



C.S.L.....PETITIONER

VERSUS

J.L.K.....RESPONDENT

JUDGMENT

By an Amended Petition for Divorce dated 8th October, 2009, **C.S.L.**, hereinafter, “ *the petitioner*” sought to dissolve her marriage to **J.L.K.** hereinafter “*the respondent*” on grounds of cruelty and Adultery She also prayed that respondent be restrained from interfering with land parcel Kajiado[.....] “*the suit premises*” pending the hearing of this petition, ½ share thereof of the suit premises, Alimony pending hearing and determination of the petition, secured provision for her be made, custody of the children, and their maintenance and that of the petitioner and finally costs of the petition.

Apparently, the petitioner and respondent solemnized their marriage at A.C.K Oloirien Church in Kajiado District on 30th May, 1998. Since then they had resided and cohabited as husband and wife at Oloirien and blessed with 3 issues of marriage:-

§ M.S born on 30th June 1999

§ P.L born on 10th December 2000

§ S.S born on 1st April, 2004

Whereas the petitioner is a teacher, the respondent is a businessman dealing with livestock as well as property.

Since the celebration of marriage however, the respondent according to the petitioner had been cruel to her. He had severally assaulted her when she had failed to give in to his demands for her money, occasionally stolen and sold matrimonial property including livestock solely bought by the petitioner in a bid to finance his drinking habits and or to entertain his girlfriends, thereby causing the petitioner mental anguish, physical and psychological torture. The respondent too had neglected to maintain the petitioner and the issues of marriage leaving the burden of bringing up those issues, feeding and educating them solely to the petitioner. Indeed the respondent harbours a “*don’t care attitude*”, has refused to be responsible and had since chased the petitioner away from their matrimonial home.

Besides cruelty, the respondent too had been adulterous with known and unknown women, but specifically the respondent has had illegitimate relationship with a woman namely **J** and another whom he intends to unlawfully marry under traditional and or customary rites. The respondent has admitted to these affairs to the petitioner. The respondent has occasionally slept out of the matrimonial home for days without notice or consent of the petitioner and despite several attempts by the petitioner to resolve the conflict, the respondent has failed to mend his ways.

Because of the respondent’s conduct it is the view of the petitioner that the marriage has irretrievably broken down and ought therefore to be dissolved. In dissolving the marriage though, the court should

consider awarding her ½ of the suit premises on account of being the matrimonial property. Otherwise the petitioner had not in any way been an accessory to or connived at and or condoned the cruelty, adultery and or the respondent's mis-conduct.

Contemporaneously with the mounting of the petition, the petitioner took out a chamber summons application in which she sought amongst other prayers, leave for her to institute divorce proceedings against the respondent before the elapse of 3 years required under the statute. However, it would appear that the application had not been disposed off by the time the petition came up for hearing.

Any way, once the respondent was served with the petition, he filed an answer to the petition and cross-petition. In an answer to the petition, he denied the allegations of cruelty and adultery attributed to him by the petitioner and the particulars thereof. He admitted that though the marriage between them had irretrievably broken down and that they had been living apart since December, 2008, the collapse had been brought about by the petitioner's acts of adultery, desertion and cruelty. Finally, he denied that the petitioner had any claim in law to the suit premises as it belonged to a third party.

By way of cross-petition the respondent averred that since the celebration of the marriage, the petitioner had committed acts of adultery, cruelty and desertion. With regard to adultery, the respondent stated that the petitioner had intimate sexual relationship with known and unknown men and more particularly, one "D", the petitioner had been coming home late, drunk and in the company of men, she has also occasionally slept out of the matrimonial home without the knowledge of the respondent, had boasted to the respondent that she had a right to have sexual relationships with the said men because she was no longer interested in him sexually. Despite the respondent having called meetings to resolve issues over her conduct, the petitioner had refused to mend her ways.

With regard to cruelty, it was the case of the respondent that the petitioner had been hostile and harsh towards him, had been disappearing from the matrimonial home leaving the respondent to tend to the issues of marriage single handedly, and in December, 2008, the petitioner took away all household goods leaving the respondent and the issues of marriage in an empty house, in March, 2009, the petitioner intercepted the issues of the marriage on their way to school and took them away without the respondent's knowledge, had denied the respondent his conjugal rights causing him mental anguish, psychological torture and deprivation.

With regard to desertion, the respondent averred that in or about December, 2008, the petitioner deserted the matrimonial home without any valid reason or justification and has never returned. The respondent visited the petitioner's parents severally to try and resolve the dispute but the petitioner has refused to return to the matrimonial home. He too had not in any way been an accessory to, connived at and or condoned the acts of cruelty, adultery and desertion and or the petitioner's conduct.

