



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO.35 OF 2009**

**C M U.....PETITIONER**

**VERSUS**

**V P U.....RESPONDENT**

**J U D G M E N T**

The Petitioner and the Respondent were married on 4<sup>th</sup> June 2004 at Registrar's Office, Nairobi. The marriage has been blessed with two (2) children, A N, born on 5th October 2003 and G A born on 22<sup>nd</sup> November 2005. According to the Petitioner, the Respondent had since the celebration of the marriage been cruel to her. She further accused the Respondent of committing adultery. In the particulars set out in the petition for divorce, the Petitioner averred that the Respondent had neglected his duty to provide and maintain the family. She accused the Respondent of subjecting her to mental anguish by leaving the matrimonial home for extended periods of time without keeping her informed. She further accused the respondent of failing to attend the family's social needs and in particular their children's school related functions. The Petitioner averred that the Respondent had engaged in extra marital affairs during the subsistence of their marriage. She stated that she was forced to move out of their matrimonial home on 28th December, 2008 due to the Respondent's cruelty and adulterous life. It is on account of the above matrimonial offenses that the Petitioner is of the view that her marriage to the Respondent had irretrievably broken down with no possibility of salvage. She therefore urges the court to dissolve the marriage and make a further order directing that the Petitioner have custody and care of the children of the marriage. She also urged the court to issue orders of maintenance of the children of the marriage.

When the Respondent was served, he duly entered appearance and filed answer to the petition. He also cross-petitioned for divorce. He denied the allegations made in the petition for divorce. He averred that the Petitioner did not make any effort to salvage the marriage. He attributed their marital woes to financial constraints on his part. According to the Respondent, the Petitioner was never committed to the marriage from the onset and had frustrated his efforts to sustain the marriage. The Respondent averred that it is the Petitioner who has been cruel towards him. He accused the Petitioner of deserting from the matrimonial home. He admitted that the marriage had irretrievably broken down. He cross-petitioned to be divorced from the Petitioner on the grounds of cruelty. He set out the particulars of cruelty in his cross-petition. It is for these reasons that he asks the court to dismiss the petition for divorce with costs and that he be granted custody of the children.

The petition was heard by G.B.M. Kariuki J (as he then was). He heard oral evidence adduced by both the Petitioner and the Respondent. After the close of the hearing, counsel for the parties made submission urging their respective client's cases. Ms. Ndirangu counsel for the Petitioner submitted that the Petitioner was only seeking for the dissolution of the marriage and an order for maintenance of the children. Ms Ndirangu submitted that the Petitioner had abandoned the prayer for alimony. According to Ms. Ndirangu, the marriage had irretrievably broken down with no possibility of salvage. She submitted that all attempts to salvage the marriage has not borne any fruits. According to Ms. Ndirangu, the marriage was a mistake in the first instance. On his part, Mrs. Tindi for the Respondent also submitted that the marriage had irretrievably broken down. She submitted that the Respondent was also of the view that the marriage was a mistake from the onset. According to Mrs. Tindi the court should dissolve the marriage since the parties have been separated for more than four (4) years.

This court has carefully considered the pleadings filed by the parties to these divorce proceedings. From

the facts of this case, it is clear that the marriage between the Petitioner and the Respondent has indeed irretrievably broken down with no possibility of salvage. The Petitioner established to the required standard of proof on a balance of probabilities the matrimonial offence of desertion. The Petitioner and the Respondent have lived separately for more than four (4) years. Neither the Petitioner nor the Respondent seems to have any wish or desire to sustain the marriage. This court therefore has no option but to grant the petition for divorce. The Petitioner has abandoned her prayer of alimony.

In the premises therefore, the marriage celebrated on 4<sup>th</sup> June 2004 between the Petitioner and the Respondent. at the Registrar's office in Nairobi is hereby dissolved. Decree nisi dissolving the said marriage is hereby issued. The decree nisi shall be made absolute thirty (30) days from the date of this judgment. Both Petitioner and the Respondent shall have joint custody of the children. The Petitioner shall have the physical custody of the children whereas the Respondent shall have unlimited access to them. As regards the issue of maintenance of the children, the same shall continue to be canvassed at the Children's court. It is that court which has jurisdiction in the first instance to consider such disputes. There shall be no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2013**

**L. KIMARU**

**JUDGE**