



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
DIVORCE CAUSE NO. 23 OF 2011

B I SPETITIONER

VERSUS

F K YRESPONDENT

JUDGMENT

1. The Petitioner **B I S** has filed this Petition dated 3.6.11 seeking the dissolution of her marriage to the Respondent **F K Y**. **The marriage was solemnized at the District Commissioner's Office in Malindi on 15.3.08 and was not blessed with any children.** The Respondent filed an Answer to Petition and Cross-Petition dated 29.3.12.
2. The grounds for divorce as stated in the Petition are desertion, cruelty and adultery on the part of the Respondent the particulars whereof are set out in paragraph 9 of the Petition and include: deliberately and purposely refusing to extend proper love and concern to the Petitioner; denying the Petitioner conjugal rights; dishonesty in his financial dealings; adultery with C P whom he frequently visits in Germany and with A N C to the extent that the Petitioner has found underwear, lip shine and lotion in her bedroom; cohabiting with the said A N C in the matrimonial home in Malindi; forcing the Petitioner out of the matrimonial home on 22.8.10 by denying her the key to the premises. She claims that due to the aforesaid conduct of the Respondent, the marriage has irretrievably broken down and she prays for the dissolution of the same.
3. The Respondent in his Answer to Petition and Cross Petition denies the allegations of desertion, cruelty and adultery made by the Petitioner. In his Cross-Petition, he accuses the Petitioner of desertion, cruelty and adultery the particulars whereof include abandoning the matrimonial home in Malindi and moving back to her house in Mtwapa; denying the Respondent access to her house in Mtwapa and denying him conjugal rights; accusing the Respondent of infidelity without justification; accusing the Respondent's mother and family of being witches; adultery with one J her ex-boyfriend; visiting the matrimonial home dressed in disguise in the company of strange men. The Respondent states that as a result of the Petitioner's desertion, cruelty and adultery the marriage has irretrievably broken down.
4. In her answer dated 20.4.12, the Petitioner denies all the allegations contained in the Cross Petition and puts the Respondent to full proof thereof. She prays that the Cross-Petition be dismissed with costs and her Petition be allowed.
5. At the hearing on 4.9.12, the Petitioner testified that she married the Respondent in 2008. That prior to the marriage she entered into an Agreement with the Respondent in which the Petitioner

and the Respondent were to build a house for themselves in the Respondent's father's land at their home village at [particulars withheld], Malindi; that the respondent however made no contribution whatsoever but misused the funds meant for construction; that the Respondent brought his children to live with them in 2007 and the Petitioner took them to a private school; that the Respondent was cruel to the Petitioner early in their relationship; that he was in adulterous relationships with A and C; that she fell in a pit and broke her bones and was confined to a wheelchair but the Respondent neglected her; that she went to Switzerland for treatment while the Respondent went to Germany for 3 months; that she saw email communication between the Respondent and the said C; that she once found a woman in the matrimonial home with the Respondent and saw a used condom in the house.

6. Lemmy John Mreje who knew the couple well having lived with the Petitioner as a helper also testified that she saw the Respondent and C at the Petitioner's house and that they were behaving like lovers; that she accompanied the Petitioner to Rana Cottages to look for the said C; that when the Petitioner asked the guard for C's telephone number, the guard told her he did not have it but could give her C's husband's number; that the number given was that of the Respondent. On cross examination, the witness stated that the Petitioner was in a relationship with other men.
7. The hearing of the Respondent's case failed to proceed on a number of occasions for various reasons. When the matter first came before me on 17.9.15, Mr. Lewa, the Respondent's counsel applied for an adjournment as his client was unwell. The matter was then fixed for hearing on 2.10.15. On this day also Mr. Lewa applied for an adjournment as the Respondent was not in Court. According to Mr. Lewa, the Respondent had confused the date and he thought the hearing was in November. The application for adjournment was declined and the matter proceeded. Mr. Lewa then closed the Respondent's case but maintained that the Cross-Petition remains. The parties were then granted time to file written submissions.
8. In her written submissions, the Petitioner argued that she was driven out of the matrimonial home by the Respondent's relatives in 2010 and that since then they had not had any conjugal relations. That they both live separate lives with a different partners. That the marriage has irretrievably broken down and that the same should be dissolved.
9. The Respondent in his submissions reiterated the contents of his answer to Petition and Cross-Petition. He urges the Court to find that the Petitioner has not proved any of the grounds of divorce in her Petition. He argues that if the marriage has irretrievably broken down then it is the Petitioner who has caused it to break down by her desertion of the matrimonial home. He prays that the Petition be dismissed with costs.
10. I have considered the Petition, the Answer to Petition and Cross Petition as well as the testimony of the Petitioner and her witness. I have also considered the written submissions of the parties. The Petitioner met and married the Respondent at the District Commissioner's Office in Malindi on 15.3.08. It is clear that the marriage herein has irretrievably broken down. Each spouse is keen on proving that the other is responsible for the breakdown of the marriage. There are accusations and counter accusations. With the enactment of the Marriage Act 2014, the Court no longer requires parties to adduce evidence sufficient to prove the commission of a matrimonial offence by one spouse against the other. All that a party needs to do is satisfy the Court that the marriage has irretrievably broken down. Section 66(2)(e) of the Marriage Act 2014 provides that a marriage may be dissolved on the ground of "***the irretrievably break down of the marriage.***"
11. Section 66 (6) of the Marriage Act provides further that

A marriage has irretrievably broken down if—

- a. ***a spouse commits adultery;***
- b. ***a spouse is cruel to the other spouse or to any child of the marriage;***
- c. ***a spouse willfully neglects the other spouse for at least two years immediately preceding the date***

of presentation of the petition;

- d. *the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;*
- e. *a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;*
- f.

12.

13.

14. This is a classic case of irretrievable breakdown of a marriage. Both spouses have committed adultery, both have been cruel to each other, both have willfully neglected each other for more than two years, both have been separated for more than two years and both have deserted each other for more than three years. Both parties are to blame for the break down in the marriage and are now seeking an end to a union that exists only on paper.

15. It is clear from the foregoing that the marriage herein has cannot be salvaged. Neither of the parties is interested in the same. Accordingly, I pronounce a decree of divorce and order that the marriage solemnised at the District Commissioner’s Office in Malindi on 15.3.08 be and is hereby dissolved. Decree *nisi* to issue and the same to be made absolute within 1 month.

16. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED in MOMBASA THIS 9th DAY OF FEBRUARY, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**