



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO. 60 OF 2014

IN THE MATTER OF THE MARRIAGE ACT, CAP 150

AND

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT, CAP 152

BETWEEN

D W W.....PETITIONER

VERSUS

N A R.....RESPONDENT

JUDGMENT

By way of a Petition and a Supporting Affidavit dated 7th March 2014, D.W.W the Petitioner herein sought orders;

- a. That the marriage solemnized between him and the Respondent be dissolved,**
- b. That the Court adopts the award in Children Case No. 783 of 2011 in relation to custody, access, visitation and maintenance of the issues of the marriage**
- c. That joint matrimonial property be shared between him and the Respondent in accordance with the Married Women and Property Act, 1882 and**
- d. That costs of the proceedings be paid by the Respondent.**

The Petitioner and the Respondent herein were married on 30th November 1996 at the [particulars withheld] Church, Nairobi under the Marriage Act, Cap 150 as evidenced by their marriage certificate of serial no. [particulars withheld] They resided in Changamwe, Mombasa before relocating to Nairobi. The marriage was blessed with two Issues; A I R and C A W aged 13 years and 5 years respectively. The Petitioner presently works at [particulars withheld] Authority and the Respondent works at [particulars withheld] Bank. The Petitioner and Respondent currently live separately. The Petitioner currently resides in Garden Estate, Nairobi and the Respondent currently resides in Ngumo Estate, Nairobi.

PETITIONER'S CASE

In his Petition, he deposed that since the celebration of the marriage, the Respondent treated him with cruelty. Particulars of the cruelty were stated in paragraph 7 of the Petition. He stated that the Respondent threatened him time and again, caused a lot of conflict and tension within the marriage. The Respondent hurt him emotionally and there is no hope of ever building back the trust with the Respondent. He stated that he had attempted to salvage the marriage by seeking the intervention of their parents and family but the attempts were futile. In fact, the Respondent returned her wedding ring to the Petitioner to signify the end of the marriage. Further, he averred that he left his matrimonial home leaving the Respondent with the issues of the marriage. They have been living separately for a period three (3) years and they have both moved on with their individual lives.

Concerning the issues of the marriage, the Petitioner stated that there was an ongoing suit in the Children's Court at Nairobi dealing with the issue of custody, access, maintenance and visitation of their children.

On the issue of their matrimonial property, the Petitioner stated that during the subsistence of their marriage, they jointly bought a matrimonial property, being their family house at Kiembeni, Mombasa which is registered under the Respondent's name and that she (the Respondent) has been receiving rental income of Ksh, 18,000/- monthly since May 2011 while he still continues to pay the mortgage thereof of Ksh. 4,000,000/- and thus she is not entitled to alimony.

He prayed for the marriage to be dissolved and that the joint matrimonial Property be shared between him and the Respondent according to the provisions of the Married Women and Property Act, 1882.

RESPONDENT'S CASE.

The Respondent replied to the Petition by filing her Reply to Petition dated 22nd May 2014. She admitted being married to the Petitioner in the stated year as evidenced by the copy of the marriage certificate produced by the Petitioner. She also admitted that the marriage was indeed blessed with two Issues and that they currently live separately. The Respondent however denied the particulars of cruelty as stated in the Petition and averred that she was never cruel or disrespectful to the Petitioner. In the alternative, she stated that the Petitioner had stopped loving her and mistreated her several times. She also stated that her marriage to the Petitioner has been strenuous and full of irreconcilable differences.

The Respondent admitted that they had indeed lived separately for three (3) years due to their irreconcilable differences but emphasized that the Petitioner left the matrimonial home on his own volition. She denied the Petitioner's allegations that they jointly bought a matrimonial property, being their family house at Kiembeni, Mombasa which is registered under the Respondent's name and that she has been receiving rental income of Ksh, 18,000/- monthly since May 2011 while he still continues to pay the Mortgage thereof of Ksh. 4,000,000/-. In the alternative, she averred that she solely bought the house by obtaining a mortgage which she still pays to date, that the said house is not jointly owned and thus should not be divided equally between them

She prayed that the marriage be dissolved.

