



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 14 OF 2009

C KPETITIONER

VERSUS

F N RRESPONDENT

JUDGMENT

The Petitioner is lawfully married to the Respondent under the provisions of the Marriage Act Cap 150 Laws of Kenya (repealed). The ceremony took place at the District Commissioner Office at Kajiado. A copy of the Marriage Certificate is attached and **Marked [Particulars withheld]**. The parties lived together in Kajiado. They were blessed with two issues; I K born on 21st April 2005 and C K born on 10th March 2008.

The Petitioner alleges that since the celebration of the said marriage the Respondent treated him with cruelty, the particulars having been stated under paragraph 5 of the petition dated 28th January 2009. The Petitioner has been living separately from the Respondent since 27th August 2007. The Petitioner prays for orders that the marriage between the Petitioner and the Respondent be dissolved on grounds of cruelty and irretrievable breakdown of the marriage. He also seeks orders that the costs of the petition be borne by the Respondent, and custody of the issues be given to the Petitioner with the Respondent getting unlimited access to them.

The Respondent filed Answer to Petition on 26th March 2009 and denies the allegations of cruelty found under paragraph 5 of the said petition. She further alleges that the Respondent kicked her out of their matrimonial home on 27th August 2007 and the Petitioner's sisters witnessed the same. The Respondent claims that the marriage has not irretrievably broken down and can be salvaged should the Petitioner give their marriage a chance.

The Respondent stated that this court has no Jurisdiction to hear divorce cases arising out of civil marriages and only the magistrates' court can hear this matter. The Respondent also requested that this matter be heard in the Resident Magistrates Court at Kajiado since both parties reside in Kajiado and the court would be a more convenient forum. She prayed that her marriage to the Petitioner should not be dissolved. Further, she prayed that she be granted custody of the issues and that the Petitioner be ordered to pay costs of these proceedings.

HEARING

On 16/9/2010, the hearing of these proceedings commenced before Hon. Justice L. Kimaru. PWI the Petitioner testified that he works with the Judiciary. He stated he married to the Respondent on 5/12/2003 and they lived at his parents' home in Kajiado. He further testified that they have two issues, I S K born

on 24/04/2005 and C K K born on 10/03/2008, the family is not living together. The Applicant and the Respondent separated on 24/07/2007. Further according to his testimony he had several quarrels with the Respondent which led to their separation. He claims that the Respondent was negligent with their children and embarrassed him on several occasions by insulting him. On 27/08/07 PW1 was informed that Respondent left their matrimonial home. On 28/06/08 the couple attempted reconciliation in the presence of the Applicant's brothers, father and other elders. Upon failure of reconciliation the marriage was traditionally dissolved. The marriage affected the Applicant (PW1) mentally. The Applicant prayed for dissolution of the marriage and custody of the issues. Upon Cross Examination the PW1 stated that both sets of parents have agreed that the marriage should be dissolved. He also said that he did not intend to divorce the Respondent so as to start another life.

The Petitioner's father (PW2) testified in Kiswahili. He confirmed that he resides in [Particulars withheld], Kajiado and that the Petitioner in this matter is indeed his son and that he was indeed married to the Respondent at the D.C's office in Loitoktok. According to him, the couple lived on his farm after their marriage. They were not living happily. The Respondent and PW2 were not in good terms. The Respondent left the home. It was after this that PW2 went to Loitoktok where the Respondent was at the time with a view of reconciling the couple. The Respondent was adamant. Reconciliation was attempted the second time and upon failure it was agreed that the two parties should separate.

Upon Cross Examination, PW2 stated that the allegation made by the Respondent of being chased away by her husband was untrue. He further added that the Respondent was not in good terms with his wife, her mother in law. He continued to state that the Petitioner and the Respondent only quarreled but never physically fought. PW2 was unhappy since the Respondent did not allow her issues to visit him.

Further hearing of the matter commenced in this Court on 23rd October 2014. both Counsel agreed to await typed proceedings and then determine the way forward. On 11th December 2014 the proceedings were ready but the evidence of PW2 was omitted from being typed.

On 5th November 2015, the parties agreed to proceed from where Hon Justice L. Kimaru left off and included the evidence of PW2 which is legible from the Court record.

PW3 F N G the Respondent told this Court , they were married on 5th December 2003 with the Petitioner. They lived together at his parents' home but his parents did not accept her. The Petitioner and Respondent disagreed in 2007, the petitioner asked her to leave. She did and the 2nd child was born at her parents' home. They lived well except for interference from the Petitioner's parents. The Petitioner did not visit the child. The respondent denied she was harsh to the child. She sought from this Court that divorce is not granted, the petitioner pays for children upkeep and costs of this suit.

DETERMINATION

According to **Section 2 of the Marriage Act 2014**, *"...unless the context otherwise requires, "court" means a Resident Magistrate's court established under Section 3 of the Magistrates' Courts Act;"* meaning that it is whence all matters of divorce should first proceed. However, this matter was first brought to the High Court in the year 2009 way before the enactment of the Marriage Act of 2014 therefore this court has unlimited original jurisdiction over the mater pursuant to **Article 165(3) of Constitution 2010**.

The Petitioner outlined in detail the grounds of cruelty by the Respondent that she is a person of uncontrollable temper and had hurled insults at him severally even in the presence of family members and visitors and this caused him mental anguish. The last straw was in 2007, when the Respondent destroyed their wedding pictures and threw out his clothes. He told her to leave the matrimonial home. They have lived separately to date.

The Respondent's testimony was denial of the allegations in the Petition and the issue raised that divorce proceedings ought not to be conducted in this Court. The Respondent in her testimony sought the marriage to be salvaged and divorce not to be granted.

Despite pleadings by the Respondent to salvage her marriage to the Petitioner, this court is of the view that the marriage has irretrievably broken down. According to **Section 66(2) of the Marriage Act 2014**, **“A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—**

- (a) adultery by the other spouse;**
- (b) cruelty by the other spouse;**
- (c) exceptional depravity by the other spouse;**
- (d) desertion by the other spouse for at least three years; or**
- (e) the irretrievable breakdown of the marriage.”**

From the foregoing, this court finds that the particulars of paragraph 5 of the Petition disclose cruelty by Respondent to the Petitioner. The evidence of all witnesses is that they all attempted reconciliation but the several attempts did not yield any fruits. They have been separated for over 10 years now. The marriage has irretrievably broken down. Although the Respondent desires reconciliation; it cannot be a one person effort. Parties are at liberty to reconcile at anytime and the Court is mandated by Article 45 of Constitution 2010 to facilitate and support reconciliation and family remaining intact. However, in the absence of mutual understanding and effort by both parties it will be an effort in futility. In the instant case the parties have not shown probability of reconciliation.

DISPOSITION

The Court finds that the marriage solemnized between the Petitioner C K L and Respondent F N R has irretrievably broken down on the basis of cruelty and the marriage between the Petitioner and the Respondent is dissolved.

A decree nisi is hereby issued and will be absolute within 30 days.

The legal custody of the 2 issues of the marriage shall be to both parents, but physical custody is to the Respondent and the Petitioner may exercise agreeable visitation and access to children rights until further orders from the Children court to determine upkeep and maintenance of the children of the marriage.

Each party to bear own Costs

DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 6TH MARCH, 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

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