



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
DIVORCE CAUSE NO. 28 OF 2009

B MPETITIONER

VERSUS

J M F MRESPONDENT

JUDGMENT

1. The Petitioner **B M** has filed this Petition dated 8.4.09 seeking the dissolution of her marriage to the **J M F M**. The Respondent filed an Answer to Petition and a Cross Petition for nullification of marriage.
2. The ground for divorce as set out in the Petition is desertion. The Petitioner avers that marriage between her and the Respondent was solemnised at the Registrar's Office in Mombasa on 31.3.06; that on the same day of the marriage, the Respondent travelled to Seychelles without even sleeping in the matrimonial house and stayed there for a month; that upon his return he did not go to the matrimonial home but went straight to the barracks; that she tried to communicate with the Respondent by telephone and email for reconciliation as she too had left the country for Dubai. That as a result of the desertion by the Respondent, the Petitioner has suffered extreme embarrassment and mental agony; that all efforts at reconciliation have failed due to the Respondent's refusal to cooperate. The Petitioner therefore prays for the dissolution of the marriage.
3. The Respondent in his Answer to Petition denies that the Petitioner was at the date of the marriage a spinster. He admits that he left for South Africa on official duty on the day of the marriage which fact was known to the Petitioner prior to and during all the arrangements of the marriage. He however denies that there was a matrimonial bed or house prior to his departure or upon his return as the Petitioner had contrary to his instructions failed to set up a matrimonial home/bed.
4. In addition to the Answer to Petition, the Respondent also filed a Petition for Nullification of Marriage dated 12.6.09 on 16.6 09. He seeks nullification of the marriage between him and the Petitioner. In his Petition, the Respondent avers that he is a Navy Officer and sailed to South Africa on military duties on the date of his marriage before consummation of the marriage; that he had informed the Petitioner of the same prior to the marriage and had requested the Petitioner to set up their matrimonial home pending his return; that the Petitioner failed to do so and instead travelled to Dubai to seek employment against the Respondent's advice and instructions.
5. The Respondent in paragraphs 4 and 6 of his Cross Petition sets out particulars of desertion and cruelty respectively.

6. The Respondent testified that he is a Navy officer. He stated that after the celebration of the marriage, he travelled to South Africa and Seychelles on military duties for a month. That the Petitioner was well aware of his travel prior to the marriage and was to set up a matrimonial home in his absence. That upon his return to Kenya, he established a matrimonial home in Miritini, Mombasa but the Petitioner then in Dubai, refused to join the Respondent; that the Petitioner further refused to join the Respondent at the Navy barracks in Mtongwe and Nakuru; that the Petitioner left for Dubai without setting up a matrimonial home;

7. On cruelty, the Respondent cites the refusal by the Petitioner to join him in the matrimonial home; refusal to consummate the marriage; leaving for Dubai without setting up a matrimonial home against the Respondent's advice; engaging in acts of adultery and as a result having a child known as K on 17.2.07 with another man during the subsistence of the marriage.

8. Although the Petitioner was duly served with the hearing notice, she did not make an appearance on the hearing date. The Respondent in his uncontroverted testimony in Court more or less confirmed the facts in his Cross Petition.

9. I have considered the Petition, answer to Petition and Cross Petition as well as the uncontroverted testimony of the Respondent. The Petitioner in her Petition seeks divorce on the ground of desertion. The Respondent on the other hand seeks nullification of the marriage but also claims that the marriage has irretrievably broken down. He however cites desertion, cruelty and even adultery as the grounds.

10. The Petitioner did not tender any evidence to support her Petition. In the circumstances, the same is hereby dismissed.

11. The Respondent on the other hand claims that the marriage was not consummated. It is not disputed that this marriage has not been consummated. Section 73(1)(a) of the Marriage Act, 2014 provides that

“73(1) A party to a marriage may petition the court to annul the marriage on the ground that -

(a) The marriage has not been consummated since its celebration.”

Non-consummation of a marriage provides a valid ground for the nullification of that marriage. The marriage between the Petitioner and the Respondent has not been consummated since its celebration. Should it therefore be annulled for non-consummation? Section 73(2)(a) of the Act provides that

“73(2) The court shall only grant a decree of annulment if-

(a) The petition is made within one year of the celebration of the marriage.”

The marriage between the Petitioner and the Respondent was solemnized on 31.3.06. The Respondent filed the Cross Petition for the Annulment of the marriage in Court on 16.6.09 long after the statutory period of one year of the celebration of the marriage. A decree of annulment is not therefore available to the Respondent and the prayer for the same is dismissed.

12. The Respondent further claims that the marriage herein has irretrievably broken down. Under Section 66(2) of the Marriage Act 2014, the irretrievable breakdown of a marriage is a ground for divorce. Section 66(6) provides that a marriage has irretrievably broken down if *inter alia*:

(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;

13. The failure by the Petitioner to set up a matrimonial home as agreed with the Respondent, refusal to join him in the matrimonial home that he set up and refusal to consummate the marriage amount to cruelty. The continued stay in Dubai by the Petitioner for a period exceeding three years amounts to desertion. Having a child known as K with another man during the subsistence of the marriage amounts to adultery. I am satisfied that the above acts of the Petitioner have resulted in the irretrievable breakdown of the marriage herein.

14. Accordingly, I hereby pronounce a decree of divorce and order that the marriage solemnised on 31.3.06 at the Registrar's Office in Mombasa be and is hereby dissolved. Decree *nisi* to issue and the same to be made absolute within 1 month. Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of February 2016.

M. THANDE

JUDGE

In the presence of:

..... **for the Petitioner**

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

..... **Court Assistant**