



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

DIVORCE CAUSE NO.8 OF 2011

B M O.....PETITIONER

VERSUS

R B M.....RESPONDENT

JUDGMENT

1. The Petitioner B.M.O has filed this petition on **27th September 2011** seeking the dissolution of his marriage to the Respondent R.B.M in which he sought orders as follows:

- a) Dissolution of the marriage and custody of the minor subjects of the marriage.**
- b) Costs of the Petition.**
- c) Any other relief that this court may deem fit to grant.**

2. On her part, the Respondent who acted in person, filed a Statement of Defence on **15th December 2011** in which she basically denied all the allegations contained in the petition and objected to the Petitioner's prayer for custody of the minor subjects and instead prayed that the said minors remain in her custody with maintenance being provided by the Petitioner.

The Respondent added that the petition was brought in bad faith, was an abuse of the court process and ought to be dismissed with costs.

3. On **11th June 2015**, the matter proceeded by way of viva voce evidence. Mr. Onsembe advocate acted for the Petitioner whilst the Respondent acted in person.

4. The undisputed facts of the case were as follows:

- The Petitioner and the Respondent got married under customary law in the year 2004 and later formalized their union through a Civil Marriage on 17th May 2005 in which marriage certificate No.[particulars withheld] was issued to the couple.**
- Their union was blessed with two daughters namely HMM and ANM. Problems started in the marriage in 2008 when the Petitioner left the country for Qatar.**

Petitioner's Case

5. In his testimony, the Petitioner stated that the Respondent deserted the matrimonial home and was cruel

to him by denying him his conjugal rights.

6. The Petitioner confirmed the particulars of cruelty and desertion that he had listed in the petition as follows:

“a) The Respondent has stayed away from the Petitioner since 2010 to date and now resides at a place unknown to the Petitioner.

b) The Respondent continually ignored and did not meet the conjugal needs of the Petitioner.

c) That this petition is not brought in collusion with the Respondent.

d) The Respondent stays in Gucha while the Petitioner stays in Kisii Township.

e) There is no other suit pending and there have been no previous proceedings in any other court over the same subject matter.

f) Failing to communicate with the Petitioner.

g) Failing to refund dowry.”

7. The Petitioner claimed that the marriage had failed and asked to be granted the custody of the children of the marriage because he believed that the Respondent was not taking good care of them. The Petitioner produced a bundle of receipts as Exhibit 2 to demonstrate that he pays school fees for the children.

Respondent’s Case

8. On her part, the Respondent testified that all was well in her marriage to the Petitioner until he left the country for Qatar where he went to work leaving the Petitioner and the children back there in the country.

9. The Respondent testified that her in-laws, especially her mother in-law, made life difficult for her by calling her names, undermining her and eventually chasing her out of her matrimonial home. Later in the year 2011, the Respondent discovered that the Petitioner had married someone else with whom he even had a son. On confronting the Petitioner about his marriage, the Petitioner told her to go back to her home and look for another husband.

10. The Respondent vehemently opposed the divorce petition because according to her, marriage is for life and that she had no intentions of looking for another husband due to the fact that she was no longer a young girl and that she had children to take care of. She added that she had invested so much of her time and emotions in the marriage that she was not willing to let it go down the drain.

11. On being cross-examined by Mr. Onsembe advocate for the Petitioner, the Respondent stated that she had lived separately from the Petitioner for the last 5 years as they parted ways in 2010 when she was chased away from her matrimonial home.

She however said that their marriage was still intact despite the separation as the Petitioner pays school fees for the children. The Respondent confirmed that she had not had any conjugal relationship with the Petitioner for the last 5 years. The Respondent like the Petitioner then closed her case without calling any witness.

Analysis and Determination

12. Section 66(2) of the Marriage Act 2014 provides for grounds upon which a civil marriage (*such as this instant case*) may be dissolved. This section provides as follows:

“(2) 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**
- f) The irretrievable breakdown of the marriage.”**

13. In her own testimony, the Respondent stated that she has not lived with the Petitioner as husband and wife for the last 5 years. She further stated that the Petitioner is in another relationship with another woman whom she named as **W.N.O** with whom he has a son.

14. To my understanding, the implication here is that the Petitioner is guilty of adultery, if not bigamy by entering into another marriage before dissolving his relationship with the Respondent.

15. The Petitioner alleged that the Respondent had deserted the matrimonial home and this to him, constituted cruelty. On her part, the Respondent claimed that she was chased away from the matrimonial home by her in-laws.

16. Either way, irrespective of the circumstances under which the Respondent left the matrimonial home, the net effect is that the parties have not lived together as husband and wife for the past 5 years. It is clear to me that the marriage has broken down in terms of **Section 66(2)** of the **Marriage Act**. The couple has lived apart since 2010.

17. **Section 66 (6) (d)** provides that a marriage is deemed to have irretrievably broken down where;-

“the spouses have been separated for at least two years whether voluntary or by decree of the court.”

18. In this case, the couple do not live in the same country as the Petitioner is said to live and work in Qatar. For all intents and purposes, their marriage cannot be said to be an existing marriage in reality save on paper (*read marriage certificate*). Rejecting this petition for divorce will be an exercise in futility going by the fact that the Petitioner is reported to have moved on with another woman. In my view, his marriage to the Respondent is as dead as a dodo.

19. Based on the foregoing I do hereby order for a dissolution of the said marriage and direct that a decree nisi do issue to be made absolute within three (3) months from today’s date. On the aspect of custody of the two minor children of the said marriage, I order that they remain in the custody of the Respondent but that they be maintained by the Petitioner since the Respondent stated that she was not engaged on any meaningful employment, in any event, parental responsibility is for both parents.

20. Since the particulars of the children requirements in terms of school fees, food, clothing and shelter were not fully canvassed in this petition, I direct that the same be addressed by the Children’s Court.

21. This being a Matrimonial Cause, I direct that each party shall bear his/her own costs.

Dated, signed and delivered in open court this 10th day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Miss. Moguche holding brief for Onsembe for the Petitioner.
- N/A for the Respondent
- Omwoyo: court clerk