



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
DIVORCE CAUSE NO. 187 OF 2014

FORMERLY MOMBASA DIV. CAUSE NO. 2 OF 2010

Z.Y.S.A.....PETITIONER

VERSUS

Y.S.A.....RESPONDENT

JUDGMENT

1. This divorce cause was initially filed in Mombasa as HC Divorce Cause No. 2 of 2010, but was consequently transferred to Nairobi vide an order that was made on 1st September 2014.
2. The petitioner and respondent got married on 4th December 1971 at the Registrar's Office, District of St Pancras in the London Borough of Camden. They lived and cohabited in various places in England before coming to Kenya where they stayed in Nairobi and then at various places in Mombasa. They have since October 2006 lived apart.
3. The couple was blessed with three sons who are now adults. They are
 - a. A K, born on 22nd June 1972;
 - b. A K, born on 27th January 1977; and
 - c. A K, born on 28th June 1983.

The petitioner is a retired nurse and stays with her son in Nairobi and the respondent is a medical doctor who practices in Mombasa.

4. This petition was filed on 15th January 2010. The petitioner wanted the marriage dissolved on the ground that since December 2006 the respondent has been living in an adulterous relationship with a woman known as Y.M.B.S. She sought alimony pending the suit and maintenance in the sum of Kshs.102,193/= per month. In a ruling delivered on 29th June 2012 the Court in Mombasa ordered alimony *pendete lite* at Kshs.100,000/= per month.

5. The respondent filed an answer to the petition in which he denied the allegations by the petitioner. He cross-petitioned for divorce on grounds of desertion and cruelty. He asked that the petition be dismissed and the cross-petition be allowed.

6. It is notable that in 1986 the couple and their children were being driven by the respondent when the car rolled. The petitioner was the only one injured. She received serious injuries. She was flown to the United Kingdom and later to India for treatment. She was left physically impaired as she is on a wheelchair. She testified that in 2006 she moved out and went to live with her son in the United Kingdom. Her explanation was that she was fed up with the respondent's incidents of unfaithfulness from which she had got infections. After she left, she said, the respondent moved to a flat at Kizingo in Mombasa with the woman with whom he now stays as husband and wife. The respondent admitted that he now lives with the woman (Y.M.B.S.) as husband and wife. They have adopted a child, a girl, who is aged 16. It is clear from the testimony by the petitioner that she did not condone the respondent's relationship with the woman. I find that the ground of adultery on the part of the respondent was proved. The petitioner has since returned to Kenya where she stays with her son in Nairobi.

7. From the testimony of the parties, it was clear that each considers that the marriage has irretrievably broken down. Otherwise, I did not find that the respondent called sufficient evidence to prove the cross-petition.

8. Regarding the issue of maintenances, the petitioner made reference to her physical condition which she says is deteriorating with age. She stays with her son at Muthaiga in Nairobi. He is a professor in orthopaedic surgery. The respondent's case is that she does not require any maintenance as he has already provided for her. But this is what the petitioner told court:-

“I ask for maintenance because everything we had and built was joint effort. He has a few properties in Mombasa that belongs to the family. Respondent is an affluent physician who earns a lot of money.....”

She claimed that he earns Kshs.1.5 million a month which he denied. He stated that he earns about 300,000/= a month, Kshs.100,000/= of which goes to tax and he uses the balance on his family of a wife and a child. Further, his case was that he will soon retire as he has had a heart condition and has a stent in his heart. He has had three surgeries in his food pipe because of cancer. The surgeries have been in the U.K. On the other hand, the petitioner stated that her monthly expenditure is Kshs.103,000/= which, according to the respondent, was excessive. The respondent stated that he could afford to pay only Kshs.30,000/= in maintenance to the petitioner.

9. There was a hotel *[particulars withheld]* that the couple bought and operated before being forced to sell it because of accumulated debt owed to the bank. The debt was one million USD. The petitioner stated that the money used to buy the hotel came from her accident compensation. The respondent's case was that each side contributed to the purchase. Whatever is the case, the couple incorporated a company called *[particulars withheld]* Investments Limited which owned the hotel. The two were shareholders, each having 50% shares. The hotel was sold for Kshs.120 million. They paid Kshs.68 million to the bank. The respondent gave the petitioner Kshs.36 million out of which she used Kshs.15 million to buy her son an apartment in the UK. She agreed on cross-examination that the decision to buy her son the apartment was hers alone. The respondent was left with Kshs.29 million. Kshs.500,000/= was put in a joint account. The money later went to the respondent. Further there was an apartment that the couple had which the petitioner subsequently sold for Kshs.17 million and kept the money. It is on the basis of this evidence that the respondent maintained that the petitioner did not deserve maintenance as she was financially well taken care of. The petitioner's case was that, on the facts, she deserved to be maintained.

10. Under **section 25(2) and (3) of the Matrimonial Causes Act** (now repealed) the jurisdiction to order maintenance was provided as follows:-

“25(2) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of

money or annual sum of money for any term not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable.

(3) In any such case as aforesaid the court only, if it thinks fit, by order, either in addition or instead of an order under subsection (2) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly for her maintenance and support as the court may think reasonable.”

11. It is notable that the petitioner did not ask for a gross sum, or annual sum, for any term from the respondent. She asked for Kshs.100,000/= monthly. She did not in any verifiable way demonstrate that the respondent earns more than Kshs.300,000/= a month. There was no evidence that he still holds on any family property. It is not in dispute that he now has a family to tend. When the parties went apart, the petitioner received a lot more money from the investments of the family. Lastly, under **Article 45(3)** the Constitution of Kenya 2010:-

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

I understand this to mean that these rights carry with them obligations, so that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage (**W.M.M. V B.M.L. {2012}eKLR**).

12. I have considered the facts of this case and the law applicable. In my view, the respondent is not entitled to pay any maintenance to the petitioner. However, because he has offered to pay Kshs.30,000/= per month he shall be asked to pay the sum.

13. The result is that the petitioner’s petition succeeds with costs. The respondent’s cross-petition is dismissed with costs. The marriage between the petitioner and the respondent is hereby dissolved. *Decree nisi* shall issue henceforth and shall become absolute after 30 days. The respondent shall pay the petitioner Kshs.30,000/= (Thirty Thousand Kenya Shillings) per month, beginning the end of this month, towards her maintenance during her life or his life, whichever is earlier. The order that was made on 29th June 2012 by the Court in Mombasa for the payment of alimony to the petitioner by the respondent hereby lapses.

DATED and DELIVERED at NAIROBI this 5th day of March 2015

A.O. MUCHELULE

JUDGE