



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 2 OF 2013

H – P C S.....PETITIONER

VERSUS

M N A.....RESPONDENT

JUDGMENT

1. This Divorce Petition is dated 7th January, 2013 and filed in court on 9th January, 2013. The Petitioner thereby prays for dissolution of the marriage celebrated between the Petitioner and the Respondent.
2. The grounds upon which the petition is based are adultery, cruelty and desertion. The particulars of adultery are that the Respondent between various dates in the year 2011 committed adultery with an individual only known to the Petitioner as S and has continued with that relationship despite protests from the Petitioner thus causing the Petitioner mental anguish.
3. The particulars of cruelty are that the Respondent has threatened the Petitioner using harsh words hence causing him a lot of emotional pain and suffering; the Respondent has deserted the matrimonial home for a period exceeding one year thus denying the Petitioner his conjugal rights; that the Respondent has neglected the matrimonial obligations of caring for the Petitioner. On the ground of desertion the particulars thereof are that abandoning the Petitioner and her matrimonial responsibilities, and disappearing to unknown destination where she and the issue reside for the last one year.
4. I note that the Respondent despite being served with a copy of the petition and Notice to Appear on 18th January, 2013, did not enter appearance nor filed any response. Indeed, an affidavit of service sworn by Stephen Waititu Kimani, a process server on 5th February, 2013 indicates at paragraph 3 that he tendered service to the Respondent and she accepted and signed on his reverse copy of the Notice to Appear. He avers that the Respondent told him that she is not opposing the divorce petition and she is therefore not going to file any paper in response.
5. As a result of the above mentioned default to enter appearance by the Respondent, the court was left with no option but to proceed with the hearing of the petition. The Petitioner, however, filed Summons dated 16th May, 2014 where he sought this court's order that the petition for divorce dated 7th January, 2013 be determined on the basis of affidavit evidence on the grounds that he suffers from various medical complications and his doctors had advised him against long distance travel. This court in exercise of its discretion allowed the said application but noted that petitions in divorce cause are disposed of by oral evidence and that, a petition is not in the nature of an application, and it ideally ought not be disposed of without a formal appearance by the party or parties in court.

6. Subsequently, the Petitioner swore an affidavit on 23rd September 2014 and filed it in court on 7th October 2014. In the said affidavit, he reiterates the contents of his petition. He avers that after the celebration of the marriage the Respondent began to change her attitude towards him, and did not treat him as her husband. He states that he established that the Respondent was romantically connected with another man, with whom he alleges she committed adultery with. I note however that the paramour was not named as a respondent in the matter. When he confronted her with this she became extremely hostile to him threatening to take the child of the marriage away to an unknown destination. She eventually deserted the matrimonial home on 5th October 2011.

7. It is the Petitioner's case that the Respondent was romantically and sexually involved with an individual only known to him as S. It is unfortunate that the Respondent chose not to file any response to these allegations. In *RC vs. DKM* [2010] eKLR Kariuki J (as he then was) had this to say: "*Normally, it is not always necessary or possible in cases of adultery for a spouse to catch the offending spouse in flagrante delicto or red-handed so as to prove adultery. After all, sexual encounters and sexual escapades are done so clandestinely.*"

8. I note that the Respondent despite being served opted not to enter appearance. It therefore follows that she did not defend herself. The upshot of this is that the Petitioner is entitled to the order of divorce as prayed.

9. In view of the foregoing, this court makes the following orders:-

- (a) The marriage solemnized on 13th October, 2006 at Nairobi between the Petitioner and the Respondent is hereby dissolved.
- (b) Decree *nisi* to issue Decree nisi shall issue forthwith, the same to be made absolute after expiry of a period of 30 (thirty) days from the date hereof.
- (c) There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 6th DAY OF March 2015.

W. MUSYOKA

JUDGE