The cause came up for plenary hearing before me on 4th June, 2012. Before the commencement of the hearing, the petitioner withdrew her claim to ½ share of the suit premises. Otherwise she reiterated in her evidence what I have already set out elsewhere in this judgment. Suffice to add that she was now a sales person with Water Springs Company and the issues of marriage now stayed with her. They go to Red Soil School which is a private school and the petitioner solely meets the expenses. She did not wish the respondent to assist her in those expenses. She also did not require maintenance for both herself and the issues of the marriage from the respondent.

With regard to cruelty she testified that the respondent had constantly assaulted her. On one occasion he assaulted and seriously injured her, necessitating her to attend Jamii Hospital for treatment. She further reported the said assault to Kiserian Police Station and was issued with a P3 form. She tendered in evidence the treatment cards from Jamii Hospital as well as the P3 form. It was on account of the above incident that she left the matrimonial home and has never returned. Since then the respondent had moved on with his life, married another woman called **I.T** with whom he had sired 2 children; a boy called **O** and a girl whose name she could not easily recollect. For all the foregoing reasons, according to the petitioner the marriage had irretrievably broken down and could not be resurrected. Elders from both sides had intervened and had tried without success to reconcile them.

The respondent opted not to cross-examine the petitioner on her evidence. The petitioner thereafter closed her case. At this juncture, the respondent opted to withdraw his cross-petitioner. He also decided not to read any evidence in support of his answer to the petition. Accordingly the petition proceeded as though it was uncontested.

I have carefully read and considered all the pleadings filed as well as the evidence led in support of the petition. It is common ground that the petitioner and respondent got married on 30th May, 1998 at the ACK Oloirien Church and were duly issued with a marriage certificate thereof. This petition was filed on 29th September, 2009. In view of the above, the couple had been married for over ten (10) years prior to the filing of the petition for divorce. Therefore the prayer for leave to file the petition for divorce before 3 years are over was without legal or factual basis. No such leave was required in the circumstances as over 3 years had already elapsed. Therefore the restriction on petitioning for divorce during the first three years after marriage, vide section 6 of the Matrimonial Causes Act was inapplicable.

The petitioner has sought the dissolution of the marriage on account of cruelty and adultery. Through her unchallenged and uncontroverted evidence, the petitioner has ably proved that indeed the respondent has been cruel to her and committed adultery.

Section 8(1) of the matrimonial Causes Act provides *inter alia*;

“A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent -

a. Has since the celebration of the marriage committed adultery; or

b. Has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition, or

c. Has since the celebration of the marriage treated the petitioner with cruelty, or

d. Is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty or rape, sodomy or bestiality.

In this cause, the petitioner has anchored her petition of grounds of cruelty and adultery. The petitioner's evidence on the ground of cruelty is that the respondent had assaulted her severally. However, the incident which has stuck in mind and which properly broke her back was on 4th December, 2008 on this occasion the respondent seriously assaulted her until she was hospitalized. The doctor who examined her later on 22nd December, 2008, 24 days after assault assessed the degree of injury as harm and the probable weapon used as blunt. She had reported the assault to Kiserian Police Station and issued with a P3 form. In her evidence, the petitioner had stated that the respondent on that occasion had assaulted her with a walking stick. Again the treatment records from Wananchi Jamii Clinic Maternity confirms that the petitioner was indeed assaulted on 4th December, 2008 by her husband with a stick. She had a swelling on the leg as a result. Assault is one way of committing cruelty. A single incident of assault is sufficient evidence of cruelty that will entitle a petitioner to the dissolution of a marriage on that account. Assault or cruelty need not be prolonged or repetitive to justify the dissolution of a marriage on that ground.

On the ground of adultery, again the petitioner has been able to demonstrate that during these coverture the respondent had engaged in acts of debauchery and infidelity with one, **I.T.** As a result of the indiscretion aforesaid, they have sired 2 children. This fact has not been denied. Those children could only have been as a result of respondent's illicit affair with **I.T.** This was while the marriage was still subsisting. On the basis of the foregoing, this ground for divorce too, has been proved. Both the petitioner

and respondent are in agreement that on account of adultery and cruelty aforesaid, the marriage has irretrievably broken down. Interventions by elders to try and save the marriage have not borne any fruits. Neither the petitioner nor the respondent have been accessory to, connived at and or condoned the acts of cruelty and adultery aforesaid. In my view the marriage has reached the dead end. The best that this court can do in the circumstances is to dissolve it. It is so ordered. Accordingly a Decree Nisi shall forthwith issue to be made absolute in accordance with the rules. I make no order as to costs.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS, this 12TH day of JULY 2012.

ASIKE-MAKHANDIA
JUDGE