



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 229 OF 2013

JMM.....PETITIONER

VERSUS

TMM..... RESPONDENT

JUDGMENT

1. These divorce proceedings commenced by way of a plaint dated 27th July 2009 before Milimani Chief Magistrate's Court as a divorce cause No. 215/2009. After conducting full trial and before delivery of Judgment, the trial magistrate discovered that she did not have jurisdiction to hear claims over customary marriages pursuant to the amendment of Section 2 of the Magistrate's Act Cap 10. The learned magistrate therefore downed her tools and advised parties to seek the matter transferred to the High Court. Consequently, Justice Waweru made orders on 12th September 2013 transferring the file to the High Court for hearing and determination.

2. The plaintiff therefore sought orders as follows:

(a) That the marriage between the plaintiff and the defendant be dissolved.

(b) That the defendant be restrained by way of a permanent injunction from threatening, assaulting or getting into contact with the petitioner or interfering with her business.

(c) That custody of the children be awarded to the plaintiff.

(d) Costs of the suit.

3. According to the plaint, the couple contracted their Marriage in accordance with Kamba Customary Law sometime in 1999. They then settled and started cohabiting as husband and wife at [Particulars Withheld] Estate Embakasi Nairobi. Their marriage was blessed with two living issues namely, IM and SN then aged 8 and 4 years old respectively.

4. The suit is predicated upon grounds of cruelty and adultery particularized as below:

Adultery

(a) That the defendant has had a love affair with a house help whom he eventually financed to open a wholesale shop at Donholm estate

(b) That the defendant has had love affairs with other women.

Cruelty

(1) That the defendant has on several occasions assaulted the plaintiff particularly on 1st November 2008 leading to the plaintiff reporting to the police thus obtaining a P3 form.

(2) That the defendant is a violent person.

(3) That the defendant is a heavy alcohol drinker.

(4) That the defendant has neglected his family and at times disappears for over a week.

5. The plaintiff further claimed that, sometime on 5th July 2009, the defendant left their matrimonial home never to return thus abandoning his family.

6. In response, the defendant filed a defence dated 19th October 2009 and filed the same day virtually denying every allegation contained in the plaint. He accused the defendant of deserting their matrimonial home and thereafter kept pestering him to allow her return back home. He basically prayed for the dismissal of the suit.

7. During the hearing, the plaintiff (PW1) literally reiterated the allegations and particulars contained in the plaint. She stated that her husband is a cruel man who had subjected her into humiliation by assaulting her regularly and sleeping with their house help. That he is a heavy alcohol drinker who loves women. She alleged that after deserting their matrimonial home, the defendant went staying with another woman one Stella with whom they have a baby.

8. On the other hand, the defendant gave his testimony blaming the plaintiff for the failure of their marriage. He denied being a habitual drunkard. He further denied assaulting her and instead alleged that he was the one assaulted by the plaintiff who at one time planned to assassinate her. He claimed that there is a criminal case going on at Milimani Law Courts with the plaintiff as the accused for the offence of planning to assassinate him.

9. He admitted that he is currently staying with another woman one Stella whom he married after separating with the plaintiff. That it was the defendant who left their matrimonial home after stealing Kshs.6,000,000/= from their family business. In a nut shell, the defendant blamed the plaintiff for the failure of their marriage and urged the court to dismiss the plaint.

10. I have considered the plaint and defence herein filed and testimony by both parties. Issues for determination are: Whether adultery is a ground to dissolve a customary marriage; whether the plaintiff has proved cruelty as a ground for divorce; whether the marriage has irretrievably broken down.

11. There is no dispute that the plaintiff and defendant celebrated their marriage under Kamba Customary Law. Although there was no evidence tabled to prove the same, admitted facts need no further proof to authenticate the same.

12. Both parties are in agreement that after they separated sometime 2009, the defendant went ahead and married one Stellah the year 2013. The plaintiff did not allege that Kamba Customary Law prohibits a man from contracting a subsequent marriage with another woman during the subsistence of another customary law marriage. The defendant said in his evidence that, under customary law, he is allowed to marry more than one wife.

13. Besides the defendant's marriage to one Stellah the year 2013, the plaintiff has not proved any adulterous activities between the defendant and any other woman including the house help. The allegation of the defendant having many wives is a mere assertion which has not been proved. It is trite law that he who alleges must prove (**See Section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya**). The plaintiff has not discharged this onerous duty to the required degree.

14. Taking into account that under customary law one is potentially polygamous, the defendant cannot be said to have committed adultery by marrying a second wife. This position has not changed even under the current Marriage Act 2014(see section 2). For those reasons, the ground of adultery fails.

Cruelty

15. Regarding cruelty, the plaintiff is under obligation to prove that the acts complained of against the defendant constitute cruelty. In the case of **A.M.A. vs G.S.B. HCDC No. 134 of 2010 Kariuki J stated that:**

“it is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the petitioner's health or reasonable apprehension of such injury. 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 rise to reasonable apprehension of such danger (See Russel vs Russel (1985) P. 315, 322 ...”

16. Both parties have complained of cruelty against each other. The plaintiff admitted that she is currently facing charges of attempting to assassinate the defendant. The matter is still pending hence she is innocent until proved guilty. Besides allegations by the plaintiff that she once reported to the police of having been assaulted, she did not produce a copy of the P3 she alleged to have been given. In a nut shell none of the parties adduced sufficient evidence to prove allegations of assault meted against each other. For those reasons the ground of cruelty fails.

17. Is there any ground upon which this court can grant the divorce or reject the same? The couple herein have been living separately since the year 2009. They have made all manner of effort including the intervention of their parents to reconcile but to no success.

18. It is apparent and common sense that there cannot be a marriage by osmosis. Parties having parted the year 2009 which is now 9 years down the line, there is nothing remaining to salvage. Each party has since moved on with life with the defendant having married another wife.

19. I am convinced that the period of separation is far too long to infer a marriage which has irretrievably broken down. Marriage is a social contract based on companionship and happiness. Such ingredients cannot be executed while separated. This far, the couple is physically and in spirit disentangled from their marriage and love. I have no reason to force the couple to stay together. I am satisfied that the divorce proceedings were not filed through connivance or collusion.

20. For the reasons above stated, it is my finding that the marriage between the plaintiff and defendant has irretrievably broken down. As regards custody and maintenance of children, the parties admitted that there are proceedings going on before the Children's court hence the right court to determine the issues. I will therefore not make any orders to that extent as the children's Court is the best place to litigate on those issues.

21. Having held that the marriage between the plaintiff and defendant has irretrievably broken down, I am inclined to make the following orders:

(a) That the customary marriage between the plaintiff and defendant celebrated in 1999 be and is hereby dissolved.

(b) That a decree nisi order to issue and that the same be declared absolute after one month.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF DECEMBER 2018.

J.N. ONYIEGO

JUDGE