



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL SEPARATION CAUSE NO. 23 OF 2010

C N M.....PETITIONER

VERSUS

M F D.....RESPONDENT

JUDGEMENT

By the Petition dated 28-4-2010 the Petitioner **C N M** sought the following orders:-

- a. "That an order for Judicial Separation be granted by this Honourable Court.
- b. That an order of maintenance in terms of periodical payments of Kshs. 51,500/= per month be granted by this court pending the hearing and determination of this cause made up as:-

<u>PARTICULARS</u>	<u>AMOUNT</u>
1. House Rent	Kshs. 15,000.00
2. Electricity bill	Kshs. 2,500.00
3. Water bill	Kshs. 500.00
4. Food Stuff Expenses	Kshs. 15,000.00
5. Pocket Money	Kshs. 2,000.00
6. Medical	Kshs. 10,000.00
7. Transport	Kshs. 6,000.00
8. Fuel	Kshs. 500.00
<u>TOTAL</u>	<u>Kshs. 51,500.00</u>

(c) That the Respondent be condemned to pay the costs of this Petition"

The respondent **M F D** filed an answer to petition and cross-petition on 8/6/2010 seeking the dissolution of the marriage.

The matter commenced for hearing before **Hon. Justice Edward Muriithi** on 30/3/2012. The Hon. Judge took the evidence of both the petitioner and the respondent but was later transferred on temporary basis to the Kisii High Court. The proceedings were typed and I took over the case and proceeded to hear two (2) of the respondents witnesses. Both parties closed their cases and counsel duly filed final submissions. The matter is now pending judgment. There are two issues which require determination being:-

1. The Petitioners prayer for Judicial separation.
2. The Petitioners prayer for maintenance.

JUDICIAL SEPARATION

The petitioner sought for judicial separation on the basis of the alleged cruelty of the respondent. On his part the respondent denied having committed any acts of cruelty and cross-petitioned for the dissolution of the marriage. The undisputed facts of the case are as follows. The petitioner and the respondent are a couple who got married at the new Horizon Ministry in Mombasa on 4th September 2005. A copy of their marriage certificate serial No. 392522 **P.exhibit1** provides adequate proof of the fact of the marriage. The Petitioner worked at the time as a designer at the EPZ whilst the respondent works as a ship captain. After their union the couple lived in Mtongwe. They bore no children together but the petitioner did fall pregnant in December 2005 but unfortunately suffered a miscarriage at five months pregnancy. In her evidence the petitioner claims that the respondent would avoid sexual intimacy with her claiming that he was too tired. She complained that the respondent spent too much time with his friends and often came home late. On the day when she suffered the miscarriage, the petitioner claims that the respondent ignored her pleas for medical attention. She claims that she had to call in neighbours to attend to her. Finally the petitioner claims that a friend of the respondent called 'S' would come to her home when her husband was away on duty and would try to persuade her to watch pornographic movies with him. The petitioner declined and reported the matter to her husband. The respondent then turned around and accused her of having an extra-marital affair with the said 'S'.

On 10/9/2007 the petitioner claims that the respondent left the matrimonial home. He stopped communicating with her. He would not take her calls and even changed his number. Even when he was on shore i.e. of duty he would not bother to seek her out. She claims that the respondent removed his wedding ring. Several approaches were made to church elders, and to family for reconciliation but nothing was successful. The Petitioner sought for Judicial Separation saying that

"I think that the marriage can be salvaged. I pray for six months to see whether it can be saved. I pray that I be provided with maintenance for about 6 months. If it does not work I pray to come back. I wish to stay with the respondent in the marriage if he is going to change. That is all".

On his part as stated earlier the respondent denies all allegations of cruelty made against him. He denies that he willfully declined to share a bed with the petitioner. The respondent explains that he had to sleep in the living room because the petitioner could not tolerate the fan due to her TB. He claimed that the petitioner disrespected him by fighting him in public. He denies that he deserted the matrimonial home but claims that it was the petitioner who walked out first and is only after that that he went to stay with his brother. The respondent concedes that he would spend the whole day away from the home but he explains that this was due to the fact that he had to be out at work. In his cross-petition the respondent asks for the dissolution of the marriage. He agrees that all attempts made by pastors, relatives and friends to reconcile the couple have failed. The respondent in his evidence states

"I do not think we could be reconciled"

One of the allegations of cruelty made by the petitioner is that the respondent was abusive towards her. She has not cited even one instance of such abuse. In the case of **MEME –VS- MEME [1975] KLR 13** the learned judge held as follows:-

"To establish cruelty the complainant must show to the satisfaction of the court;-

- i. Misconduct of a grave and weighty nature.
- ii. Real injury to the complainant's 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 that the conduct amounted to cruelty in the ordinary sense of that word"

The petitioner alleged that the respondent shunned sexual intimacy with her and declined to sleep in their bed. However the respondent in conceding that he did move to sleep in the living room explains his reasons for doing so. He states that the petitioner who was under treatment for TB could not tolerate the bedroom fan. He (probably due to the heat) wanted the fan to run. In order to avoid inconveniencing his wife the respondent moved to sleep elsewhere. This explanation is in my view reasonable. The respondents actions cannot be said to have been malicious and/or cruel in the circumstances.

