must satisfy itself that there is evidence indicating that the respondent, without any justifiable cause, deliberately conducted herself in such a manner as to endanger the other party's physical or mental health, or to cause that party anxiety over the imminence of such danger.

17. Having considered the evidence adduced before by the petitioner and on the basis of the above authorities, this Court finds that the allegations of adultery and cruelty made by the Petitioner against the Respondent have been established to the required standard.

18. I therefore find that the marriage between the Petitioner and the Respondent has broken down irretrievably and it cannot be salvaged.

19. On the issue that the marriage has broken down irretrievably, Section 6 of the Act provides as follows;

S. (6) A marriage has irretrievably broken down if—

(a) A spouse commits adultery;

(b) A spouse is cruel to the other spouse or to any child of the marriage;

(c) A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;

(d) The spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;

(e) A spouse has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition;

(f) A spouse has been sentenced to a term of imprisonment of the for life or for a term of seven years or more;

(g) a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or

(h) Any other ground as the court may deem appropriate

20. I also find that the Petitioner has proved that the Respondent gave birth several years after they parted ways and that is prima facie evidence that she committed adultery with a person only known to her.

21. The Petitioner's evidence was not controverted since the Respondent did not oppose the petition. My findings are as follows:

(i) I find that the Petitioner has proved his case to the required standard.

(ii) I accordingly allow the Petition in the following terms:

(a) THAT the marriage celebrated between the Petitioner and the Respondent be and is hereby dissolved.

(b) THAT Legal Custody of the Child of the Marriage AOO be and is hereby granted to the Petitioner.

(c) THAT a decree Nisi to issue and to be made absolute within 30 days of this date.

(d) THAT the Petitioner to bear his own cost of this Petition.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 1ST DAY OF FEBRUARY, 2019

ASENATH ONGERI