DETERMINATION

From the pleadings and oral evidence of the parties in this case, the issue before this Court is whether the parties have adduced sufficient evidence to warrant the dissolution of the marriage. From the facts, the marriage between the parties was a Christian marriage. **Section 65 of the Marriage Act, 2014** provides:

“A party to a marriage celebrated under Part III may petition the court for a decree for the dissolution of the marriage on the ground of—

(a) One or more acts of adultery committed by the other party;

(b) Cruelty, whether mental or physical, inflicted by the other party on the petitioner or on

the children, if any, of the marriage; or

(c) Desertion by either party for at least three years immediately preceding the date of presentation of the petition;

(d) Exceptional depravity by either party;

(e) The irretrievable breakdown of the marriage...”

In the instant case, both parties have accused each other of cruelty and other matrimonial offences. This notwithstanding, none has provided sufficient evidence to support the allegations of cruelty, neglect, emotional abuse and the other offences. Having said that, this Court however acknowledges the fact that both Parties admit that their union is indeed broken down and there is no hope of salvaging the situation. Moreover, the parties have been living apart from each other for a period of three years now and have confirmed that each of them has moved on with their individual lives. They do not see any likelihood of ever getting back together and both seek that their marriage be dissolved.

In *N vs N 2008 1 KLR 16*, Madan J (as he then was) held:

“if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union.....”

Accordingly, this Court finds that the marriage between the parties has irretrievably broken down with likelihood of reconciliation as efforts to salvage the marriage were futile and thus the marriage is so dissolved on the ground of irretrievable breakdown under **Section 65(e) of the Marriage Act, 2014**.

With regard to the question of the issues of the Marriage, the Petitioner stated that there was an ongoing suit **Children Case No. 783 of 2011** dealing with the issue of custody, access, visitation and maintenance of the children. These issues will be determined by the Children’s Court and any parties who will be aggrieved by the orders granted shall have a right to apply for review in Children Court or Appeal in the High Court.

On the issue of matrimonial property, the Petitioner prayed for orders that the matrimonial property namely house in Kiembeni Mombasa be shared between the parties as per the **Married Women Property Act, 1882**.

The Matrimonial Property Act, 2013 is the current statute which provides for the rights and responsibilities of spouses in relation to matrimonial property.

Section 19 of the Act provides:

“The Marriage Woman Property Act shall cease to extend to or apply in Kenya.”

The new Act repealed the **Married Women Property Act, 1882** and all matters relating to matrimonial property are now governed by **The Matrimonial Property Act, 2013**.

In this regard, the issue of the division of matrimonial property between the parties herein shall be governed by the Matrimonial Property Act, 2013 and not the Married Women Property Act, 1882. However, parties herein are required to institute a matrimonial property cause and provide evidence in compliance of **Sections 2, 6, 7 &14 of Matrimonial Property Act 2013** so as to enable the Court determine division of matrimonial properties between the parties.

DISPOSITION

Accordingly, this Court holds that:

- 1. The Marriage between the Petitioner and the Respondent celebrated on 30th November 1996 under the Marriage Act, Cap 150 is hereby dissolved. A decree *nisi* is hereby issued and will be made absolute within 30 days.**
- 2. Physical custody of the Issues of the Marriage shall remain with the Respondent with agreed visitation rights to the Petitioner pending the hearing and determination of the Children Case No. 738 of 2011.**
- 3. Parties shall institute a matrimonial property cause under the Matrimonial Property Act 2013 to determine division of the Matrimonial Property.**
- 4. The suit property house in Kiembeni, Mombasa is presented under Section 17 of Matrimonial Property Act 2013 until hearing and determination of the Matrimonial Property Cause.**
- 5. Each party shall bear their own costs.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF MAY 2017.

MARGARET W. MUIGAI

JUDGE

IN THE PRESENCE OF:

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