



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 127 OF 2010

W.W.K PETITIONER

VERSUS

E.N.KRESPONDENT

JUDGMENT

W.W.K, the Petitioner filed a petition on 12th October 2010 seeking that the marriage between him and the Respondent, E.N.K be dissolved on the grounds of adultery and cruelty. The Petitioner and the Respondent solemnized their marriage on 16th May 2003 when they were married at the Office of the Registrar in Nairobi. A copy of the Certificate of Marriage was produced in court as proof of the marriage. There are two issues of the marriage, namely A.S.K born on 4th February 1995 and D.N.W born on 2nd November 1998. In his Petition of 12th October 2010, Petitioner W.W.K accuses the Respondent E.N.K of committing the matrimonial offence of adultery during the subsistence of the marriage. In his particulars of adultery, the Petitioner states that the Respondent has cohabited with one E.K as husband and wife. The Petitioner further states that the Respondent has given birth to a child not sired by him. The Petitioner also accuses the Respondent of being cruel to him. In his particulars of cruelty, the Petitioner alleges that the Respondent moved out of the matrimonial home in April 2008 while the he was out of the country on duty. The Petitioner further alleges that the Respondent eloped with another man.

The Petitioner served the Respondent with the Petition and the Notice to Appear on 3rd February 2011. On 24th February 2011 The Respondent filed an answer to then petition. She also cross petitioned to be divorced from the Petitioner. In her answer to the petition, the Respondent denied the allegations made by the Petitioner in his petition and put the Petitioner to strict proof thereof. In the Cross Petition the Respondent alluded to acts of cruelty and adultery by the Petitioner on her. In her particulars of cruelty, the Respondent stated that the Petitioner was a drunkard and violent. She stated that the Petitioner attacked her causing her to fall down and suffer a tear in her anal canal. She stated that as a result of the Petitioner's actions, she suffered depression. In the year 2005 the Petitioner sold the Respondent's motor vehicle registration number KAL 990J and utilized the proceeds therefrom for his own use contrary to the Respondent's wishes. In the year 2008 Petitioner and the Respondent agreed to sell motor vehicle registration number KAV 503R in order to offset the Petitioner's loan with Standard Chartered Bank. However, after offsetting the loan, the Petitioner utilized the remaining amount for his own personal use contrary to the Respondent's wishes. The Respondent also accused the Petitioner of forcing her out of their matrimonial home. He packed their household items from their matrimonial home and transferred them to his ancestral home without the Respondent's consent. She stated that the Petitioner has failed to meet his financial obligations as a parent to the children of the marriage and as a husband to her. He has also cut all communication links with the Respondent and the children of the marriage. In her particulars of adultery, the Respondent accused the Petitioner of having extra marital affairs with Catherine Kituyi

and one Vickie.

The matter was heard on 12th November 2015, and the Petitioner gave oral evidence reiterating the averments in his petition for divorce. He testified that he has cohabited with the Respondent as husband and wife since the year 1994. He testified that the Respondent left the matrimonial home in Bungoma in the year 2008 to live in Kakamega. Since then he has not cohabited with the Respondent and has not been able to trace her. The Petitioner testified that all attempts at reconciling with the Respondent have not borne any fruits. According to the Petitioner, his marriage to the Respondent has irretrievably broken down. On her part, the Respondent did not adduce evidence in support of her Answer to the Petition nor the Cross Petition for divorce.

From the pleadings and the oral evidence adduced in this case, the issue for determination by this court is whether the parties in this suit adduced sufficient evidence in their presentations to warrant the grant by this court of the orders sought in their respective pleadings. The evidence on record shows that the Petitioner and the Respondent contracted a civil marriage. Thus, the applicable law concerning the dissolution of their marriage is to be found in **Section 66** of the **Marriage Act 2014** which provides:

“(1)A party to a marriage celebrated under Part IV may petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

(2) A party to a marriage celebrated under Part IV may only petition to court for the separation of the parties or the dissolution of the marriage on the following grounds-

- 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.”**

By his petition of 12th October 2010 the Petitioner seeks to have his marriage to the Respondent dissolved on the grounds of alleged cruelty and adultery. The grounds of cruelty and adultery are questions of fact which require this court to assess them based on the evidence adduced in court. The evidence on record makes it clear that the Petitioner and the Respondent have been separated since 2008. In his evidence in court, the Petitioner testified that in the year 2008 he found that the Respondent had left their matrimonial home when he returned home from Jordan where he had gone on official duty. The Respondent did not however adduce any evidence in court to prove the allegation of adultery against the Respondent. For this reason, the Petitioner’s petition on the ground of adultery therefore fails. The Respondent did not adduce any evidence in court to rebut the allegations of cruelty made by the Petitioner nor the allegations and particulars of cruelty and adultery against the Petitioner set out in her Cross Petition for divorce. In the circumstances therefore, this court holds that the Petitioner established his case on the ground of cruelty against the Respondent.

This court therefore orders as follows;

- a. The marriage between the Petitioner and the Respondent solemnized on 16th May 2003 is hereby dissolved.
- b. Decree nisi to issue and in thirty (30) days decree absolute to issue in 60 days.
- c. Each party to bear its own costs.
- d. The Petitioner and Respondent to share costs of the children of the marriage. The Petitioner to pay school fees and school expenses and the Respondent food, clothing and shelter.
- e. Each party is at liberty to apply.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF

FEBRUARY, 2016

M. W. MUIGAI

JUDGE

In the presence of:

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