



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**DIVORCE CAUSE NO. 2 OF 2011**

**N B P ..... PETITIONER**

**VERSUS**

**E M T .....RESPONDENT**

**J U D G M E N T**

This is a petition for the dissolution of the marriage between **N BP** (Petitioner) and **E M T** (Respondent).

Custody of the issues of the marriage is also sought by the petitioner. The facts giving rise to the petition are that in December, 1999, the parties herein contracted a marriage under the marriage Act at the District Commissioner's office in Mombasa. Thereafter, they cohabited in Mombasa and later moved to the County of Trans – Nzoia. Three issues resulted from the marriage i.e B N born in 1992, T K born in 1999 and E K born in 2004. However on the 14th February, 2008, the respondent deserted the matrimonial home at Trans Nzoia County and has to-date not returned. Additionally, the respondent failed to show love and affection to the petitioner, she neglected her responsibility as a wife and denied the petitioner his conjugal right.

The petitioner therefore contends that the marriage has irreparably broken down and prays for its dissolution.

The respondent filed a reply to the petition in which the allegations made against her by the petitioner are denied. She contends that she has never deserted the matrimonial home save for business trips from time to time of which the petitioner was aware. That, no ground exists for the dissolution of their marriage which has not broken down as alleged.

The respondent therefore prays for the dismissal of the petition.

The reply to the respondent's answer was a denial by the petitioner of the allegations made by the respondent and a reiteration that the marriage has irretrievably broken down.

Upon issuance of a certificate of compliance by the Deputy Registrar of this court, on the 1st September, 2011, the matter was set down for hearing and was eventually heard on the 20th November, 2013, in the absence of the respondent who failed to appear despite being served with the necessary hearing notice through her advocate on record.

In his testimony, the petitioner (PW1) more or less reiterated the facts contained in the petition and in the process clarified that their child B N was born of a different biological father and came into the marriage through the respondent.

The petitioner produced a marriage certificate (P. Ex.1) to confirm the existence of the marriage and stated that the marriage was largely peaceful until the year 2008 when the respondent deserted the matrimonial home and went to live in Mombasa. He said that prior to that, in the year 2006, there was a lot of disagreements in the marriage and that when the respondent deserted he followed her to Mombasa in an attempt to reconcile their differences and persuade her to return home but all in vain. She has since remained away from the matrimonial home.

On the allegations made against him by the respondent in her answer to the petition, the petitioner contended that the same were untruthful.

Having considered the petition in the light of the evidence adduced by the petitioner which evidence remained unchallenged in any substantial manner and bearing regard to the first prayer, it is the opinion of this court that a substantial ground for the dissolution of the subject marriage has been fully established and proved and this is desertion from the matrimonial home by the respondent for an unreasonable period of time and without justifiable reason i.e slightly over three years to the time the petition was filed in court. Consequently, prayer one of the petition is granted to the extent that the marriage between the petitioner and the respondent be and is hereby dissolved. A decree – nisi shall issue forthwith and be made absolute after the expiry of six (6) months from this date hereof.

With regard to the second prayer i.e custody of the issues of the marriage, it is notable that only T and E are minors aged approximate 15 and 10 years respectively. In the circumstances, and taking consideration of their welfare they will remain where they are in the custody of the petitioner but subject to the respondent's rights to access them as and when necessary.

The child B, has already attained adulthood. She is at liberty to decide whom she wants to live with between the petitioner and the respondent. She may even decide not to live with any one of them. The choice is hers.

All in all, prayers one and two of the petition are granted as ordered herein above.

Each party shall bear own costs of the suit.

(Delivered and signed this 4th day of February, 2014.

**J. R. KARANJA,**

**JUDGE**