



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
DIVORCE CAUSE NO. 50 OF 2014

C W N.....PETITIONER

VERSUS

W CRESPONDENT

JUDGMENT

1. The Petitioner **C W N** has filed this Petition dated 2.7.14 seeking the dissolution of her marriage to the Respondent **W C**. The Respondent despite of service of the Notice to Appear and the Petition failed to put in any appearance. The matter proceeded as an undefended cause.
2. The ground for divorce as set out in the Petition is desertion the particulars whereof are set out in paragraph 8 of the Petition and include: that since early December 2011, the Respondent left the Petitioner alone in their matrimonial home for Netherlands, his home country without any communication, maintenance and/or any form of contact; that as a result of the desertion, the Petitioner and the Respondent have since December 2011 lived in separate countries and have not resumed conjugal cohabitation; the marriage has therefore irretrievably broken down. The Petitioner prays for dissolution of the marriage, maintenance for all the past and current years of desertion, alimony and costs of the Petition.
3. The Petitioner testified in court that she and the Respondent met in 2007 and courted for about 4 years during which period the Respondent used to come to Kenya every 3 months; that they got married on 4.11.11 at La Marina in Mombasa; that following their marriage, the couple stayed in a hotel for 2 days and thereafter in the Petitioner's home in Mombasa for 2 weeks; that the Respondent then left for Netherlands never to return; that the Respondent has since never communicated with the Petitioner in spite of promising her that he would do so; that they were not blessed with any children but that she had a daughter from a previous relationship;
4. The Petitioner further testified that the Respondent is a man of means and that prior to the marriage the Respondent procured a Schengen visa for the Petitioner and together they travelled to many countries; that the Respondent would send her between Kshs. 50,000/= and Kshs. 70,000/= for her and her daughter's school fees and upkeep and even opened a bank account for her wherein he deposited Kshs. 2,000,000/= for her upkeep; that they had a high profile wedding; that since the Respondent left her, she has developed high blood pressure; that he has not sent her any support at all and she now hawks used clothes and has had to sell her car, jewelry and furniture to support herself and her daughter; that she used to be a hotelier but that the Respondent asked her to quit her job so that she could go to Netherlands after the marriage.

5. The Petitioner prayed for dissolution of the marriage, alimony, maintenance for the period of desertion and for costs.
6. I have considered the Petition and the uncontroverted testimony of the Petitioner. The facts herein are that the Petitioner and the Respondent met in Mombasa and were friends for a period of 4 years; that during this period the Respondent introduced the Petitioner to a high profile life which included travel to many countries; that they married at La Marina in Mombasa on 4.11.11. The marriage certificate serial number *[particulars withheld]* is sufficient proof of the fact of the marriage. After the marriage the two cohabited as man and wife in Mombasa for two weeks and then in December 2011, the Respondent returned to Netherlands, his home country. That the Respondent has since never returned nor has he communicated with the Petitioner since he left.
7. The Marriage Act, 2014 at Section 66(2) provides for the grounds upon which a civil marriage may be dissolved. These include:

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

e. the irretrievable breakdown of the marriage”

8. In her Petition and in her evidence which remains uncontroverted, the Petitioner cites the ground of desertion on the part of the Respondent. The law requires that the desertion be for at least three years. At the time of filing the Petition, three years had not elapsed. The Petitioner had however vide an order dated 9.6.14 obtained leave of this court to file Petition for dissolution of the marriage notwithstanding that 3 years had not passed since the said marriage. It is the Petitioner’s testimony that the Respondent left the matrimonial home and the country in December 2011 never to return. I am satisfied that the ground of desertion has been proved.
9. On the issue of maintenance, the Petitioner claims that she was a hotelier but that the Respondent asked her to quit so that she could go with him to Netherlands after the marriage. I am not persuaded that this is so. The certificate of marriage which the Petitioner produced in Court indicates “N/A” in the box for her occupation. It is clear that she had no occupation at the time of marriage. The Petitioner further claims that the Respondent is a man of means engaged in business after retirement. Again this is unconvincing as his occupation is indicated in the marriage certificate as “retired” a fact which the Petitioner states in her Petition. Further while the Petitioner was 34 years old in 2011 at the time of the the Respondent was 70 years old! In the case of W.E.L v J.M.H [2014] eKLR, which is similar to the instant case, Odero, J. had this to say

“A spouse who is capable of supporting himself ought not to be allowed to shirk this responsibility and turn the other spouse into a money machine or an ATM. Maintenance will only be ordered where it is warranted e.g. where a spouse is incapable of supporting herself and/or is deserved e.g. where one spouse cannot meet all needs. Thus no spouse has an inherent right to be maintained at the detriment of the other. I find no basis exists upon which an award of maintenance ought to be made to the respondent by the petitioner and I therefore dismiss this prayer for maintenance.”

I agree with the learned Judge that no spouse has an inherent right to be maintained. I too find no basis upon which an award for maintenance ought to be made to the Petitioner.

10. Similarly, in the case of WMM –VS – BML [2012] eKLR G.B.M. Kariuki, J (as he then was) stated that:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage” No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

11. It is the evidence of the Petitioner that the Respondent left her in December 2011 only 2 weeks after their marriage. It is her further testimony that since the Respondent deserted her, he has not communicated with her nor sent her any financial support at all. From December 2011 to date therefore, the Petitioner has been living on her own and providing for herself and her daughter without any financial help from the Respondent. I am persuaded that the Petitioner is quite capable of supporting herself and her daughter as she has been doing so since December 2011 when the Respondent left her. Granted, she may not have the lavish life that the Respondent had introduced her to prior to the marriage. Indeed he may have used up all his pension to provide her with that kind of life. Further she is relatively young and with hard work and creativity she can make a good life for herself and for her daughter.

12. The Petitioner and the Respondent have lived apart since 2011. The Respondent has not communicated with the Petitioner since he left her in December 2011 just 2 weeks after the marriage. The marriage is therefore virtually non-existent. Accordingly, I pronounce a decree of divorce and order that the marriage solemnised at La Marina in Mombasa on 4.11.11 be and is hereby dissolved. Decree *nisi* to issue and the same to be made absolute within 1 month. The prayer for maintenance and alimony lacks merit and is hereby dismissed. Each party to 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**