



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 39 OF 2014

BETWEEN

D V.....PETITIONER

AND

P B.....RESPONDENT

JUDGEMENT

1. Marriage was celebrated between the parties herein on 13th October 2004 at a civil ceremony held at the Office of the Registrar of Marriages at Nairobi, Kenya. A copy of the marriage certificate serial number[particulars withheld] is on record. The parties cohabited in Nairobi. They have been blessed with three children, C E (born in 1996), C O (born in 1999) and C V (both born in 2002).

2. The petition in this matter was filed in court on 14th February 2014. The petitioner accuses the respondent of cruelty and adultery. The particulars of the two alleged matrimonial offences are listed in the petition. She avers that on account of the alleged matrimonial offences the marriage between her and the respondent has irretrievably broken down. She seeks dissolution of the marriage, custody of the children, maintenance for herself and the children of the marriage, orders to restrain him from interfering with her at her residence and at her place of work, an order that he should remit half of the rental income from the alleged matrimonial property at Lucky Summer to the respondent, and costs of the suit.

3. On cruelty, it is alleged that during the course of the marriage the petitioner was subjected by the respondent to physical, emotional and verbal abuse. It is alleged that in 1997 the respondent assaulted the petitioner on the face with a plate, leaving her with scars. In 1999 he allegedly threw sand into the respondent's food and beat her up very badly despite the fact that she was pregnant. He is said to be given to slapping the petitioner whenever there is a disagreement on any issue. He often verbally insults the petitioner in the presence of their children and neighbours by calling her *malaya* and *mjinga*. He is also said to be given to threatening the petitioner and the children with death. He often chases or throw out the petitioner from the matrimonial home even at the dead of night when she scantily dressed. These are some among several other allegations of cruelty.

4. On adultery, it is alleged that the respondent has had adulterous liaisons with unnamed individuals during the currency of the marriage. One such alleged affair was with a house-help while he was working at Mombasa and residing there with his sister. He is also said to have had a relationship with another woman while he was undertaking further studies in Germany in 2004.

5. It is further pleaded that the petitioner left the matrimonial home, on a date that is not disclosed, on account of respondent's alleged cruelty and disregard of the matrimonial institution.
6. The petitioner alleges that the matrimonial home on Plot No. [particulars withheld] is jointly owned by the parties for both contributed to its acquisition, and on it stands rental houses which generate income of Kshs. 70,000.00 which is utilised for payment of school fees for the children.
7. There is no record of an appearance by the respondent, but he did file an answer to the petition on 28th March 2014. In the answer, denies the allegations made against him, dismissing them as false and inaccurate, contrived to justify the dismemberment of the family unit. He asserts that he is a born-again Christian, married to only one wife, the petitioner, and that he had never committed adultery with any woman during the course of the marriage. He also denied being harsh and hostile to the petitioner. He accuses her of having moved out of the matrimonial home on 10th February 2014 on her own volition and without provocation. He states that the marriage has not broken down irretrievably as there are several properties that are still registered in the joint names of the parties. It is pleaded that the Lucky Summer property averagely attracts income of Kshs 50, 000.00, which is the respondent's sole source of income utilised to pay school fees for the children.
8. The petitioner responded to the answer to the petitioner by filling a reply on 6th May 2014. She reiterated in the reply that the respondent had been physically abusive during the marriage and verbally abusive thereafter. She states that she did not leave the matrimonial home on her own volition, but after she had been physically assaulted by the respondent.
9. The matter was cleared by the Deputy Registrar on 24th July 2014 to proceed as a defended cause.
10. The petitioner testified on 25th September 2014 and gave vent to the allegations made in her petition. She added that on 22nd January 2014 the respondent went to her place of work and accused her of having a sexual affair with a male colleague. On another occasion, he came there and alleged that she had cheated him that she had been transferred to another branch, which then caused her employer to transfer her. In June 2014 he again went to her place of work with placards proclaiming her to be a con-woman. On the rent, she testified that currently the rents collected stood at Kshs. 75, 000.00.
11. The respondent testified on 20th November 2014. His testimony largely mirrored the averments made in his answer to the petition. He gave detailed evidence on how he paid school fees for the children of the marriage, with little contribution from the petitioner. He also gave evidence on the acquisition of the Lucky Summer property, from a loan that he had sourced from the petitioner's employer, his salary at the Coffee Board of Kenya and from part-time employment while at Germany. He stated that the rental income from the property ranged between Kshs 40, 000.00 and Kshs. 50, 000.00 per month. He narrated the events prior to the petitioner and the children moving out, and blamed the petitioner for igniting the fracas.
12. At the conclusion of the trial, both parties filed detailed written submissions on the various issues arising in the matter. The petitioner's written submissions are dated 2nd April 2015 and were filed herein on even date. The respondent's submissions are dated 6th July 2015 and were filed herein on 6th July 2015. I have gone both sets of written submissions, inclusive of the authorities cited, copies of which are attached to the written submissions.
13. I am satisfied from the recorded evidence that the marriage between the parties hereto has broken down irretrievably. I am satisfied that there are irreconcilable differences between them. The petitioner moved out of the matrimonial home and has stayed away to date. She initiated these proceedings shortly after she moved out. She is therefore clearly not interested in the marriage. I doubt whether parties to a marriage can be forced by court order to live together when one of them is keen on getting out of the relationship.
14. It would also appear to me that there has been no collusion between the petitioner and the respondent

in the bringing of these proceedings.

15. On the issue of the children of the marriage who, from the evidence are still in school, it is not in dispute that the respondent has been paying their school fees. I take cognisance of the fact that the Children's Court is the court of first instance so far as children's matters are concerned. It would be best to have matters touching on the children's welfare to be dealt with by that court. Needless to say that the petitioner has not placed before me sufficient material upon which I can adjudicate on the issues on the welfare of the children.

16. On the maintenance of the petitioner, I do note that she is in employment, from which she draws a salary. It would appear that the respondent is not working and relies entirely on the income from the alleged matrimonial property for his needs and for the educational needs of the children. I have noted that the petitioner has not detailed her needs and I therefore do not have any basis upon which I can order her maintenance by the respondent.

17. The petitioner has prayed in the petition that I should order the respondent to pay half of the rental income collected from the alleged matrimonial home to her. I have noted that the petitioner has no laid basis at all, in her pleadings and in her oral testimony, for the making of the order sought. She has not coherently made averments in her pleadings to justify the order sought. A party is bound by their pleadings. In any event such orders should be sought in a suit seeking division of matrimonial property.

18. In the end I hereby make the following orders:-

- (a) That I dissolve the marriage celebrated on the 13th October 2004 between the petitioner and the respondent;
- (b) That decree *nisi* shall issue forthwith, to be made absolute on application upon expiry of sixty (60) days from date hereof;
- (c) That custody and maintenance of the children of the marriage should be canvassed in a suit lodged at the Children's Court, but in the meantime the respondent shall continue to pay their school fees and to meet their other school related needs; and
- (d) That each party shall meet their own costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W MUSYOKA

JUDGE

In the presence ofadvocate for the Petitioner.

In the presence ofadvocate for the Respondent.