



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**DIVORCE CAUSE NO. 4 OF 2018**

**JAO.....PETITIONER**

**-VERSUS-**

**FOO.....RESPONDENT**

**JUDGMENT**

[1] The Petitioner herein, **JAO**, filed this Petition on **16 November 2018**, seeking the dissolution of the marriage solemnized between her and the Respondent, **FOO**, on **5 June 2012** under the **Marriage Act, Chapter 150** of the **Laws of Kenya**. The parties were, prior thereto, married in accordance with the Luo Customary Law and had been cohabiting together as husband and wife from the year **2004**, during which time they were blessed with two children, **MFA**, aged 14 years and **FT**, aged 10 years.

[2] It was the averment of the Petitioner that, although their marriage was initially happy and satisfying, they started experiencing marital discord when she informed the Respondent of her desire to pursue further education, by enrolling for a degree course at **[Particulars Withheld]**. That on account of their differences, the Respondent, in addition to subjecting her to cruelty, engaged in several acts of adultery and ultimately deserted the matrimonial home in **2013** and got married to another woman with whom he has sired an offspring. She furnished the particulars of adultery and cruelty on the part of the Respondent at paragraphs 8 and 9 of her Petition. It was therefore the Petitioner's averment that their marriage has irretrievably broken down and therefore that the only option available is for the same to be dissolved.

[3] The court record shows that the Petition was duly served on the Respondent. The Affidavit of Service sworn by **EM** on **16 January 2019** shows that the Respondent was served with the Petition on **19 December 2018**; and that he signed a copy thereof in acknowledgement of service. The court record further shows that the Respondent was duly served with a Hearing Notice for **17 June 2019** and an affidavit to that effect filed herein, confirming service and showing that, again, the Respondent acknowledged service by signing on the reverse of the Hearing Notice. In the premises, hearing of this petition, which was unresisted, proceeded *ex parte*.

[4] The Petitioner testified herein to the fact that she got married to the Respondent in **2006** under Luo customary law; and that they thereafter converted their marriage in **2012** to a monogamous union under the **Marriage Act, Chapter 150** of the **Laws of Kenya** (now repealed). She produced their Marriage Certificate as **Exhibit No. 1**, and added that they have two children, **MF** aged 14 years and **FT** aged 10 years who are presently under her care and custody. The Petitioner also testified about the deterioration of their marriage, especially from the time when she took a decision to pursue further studies. Her uncontroverted evidence was that the Respondent would engage in adulterous liaisons and desert the matrimonial home from time to time before finally moving out in **2013**. Thus, according to the Petitioner, it has been 6 years since the Respondent left the matrimonial home.

[5] Granted the uncontroverted evidence placed before the Court by the Petitioner, I am satisfied that the grounds of adultery, cruelty and desertion, as set out in paragraphs 8 and 9 of the Petition have been proved to the requisite standard. I am further satisfied that the Petition has demonstrated that their marriage with the Respondent has irretrievably broken down; and therefore, that she is entitled to the relief sought. In **Kamweru vs. Kamweru [2000] eKLR**, it was held by the Court of Appeal that:

**“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.”**

[6] In the more recent case of **J S M vs. E N B [2015] eKLR**, the Court of Appeal re-examined the applicable law in the light of the **Marriage Act, 2014** and held that:

**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.

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...

What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down."

[7] In the light of the foregoing, I am satisfied that, in this case, the Petitioner has proved the grounds relied on by her, including the ground that their marriage with the Respondent has irretrievably broken down. In the premises, I would allow the Petition dated **15 November 2018** and grant orders in the following terms:

[a] That the marriage between the Petitioner and the Respondent solemnized at the office of the Registrar of Marriages, Kisumu, on the **5 June 2012** be and is hereby dissolved;

[b] That a *Decree Nisi* be and is hereby issued to be made absolute after 30 days;

[c] That the custody of the two children of the union, namely, **M FA** and **FT**, be and is hereby given to the Petitioner until they attain the age of majority;

[d] That there be no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF JULY 2019**

**OLGA SEWE**

**JUDGE**