



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

DIVORCE CAUSE NO.3 OF 2014

R M O - - PETITIONER

VERSUS

J O O - - RESPONDENT

JUDGMENT

1. The Petitioner is the wife of the Respondent. The parties got married in a civil marriage celebrated at Homa Bay District Commissioner's Office on 23rd July 1993. A copy of certificate of marriage No. (*Particulars withheld*) was annexed to the petition filed herein on 21st January 2014. They then lived and cohabited in.
2. The said marriage was blessed with three children. The Petitioner was employed as a civil servant working with the Ministry of Agriculture while the Respondent is an Administration Police Officer. The Petitioner seeks in the petition, the main order for judicial separation. There are also prayers for other reliefs namely;

“(b) Maintenance of the petitioner and college and school going children.

(c) Costs of this petition.”

3. The Petitioner has sought an order for judicial separation on grounds of adultery the particulars of which she enumerated in the petition she filed in court as follows:
 - a. **Engaging in extra marital affair with another woman.**
 - b. **That the open relationship with this woman has affected the Petitioners prestige as a wife and caused a lot of acrimony between the Petitioner & the Respondent.**
 - c. **That as a result of the open love affair the respondent has greatly compromised the family finances as he spends a lot of money maintaining the other woman with her children at the expense of the family.**
 - d. **That relationship between the respondent and the children has also been strained as they are aware of the extra marital affair the respondent is engaged in which has also affected the children psychologically.**
 - e. **That the respondent infidelity and sharing intimate details of the Petitioner with his woman has led to a total breakdown in communication between the couple.**
 - f. **That any time I visit the respondent at his work place, the woman doesn't give me time to share my problems with the respondent.**
 - g. **That there is no pending suit neither has there been any proceedings between the two of us over the same subject matter.**

4. When the Petition was served upon the Respondent, he neither entered appearance nor filed a defence and as a result interlocutory judgment was entered and recorded against the Respondent on 12th May 2015.
5. On 13th October 2015, the case came up for formal proof during which the Petitioner tendered her oral evidence in support of the Petition in which she stated that after the celebration of their marriage in 1993, they cohabited in both Homa Bay and Rongo Town till 2009 when the Respondent was transferred to Meru (Tharaka Nithi). Upon being transferred, the Respondent stopped visiting the Petitioner and the children as he kept of their matrimonial home.
6. In January 2014, the Petitioner visited the Respondent in Meru only to discover that he had married another woman called “A.”
7. According to the Petitioner the Respondent still refused to come back home despite interventions from his bosses. The Petitioner further testified that the Respondent has abandoned her completely with the children whom he does not maintain in any way. It is for the above reasons that the Petitioner sought orders for judicial separation, maintenance for her and the three children.
8. I have carefully considered the Petition and the oral evidence tendered by the Petitioner. I have formed the view that the main issues to be determined are whether the parties should be judicially separated and whether the Respondent should maintain the Petitioner and children of the marriage.
9. From the pleadings and the evidence tendered by the Petitioner it is clear that the Petitioner already has the custody of the children of the marriage and in any event, the issue of custody was neither canvassed nor sought in the pleadings and therefore, I will make no findings on the same at this point.
10. I note that the Petitioner seeks judicial separation on the basis of Adultery by the Respondent. Adultery is one of the grounds upon which a Petition for judicial separation may be presented.
11. It is not clear to me why the Petitioner sought orders for Judicial Separation when her own pleadings showed that the marriage had totally broken down. In her pleadings she states:

“The Respondent’s infidelity and sharing intimate details of the Petitioner with his woman has led to a total breakdown in communication between the couple.
12. In her evidence in court, the Petitioner painted a picture of a marriage that had reached a point of no return when she stated:

“It is now more than two years since we were together.”
13. The Petitioner did not, in her testimony, state if she had any hopes of their marriage going back to its tracks as it were.
14. **Section 66(2) (e)** of the **Marriage Act 2014** allows for the desertion of a marriage due to “*the irretrievable breakdown of the marriage.*”
15. **Section 66(6)(d)** of the same **Act** provides:-

“a marriage has irretrievably broken down if:-

(d) the spouses have been separated for at least two years, whether voluntarily or by decree of the court.”

In this case, the couple have lived separately for 6 years, since 2009 when the Respondent got transferred to Meru (**Tharaka Nithi**).

16. All attempts made to reconcile the couple through the Respondent's boss at work have not yielded any fruits. It is quite apparent, from the Petitioner's testimony, that the Respondent has moved on with his life. This would have been a good case for the grant of orders for divorce.

17. However, in view of the fact that parties are bound by their pleadings before the court and in view of the fact that the Petitioner, in her own testimony before the court prayed for orders of judicial separation, I hereby allow the Petitioner's prayer for Judicial Separation.

Maintenance:

18. In her prayers seeking orders of maintenance, the Petitioner did not provide the court with the specific particulars of the payments sought. Furthermore, in her testimony, the Petitioner did not state or prove the particulars of the amount she required the court to order in terms of money due for the Children's and her upkeep – *vis a vis* the Respondent's earnings.

19. Under those circumstances, this court is unable to grant the orders sought. I will therefore make no orders in respect to maintenance, but with a rider that the Petitioner may file a separate suit specifically for maintenance of the children of the marriage.

20. The Petitioner is hereby granted the costs of this suit.

Dated, signed and delivered this 11th day of November, 2015

HON. W. OKWANY

JUDGE

In presence of:

- Petitioner in person
- N/A for the Respondent
- Mr. Ogega: court clerk