



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 43 OF 2011

E W K.....PETITIONER

VERSUS

J A O.....DEFENDANT

JUDGMENT

By a petition dated 24-10-2011 the Petitioner **E W K** sought the following orders:-

- “(a) **THAT** the marriage between the Petitioner and the Respondent be dissolved.
- (b) **THAT** the Petitioner and the Respondent be granted joint custody of the issues of marriage with the Respondent having physical possession of the issues and the Petitioner having unlimited access.
- (c) **THAT** the Respondent be condemned to bear the costs of this cause.
- (d) **THAT** the Respondent to pay alimony to the Petitioner.
- (e) **THAT** any further or other relief that this honourable court may deem just and fit to grant the Petitioner in the circumstances”

The Respondent **J A O** having been duly served with the Petition filed his Answer to Petition on 20-12-2011 by which he sought the following orders;-

- a. That this Petition be dismissed with costs to the Petitioner
- b. That an order be issued for custody of the issues of the marriage to remain with the Respondent and the Petitioner be granted limited access.
- c. That the petitioner be ordered to contribute equally to the upkeep of the issues of the marriage.
- d. That this Honourable court do refer the Petitioner to the alternative dispute resolution under Article 159(2)(c) and (3) of the Proposed Constitution of Kenya.
- e. Any further or other relief that this Honourable court may deem just and fit to grant to the Respondent in the circumstances.

The petition was disposed of by way of vive vove evidence and both parties testified in court **MS OSINO** acted for the Petitioner whilst **MR. NYAMONYE** appeared for the Respondent. [The brief facts of the case are that the Petitioners began to cohabit as man and wife in 1993. They formalized their union in December 2001 in Nairobi. They cohabited briefly in Nairobi, but later moved to live as a couple in Nyal Estate in Mombasa. Their union was blessed with three sons as follows:-

- J R O born on 4-11-1994
- G O born on 13-7-1999
- A O born on 13-12-2000

During the course of the marriage, the respondent went to work in South Sudan leaving the Petitioner in Kenya with the children. Problems arose within the marriage and by 2008 the couple were no longer sharing the matrimonial bed. In July 2010 the petitioner walked out of the matrimonial home leaving the children behind with their father. Since that date the couple have not lived together as man and wife. In the submissions filed by learned counsel there was agreement on the issues for determination in this case. These were stated to be as follows:-

1. Whether the marriage has irretrievably broken down as a consequence of desertion and cruelty.
2. Who is to blame for the breakdown of marriage.
3. Is the Petitioner entitled to alimony.
4. Should the petitioner and the respondent be granted joint custody of the issues of marriage with the respondent having physical possession [custody] and the Petitioner having unlimited access
5. Who should pay the costs.

I will proceed to deal with the issues as listed above with some variation. It is prudent to determine whether the allegations of cruelty and desertion have been sufficiently proved before coming to a determination as to whether or not the marriage has irretrievably broken down.

In her testimony before the court, the Petitioner alleged that the Respondent during the course of the marriage would mentally torture her. She said that this caused her to suffer depression. She claims that the Respondent would sack her maids for no reason and that he once gave instructions that their children should live with his brother. She states that he would deliberately leave his jobs and stay at home leaving her with the financial burden of providing for family. On one occasion her mother had to pay their rent arrears to prevent them from being evicted from their home. Often times she would have to step in and pay school fees to prevent a child from being chased away from school. The petitioner claims that due to these acts of cruelty she had no option but to walk out of the matrimonial home on 17th July 2010.

On his part the Respondent in his evidence denies totally all the allegations of cruelty made against him. He concedes that there were times when he was out of work due to expiry of his contracts and denies that he ever deliberately left his job. He concedes that the respondent did once or twice step in and help in paying their children's school fees but insist that he has all along paid the children's fees and expenses. He states that he has never physically assaulted his wife and states that when he returned from South Sudan where he had been working the petitioner announced that she no longer loved him. He insists that it was she who deserted the matrimonial home without cause and he insists that she is currently living with another man. Both the Petitioner and the respondent state that efforts made by church elders and family members to reconcile them have been unsuccessful. They are both in agreement that their marriage ought to be solved as it has broken down irretrievably.

(1). Has any matrimonial offence been proved as against either the Petitioner or the Respondent.