The petitioner complains that the respondent falsely accused her of having a love affair with one ‘**S**’. She has also admitted that she informed the respondent that this ‘**S**’ who was a family friend would come to her home in the respondent’s absence armed with pornographic movies and would try to persuade the petitioner to watch them with him. It is very unlikely that a man would try to persuade his friend’s wife to join him in watching pornographic movies unless some level of familiarity existed. Whilst I cannot make a finding on the alleged adultery, my view is that the suspicions of adultery harboured by the respondent were not entirely unfounded. Here again I find no proof of cruelty. The petitioner also claims that despite her pleas for medical attention during the time of her miscarriage the respondent ignored her and chose to go and watch football with his friends. She claims that she had to call in neighbours to help her access medical care. However under cross-examination by counsel for the respondent the petitioner states as follows:-

“I was there [at her job at the EPZ] until I miscarried. The respondent left me alone to go and watch football. **It is the respondent who took me to hospital.** After I came back I expected him to come [stay] with me but he left me to watch football. **I did not want him to leave**”—(my own emphasis)

Thus it becomes clear that by her own admission the petitioner concedes that at the time of her miscarriage it was actually her husband who took her to hospital. He claims that he had abandoned her are therefore proved to be false. It is clear that what annoyed the petitioner was the fact that after returning home from treatment the respondent went out to watch football. She wanted him to stay with her. His actions could be said to have been insensitive but not cruel. The fact that a spouse does not behave in a way one want does not amount to cruelty.

Finally the petitioner claims that the respondent deserted her by walking out of the matrimonial home in November 2007 she states in her evidence that

“He took everything from the house and I remained with a mat in the house. This was in November 2007. I am aware that he is still a ship captain. I was not cruel to the defendant(respondent) to prompt him to desert”

The respondent however denies that he deserted his wife. He states under cross-examination that:-

“We separated in 2007. I had met the mother and the father the date she left the matrimonial home. My wife walked out of the matrimonial home first---”

In her evidence the petitioner claims that the respondent left the matrimonial home and that he took with him everything in the house leaving her with only a mat. However this evidence is contradicted by the testimony of **DW2 J N** a colleague of the respondent who lived in the same estate as the couple. **DW2** told the court that on 10/9/2007 at about 7.30pm the respondent came home from a trip at night and found nobody in his house. The respondent went to the house of **DW2** and told him that he was told that his wife had moved out. He decided to spend the night on the ship. The respondent requested **DW2** to accompany him to the hose his wife had moved into to collect his things. **DW2** accompanied the respondent to the said house. Upon knocking the petitioner opened the door. The respondent asked for his things and the petitioner handled them over to him one by one in the presence of **DW2**. The respondent received his thing and called a taxi and left. How then can the petitioner claim to have been abandoned in an empty house yet from the testimony of **DW2** it was she who moved out of the matrimonial home carrying everything with her. The fact that **DW2** witnessed the respondent collect his belongings from the petitioner contradicts her testimony that the respondent left with all the things. If the respondent had truly walked out of the matrimonial home I have no doubt that at the very least he would

have taken with him his property. He would not have left his own property behind only to collect them from his wife at a later date. The evidence of **DW2** casts doubt on the petitioner's claim of desertion. On the whole I find that the petitioner has been unable to prove even one of the allegations of cruelty made against the respondent. As such her prayer for judicial separation should fail.

In his cross-petition the respondent also made allegations of cruelty as against the petitioner. He claimed that the petitioner moved out of the matrimonial home and into a rented house assisted by '**S**'. Although I have found that indeed it was the petitioner who moved out of the matrimonial home there is no evidence that it was '**S**' who assisted her to move. Even when the respondent went to the petitioner's new house with **DW3** they found the petitioner alone inside the house. '**S**' was not there. This therefore remains an allegation which has not been proved. The respondent claims that the petitioner physically assaulted him which assault he reported at Makupa police station. However he was unable to cite any OB number to prove that such a report was made. The respondent claims that the petitioner disrespected him in public and abused him but once again evidence from any other witness is called to prove this. As such the cross-petition must equally fail. The picture that emerges is of a couple who are constantly at loggerheads. They both concede that numerous efforts made to reconcile them have failed. Both appear to want out of the marriage. Section 66 2(e) of the marriage Act 2014 allows for the dissolution of a marriage due to "the irretrievable breakdown of the marriage"

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 voluntary or by decree of the court"

In this case the couple have lived separately since 2007 a period of seven(7) years. There is a clear indication that the marriage has irretrievably broken down. All attempts made to reconcile have failed. On this basis I hereby allow the respondent's prayer for the dissolution of the marriage. Decree Nisi to issue to be made absolute within a period of three(3) months from today's date.

MAINTENANCE

In her prayer seeking orders of maintenance the petitioner sought for payments of Kshs. 51,500/= "**pending the hearing and determination of this cause**". From this wording it would appear that the petitioner's prayer was for maintenance 'pendente lite' i.e. pending suit. The suit has now been determined and this prayer is therefore spent. I will therefore make no orders with respect to maintenance. This being a family matter I direct that each party bears own costs.

Dated and delivered in Mombasa this 10th day of October 2014.

In the presence of;-

Mr. Mokaya holding brief Ms. Umara for Petitioner

Mr. Were for Respondent

M ODERO

JUDGE

10/10/2014