



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 6 OF 2010

S M.....PETITIONER

VERSUS

M K M.....RESPONDENT

JUDGMENT

1. S M the petitioner in these proceedings came to this honorable court vide a petition dated 18th December 2009 but filed on 18th January 2010 seeking dissolution of his marriage to his wife M K M the respondent herein. His prayer is predicated upon grounds of cruelty and irreconcilable differences leading to irretrievable breakdown of their marriage.

2. It is the petitioner's case that sometime on 13th August 1983, he contracted a statutory marriage to the respondent under the Marriage Act Cap 150 at the Registrar of Marriages AG's office Nairobi and a marriage certificate S/No 18175 issued to that effect. Subsequently, the couple established their matrimonial home and started cohabiting as husband and wife. They were blessed with two living issues namely G M and D M aged 24 and 26 years respectively as at the time this petition was filed.

3. That during the subsistence of their marriage, the respondent became so violent thereby threatening to kill him while asleep on several occasions; that the respondent had become a habitual drunkard thus causing the petitioner extreme humiliation, mental anguish, stress and psychological torture; that on 14th December 2003, the respondent smashed a glass on the floor in readiness to attack the petitioner and subsequently deflated his car's tyres thus immobilizing him; that the respondent has squandered family finances thus occasioning him a lot of anxiety.

4. Upon being served with the petition, the respondent filed a response by way of an answer to petition dated 10th March 2010 in which she opposed the petition thereby denying allegations of cruelty and more particularly claims of drunkenness, violence, financial indiscipline and or irresponsibility. She also challenged the jurisdiction of this court although without specificity.

5. Vide the petitioner's Chamber Summons dated 11th November 2016 and filed on 14th November 2016, the registrar's certificate was issued on 5th October 2017 certifying the pleadings as being in order and proper and that the suit to proceed as a defended cause before a single Judge. On 26th July 2018 when the matter came up for hearing, the respondent did not turn up despite service of the hearing notice. The matter therefore proceeded ex parte.

6. In his testimony, the petitioner adopted and relied on the contents contained in his petition and affidavit in support thereby urging the court to dissolve the marriage which had broken down irretrievably due to irreconcilable differences leading to their separation for over 17 years. He further stated that since 4th December 2008 when his original divorce petition cause No. 125/2001 was dismissed, they have not been staying together. He contended that there is no mutual desire to continue staying together as husband and wife and that there is no collusion or connivance in filing the divorce petition.

7. I have considered the petition herein, answer to petition and testimony by the petitioner. There is no dispute that the petitioner and respondent celebrated a statutory marriage on 13th August 1983. According to the petitioner, he is the one who moved out of their matrimonial home after the respondent had become so violent, habitual drunkard and an irresponsible money spender. He has never gone back since 14th December 2003.

8. From this testimony, it is apparent on his own admission that he is the one who deserted their matrimonial home. A perusal of the petition and testimony reveals that there are two grounds for divorce and therefore the only issues for determination. Firstly, whether the respondent committed acts of cruelty against the respondent and secondly, whether the marriage in question has irretrievably broken down.

9. Although there is no universal standard definition of the word cruelty as relates to divorce proceedings, courts have made great jurisprudential approach in trying to define the same. Justice GBM Kariuki in the case of AMA vs GSB HCDC No. 134/2010 Nairobi held as follows:

“.....cruelty is willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental or so as to give reasonable apprehension of such a danger.....”.

(See also Russel vs Russel (1895) P 315, 322).

10. In the instant case, the petitioner alleged that on various dates the respondent had attempted to kill him while asleep. He also stated that on 14th December 2003 she smashed a glass on the floor while threatening to kill him. Allegations of habitual drunkenness and misuse of family finances have not been challenged. Habitual drunkenness of one spouse can be mentally disturbing and traumatizing to another spouse besides intimidation before one's peers.

11. The petitioner's testimony having not been challenged or controverted remains the only evidence for reliance on account of cruelty. I am therefore persuaded to believe that the respondent's behavior and conduct amounted to cruelty meted against the applicant as her conduct was life threatening and caused mental anguish.

12. Has the marriage broken down irretrievably? As stated above, the petitioner quit their matrimonial home sometime on 14th December 2003 just to avoid the nasty behavior of the respondent. Since then they have not reunited and in the petitioner's words, there is no hope. It is now 17 years since they separated on account of the petitioner's desertion from their matrimonial home and every effort to reconcile them having failed, their marriage can be classified as having irretrievably broken down.

13. There is nothing remaining to salvage this marriage. Marriage is a social contract pegged on mutual love, trust and commitment to each other's weaknesses and strength. Where the candle of love is extinguished without connivance or collusion as in this case, courts have no business in forcing such relationship to subsist. Each party should be let free to continue with his or her life elsewhere in the manner satisfying one's desire for meaningful life on earth before the return of the Lord.

14. Having held as such, it is my finding that, the petitioner has proved his case on a balance of probability as the marriage herein has irretrievably broken down and the same must be dissolved. To that extent, the petitioner's marriage to the respondent celebrated on the 13th August 1983 be and is hereby dissolved. A decree nisi order to issue and the same to be declared absolute within two months from the date of delivery of this judgment. This being a family issue, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 1ST DAY OF NOVEMBER 2018.

J.N. ONYIEGO

(JUDGE)