



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO 89 OF 2014

J. A. D.....PETITIONER

VERSUS

J. C. D.....RESPONDENT

JUDGMENT

1. The Petitioner J. A. D. filed a petition on 29th April, 2014 for the marriage between her and the Respondent J. C. D. be dissolved, the Petitioner may have such further or other relief as may be just and the Respondent be condemned to pay costs of this cause.
2. The Respondent was served with the petition for divorce and he filed a memorandum of appearance on 26th May, 2014. The petitioner filed an application for the Registrar's Certificate on 11th June, 2014. The Registrar's Certificate was granted and the matter was to proceed as an undefended cause.
3. The Petitioner pleaded she was married to the Respondent on 14th October, 2000 at the Bridgewood Manor at Rachester, Bridgewood Roundabout, Waldersladewoods, Chatham Kent, UK. the marriage certificate copy was under the UK Marriage Act of 1949 attached to the petition. They lived together in Capetown, London, Vietnam and Nairobi.
4. The marriage between Petitioner and the Respondent resulted in two (2) issues of the marriage; M. R. D. aged nine years old C. G.D. aged five years.
5. The Petitioner's petition for dissolution of the marriage is grounded on the particulars of cruelty detailed in paragraph 7 of the petition. Briefly, the Petitioner alleged the;
6. Respondent was cruel, he often left the Petitioner at home and travelled for work and socially and therefore isolated the Petitioner and she felt alone and this caused her stress, anxiety and mental anguish.
7. The Petitioner was left alone when the Respondent went alone for sporting trips, football matches, cricket and golf trips while the Petitioner was left on her own at home looking after their children.
8. The Respondent travelled for a cricket match and left the Petitioner at home after she had been discharged from hospital after giving birth to their second born child and this caused her mental anxiety.
9. The Respondent during the marriage planned holidays for himself and left behind the Petitioner and the children of the marriage.
10. On 18th September, 2014, the Petitioner testified in Court on the fact of the marriage, the issue of the

children of the marriage, the ground of cruelty and the effect it all had on her and the children. She also told the Court that through her lawyer Ms. Quadros and the Respondent's lawyer Mr. Malik she and the Respondent reached and signed an agreement dated 30th April, 2014 that was produced in Court and wanted it adopted as the order of the Court with regard to custody care and control of the children of the marriage and division of matrimonial property between her and the Respondent.

11. The Respondent despite service of the petition and entering memorandum of appearance did not file an answer to the petition and /or cross petition. The allegations of cruelty pleaded in the petition and alluded to by the Petitioner in oral evidence is not controverted by the pleadings or testimony from the Respondent.

12 This Court finds that the marriage between the Petitioner and Respondent has irretrievably broken down under the 66(6) of new Marriage Act 2014.

13. The marriage solemnized between the Respondent and Petitioner on 14th October, 2000 under the Marriage Act of England of 1949 is hereby dissolved;

- a) A decree nisi to issue forthwith.
- b) Decree absolute within 30 days thereafter
- c) The agreement filed in Court is not adopted as an order of the Court for the following reasons;
 - 1) Although parties entered the Agreement voluntarily and with legal advice the Agreement is intended to be final agreement of matters addressed herein (Paragraph 6 and 7) Yet the contents of the Agreement are not final. The parties need to reconcile issues. Some of the concerns are raised herein below.
 - 2) The Petitioner will retain care and control of the children of the marriage until they attain age of majority. Access to the children will be by prior arrangement as discussed and agreed.
 - 3) The Respondent will pay economy flight ticket for each of the children when they travel to the U.K each year. (Paragraph 5);
 - a) Who will travel with the children who are 9 and 5 years respectively?
 - b) Will the children travel alone?
 - c) Who will cater for the cost of the person travelling with the children?
 - d) Will the children travel with the Respondent/Father?
 - e) Who will take care of children during the holiday abroad?
 - 4) The Respondent will pay present school fees for the two (2) children of the marriage whilst they are schooling at School. The wife is employed as a Teacher of the same school and consequently paying school fees for the children. If the children move from this school then the school costs including fees can and will be reviewed. (Paragraph 7).

The Court is concerned with the fact that the Agreement seems to focus only on the primary education of the children of the marriage. Whereas it is obvious, the children will pursue high school and university, the same is left to be reviewed later yet the agreement is final on matters herein.

The Petitioner and Respondent ought to settle on education of the children of the marriage not only at the primary school level but also secondary, high school and university otherwise

the Agreement is not final.

5. The Agreement gives the Petitioner custody care and control of the children of the marriage. She will be with the children fulltime or most of the time.

To add onto the responsibility, the monthly payment of Ksh. 135,000/= is to cater for house rent for the children, food and clothing of the children of the marriage with an increment of 8% each year (Ksh. 10,800/=) subject to a review in light of incremental cost, incurred for maintenance of the children. How will the review be possible if the Agreement is final and what form will it take? (Paragraph 8). Secondly Kshs. 135,000/- global figure for rent, food, clothing of the children and she is paying school fees is not adequate, fair or just in the circumstances.

6. With regard to division of matrimonial property, the values of the properties (house) are not disclosed. The Respondent obtains the house in England (whose value is not included) and the one in Karen estimated at Ksh. 27million.

The Petitioner obtains the home in Kuala Lumpur in the meantime collect (Again the value is not indicated) rent. Both Respondent and Petitioner share the rent proceeds from the house in Malaga, Spain. The Respondent has transferred motor vehicle Reg. [particulars withheld] to Petitioner and is to be paid Ksh. £150,000 in full and final by the Respondent. The Court is concerned that the division of matrimonial property between the Petitioner and Respondent is not fair and just to safeguard the interests of the children of the marriage. In the absence of value of the properties disclosed and the affidavit of means filed by the Petitioner and Respondent, the Court cannot adopt the Agreement the same as fair and just.

7. The Court has gone to great lengths this to identify the issues in the Agreement that do not safeguard interests of the children of the marriage.

8. This Court is guided by the Children Act, 2001 Section 4(1) and (2) on survival and best interests of the child;

4(1) –“ every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.”

4 (2) – “In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law administrative authorities, or legislative bodies the best interest of the child shall be the primary consideration.”

Section 98 of the Children Act mandates the court to make order and give directions regarding any aspect of maintenance of child for provision of Education, medical care, having clothing and an order for financial provisions of the child.

It is this responsibility that makes this Court intervene and interrogate the content of the Agreement with a view to safeguarding the best intent of the child. The court find it does not adequately cater for the children of marriage.

The Petitioner and Respondent are at liberty renegotiate appropriate terms and file values of the properties and affidavit of means to facilitate relevant information in arriving at just and equitable distribution of matrimonial property and maintenance of the children of the marriage.

9. No orders as to costs.

DELIVERED, READ AND SIGNED AT NAIROBI THIS 10th DAY OF OCTOBER, 2014.

M. MUIGAI

JUDGE