



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 22 OF 2012.

M O C.....Petitioner

Versus

A C M.....RESPONDENT

JUDGMENT

The Petitioner M O C and Respondent A C M solemnized their marriage at the Registrar of Marriages on 13th April, 1984 and were issued with the marriage certificate No. *[particulars withheld]*. The Petitioner and Respondent cohabited in Nairobi, County, Kenya and had 3 children of the marriage who are now adults.

The Petitioner served the Respondent with the application/petition for dissolution of the marriage filed on 9th February, 2012. The Respondent filed Reply to Petition on 8th March, 2012 and the Petitioner filed Answer to Reply to Petition on 5th April, 2012. The Registrar's Certificate was obtained on 21st June, 2012 for the matter to proceed as a defended cause.

On 16th October, 2014 the matter proceeded exparte. The Respondent was served through the advocates on record and the affidavit of service was filed on the same date.

The Petitioner testified that she was married to the Respondent under Luo Customary Law in 1973 and later married at the Registrar of Marriage's Office in 1984. They cohabited in Buru Buru, Nairobi, Kenya and have 3 children of the marriage. The 1st and 2nd children are married with children and the last born lives with her at her residence.

She separated from the Respondent in September, 2012. During the marriage the Respondent has had extra marital relationships and committed adultery. The Petitioner shared her home with other women; during the marriage to the Respondent.

When the Respondent retired from employment in 1998, he left the family in Nairobi and went to the family's rural home. The Petitioner was left to fend for the 3 children on her own; the 1st born A C was joining the University, the 2nd born E C was in form 3 and 3rd born was in form I.

All the children were in school and she educated them on her own and the Respondent did not offer any financial support. When they graduated the Respondent attended the graduation ceremonies. The Respondent physically assaulted the Petitioner on several occasions and demanded money from her yet he did not help her to look after the children.

The Respondent was cruel to her. In one incident when her mother-in-law died, the Respondent asked her to give him Kshs 10,000/= and she did. On the day she travelled home from the funeral, she arrived at night and was left stranded. She was rescued by her sister in-law. After the funeral while at home; a woman appeared with a child whom she claimed her husband the Respondent was the father. She demanded she take care of the child. When she refused, the Respondent insulted her and picked a metal bar and raised it, when he was going to hit her mouth, it was held back by one of the relatives. She reported the matter at the Police Station.

On coming back to Nairobi the Respondent followed her and beat her. She reported the matter at Buru Buru Police Station. She left the matrimonial home. She resided with her sister for a while and then moved to Umoja estate which she resides to date. The matter was reported to FIDA KENYA. The Petitioner seeks divorce from her husband the Respondent.

The court has considered the evidence on record and the pleadings filed. The testimony of the Petitioner is not controverted by any other evidence. The Respondent despite service did not attend Court or give any evidence except the Answer to Petition filed on 8th March, 2012 which consists of mere denials and claimed particulars of cruelty against the Petitioner. The allegations were not substantiated by evidence and therefore do not meet the threshold standard of proof of a balance of probabilities.

This court has considered the evidence on record carefully and finds the following;

The Petitioner stated that during the marriage she suffered physical and mental cruelty by the Respondent in form of domestic violence and incidents of adultery by the Respondent

The Respondent deserted her and the children of the marriage after his retirement and did not contribute or support the family emotionally or financially. When the petitioner visited the rural home to attend a burial, she was stranded, abused, physically assaulted and chased away. On coming back in Nairobi, the Respondent followed her and physically assaulted her chasing her from the matrimonial home.

These facts disclose psychological trauma due to physical and mental cruelty on the Petitioner by the Respondent. The Petitioner has brought up the children of the marriage single handedly in the midst of physical violence and acts of adultery and thereafter desertion by the Respondent.

These actions culminate to the Respondent's in human conduct to the Petitioner. He has over the years behaved in an irresponsible way that the Petitioner cannot be expected to continue living and/or reconcile with the Respondent.

The Respondent's conduct depicts the grounds of cruelty, adultery desertion and irretrievable break down of the marriage.

All these are legal grounds of dissolution of a Civil Marriage envisaged in **Section 66 2 (a) (b) (c) (d) and (e) of the Marriage Act 2014.**

The evidence demonstrates that the Respondent mistreated the Petitioner during the time they lived together; he left the matrimonial home in 1998 with a clear intention of deserting the Petitioner, without her consent and without just cause. After she took up the role to bring up the children of the marriage alone and they completed their studies, the Respondent came back to her and descended on the Petitioner with physical violence and evicted her from the matrimonial home. These facts inform the court decision to dissolve the marriage as any other option would be to endanger the petitioner's life.

The upshot of this matter is that the court finds that the Petitioner has proved on a balance of probabilities that the Respondent has committed adultery and deserted her and the children of the marriage. Consequently the marriage has broken down.

- a. The court orders the dissolution of the marriage between the Petitioner and Respondent solemnized on 13th April, 1984 be dissolved.
- b. A decree nisi to issue forthwith and decree absolute to issue within 30 days.
- c. With Regard to children of the marriage, they are adults and 2 of them have their own families. No order as to legal custody, care and control and maintenance of the children by either of the parties.
- d. With regard to the Petitioner's maintenance the case of **W.M.M. VS.B.M.L Divorce Cause 179 of 2009** is instructive where the Supreme Court of Kenya observed;

Article 45 (3) of the constitution "recognised parties were entitled to equal rights at the time of marriage, during the marriage and after the marriage, dissolution of the marriage. It is a provision that recognises the personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination act on the basis of gender".

- e. The Respondent did not attend court but the pleadings show that he was a sales representative for Twiga Chemical and retired in 1988. The Petitioner was a secretary Kenya Railways and retired in 2007. Both are retired and may not have or enjoy regular income.

Since the Petitioner is entitled in the Court's view to the maintenance/alimony and she contributed directly and indirectly to the purchase of properties during the marriage. Payment may not be forthcoming due to the state of finance at the moment. The Respondent is retired.

This court will revert to the properties of the marriage namely;

- a. Buru Buru House No. *[particulars withheld]*
- b. Property in Kayole
- c. Rural home in Rarieda.

This court has taken into account the following;

- a. The Petitioner worked up to 2007 and helped maintain the home and the children.
 - b. The Petitioner developed the property in Kayole which she is prevented from collecting rent by the Respondent and receives no share of the proceeds from it.
 - c. The Respondent forcefully evicted her for the matrimonial home in 2012.
 - d. The Respondent took all the belongings of the home and left the Petitioner homeless.
1. The court orders 50% /50% share of all the 3 properties to the Petitioner and Respondent, in the meantime.
 2. 50%/50% rents payment for the said properties to both Petitioner/Respondent.
 3. Direct access and possession of Buru Buru House No. *[particulars withheld]* and the rural house Rarieda.
 4. Enforcement of any of the orders by the nearest Police Station.
 5. Either of the parties are at liberty to apply to this court for further orders.
 6. No orders as to costs.

DELIVERED, READ AND SIGNED IN OPEN COURT ON THIS 14TH DAY OF NOVEMBER, 2014.

In the presence of;

Ms. Kinyua holding brief for Mrs Kangethe for the Applicant in the absence of Respondent.

M. MUIGAI

JUDGE