This petition was filed in the year 2011 under the matrimonial causes Act Cap 160 laws of Kenya. This Act was repealed and has now been replaced by the marriage Act No. 4 of 2014 section 8 of cap 160 provided for the grounds upon which the courts in Kenya could dissolve a marriage. These includes

- Adultery
- Cruelty
- Desertion
- Insanity

Section 66 of the New Marriage Act includes these same grounds with the addition of the ground of

exceptional depravity and irretrievable breakdown of marriage (more on this later). Obviously the question would arise as to what is the standard of proof required to prove a matrimonial offence. Is it beyond a reasonable doubt. In my own thinking the standard of proof would be beyond a preponderance of doubt. Therefore mere allegations will not suffice to prove allegations of cruelty by one spouse against the other.

The petitioner made several allegations of cruelty as against the respondent. The respondent countered that he has never physically assaulted the petitioner a fact which the petitioner conceded to be true. However cruelty to a spouse can and does take several forms other than physical assault. One can act in a way that is abusive, unkind, nagging, derisive and other types of behavior designed to humiliate and/or lower the esteem of the other spouse. All this amounts to psychological or mental torture which also amounts to cruelty. The Petitioner herein claims that the respondent was both violent and abusive towards her. She did not cite any one particular incident. However she states that as a result of his actions, she fell into depression and even lost her job at the Aga Khan hospital in Mombasa due to non performance. There is no evidence e.g. a doctor's note or any treatment records to show that the petitioner ever suffered from depression. Neither has she produced any letter from Aga Khan hospital indicating that she was relieved of her duties due to non-performance. There is no proof tendered at all that the petitioner suffered from depression apart from her say so. The evidence on this regard falls short to establishing this aspect of cruelty beyond a preponderancy of doubt. In the particulars provided in her petition filed on

28-10-2011, the Petitioner alleges that the Respondent chased away housemaids for no reason. Here again no details are provided which housemaids were chased away and when. This remains a mere allegation with no evidence of the same.

The other aspect of cruelty cited by the Petitioner is that the Respondent frequently left his jobs and left her the financial burden over the whole family. The Respondent denies that he deliberately left his jobs. He states that he was compelled to leave and was rendered jobless in situations when his contracts expired. The court takes judicial notice of the fact that in many cases one is employed on contract. Upon expiry of said contract, one has to leave unless the contract is extended. There is no evidence that the respondent ever declined to take up a job or that he deliberately left any job so as to remain jobless and be 'a house-husband' as the petitioner claims. On the contrary there is evidence to show that the respondent went as far as South Sudan in pursuance of work. If his aim was to be jobless and leave all financial responsibilities to his wife, then the respondent would not have gone to seek work in South Sudan. In the present precarious job situation in Kenya it is common for a spouse to find him or herself unemployed. In those circumstances marriage vows oblige the spouse earning an income to step up financially until such time as the other partner secures a job. That is not cruelty – that is marriage. The Petitioner even alleges that her mother did at one time step in and pay their rent arrears so as to forestall the families eviction. The Respondent denies that this ever happened. The Petitioner has not stated precisely how much her mother paid as rent arrears. The petitioner did not call her mother as a witness to confirm having paid these arrears. No receipts have been produced as evidence of the payment of any such arrears. Here again I find that the evidence to prove these claims is not sufficient. I am not persuaded that the Respondent deliberately rendered himself jobless so as to torture his wife rather he was simply the victim of Kenya's volatile job market.

The Petitioner claims that the Respondent has denied her access to the children. However she never bothered to file any case in the children court seeking orders for access to her children. If the petitioner was truly aggrieved I have no doubt that she would have taken legal action just as she had done now. The petitioner claims that the respondent's actions forced her to leave the matrimonial home. Whilst I do not doubt that the couple had a tumultuous union- the Respondent has conceded as much, as I have found earlier on the actions complained of cannot be said to have amounted to cruelty. The Petitioner may well have left the home due to unhappiness or discontent but I have no evidence to show that the respondent either told/ordered her to leave or that his action were so unreasonable as to leave her no option but to move out. As such I find that the Petitioner has failed to prove these allegations of cruelty against the Respondent.

The Respondent did not file any cross-petitioner but he too stated that he wished to have the marriage dissolved. He conceded that their marriage has been characterized by quarrels and problems. Both parties state that since July 2010 they have lived separately. They both state that all efforts by other parties to reconcile them have failed and they are both in agreement that the marriage has irretrievably broken down section 66(6)(d) of the Marriage Act, 2014 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 court”

In this case, the couple have been voluntarily separated for a period of four (4) years. From the evidence of both, it is clear that all that remains a shell. It would serve no purpose for this court to compel the two to remain bound in matrimony when by their actions they have shown that they both desire to be free.

