



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(FAMILY DIVISION)

DIVORCE CAUSE NO. 42 OF 2008

J O OPETITIONER

VERSUS

M B O.....RESPONDENT

JUDGMENT

1. The petitioner via amended petition dated 31st October 2012 prays for dissolution of the marriage, custody of the children and an order directing the respondent to move out of the petitioner's house. The parties got married on 30th August 1995 and cohabited as husband and wife in *[particulars withheld]* estate in Nairobi where the petitioner had built a house. The parties were blessed with two issues of the marriage namely T K O aged, 21 years and B B O, aged 15 years. The petitioner seeks a divorce on grounds of cruelty.

2. He particularized cruelty as follows; that the respondent is a person of bad temperament and violent behavior and has constantly humiliated him and belittled him both in private and in public through abusive language and making humiliating remarks. That she constantly threatens the petitioner with death and over the years, she has treated the petitioner with extreme and unreasonable suspicion by going through his phone book and calling addresses to demanding explanations on the nature of their relationships and hurling insults at them. By making abrupt and uninvited visits to the petitioner's workplace; constantly molesting and abusing the children of the marriage. Failing to disclose her income and refusing to contribute towards the welfare of the family all of which have caused the petitioner to suffer mental anguish, strain and anxiety worsening the petitioner's diabetic condition. Conducts, which he claims forced him to desert their matrimonial home in *[particulars withheld]* Estate sometime in 2008 to *[particulars withheld]* Guest House, and later on to *[particulars withheld]* .

3. He particularized desertion as follows; that since the solemnization of their marriage the respondent constantly made the petitioner suffer mental anguish forcing him out of their bedroom. That the respondent showed cruelty towards T K and she even threatened to commit suicide forcing the petitioner to move out and later the petitioner and the issues of the marriage relocated to *[particulars withheld]* Estate as a result of the respondent's cruelty. Reasons whereof the petitioner prays for dissolution of the marriage, custody of the children of the marriage and that the respondent be ordered to move out of the respondent's house.

4. The respondent in her further amended answer to the petition dated 11th December 2012 denied the allegations of cruelty leveled against her by the respondent adding that she has always disclosed her income to the petitioner and denied that she ever denied him food adding that food was always prepared

and parties served themselves at their convenience. She added that both of them undertook the provision of family needs; that the petitioner in November 2007 took away the respondent's car to bar her from dropping and picking the children from school and any efforts to reconcile with him failed as the petitioner refused to take part in any meetings. She denies that the marriage has not irretrievably broken down adding that given a chance she would continue living with the petitioner. She avers that it is the petitioner who deserted their matrimonial home. She denies the particulars of cruelty and put the petitioner to strict proof. She avers that the petitioner has willfully neglected to make any maintenance further that the petitioner forcefully evicted her from the matrimonial home. She mentions an issue that arose around 2005 when the respondent's relatives stormed their matrimonial home seeking to have their daughter undergo Female Genital Mutilation as a result of which the respondent's sisters have refused to recognize her marriage to the petitioner. She seeks to have the petitioner dismissed.

5. The cause came up for hearing on 23rd January 2014. The petitioner reiterated the averments of his petition. Briefly he testified that he was subjected to frequent abuses before he left for work and returning home in front of the children and househelp. Some of the abuses were that was sickly and useless, he did not satisfy her sexually, that he was not worthy to be a husband and that he was suffering from HIV. That he was a witch. He further stated that he lived in a different room since 2007 due to the respondent's frequent abuses. That the respondent would lock him out when he came late. He testified that when his wife refused him funds to run his cyber café he decided to use one of the cars to supplement their income and only left the matrimonial home when his health deteriorated.

6. The respondent in her testimony reiterated the averments on her replying affidavit denying all allegations of cruelty as alleged by the respondents. She testified that sometime back, when she had gone to collect money for the children's upkeep the petitioner beat her with a chapatti rolling pin and she reported the matter to the police although she did not have a P3 form as the respondent had taken all the documents. She denied owning a cyber café claiming that she was unable to pay rent and the landlord levied distress. She denied having thrown him out of the house and blamed their woes on interference from the respondent's family adding that the petitioner has not made any efforts to reconcile as he has refused to even talk to her mother. She urged the court to dismiss the case and allow the parties to talk with the wazees at home to try and resolve the matter or refer the matter for mediation.

7. Parties filed written submissions which I have read . The petitioner alleges that the respondent was cruel to him and gave a detailed account of instances when the said cruelty arose. He relied on the case of ***Mogaka vs Isoe, The High Court of Nairobi, Divorce cause no. 30 of 2004***, where the court in adopting the decision in ***Russel vs Russel (1987)***, where it was held that for nature of cruelty to constitute a ground for divorce, "*there must be danger to life, limb or health bodily or mentally or a reasonable apprehension of it to constitute cruelty.*"

Further that the issue of motive of the respondent's conduct is immaterial as was held in the case of ***V. N. & Another, The High Court at Nairobi, Divorce Cause No. 103 of 2001***, where the court held that for a divorce decree nisi to issue on grounds of cruelty, there should not be any connivance or condonation on the part of the petitioner and respondent.

