



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 20 OF 2008

BETWEEN

RSAPETITIONER

VERSUS

GJO.....RESPONDENT

JUDGMENT

1. This matter is titled HCC but it is in essence a Divorce Cause. RSA (hereinafter the Petitioner) and GJO (hereinafter the Respondent) got married under the Luo Customary Law on 1st September, 1989. They lived together as husband and wife from April, 1990 in Nairobi and Kajiado respectively. The couple was blessed with three issues of the marriage, as follows:

- i. NO born on 4th April, 1990
- ii. WO born on 14th December, 1991.
- iii. TJ born on 23rd April, 1997.

2. The Petition filed on 14th October, 2008 is premised on grounds of cruelty, desertion and adultery said to have been occasioned by the Respondent against the Petitioner. It is averred that the acts of cruelty, desertion and adultery complained of caused the Petitioner much mental anguish and physical suffering, and the marriage has, as a result, for all purposes irretrievably broken down.

3. The particulars of cruelty have been set out in the petition. The Petitioner complained that the Respondent is possessed of a vicious and aggressive personality and has on numerous occasions verbally and physically abused the Petitioner. That in 2003 the Petitioner paid a visit to the Respondent in the United Kingdom, and the Respondent not only assaulted her and broke her toe but also declined to take her to hospital.

4. The Respondent is also said to have had several extra-marital affairs with women known and unknown to the Petitioner, one of whom he lived with in the United Kingdom. It is further pleaded that upon returning to Kenya in December, 2003, the Respondent immediately thereafter deserted the matrimonial home, and changed his telephone numbers so that his whereabouts were unknown.

5. The Petition states that in July 2008 after five years of desertion, the Respondent resurfaced and forcefully moved into the Petitioner's house without her consent. In October of the same year, the Respondent chased the Petitioner and the children from the house at knife point. The Petitioner reported

the incident at the Rongai Police Station vide OB No[particulars withheld]. The Petitioner also complains that the Respondent has persistently denied her conjugal rights.

6. Upon being served with the process, the Respondent filed a replying affidavit dated 17th November, 2008 and denies the allegations made against him. He states that on the contrary, it is the Petitioner who has subjected him and the family to untold suffering and ridicule by her continuous extra marital relationship with a married man known as Major S A, who formerly worked with the United Nations and is now based at Nanyuki. The Respondent believes that this is the sole cause of the matrimonial conflict they have been undergoing.

7. The Respondent further avers that while in the United Kingdom, he used to send substantial funds to his family and also paid school fees for his children who were in private schools. The Respondent explains that he deserted the matrimonial home because the Petitioner had gone to the extent of inviting and staying with Major S in their matrimonial home and he feared for his life considering that the Petitioner's lover is a soldier.

8. The Petitioner testified on 13th April 2017 and reiterated what was stated in the grounds of her petition. The Respondent was in court but did not testify opting instead to have his general defence in answer to petition adopted as his evidence. The Petitioner had prayed for the custody and maintenance of the children WO and TJ who were minors when this cause was instituted. They have since however, attained the age of majority and the Petitioner has thus abandoned this prayer. The parties also agreed to extricate the issues of division of matrimonial property and canvass them in a separate suit. This judgment is therefore with regard to the divorce petition only.

9. Upon consideration of the grounds of the petition for divorce and the answer thereto, there is no dispute that this marriage fell apart a long time ago and there is no hope, or willingness to resuscitate it on the part of either party. The evidence adduced in court and the hospitality exhibited towards each other left many questions as to how they ever related on an intimate level to be able to sire the three children of the marriage.

10. Having considered the grounds of the petition and the answer thereto I find that although there is no evidence of the celebration of a marriage between the two parties either under customary law or under any statute, a presumption can be made that there existed a common law marriage between the Petitioner and the Respondent. A common law marriage is one in which parties are married by acrimony which though informal is recognized as valid by the common law according to **Stroud's Judicial Dictionary and Words and Phrases 4th Ed 1974 pg 3014.**

11. From their pleadings and the evidence adduced in court I am however in no doubt from their evidence that the marriage between the two parties has irretrievably broken down and there is no hope of reconciliation. They have lived apart for more than ten years and the husband seems to harbor a bitterness that is hell bent on doing the wife harm.

12. They are safer and better off apart. Reasons wherefore I make a finding that there is a presumption of marriage between the Petitioner and Respondent which has subsisted since 1st September, 1989 and order that the said marriage is hereby dissolved. The Decree nisi dissolving the said marriage is hereby issued to be made absolute thirty (30) days from the date of this judgment and there shall be no orders as to costs.

SIGNED DATED and DELIVERED in open court this **15th day of June 2017.**

L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Petitioner

In the presence ofAdvocate for the Respondent