



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**FAMILY DIVISION**  
**DIVORCE CAUSE NO. 44 “B” OF 2002**

**T I A.....PETITIONER**

**VERSUS**

**D M M.....RESPONDENT**

**JUDGMENT**

1. The Petitioner **T I A** has filed this Petition dated 17.12.02 seeking the dissolution of her marriage to the Respondent **D M M**. **The marriage was solemnized at the Registrar’s Office in Nairobi on 24.1.97 and was blessed with one daughter N L C born on 14.1.99.** The Respondent filed a Reply to Petition dated 22.1.03 and an Amended Reply to Petition and Cross Petition dated 3.3.03.

2. The ground for divorce as stated in the Petition is cruelty on the part of the Respondent against the Petitioner. The particulars of cruelty are set out in paragraph 6 of the Petition and include: constantly using threats of physical harm against the Petitioner after coming home drunk; abusing the Petitioner in the most vulgar manner; leaving the matrimonial home on several occasions for a number of days without providing for the Petitioner and the child; falsely accusing the Petitioner of adultery; constant threats to the Petitioner of chasing her away from the matrimonial home; actually chasing the Petitioner from the matrimonial home on 4.12.2002; continued harassment of the Petitioner and the child through insulting and vulgar text messages and threatening to abandon his responsibility to the child. The foregoing conduct of the Respondent has caused the Petitioner anguish, embarrassment and humiliation. The Petitioner prays that the marriage be dissolved, for maintenance for herself, that the Respondent be restrained from harassing interfering with or threatening the Petitioner and for equal division of monies held in various bank accounts.

3. The Respondent in his Amended Reply to Petition and Cross Petition denies the allegations of cruelty by the Petitioner. He accuses the Petitioner of cruelty, desertion and adultery. The particulars of cruelty are mismanagement of family income from *matatu* business; causing a salon business in which Kshs. 500,000/= was invested to collapse; selling motor vehicle registration number [particulars withheld]; extravagance; denying the Respondent conjugal rights; coming home late or failing to come altogether without explanation and failing to carry out matrimonial duties. The Respondent states that all these acts caused him mental agony.

4. On adultery, the Respondent alleges that the Petitioner cohabits to date with one S H who he has enjoined as “Co-Respondent”. On desertion, he claims that the Petitioner after being advanced Kshs. 100,000/= by the Respondent deserted him. He prays that the marriage herein be dissolved.

5. In her answer dated 27.9.13, the Petitioner denies all the allegations contained in the Amended Reply to Petition and Cross Petition and puts the Respondent to full proof thereof. She avers that the alleged adultery has been overtaken by events and cannot lie as the Respondent condoned the same when he reconciled with her and moved in with her and conjugal cohabitation resumed.

6. At the hearing, the Petitioner did not make an appearance and since the date was taken by consent and given that this is a very old matter, the Petitioner's case was closed and hearing of the Respondent's cross petition proceeded. The Respondent testified that he met the Petitioner in Ukraine in 1989 and they got married on 24.1.97 at the Registrar's Office in Nairobi; that they cohabited in Nairobi for one year and thereafter moved to Mombasa; that the marriage was blessed with a daughter born on 14.1.99 whom he supports in every way; that he and the Petitioner separated in 2002 and have not lived together since; that he seeks the dissolution of the marriage due to mental torture; that she ran down a salon business that he set up for her for Kshs. 500,000/= at Nakumatt Nyali. The Respondent claims that the Petitioner has been adulterous with the said S H with whom she has lived since their separation. He finally states that there is absolutely no hope for the marriage and prays that the same be dissolved.

7. In her written submissions, the Petitioner argued that the Respondent had failed to prove his claims of desertion, cruelty and adultery and urged the Court to dismiss the cross petition with costs. She submits that it is in the interest of justice that the marriage be dissolved and the Respondent be ordered to maintain the Petitioner until she can be economically independent.

8. The Respondent on his part submitted that he had in his testimony proved the particulars of cruelty, adultery and desertion. In regard to the failure by the Petitioner to attend Court on the hearing date the Respondent argued that her case was closed without her tendering any evidence in proof of the allegations in her Amended Answer to Petition. He further argued that the parties herein have lived separately since 2002 and that the marriage has irretrievably broken down, remains only in theory and has no future. He urged the Court to allow his Cross Petition and dissolve the marriage.

9. I have considered the Petition, the Amended Reply to Petition and Cross Petition as well as the testimony of the Respondent. I have also considered the written submissions of the parties. The Petitioner married the Respondent at the Registrar's Office in Nairobi on 24.1.97. Both the Petitioner and the Respondent in their pleadings were keen on proving the other as the cause of the break down in the marriage.

10. 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"**

11. In her Petition the Petitioner cites the ground of cruelty while the Respondent in his Reply to Petition accused the Petitioner of cruelty, desertion and adultery.

12. On the ground of cruelty, it is clear from the evidence that both parties were cruel to each other. Their conduct as set out above was such that caused both parties mental, emotional and psychological anguish. I am satisfied that this ground has been proven.

13. On the ground of adultery, the Respondent alleges that the Petitioner has been cohabiting with S H since the separation to date. The Petitioner alleges in her Amended Reply to Cross Petition that the

Respondent condoned the adultery when he reconciled with her moved in with her and conjugal cohabitation resumed. Unfortunately the Petitioner chose not to attend Court on the hearing date and her case was closed. She therefore did not tender any evidence to prove this allegation. The Respondent on his part testified that since the separation, the parties have remained separated to date. The Petitioner has admitted the adultery but claims that the Respondent condoned the same. I am inclined to accept that the ground of adultery has been proved.

14. On the ground of desertion, the Petitioner states in her petition that the Respondent chased her away from the matrimonial home on 4.12.02. In her Amended Reply to Cross Petition however, she claims that it was the Respondent who in fact deserted the matrimonial home of his own free will and volition after the said reconciliation. The Respondent on the other hand simply states that the parties have lived separately since 2002. The circumstances that led to the separation are not clear. The fact however remains that the Petitioner and the Respondent have not lived together since 2002 when they separated.

15. Section 66 (6) (d) provides that a marriage has irretrievably broken down if the spouses have been separated for at least two years, whether voluntary or by decree of the court. The Petitioner and the Respondent have been separated for over thirteen years. The marriage herein has clearly irretrievably broken down.

16. On the issue of maintenance, the Petitioner did not testify in Court in support of this claim. Consequently, without the benefit of any evidence of the means of both partners I am unable to make a determination of this issue. Further, I am guided by the provisions of Article 45 (3) of the Constitution of Kenya which provides that

***“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

17. The Respondent prayed for joint custody of the child of the marriage. The issue of custody and maintenance of the child ought to be litigated in the Children’s Court which has jurisdiction in the first instance.

18. It is clear from the foregoing that the marriage 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 Registrar’s Office in Nairobi on 24.1.97 be and is hereby dissolved. Decree nisi to issue and the same to be made absolute within 1 month. The matter of the child’s custody shall be placed before the Children’s Court for determination.

19. Each party shall bear its 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 Applicant**

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

..... **Court Assistant**

