



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
DIVORCE CAUSE NO. 5 OF 2014
G P KPETITIONER
VERSUS
C S MRESPONDENT

JUDGMENT

1. The petitioner J G P K has filed this petition dated 11.12.13 seeking the dissolution of her marriage to the C S M. The Respondent filed an Answer to Petition and a Cross Petition.
2. The ground for divorce as set out in the Petition is that the marriage has irretrievably broken down. The Petitioner alleges that throughout the marriage the Respondent spent an undue proportion of his earnings on his relatives and extended family and failed to provide for the Petitioner and the two issues of the marriage; that he treated the Petitioner and the children with total lack of consideration, interest and affection; that he on several occasions used foul and abusive language on the Petitioner and has displayed a violent temper in his treatment of the Petitioner thereby exposing the children to bad behaviour and hatred; that the Respondent told the Petitioner that he no longer loved her and shortly after filed a case at Tononoka Children's Court No. 209 of 2009 and that in the circumstances she could not be expected to continue living with the Respondent.
3. The Petitioner prays for custody of B W and unlimited access to D W, the children of the marriage. She also prays that the Respondent meets the school fees and a lump sum payment for the children's maintenance.
4. The Respondent in his Answer to Petition denies all the allegations by the Petitioner. He admits filing the case in the Children's Court but claims that the same was prompted by the Petitioner denying him access to the children. In his Cross Petition prays for dissolution of the marriage on grounds of cruelty and desertion. He alleges that the Petitioner has denied him love and affection as well as conjugal rights; that the Petitioner disparaged the Respondent by continually stating in public that he was sexually weak. He further alleges that the Petitioner deserted the matrimonial home and left with all household goods. He prays for dissolution of the marriage and seeks custody of the children.
5. Although the Respondent was duly served with the hearing notice, he did not make an appearance on the hearing date. The Petitioner in her brief testimony in Court testified that she and the Respondent got married on 12.4.03 at the Alidina PEFA Church and were issued with marriage certificate. Following their marriage, the couple cohabited for five years in Mikindani but the marriage turned sour; that the

marriage was blessed with two children; that the Respondent did not meet his obligations as a husband; that he would not involve her in any of his affairs but only involved his family members. He even trusted his mother with the construction of their house in [particulars withheld], Kilifi but not her. She stated that they had been separated for four years and that it was her view there was no hope for the marriage. She prayed that the Court dissolves the marriage.

6. I have considered the Petition, answer to Petition and the uncontroverted testimony of the Petitioner. As stated earlier, the Respondent did not make an appearance on the hearing date. It was therefore not possible to prove the veracity of the allegations contained in his Answer to Petition. The Petitioner met and married the Respondent on 12.4.03 at the Alidina PEFA Church. The marriage certificate serial number [particulars withheld] is sufficient proof of the fact of the marriage. The Petitioner testified in Court and was keen on proving the Respondent as the cause of the break down in the marriage.

7. The Marriage Act, 2014 at Section 66(2) provides for the grounds upon which a civil marriage may be dissolved. These include:

- (a) adultery by the other spouse;**
- (b) cruelty by the other spouse;**
- (c) exceptional depravity by the other spouse;**
- (d) desertion by the other spouse for at least three years; or**
- (e) the irretrievable breakdown of the marriage”**

8. In her Petition and in her evidence the petitioner cites the ground of the irretrievable breakdown of the marriage. The Marriage Act, 2014 at Section 66(2) 66(6) provides that a marriage has irretrievably broken down if *interalia*:

- (a) ...**
- (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) ...**
- (g) ...**
- (h) ...**

9. The Petitioner claims in her Petition and testimony that the Respondent treated her and their children with total lack of affection and consideration and showed little interest in them; that the Respondent used foul and abusive language and exposed their children to hatred and bad behavior; that he told her he no longer loved her and even filed a case against her in the Children’s Court. I find that the ground of irretrievable breakdown of the marriage has been proved.

10. Both parties prayed for custody of the Children while the Petitioner prayed maintenance of the

children of the marriage. The issue of custody and maintenance of children ought to be litigated in the Children's Court which has jurisdiction in the first instance.

11. It is clear from the Petition and Answer to Petition that neither of the parties herein who have been separated for four years is interested in the marriage. Accordingly, I pronounce a decree of divorce and order that the marriage solemnised on 12.4.03 at the Alidina PEFA Church be and is hereby dissolved. Decree *nisi* to issue and the same to be made absolute within 3 months. That the matter of the children's custody and maintenance shall be placed before the Children's Court for determination. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED in MOMBASA THIS 3RD DAY OF DECEMBER, 2015.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **Court Assistant**