

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 45 OF 2013

Z S I O.....PETITIONER

VERSUS

S K B.....RESPONDENT

JUDGMENT

The petitioner **Z S I O** has filed this petition dated 21st June, 2013 seeking to have her marriage to the respondent **S K B** dissolved. The respondent who resides in Canada was properly served with both the petition and summons to enter appearance. He did enter appearance through the firm of **Koech and Associates** but did not file any reply to the petition. Thereafter directions were taken and the matter proceeded as an undefended cause.

The petitioner testified before the court on 27th October, 2014. She told the court that she and the respondent who are both Muslims got married to each other on 27th September, 2012 at the Office of the Registrar in Mombasa. The certified copy of the marriage certificate serial number [particulars withheld] annexed to the petition provides sufficient proof of the fact of the marriage **Pexb1**. Following the marriage and in keeping with Islamic traditions the couple did not immediately begin to cohabit. The petitioner explains that they were awaiting the celebration of the '*Nikah*' ceremony before they could live together. However before this happened the respondent left and went back to his country of residence being Canada. The petitioner on her part returned to stay in her parents' home in [particulars withheld]. To date the respondent has never returned to collect his wife. All her efforts to contact him have been in vain. The petitioner now seeks a divorce.

As stated earlier the respondent did not file any reply to the petition. As such the testimony of the petitioner remains unchallenged and uncontroverted. I have no reason to doubt the veracity of the petitioner. The respondent left the country immediately after the celebration of their marriage in 2012. Since then the petitioner has neither seen nor heard from him. Clearly this is a man who has no interest in the marriage. The petitioner avers that the marriage was never consummated. Again I have no reason to doubt her evidence. It is common amongst Muslims to delay consummation until all religious ceremonies are performed. In this case no '*Nikah*' was conducted. The petitioner remained in her parents' home in Majengo.

I have looked at section 73 of the Marriage Act which provides for the annulment of a marriage in cases where no consummation has taken place. Section 73(2) provides that a decree of annulment may only be granted where the petition is made within **one year** of the celebration of the marriage. In this case this petition was filed within one year of the celebration of the marriage. However the petitioner herein did not bring a prayer for annulment. She sought a decree for divorce. The facts presented do support this petition. The respondent willfully abandoned his wife immediately the marriage was celebrated. He willfully declined to consummate their union and has persisted in that non-consummation by living an entire continent away in Canada. The respondent's actions amount to cruelty. A marriage cannot be sustained where one spouse chooses to reside miles away from his partner. I therefore allow this petition for divorce. Decree nisi to issue to be made absolute after three (3) months of today's date.

Dated and Delivered in Mombasa this 11th day of November, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Mutugi holding brief Mrs. Oluoch for Petitioner

Court Clerk Mutisya