



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
DIVORCE CAUSE NO. 9 OF 2008

N MPETITIONER

VERSUS

I M N.....RESPONDENT

JUDGMENT

On 4th November, 2009 the petitioner instituted this Divorce Cause seeking dissolution of the marriage celebrated between himself and the respondent on 12.11.1997 at the D.C's office Nyahururu. Besides dissolution of the marriage, the petitioner seeks an injunction to restrain the respondent from collecting rent from the matrimonial properties and selling some or any of the matrimonial properties. The petitioner also wants the court to compel the respondent to release to him his professional and academic certificates, birth certificates and all his personal documents, including photographs.

The petitioner's case is that, during the subsistence of his marriage with the respondent, the respondent has been cruel to him. He alleges that the respondent has been uncaring, argumentative, arrogant, disrespectful and contemptuous to him. He also blames the respondent for not having been a good mother to the issues of their marriage namely, C M, E W and A K (all adults).

He neither contends that all attempts to reconcile the differences between him and the respondent have been in vain; and that he has neither colluded with the respondent in bringing the petition nor condoned the respondent's cruelty.

In reply, the respondent filed an answer to the petition and cross-petitioned for dissolution of the marriage. In her answer, the respondent denied having treated the petitioner with cruelty and, instead, blamed the petitioner for deserting the matrimonial home, inciting their children against her, subjecting her to physical and mental abuse, scandalizing her before members of their extended family, friends and professional colleagues; and subjecting her to incessant insults and bickering.

She contends that the petitioner constructively deserted her by abandoning the matrimonial home, continuously staying away from her, refusing to support her in her business ventures and denying her conjugal rights. Further that during the subsistence of the marriage, the petitioner has engaged in and/or committed adultery with R O, B M W and other indeterminate women.

Like the petitioner, she seeks the dissolution of the marriage claiming that it has irretrievably broken down. She contends that she has neither colluded with the petitioner in bringing the petition nor condoned the petitioner's cruelty.

At the hearing, the petitioner gave a brief history of their marriage. He explained that his marriage with the respondent began having problems in the year 2000 but the problems became worse in the year 2004.

He explained that the respondent stopped cooperating with him and would deny him conjugal rights, become quarrelsome and abusive to the children of the marriage. Further that before he married the respondent she had romantic relations with another man. In 2005 he learnt that the respondent had gone back to that man.

In an attempt to save the marriage, he wrote to the respondent requesting her to give their relationship a chance but the respondent failed to respond. He produced the letter he wrote to the respondent as PEX 2 and stated that all attempts by friends and relatives to reconcile them have been in vain.

He denied the allegations that he has another family in Kisumu and that he has been inciting the children of their marriage against the respondent. However, as regards his faithfulness, he stated that he has his faults.

Maintaining that he has not condoned the respondent's cruelty, he urged the court to dissolve the marriage and grant the orders sought in his petition.

On her part, the respondent reiterated that she was not to blame for the breakdown of the marriage. She recalled that before the petitioner completely cut off links with her in year 2006, the petitioner would come home drunk and quarrel with her. In her words, the petitioner would come home, fail to greet her and, in presence of anyone, throw unprintable missiles to her.

Admitting that they had many differences, the respondent, stated that they never sat down to talk and that any attempt to talk to the petitioner was met with insults. In that regard, she explained that she has no problem with the dissolution of the marriage.

On the issues of the matrimonial properties, she explained that there are properties she was given during the subsistence of the marriage and others she bought and registered in the petitioner's name. She admitted that during their marriage they acquired several properties but developed three, [Particulars withheld] House, the Site and Service Plot. She explained that these are rental premises and the rent collected therefrom goes to the family kitty.

With regard to her cross-petition, she explained that she seeks divorce because the marriage has irretrievably broken down. In this regard, she reiterated her contention that it is the respondent who deserted their matrimonial home and maintained that the petitioner had been cruel to her.

Concerning the petitioner's prayer seeking to compel her to release the petitioner's personal documents and certificates, the respondent while admitting that she has the documents, explained that the petitioner never asked for them and stated that she will release them to him if he wants.

Contending that she did not enter into the marriage with the intention of breaking it, she explained that all her attempts to salvage the marriage have been in vain.

Issues for determination

From the pleadings hereto and the testimony of parties, the issues for determination are:-

1. Whether the marriage herein should be dissolved?
2. Whether the respondent should be restrained from selling all or any of the matrimonial properties or collecting rent therefrom?
3. What is the order as to costs?

Whether the marriage herein should be dissolved

Although both the petitioner and the respondent contend that the marriage herein has irretrievably broken down, section 10 imposes an obligation on this court to inquire, so far as it reasonably can, into the facts alleged, and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any counter-charge which is made against the petitioner.

Before the court can pronounce a decree of divorce, it must be satisfied on the evidence that:-

- a) the case for the petitioner has been proved; and
- b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived, at, or condoned, the adultery, or where the ground of petition is cruelty the petitioner has not in any manner condoned the cruelty; and
- c) The petition is not presented or prosecuted in collusion with the respondents. See Section 10(2) of the Matrimonial Causes Act.

Regarding the foregoing provisions of the law, R.N. Nambuye J., (as she then was) observed:-

"This provision had been construed in cases of this jurisdiction both by the superior court, and the court of appeal such as KAMWERU VERSUS KAMWERU (SUPRA) and MATHAI VERSUS MATHAI (SUPRA). The standard of proof required for a Matrimonial offence of adultery is no longer beyond reasonable doubt as was previously, the jurisprudence as demonstrated by the text of Toistoy on the law, and practice of divorce, and matrimonial causes (supra). It is now proof to the extent that the court is certain that adultery was committed. Proof can be garnered from circumstantial evidence as well MATHAI VERSUS MATHAI (SUPRA).

Turning to cruelty, what the court is required to look for are: -

"facts demonstrating willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such a danger"

This has been construed in the case of MEME VERSUS MEME (SUPRA) namely that in order to establish:

- i. Misconduct of a grave and weighty nature*
- ii. Real injury to the complainants health or reasonable apprehension of such injury*
- iii. That the injury was caused by misconduct on the part of the respondent and*
- iv. That on the whole of the evidence, the conduct amounted to cruelty in the ordinary sense of that word..... "*

See G.M.K v. D.K.K Nairobi H.C Divorce Cause No.81 of 2007 (2010)eKLR.

From the evidence presented, it is abundantly clear that the two parties are totally unable to live in company of each other - they cannot stand one another, and none is even keen at this stage to salvage the marriage. I am satisfied that the union has broken down irretrievably. Petitioner claims the respondent is not the type to sit down and discuss as she is always sanctimonious. The respondent also blames the petitioner, saying she has done her best to try and salvage the union in vain. It is a blame game. The union be and is hereby dissolved.

A decree nisi do issue to be made absolute after 6 months.

As regards the properties, the petitioner did not specify which these are, and how much rent the respondent collects per month. He did not even demonstrate how he single handedly purchased them. This is vital as the respondent also claims to have purchased them, although they were registered in applicant's name.

According to the respondent, they acquired several properties during their marriage but only developed three. She says the rent goes to the family kitty as the same is used to repay loans.

I am unable to issue restraining orders with regard to the rent collection, as the evidence on record is rather scanty.

The respondent is ready and willing to give the petitioner his academic papers any day. He should therefore take steps towards collecting the same.

Each party shall bear its own costs.

Delivered and dated this 6th day of June 2014 at Nakuru.

H.A OMONDI

JUDGE