



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

DIVORCE CAUSE NO.10 OF 2017

ESH.....PETITIONER

-VERSUS-

MAMF.....RESPONDENT

JUDGEMENT

1. The Petitioner in this case, ESH has petitioned the Respondent MAMF for divorce on the grounds that the marriage between the Petitioner and the Respondent has broken down irretrievably.
2. The Petitioner and the Respondent got married on 18.7.2003 at [particulars withheld], BARCELON, SPAIN.
3. The Petitioner is Belgian while the Respondent is a Spanish Citizen but both are domiciled in Kenya.
4. After their marriage, the couple cohabited in diverse places at Nairobi until the end of 2013 when the Respondent deserted the matrimonial home.
5. The couple was blessed with three issues during the subsistence of the marriage as follows:
 - a) **EH- Male born on 11.9.2001**
 - b) **CH – Female born on 8.8.2000**
 - c) **KH – Female born on 23.6.1997**
6. The Respondent filed an answer to the Petition and said the marriage had broken down and that it is the Petitioner who had deserted the Respondent in the year 2013 to date.
7. The Respondent also cross petitioned for dissolution of the marriage and asked the Court to condemn the Petitioner to pay costs of this petition.
8. The hearing of the case proceeded exparte since the Respondent did not appear in Court for the hearing of the case.
9. The Petitioner who testified as pw1 said the couple had lived separately since 2013 and asked the Court to dissolve the union as the same had broken down irretrievably.
10. The issues for determination in this case are as follows:
 - (i) Does this Court have the Jurisdiction to hear this matter considering that this is a foreign marriage?
 - (ii) Has the Petitioner established grounds for dissolution of the marriage and should the marriage be subsequently dissolved?
 - (iii) Who pays the Costs of this Petition?
11. On the issue as to whether this Court has Jurisdiction to hear this Case, I find that both the Petitioner and the Respondent were domiciled

in Kenya at the time of filing for divorce and this Court is seized of the Jurisdiction to hear this case.

12. According to the Marriage Certificate, both parties were adults of sound mind and of opposite sex as at the time of marriage hence had the capacity to consent to their marriage just as is a requirement in Kenyan laws.

13. In accordance with **Section 40** of the **Marriage Act**, a foreign marriage is recognized as a civil marriage so long as it is:-

a. Contracted in accordance with the laws of that country.

b. It is consistent with the provisions of this part and

c. The parties have the capacity to marry under this Act.

14. The part referred to in **Section 40 (b)** of the **Marriage Act** is part iv which deals with civil marriages to which the marriage herein falls.

15. I am therefore satisfied that the couple herein properly contracted marriage in accordance with their country's laws consistent with Kenyan Laws.

16. The cardinal element for consideration is the place of domicile of the parties for a period allowed and relevant to the applicable law prior to the institution of the divorce proceedings. In the case of **M.N.M v P.N.M (2016) eKLR** Judge Musyoka had this to say:

“in personal matters, such as marriage, domicile is critical about residency. The law of domicile prays an important role in the determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of a marriage where parties have been domiciled within the jurisdiction of that court for the period allowed by the relevant law..... the jurisdiction of a family court to entertain a divorce cause is therefore guided by the law of domicile”.

Similar position was held by J. Ougo in **ER v EP (2016)eKLR**.

17. As stated above, the parties herein are Belgian and Spanish citizens but residents (domiciled) of Kenya. Their marriage was celebrated at [particulars withheld], BARCELON, SPAIN. The Marriage Certificate *particulars withheld* was produced as evidence and or proof of the existence of the said marriage. Effectively, this is a foreign marriage that calls upon the application of **Section 38** of the Kenyan **Marriage Act 2014**.

18. Section 38 provides as follows:

“A marriage celebrated in a foreign country otherwise than in accordance with Section 37 is valid if:

a. It was contracted in accordance with the law of that country and is consistent with the Laws of Kenya;

b. At the time of the marriage the parties had the capacity to marry vide the law of that country and is consistent with the Laws of Kenya;

c. Either of the parties is at the time of the marriage domiciled in Kenya, both parties had capacity to marry under this Act; and

d. If the registrar is satisfied that the parties have obtained certificate of no impediment if the law of that country requires the parties to an intended marriage to obtain such a certificate.

19. On the issue as to whether the Petitioner has established the grounds for dissolution of the marriage, There is evidence that the parties have not cohabited with each other since 2013.

20. I find that there is no love lost between the parties. The marriage serves no useful purpose as there is no love, companionship or support. I accordingly find that the marriage has broken down irretrievably.

21. As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by **section 66(2) (e)** of the **Marriage Act, 2014** and was not recognized in the repealed **Matrimonial Causes Act**. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties.

22. As regards the standard of proof required to satisfy the court that the matrimonial offence of desertion has been proved, this Court, in **KAMWERU V. KAMWERU (2000) E KLR**, stated as follows:

“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.”

23. It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage. The factors that the court takes into consideration are;

- a. the length of the period of physical separation;*
- b. the levels of antagonism, resentment or mistrust between the parties;*
- c. the concern of the parties for the emotional needs of each other;*
- d. commitment of the parties to the marriage;*
- e. chances of the parties resuming their spousal duties;*
- f. chances of the marriage ever working again; among others.*

24. On the issue as to who pays the costs, I find that it is not clear who is responsible for the desertion as the Respondent also cross petitioned for divorce and blamed the Petitioner for desertion.

25. I accordingly order that each party bears its own costs of this petition.

26. For avoidance of doubt I order as follows:

- (i) THAT the Marriage between the Petitioner and the Respondent be and is hereby dissolved.**
- (ii) THAT the Decree Nisi to issue accordingly and the same to be made absolute after 3 months.**
- (iii) THAT each party to bear the costs of this Petition.**

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 5TH DAY OF APRIL, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI