



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 112 OF 2014

A.W.....PETITIONER

VERSUS

C.M.M.....RESPONDENT

JUDGMENT

The Petitioner A.W filed a petition together with a verifying affidavit before this court on the 21st of May 2014 seeking to have the marriage between her and the Respondent C.M.M dissolved on ground of adultery, desertion and cruelty.

The Petitioner stated in her petition that on 9th of September 2003, she and the Respondent were lawfully married and their marriage was solemnized in the AG's chambers.

The Petitioner attached a certified true copy of the marriage certificate. The Petitioner cohabited with the Respondent as husband and wife at Langata within Nairobi.

During their subsisting marriage, they had two issues;

- a. V W aged 10years, and
- b. V W aged 7 years.

The Petitioner is an Army Officer stationed at *[particulars withheld]* and resides at Mwiki in Nairobi. The Petitioner stated that since the celebration of the marriage the Respondent committed adultery with persons that are known and unknown to the petitioner. The Respondent consecutively deserted the matrimonial home and continued with his adulterous relationships. The Respondent treated her with extreme cruelty since celebration of the marriage. The particulars of cruelty as illustrated in the Petitioner's petition are as follows;

- a. Verbally abused the petitioner
- b. Refused to provide for the children of the marriage
- c. Refused to pay school fees for the children of the marriage
- d. Spending several nights out of the matrimonial home.

The Petitioner prayed for orders that;

- a. The marriage be dissolved,
- b. The petitioner be granted the custody of the said children of the marriage,
- c. The Respondent pays the costs of the petition,

d. Any other relief court deems

The Petitioner served the Respondent with the petition together with the notice to appear on the 13th September 2014. The Respondent acknowledged receipt of the documents according to the affidavit of service sworn on the same day by a Process Server, Mathias Mboya. However, the Respondent neither entered appearance nor file an answer to the petition within the specified time that was stated in the notice.

The Petitioner moved court by way of Chamber Summons filed under **Order 29(1), (2) and 30 of the Matrimonial Causes Rules** on the 12th of November 2014 seeking issuance of a certificate for the matter to proceed for hearing as an undefended cause. The Registrar certificate was issued and the matter was scheduled for hearing on the 22nd of January, 2015.

During the hearing, the Petitioner gave sworn evidence and stated that she and the Respondent solemnized their married in the AG's chambers on the 9th September 2003. The Petitioner and the Respondent lived together for 6 years since 2003 to 2008 and had two issues V W and V W who are aged 10 and 7 years respectively. Both the Petitioner and the Respondent worked in the military. The Respondent was discharged from military. The Respondent went absent and was not on official duty. The Respondent returned to their matrimonial home in 2008. But he would however come back home late and very drunk. The Petitioner paid the house bills and school fees for the children while they cohabited as husband and wife. The Respondent verbally abused the Petitioner and at some point called her a prostitute. The Respondent started cohabiting with other women and neglected the children and the Petitioner. The Petitioner lost communication with the Respondent. The Petitioner never condoned the adulterous and cruel behavior of the Respondent. The Respondent now cohabits with another woman from his home village and resides in Githurai.

The court has evaluated the evidence adduced by the Petitioner together with her submissions. The Petitioner based her application on adultery, cruelty and desertion. According to **Section 66(1) of the Marriage Act**, a party to a civil marriage may not petition the court for separation of the parties or for the dissolution of the marriage unless three years have lapsed since the celebration of marriage. The Petitioner and the Respondent had been separated since 2008 and their marriage was celebrated in 2003. The petition was thereby accepted by court for the three years had lapsed.

Desertion, adultery and cruelty are among the grounds out rightly provided under **Section 66(2) of the Marriage Act** that guarantee divorce to a person once proved. Cruelty is defined in the **Black's Law Dictionary** to mean;

“ the intentional and malicious infliction of mental and physical suffering on a living creature.”

The dictionary elaborated further on mental cruelty to mean;

“one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”

The case before this court, the Petitioner alleged in her oral submissions that the Respondent was verbally abusive and at one point called her a prostitute. The Respondent's conduct of during cohabitation caused the Petitioner anguish which can be construed as mental cruelty. The Respondent did not file an answer to the petition to state the contrary to this evidence and neither did he attend court when he was served with the notice on 13thSeptember 2014.

As regards the adulterous behavior of the Respondent, it is alleged by the Petitioner in her petition that the Respondent left the matrimonial home sometime in 2008 and never returned back. The Petitioner further in her oral submissions alleged that the Respondent started cohabiting with other women and he is currently cohabiting with a woman from his home village in Githurai while still married to the Petitioner.

The Respondent did not refute the allegation as he was neither present in court to give evidence to the contrary nor did he file an answer to the petition or cross-petition. This is construed by court that the petitioner's evidence is proved on a balance of probability as the respondent did not controvert the evidence.

Under **Section 66(6) of the Marriage Act**, marriage is said to have 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.

In the present case, the marriage between the Petitioner and the Respondent had irretrievably broken down because the Respondent deserted the matrimonial home since 2008 and never returned back. The Respondent neglected his parental responsibilities. The Petitioner paid all the house bills and the school fees of the children since the Respondent deserted the matrimonial home. The Respondent currently cohabits with another woman in Githurai while still married to the Petitioner. In this case, there is no doubt that the marriage between the Petitioner and the Respondent had broken down with no possibility of salvaging the marriage and no likelihood of reconciliation.

On the basis of the foregoing, the court hereby orders as follows;

- a. The petition is upheld.
- b. The marriage between the Petitioner and the Respondent that was solemnized on the 9th September 2003 has irretrievably broken down due to desertion of the matrimonial home by the Respondent since 2008 and neglect of his responsibilities as a father and a husband. The marriage can only be dissolved.
- c. Custody of the children V W and V W is granted to the Petitioner.
- d. The respondent shall pay **Ksh. 20,000/=** as maintenance and upkeep for the children of the marriage until each party files an affidavit of means.
- e. Decree nisi to issue forthwith.
- f. Decree absolute to issue in six (6) months.
- g. The respondent shall bear the costs of the case.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2015.

M. MUIGAI

JUDGE

In the presence of:

Wanyanga for the Petitioner