



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CAUSE NO. 91 OF 2012

P.C.W.....PETITIONER

VERSUS

J.B.N.....RESPONDENT

JUDGMENT

The Petitioner P. C. W and the Respondent solemnized their marriage on 14th August, 1994 under the Hindu Marriage and Divorce Act (Cap 157) now repealed. During the marriage, they cohabited in various places within Mombasa.

The Marriage has 2 issues of the marriage

- a. M. Aged 16 years
- b. R. Aged 10 years.

The petition was served on the Respondent who filed a memorandum of appearance and Answer to Petition on 21st June, 2012.

The parties obtained the Registrar's Certificate on 24th January, 2013 to proceed as a defended cause.

On 16th October, 2014, the Petitioner told the court that they were married on 14th August, 1994 and have 2 children of the marriage. The marriage has not worked mainly because, the Respondent has neglected maintaining the family. The Respondent is not responsible. He works on and off and does not help with maintenance of the home and up keep of the children of the marriage. From 1994-2004 they lived with the Respondent's family/parents. The Respondent worked for the father at the family business and even then he failed to go to work.

They moved out and lived away from the Respondent's parents but he was still not responsible. The Petitioner paid all the bills. The Respondent was harsh to her and claimed she had marital affairs with other men. He did not beat her.

In 2006 the Respondent deserted her and the children and came to live in Nairobi. This was after a disagreement with the Petitioner. She questioned his gambling habits which adversely affected his contribution to financial commitments. In 2007, she left Mombasa and moved to Nairobi with the children and they lived together with the Respondent.

In September 2011, the Respondent deserted her and the children again and left with no explanation or reasons. They talked with elders of their community and they came to live together again. Shortly thereafter the Respondent left the family again and the Petitioner decided to live with the children on her own.

The Petitioner stated she moved to another house, and she pays rent, school fees and all expenses. The Respondent does not pay any money at all or assist in anyway. She tried to stay in the marriage so that the children could benefit but it did not work.

The Petitioner confirms that she will allow the Respondent to visit and be with the children. She wants the marriage dissolved. She wants access and retrieval of gold that was given to the mother-in-law so as to help her take care of the daughters. She seeks legal custody of the children and the Respondent to pay maintenance or alimony and up keep of the children of the marriage.

The Respondent informed the court that the Petitioner was his wife and the children were his. They lived with his parents at first and later left to live on their own after conflicts of his family.

With regard, to gambling, they went to gather together and had a good time. The Respondent explained that he moved out of the home because the Petitioner tormented him and he came to live with his sister where he resides to date.

When they reunited and lived together again in Nairobi, the Petitioner would go out with friends and come back home late in the night. He tried talk with her and her family and she did not stop. She was cruel to him, she abused him in front of the children. She attempted suicide and they did not cohabit the last 4 years.

With regard to finances, he lost his parents and has been living with his sister. He has a job that pays Ksh. 20,000/= and therefore he is not financially able to sustain his family.

The court has carefully evaluated the evidence on record, both pleadings and oral testimony by of parties. The Petitioner has on a balance of probabilities proved the grounds of cruelty as particularized in paragraph 9 of the Petition. The Respondent did not provide for and maintain the family during the marriage, he was harsh and they did not cohabit the last 4 years. The Petitioner has also relied on the grounds of desertion particularised in paragraph 9 of the Petition. The Respondent deserted the family in 2006 and in 2011.

The Respondent denied the particulars of cruelty the Petitioner in paragraph 7 of the Answer to Petition. He said she physically and verbally assaulted him and locked him out of the home. He alleged the Petitioner was unfaithful and engaged in extra marital affairs. He sought the Petition be dismissed with Costs.

The ground of cruelty envisaged under **Section 66 of the Marriage Act of 2014** depicts various, components as it is a wide and broad concept. The main issue is that if a party behaves in such an extreme way and occasions violence to hurt and punish another party, the other party cannot be reasonably expected to live with the other party as their lives are in danger.

The Constitution enshrines the family unit (**Article 45**), as fundamental unit of society which should be supported but to keep adults together in conduct described by each party against the other as humiliating is to add or more misery on the existing psychological trauma shown with succession departures by the Respondent from the family. To force parties that clearly demonstrate unwillingness to reconcile and have been separated for a considerable while now would be a recipe for disaster.

To amount to desertion, it is required that parties demonstrate they have separated for 2 years at the time of filing for dissolution of Marriage. This is a clear intention by the Respondent to desert the Petitioner and without the consent and just cause of the Petitioner.

The evidence by the Petitioner is that on 2 occasions, the Respondent left the matrimonial home and did not come back until the Petitioner sought him back. The Respondent in his testimony admitted he left his family twice but attributed it to the tormenting circumstances by the Petitioner. This court is satisfied that the various departures by the Respondent are an indication that the marriage has irretrievably broken down and cannot be salvaged. This court can only give in to the wishes of the Petitioner as required by law. Any other decision to the contrary will not work in the circumstances.

- a. The upshot of this matter is that the marriage between the Petitioner and Respondent is dissolved.
- b. A decree nisi to issue forthwith and decree absolute within 30 days.
- c. With regard to custody of the 2 children of the marriage, they reside with the Petitioner who caters for all their needs, school fees, home, and other relevant expenses. The Respondent has not contributed at all for
- d. their up keep.

Under **Article 53(2) of the Constitution and Section 83 and 4 of the Children Act 2001**, outlines the first consideration is the best interests of the children of the marriage. Both Petitioner and Respondent should contribute towards the up keep of the children. Currently the Respondent is financially unable to meet financial commitments towards his family.

- e. In the circumstances; the court will award custody of the children to the Petitioner and the Respondent to have visitation rights.
- f. With regard to the Petitioner's right to maintenance or alimony the case of **W.M.M VS B.M.L. Divorce Cause 179 of 2009 the Supreme Court of Kenya observed:**

“Article 45 (3) Constitution recognised that parties were entitled to equal rights at the time of marriage, during the marriage and after the marriage.....”

- g. The financial contribution by the Respondent is suspended for the time being until his circumstances improve and the Petitioner is at liberty to apply and have the appropriate amount paid towards upkeep of the children.

The Petitioner is entitled to maintenance/alimony. The Respondent states under Oath and Cross examination that he earns Ksh. 20,000, and has a balance of Kshs. 5,000/= after payment of all his expenses.

The Petitioner may pursue a global sum for her and children expenses at a later date and hearing when the Respondent's circumstances change.

- h. There will be no orders as to costs.

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2014.

M. MUIGAI

JUDGE

In the presence of;

Mr. Osoro holding brief for Mrs Shabena for the Petitioner.