



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO. 96 OF 2014

N M.....PETITIONER

VERSUS

D O O.....RESPONDENT

JUDGMENT

1. NM hereinafter referred to as the Petitioner and DOO hereinafter referred to as the Respondent celebrated their marriage ceremony under Cap 150 Laws of Kenya, on the 22nd August, 2003 at their residence in Karen. After the union, the couple settled and continued cohabiting as husband and wife at Karen within Nairobi.

2. Subsequently, the two were blessed with three children namely RHO, KOO and JCO. Besides their biological children, they are also legal guardians of two children born by the respondents sister. The two are SOO and CAO

3. In paragraph 8 of her Petition dated 6th May but filed in court on 7th May, 2014 the Petitioner avers that her marriage has irretrievably broken down on account of the respondents cruelty to the Petitioner which behavior and conduct started on 5th March, 2012 and persisted till 6th July 2013 when she decided to move out with their children with whom she is staying to date.

4. The particulars of cruelty are particularized as follows;

- a. That the respondent stopped communicating with the Petitioner giving her silent treatment thereby causing her great distress and hardship.
- b. That the respondent made threats to the Petitioner causing her to be fearful and unsettled.
- c. That the respondent frequently spoke condescendingly to the Petitioner making hurtful statements expressing that he did not believe in love or marriage and that he married her to please the mother.
- d. That the respondent treated the Petitioner in a contemptuous and patronizing manner.

5. The Petitioners prayer therefore is for:

- a. Dissolution of their marriage

b. Actual custody, Care and control of the children of the marriage be granted to the Petitioner with the respondent having visitation rights at his convenience with prior consultation with the Petitioner.

c. Legal custody of the children be granted to the petitioner and respondent jointly.

d. An order to be made that the respondent do pay the children's school fees, medical cover, membership charges at Karen Country club and provide clothing for the children.

6. Despite service of petition upon the respondent on 23rd May 2014, as evidenced by a return of service sworn by Dickson Ooko Giani a process server in his affidavit sworn on 26th May, 2014 the respondent never bothered to file any response. On 23-6-2014, vide summons dated 18th June, 2014, the Applicant moved the court for the registrar's certificate certifying the pleadings herein as being in order and that the suit be fixed for hearing as an undefended cause. The orders sought were granted on 17-3-2016 and thereafter the matter proceeded for formal proof.

7. During the hearing, the petitioner told the court that she is a lawyer by profession so is to the respondent and that on 22nd August, 2003 being a Spinster and the respondent a bachelor, celebrated a marriage ceremony. She produced a marriage certificate Serial number; [Particulars Withheld] (P. Exhibit.1) as proof of the existence of their marriage. She alleged that, during the subsistence of their marriage, the respondent became unfaithful, cruel and kept threatening her.

8. She further claimed that the respondent persistently told her to move out of the house as he did not "love" her, and that he had many women who were after him. That after she moved out of the matrimonial home, the Respondent stopped communicating with her. The petitioner admitted that she had no proof of Adultery against the respondent and that she was the one who shut him out of communication and instead told the respondent to deal with the brother(hers) and her lawyer.

9. With regard to Actual custody of the biological children, she urged the court to grant custody to her since she has been staying with the minors who are now aged 10 years (RHO), 5 years JC and 7 years KO.

10. The Petitioner said that, when she later met with the respondent through her brother, they agreed on access rights and respondent to pay school fees and meet medical cover expenses. Categorically the petitioner told the Court that she did not want anything from the respondent. In addition to paying school fees and medical cover expenses, the Petitioner prayed that the respondent should continue paying membership and annual subscription fees at Karen Country club as she is paying for the same at Muthaiga and Railway Sports clubs.

11. I have considered the pleadings herein and evidence by the Petitioner. There is no dispute that Petitioner and respondent celebrated their marriage under Cap 150 Laws of Kenya on the 22-8-2003. Marriage certificate was produced (P. Exhibit. 1) As to whether the suit herein was filed with connivance and collusion of the respondent, there is no evidence to suggest the existence of such assertion. I do hold that there was no collusion nor connivance.

12. The Petitioner stated that she moved out of their matrimonial home on 6-3-2012, after persistent harassment and threats from the respondent. The Petition herein was filed on 6-5-2014. Since 22-8-2003 when the marriage was celebrated, it is over three years hence satisfying the requirement under Section 66(1) of the Marriage Act 2014.

13. Dissolution of a marriage is governed by Section 66 of the Marriage Act 2014.

Sub –Section (2) provides that;

“A party to a marriage celebrated under Part 1V may only petition the court for separation

of the parties or the dissolution of the marriage on the following grounds.

a. Adultery by the spouse

b. Cruelty by the spouse

c. Exceptional depravity by the either spouse.

d. Desertion by the other spouse for at least three years. Or

e. The irretrievable breakdown of the marriage.