On the respondent's claim for alimony, he submitted that the respondent had substantial savings from the cyber café which she never disclosed to the petitioner while the petitioner paid for all family expenses educated and maintained the issues of the marriage. Further that the respondent received a golden handshake after she was retrenched from her employment and the same was never utilized for the maintenance of the family. He further submitted that the respondent was a businesswoman and could maintain herself adding that the petitioner was the one taking care of maintaining the family which he was willing to continue doing. On this he relied on the case of ***SCC -vs- MKC*** where Justice Ngenye in quoting ***WMM -vs- BML***, stated that where it was held neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner.

8. The respondent in her submissions reiterated her answer to the petition and further seeks to give a

picture of what she earns as compared to the petitioner. A party cannot not adduce evidence through submissions.

9. The petitioner in his petition for divorce on grounds of cruelty and desertion. Cruelty is one of the grounds of divorce under Section 8(1) (b) & (c) of the Matrimonial Causes Act Cap 152. In his testimony, the petitioner narrated various incidences to support his claim. The incidences as narrated amount to cruelty, for the petitioner was affected to the extent of moving out of their bedroom to another room. The petitioner also admits that he was forced to leave the matrimonial home by the respondent's cruelty. The petitioner has proved his ground of cruelty. The respondent on her part however is opposed to the dissolution of the said marriage and requests that the parties be allowed to mediate with the wazee, however the petitioner is not in agreement. From the foregoing it is evident that the marriage between the parties has irretrievably broken down and there is no possibility of reconciliation. This court on its part cannot compel parties to stay together when they are not willing to do so. Therefore, this court therefore dissolves the marriage between the Petitioner and the Respondent celebrated on 30th August 1995. A decree nisi to issue forthwith and to be made absolute within 30 days.

10. The respondent claims alimony and in her submissions has indicated that she is not in employment currently and the grocery business she set up was destroyed by the petitioner when he was evicting her. Adding that she currently only earns Kshs.34,000/- rent from the units as ordered by the court adding that the respondent earns over Kshs.600,000/- gross salary and also collects rent from the properties jointly owned and also from earnings from the tea plantation. She submitted that she facilitated the petitioner in getting where he is and urged the court to give her an alimony of Kshs. 90,000/-.

11. Section 25 of the Matrimonial Causes Act, empowers the court to make such orders as it may deem just in the event of being confronted with an alimony application. On this though I find the respondent has only raised figures and there is no documents to support the same nor has she supported her claim to prove she deserves the same. In the case of **WN v PB [2013] e KLR**, it was held that, “... *The concept of Alimony originated in England. A wife was deemed to be totally reliant on her husband and would not own property or earn money to support herself. As such upon divorce alimony would provide an economic means to enable the divorced wife to support herself and to prevent her from becoming a public charge Although in making orders for alimony the court must exercise its discretion it must be remembered that what is before this court is a prayer for alimony pending suit and not a prayer for permanent alimony. The amount to be awarded in the latter case would require a full interrogation and consideration of the merits of the suit as well as a full inquiry into the income, expenses and needs of each spouse. The purpose of an award of alimony pending suit is to provide temporary support to a spouse (in this case the wife) so that she is not left destitute for the duration of the suit*”

The Court of Appeal in the case of **C.M.A.W.M v P.A.W.M [2015] eKLR** referred to the case of **W.M.M. vs B.M. L. [2012] eKLR** where it was held

“...The financial capacity of the spouses has to be considered before the court makes a finding as to whether a spouse ought to pay maintenance and the extent thereof. Secondly, the deserving spouse should be supported at the standard of life he or she was used to at the time of separation”.

As it stands this court is not able to clearly discern the earnings of the petitioner and also her earnings, the obligations attached to the same and the remaining amount after the expenses are deducted as such giving the respondent the sum requested would in my view be prejudicial to the petitioner who has also been tasked with taking care of the issues of the marriage a claims the respondent does not refute.

12. Further, Article 45(3) of the Constitution provides that, parties to a marriage are entitled to equal rights at the time of the marriage during marriage and at the dissolution of marriage.’ Justice GBM Kariuki as he then was in **WMM -VS- BML [2012] e KLR** held that, “*In considering a claim for maintenance, regard must be had to the provisions of Article 45 (3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage”. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a*

beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

Having considered what has been placed before this court I find that the respondent has not adduce sufficient evidence and is undeserving of the order sought for permanent alimony or maintenance. Parties can pursue the issue of division of matrimonial property in a suit filed by any of them.

13. On the issue of custody and maintenance of the children. I note that the children are adults and being cared for by the petitioner, being adults the petitioner does not need an order of custody and maintenance. Each party to bear its own costs.

It is so ordered.

Dated, signed and delivered this 15th day of October 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Petitioner**

.....**For the Respondent**

.....**Court Clerk**