I find that the marriage has irretrievably broken down and I grant the prayer for dissolution. Decree Nisi to issue to be made absolute within three(3) months of today’s date.

Both parties have made a prayer actual custody of the children of the union. This is a prayer which ought properly to be canvassed before the children’s court. I note that since the couple parted, the children have all along lived with the respondent who has provided their needs. No allegation is made that he has mistreated the children or is otherwise an unfit or incapable father. As such I order that pending any decision on custody by the children court, the current status quo is to be maintained. The petitioner is to be granted reasonable access on terms agreeable to both parties.

Finally the Petitioner has made a prayer for alimony. In considering any claim for alimony, the court must have in mind the provisions of Article 45(3) of the Constitution of Kenya which provides;-

‘parties to a marriage are entitled to equal rights at the time of the marriage and at the dissolution of the marriage’.

The aim of this provision is to uphold the equal rights of both parties to a marriage at all times. Therefore in determining the rights and obligations of spouses, Article 45(3) obliges a court to treat both man and wife as equals and thus neither has a greater or lesser obligation with regard to maintenance. The practice of alimony arose from an age old tradition by which men were deemed to be the bread-winners in a marriage and had the sole responsibility to provide support for their spouses even after divorce in order to prevent her becoming a charge upon the ‘public-purse’. Such thinking does not hold true anymore. Women are now very emancipated and have equal and at times even greater earning capacity than their husbands. Today alimony can go either way and is payable to the spouse who is left destitute and has no means and/or capacity to provide for him or herself. In other words no spouse of any gender has a **right** to alimony. Similarly no spouse who is capable of earning a living should not be allowed to shirk his/her responsibility to do support himself and to turn the other spouse into a cash cow or a human ATM Machine. In coming to a decision on alimony the earnings, expenses as well as the general financial capacity of the spouse to pay maintenance must be taken into account.

The respondent told the court that he currently works for the Methodist church and from May 2012 to date he has been earning a salary of Kshs. 144,200/=. He swore an affidavit of means to this effect. Out of this earning, the respondent caters fully for the housing, food and medical expenses of the children who are currently in his custody. He also caters fully for the educational expenses of all the three children as follows:-

- Kshs. 100,000 per year for the eldest son who attends [particulars withheld] University.
- Kshs. 100,000/= per term for the 2nd born son who attends [particulars withheld] High School.
- Kshs. 10,000/= per term for the youngest child who attends [particulars withheld] Primary School.

The Petitioner concedes that the children live with the Respondent and she also concedes that it is the

respondent who caters for all the children's needs in her cross-examination the Respondent says;-

“For the most part of the respondent has taken care of the children”

Given that parental responsibility is a shared obligation, it is clear from the above that the petitioner has done little to take up her role as a provider for their children. The Respondent has taken upon his shoulders the burden of providing for all three children. Is it fair to demand that in addition he pay alimony to the Petitioner? The Petitioner is an educated person physically and mentally fit and has held good jobs in the past. She herself admits that

“I am educated up to college. I am trained in the Hotel industry. At Aga Khan [hospital] I was the front office manager-----”

Despite her claim of joblessness, the petitioner states

“I currently live in Mombasa. I pay rent of Kshs. 15,000/= per month. I pay 3,500/= for electricity and water. I spend kshs. 5,000/= per month for food. Currently my family helps to support me. I am actively seeking employment. My expenses come to roughly 20,000/= per month”.

Clearly even without a job the petitioner is living a comfortable life. She claims that her family supports her but has tendered no evidence to prove this. Neither had the petitioner demonstrated what efforts if any she has been making to get a job. She has not been receiving any support from the respondent since when the couple separated yet the petitioner is able to live what I would term a middle class livelihood. Clearly she has money coming in from somewhere. In other words the Petitioner is not destitute. She has survived quite well without any alimony/maintenance from the Respondent.

In view of the fact that the respondent is single-handedly providing for the three children of marriage and given his income from employment, I am of the view that to demand that in addition he pay alimony to the petitioner would be unreasonable and unjust. Given her admitted lifestyle the petitioner does not need any alimony to survive. I therefore decline to grant the petitioners prayers for alimony. As this is a family matter each party shall meet its own costs.

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

M ODERO

JUDGE

10/10/2014

In the presence of;-

Mr. Mokaya holding brief Ms Osino

No appearance for Respondent

M ODERO

JUDGE

10/10/2014