14. In the instant case, there is only one ground cited (cruelty). The allegation of the respondent's unfaithfulness during the hearing was abandoned by the petitioner herself who said that she had no proof after her counsel posed the question of proof to her. In any event, adultery was not quoted as a ground.

The term cruelty has not gotten universally acceptable definition in legal circles as to what extent it can apply as a matrimonial offence and the standard of proof.

15. In the Case **of; A -vs- M (2008) IKLR 103**, the High court held that “ **Cruelty is a willful and unjustifiable conduct of such a character as to cause bodily or mental danger to life, limb or health as to give rise to a reasonable apprehension of such danger.**”

However, in **D.M -vs- T. M (2008) IKLR. 1**, the court held that there is really no comprehensive Judicial definition of cruelty because it is difficult to define the term by reference to facts of previously decided cases. Thus each case is to be decided by its own merits.

16. For purposes of this case, the Petitioner alleged that she had been threatened frequently by the respondent who consistently insisted on her leaving. The respondent would even brag before her that he did not love her and that there were so many women running after him. Although there was no actual physical bodily harm or injury, the conduct and behavior of the respondent more so the demeaning language applied against the Petitioner was capable of causing mental torture with the danger of stress and eventual depression thereby endangering health.

17. Under normal circumstances and in ordinary real circumstances, no spouse would take it kindly or even celebrate when “ **a sweet heart or honey**” makes demeaning and derogatory remarks against the other. It is an assault and attack on a co-spouse's image and ego when words such as the ones complained of in this case are used or uttered.

18. The evidence of the Petitioner has not been controverted as the respondent did not respond. I am left with the evidence of the Petitioner alone which in the absence of any other evidence to contrary, is persuasive enough so as to make a conclusion that the behavior, conduct, character and language used against the petitioner was injurious hence proof of cruelty.

19. Having found that the ground of cruelty has been established, the remaining issue is whether their marriage has broken down irretrievably. Since 2012, when the couple separated, there has been no effort made to reconcile. It is now five years since. The parties have agreed on sharing responsibilities. The Petitioner is in actual and physical custody of their biological children. The children in respect of whom the couple were acting as legal guardians have been staying with the respondent and one of them has since relocated to America.

20. Parties must be let free to decide on their destiny. They are the ones who know the Angelic and demonic forces in their marriage for better or for worse. Considering the duration the parties have been away without any effort to reconcile allegedly from the respondent, this marriage has no life to breath nor legs to stand on. It has simply broken down irretrievably. Even on that ground alone, the Petition would succeed and therefore the marriage herein dissolved.

21. As to the custody of the three children, the minors are aged between 5 and 10 years and have been in the custody of the mother. The respondent did not file any response to challenge this prayer. Given their tender age, it is in their interest that they stay with their mother.

In arriving at this conclusion, I am guided by the best interest of a child principle as provided in Article 53(2) of the Kenya 2010 Constitution. Accordingly, custody of the three children is awarded to the Petitioner.

22. As for maintenance, the same can be properly and adequately dealt with in the children's court. However, the arrangement subsisting with regard to payment of school fees, purchase of clothes and medical cover by the respondent shall remain subject to any further orders that the children court may make. Equally, visitation or access rights to the children by the respondent at his convenience with prior consultation with the Petitioner shall remain.

The issue of Annual subscription and membership at Karen Country club was not exhaustively argued out. The court did not have the advantage of being told how much it costs, who have been members and who was paying. I will not make any orders with regard to that prayer. The parties can continue with what they have been doing since 2012 when they separated.

23. Based on the evidence on record, and assessment by the court, this court is satisfied that the Petitioner has proved her case on a balance of probability and thus enter Judgment with the following orders.

- a. That marriage between the Petitioner and respondent celebrated on the 22-8-2003 be and is hereby dissolved.
- b. That a decree nisi order do issue.
- c. That the decree nisi order be confirmed and made absolute after six months.
- d. That actual custody, care and control of the children of the marriage be and is hereby granted to the Petitioner with the respondent having visitation rights at his own convenience with prior consultation with the Petitioner.
- e. That legal custody of the children be and is hereby granted to the Petitioner and respondent jointly.
- f. That the arrangement currently subsisting on payment of school fees and medical cover for the children shall continue.
- g. That maintenance issues with respect to the children be dealt with by the children's court

This being a family matter and the respondent having not defended the same, I will not make any order as to costs.

DATED, AND SIGNED AT NAIROBI, THIS 6TH DAY OF APRIL, 2017.

J. N. ONYIEGO

JUDGE

In the presence of:

.....for Petitioner

.....for Respondent

Court Assistant: