



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**DIVORCE CAUSE NO. 63 OF 2012**

**S M W .....PETITIONER**

**VERSUS**

**T K M .....RESPONDENT**

**JUDGMENT**

1. By a Petition dated 13.12.12 and filed in Court on 18.12.12, the Petitioner **S M W seeks orders that the marriage between him and the Respondent be dissolved. The marriage was solemnized at the Registrar's Office in Mombasa on 10.12.99. Following the marriage, the couple cohabited in Nyali, Mombasa up to 2002 and thereafter at Serena, Mombasa up to 24.3.09. The couple was blessed with three children, F O M, 13 and twins I N M and M S M aged 11.**
2. The grounds for divorce as stated in the Petition are cruelty and desertion on the part of the Respondent, the particulars whereof are set out in paragraph 7 and 8 of the Petition. It is the Petitioner's case that **since the celebration of the marriage the Respondent has treated the Petitioner with cruelty including engaging the Petitioner in family fights, violently attacking the Petitioner and threatening to kill him; destroying the door to the matrimonial home in a violent outburst thus prompting her parents to repair the same after a reconciliation meeting; failing to financially cater for the children; practicing witchcraft; going out drinking at night and refusing to take calls from the Petitioner; raising false alarm that their child was in a coma just to cause the Petitioner mental anguish; staying for weeks without communicating with the Respondent; refusing the Petitioner and the children to use a van under her control on a family trip forcing the Petitioner and his brother to pay for an alternative van;**
3. **It is also the Petitioner's case that on 24.3.09 the Respondent for no reasonable or justifiable cause deserted the Petitioner by chasing him away from the matrimonial home and since then the parties have resided separately.**
4. The Respondent in her Answer to Petition and Cross Petition dated 18.2.13 denies all the allegations of cruelty and desertion. In her Cross-Petition, she accuses the Petitioner of adultery, cruelty and desertion, the particulars whereof are in paragraph 11 of the Answer to Petition and Cross-Petition. She claims that the Petitioner has engaged in immoral and adulterous activities; that the Petitioner has been abusive and violent towards her in the presence of the children and refused to attend counselling sessions; that the Petitioner abandoned the matrimonial home in March 2009 and went to live with another woman with whom he has a child. The Respondent

- therefore prayed that the marriage herein be dissolved.
5. The matter came up for hearing before me on 10.9.15. At the hearing, both parties focussed on an incident that took place at the matrimonial home in Nyali on 24.3.09 which culminated in the Petitioner leaving the home never to return. It is alleged that on the material day, the Petitioner was attending an annual general meeting at the [particulars withheld] where he expected to be appointed club secretary. According to the Petitioner, the Respondent called him at 10pm in a state of agitation and told him that their daughter I was critically ill and further accused him of being at a house and not at the club; that when he got home he met the cook and on inquiring from him about I, the cook told him that none of the children was ill; that upon entry into the house the Respondent attacked him with an exercise roller and a stool and shouted in the presence of the children and the workers that she would kill him; that he left the house and reported the matter at the Bamburi Police Station; that the following day he went back to the house in the company of the police and collected his belongings; that he moved to a flat in Nyali where he resides to date; On cross examination, he conceded that he lives with one L and together they have a son aged 4 years. He however denied that he abandoned the Respondent for the woman;
  6. The Respondent on her part gave her version of the events of the night of 24.3.09. According to her she called the Petitioner to tell him that the children were asking for him as he had not spent the night the previous day; that he went home after 1 am; that as the children were still awake he felt guilty and became rough; that the following day the Petitioner came home with the OCS of the police and when he (the OCS) inquired as to what happened, the Respondent said that the children wanted to see their father while the Petitioner said he wanted to leave and he left. She denied attacking the Petitioner and stated that in fact they have never fought. She said that she has never met the Petitioner since 2009 but according to her the marriage has a chance.
  7. In his written submissions, the Petitioner argued that the Answer to Petition and Cross Petition were a nullity as the same had not been signed by the Respondent nor accompanied by a verifying affidavit as required by the Matrimonial Causes Rules. The Petitioner further submitted that the marriage has irretrievably broken down as a consequence of constructive desertion on the part of the Respondent. The Petitioner argues that the Respondent is to blame for the breakup of the marriage and should therefore bear the costs of the Petition. The Petitioner has cited several authorities to buttress his submissions.
  8. On whether the Answer Petition and Cross Petition are a nullity, the Respondent argued in her written submissions that the omission on her part is a matter of procedural technicality and not procedural substance and the same is not fatal. The Respondent cites the provisions of Article 159(2) of the Constitution of Kenya to support her submission. She further argued that the omission did not cause the Petitioner any prejudice and to strike out the Answer to Petition and Cross Petition would occasion injustice to the Respondent contrary to Article 48 of the Constitution. The Respondent further argued that the Petitioner abandoned the matrimonial home due to his affair with the mother of his child and being guilty of the matrimonial offence of desertion should bear the costs of the Petition. The Respondent submitted that the marriage had irretrievably broken down due to desertion on the part of the Petitioner and urged the Court to dismiss the Petition and grant the Cross-Petition.
  9. 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 and the cited authorities.
  10. I will initially address the issue of the omission by the Respondent to sign the Answer to Petition and Cross Petition. Rule 4(5) of the Matrimonial Causes Rules provides:

***“Every Petition SHALL, unless otherwise directed, be signed by the petitioner or, in the case of an infant or person of unsound mind, by his next friend.” (emphasis added)***

There are only two exceptions to Rule 4(5). The first exception is when a Petitioner is otherwise directed. In this case, there were no directions as to the signing of the Petition. The other exception

is in the case of an infant or a person of unsound mind whose petition may be signed, not by his advocate, but by his next friend. This rule applies mutatis mutandis to a cross-petition. In the instant case, the Respondent is not an infant nor is there any indication that she is of unsound mind. And even if she were under any disability, which is not the case, the person who ought to have signed the Cross Petition on her behalf is her best friend and not her advocate.

11. On failure to file a verifying affidavit, Rule 17(1) of Matrimonial Causes Rules provides:

***“There SHALL be filed with EVERY answer which contains matter other than a simple denial of the fact stated in the petition an affidavit by the person filing the answer verifying such other matter so far as he has personal cognizance thereof and deposing to his belief in the truth of the rest of such other matter...” (emphasis added)***

The requirement for signing a petition by a petitioner personally and for filing a verifying affidavit are mandatory. Indeed Rules 4(5) and 17(1) of the Matrimonial Causes Rules are couched in mandatory terms.

12. I further agree with the Respondent’s submission that the provisions of Article 159(2)(d) of the Constitution are not a panacea for procedural pitfalls. In Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR the Supreme Court had this to say while reminding litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls -

***“Although the appellant invokes the principal of the prevalence of substance over form, this Court did signal in Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others, Petition No. 14 of 2013, that “Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.” Not all procedural deficiencies can be remedied by Article 159;”***

13. In this case, failure by the Respondent to personally sign the Answer to Petition and Cross Petition and to file a verifying affidavit is in my view, fatal. It is not a mere technicality. The Respondent cannot invoke the provisions of Article 159(2)(d) to remedy the omission as “not all procedural deficiencies can be remedied by Article 159”. Consequently I find that the Answer to Petition and Cross Petition are a nullity.

14. Both parties submit that the marriage 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. Under the Marriage Act 2014, it is not necessary for spouses to try to outdo each other in apportioning blame for the breakdown of their marriage. All that the Court requires is proof that the marriage has irretrievably broken down. Section 66(2)(e) of the Marriage Act 2014 provides that a marriage may be dissolved on several grounds, one of which is the irretrievably break down of the marriage.

15. 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. ....

16.

17.

18. Adultery by one spouse can lead to the irretrievable breakdown of the marriage. In this case, the Petitioner conceded that he lives with another woman with whom he has a 4 year old son. It matters not whether the child was born before the separation of the spouses or after. The fact remains that the child was born before the dissolution of the marriage and thus adultery was committed by the Petitioner.

19. It is not disputed that there has been desertion, as a result of which the marriage has irretrievably broken down. The Petitioner blames the Respondent for constructive desertion while the Respondent blames the Petitioner. While the exact details of the events of the night of 24.3.09 which led to the Petitioner leaving the matrimonial home are disputed, the fact remains that the parties separated on that night and have not lived together since 2009. The desertion has continued far beyond the statutory period of the three years required to render a marriage irretrievably broken down.

20. It is clear from the foregoing that the marriage herein cannot be salvaged. Both parties are now seeking an end to a meaningless union that exists on paper only. Neither of the parties is interested in the same. Accordingly, I pronounce a decree of divorce and order that the marriage solemnised at **Registrar's Office in Mombasa on 10.12.99** be and is hereby dissolved. Decree *nisi* to issue and the same to be made absolute within 1 month.

21. Each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA THIS 8<sup>th</sup> DAY OF FEBRUARY, 2016.**

**M. THANDE**

**JUDGE**

**In the presence of: -**

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

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

..... **Court Assistant**