



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Divorce Cause 2 of 2002

PWK..... PETITIONER

VERSUS

JKG RESPONDENT

J U D G M E N T

On 25th October 2002, **PWK**, hereinafter referred to as “*the Petitioner*”, petitioned this court for the dissolution of her marriage to **JKG**, hereinafter referred to as “*the Respondent*”, custody of the minor child, **MNK**, maintenance and that the properties acquired during their marriage be shared equally between the Petitioner and the Respondent.

Apparently the Petitioner and Respondent were married on 5th August 1978 at Siaya Township. Thereafter they resided and cohabited in the following places.

- Siaya Township – 1978 - 1980
- Kericho & Kitale – 1981
- Murang’a – 1981 – 1987
- Nyeri – 1988 – 2002

The marriage was blessed with the following issues:-

- CWK born on 19th December 1979
- RMK born on 22nd February 1981
- DNK born on 30th June 1983
- MNK born on 5th December 1985

The respondent has since April 2002 however deserted the matrimonial home and now resides in Kerugoya. Further the respondent is according to the Petitioner guilty of Adultery as he is now living adulterously with one, **LN**, the Petitioner’s former house help. The Petitioner’s other ground for Divorce is that the Respondent has been cruel to her, having falsely filed a report with the police that the Petitioner had hatched a plot to kill him. Pursuant to the false report, the Petitioner was subsequently arrested and prosecuted for the offence of conspiracy to kill the respondent. Several witnesses testified. However she was acquitted of the charge at the stage of no case to answer having suffered torture, humiliation, ridicule and embarrassment during the proceedings.

In deserting the matrimonial home as aforesaid, the respondent took off with all the money from the family business, **S Chemists** as well as all the vehicles. The Petitioner and Respondent during marriage had acquired several properties which properties the Respondent is not willing to share with the Petitioner.

Finally, it is the contention of the petitioner that the respondent has since incorporated a parallel business called **S Medical Suppliers** and **S**

Kenchic in Kerugoya which he has funded from the money he took from **S Chemists**.

When the respondent was served with the petition aforesaid, he reacted by filing an answer to the same. Essentially he agreed with the Petitioner's contentions but stated that it was the Petitioner interse who persistently committed unwarranted cruelty to him that eventually drove him out of the matrimonial home. Particulars of such cruelty were enumerated. With regard to adultery the respondent denied the same. In rebuttal however he averred that he informed the Petitioner, at the time she drove him out of the matrimonial home, that he was going to marry another wife under kikuyu customary law to care for him. As for the properties acquired during the subsistence of the marriage, the Respondent denied that the Petitioner made any contribution towards the acquisition of most of them. In sum, the respondent essentially was not opposed to the dissolution of the marriage. However he prayed for visitation rights to their last born child, **MNK** and that costs of maintaining and educating any of their children be shared equally between them. Finally subject to payment of all outstanding debts and other liabilities pertaining thereto all movable and immovable properties jointly acquired between the date of marriage and 1st February 2002 could be shared equally between the Petitioner and the respondent.

Upon registrar's certificate being granted, the cause was then set down for hearing as a defended cause. The hearing then commenced before me on the 26th March 2009. Parties agreed that the divorce cause be heard first. Once the issue of divorce is determined, the question of distribution of matrimonial property would then be addressed subsequently. With that understanding, the respondent opted not to defend the divorce. Accordingly the divorce cause thereafter proceeded as undefended cause.

In support of the petition for divorce, the petitioner reiterated and elaborated on what she had stated in the petition save to add that after their marriage at Siaya District Commissioner's office, they followed it up with a church marriage at St. Mary's Catholic Church Murang'a town. She further testified that the petitioner had deserted her since 2002 and as at the time she was testifying she had been abandoned for a total of 7 years. That in April 2002, she came home only to find that the respondent had packed everything from the house and left. Later he caused the arrest of the Petitioner on the allegation that she had conspired with others to kill him. She was subsequently charged with the offence of conspiracy to effect unlawful purpose contrary to section 395(F) of the Penal Code, tried and acquitted. The respondent also subjected her to cruelty by deserting the matrimonial home with his house help whom he has turned into a housewife and by falsely filing a complaint against her with the police. Since then the marriage has irretrievably broken down according to her. What is left is a mere shell. It was for this reason that she was seeking for divorce. She no longer wished to have custody of any child of the marriage as they all had come of age. She denied that she was in constructive desertion. Her attempts at reconciliation had not borne any fruits. That she was not prosecuting the divorce in collusion with the respondent nor did she condone the respondent's cruelty and or adultery aforesaid.

It is common ground that the Petitioner and Respondent were married on 5th August 1978 and were blessed with 4 children who are all adults. They lived happily ever after until April 2002 when the respondent for no apparent reason deserted the matrimonial home carrying with him everything as well as family motor vehicles. It is the Petitioner's contention that she did not make conditions in the house so difficult as to force the respondent to relocate. In other words she was not in constructive desertion. In my view the fate of this cause will turn on whether the respondent was cruel to the Petitioner as well as whether the respondent is in an adulterous relationship with one, **LN**, a former house help of the petitioner.

As already stated the Petition was uncontested. Accordingly the evidence led by the Petitioner in this regard was not rebutted. It must therefore be taken as true. The Petitioner testified that the respondent moved in with their former house help, **LN**. Indeed they reside at Kerugoya as husband and wife. The respondent in his answer to the petition admits that much. He pleaded thus, he "**..... informed the Petitioner, at the time she drove him out of the matrimonial home, that he was going to marry another wife under kikuyu customary law to care for him.....**" Essentially therefore, the Petitioner is admitting to having married another woman. As long as his marriage to the petitioner had not been dissolved, he had no capacity to contract any other marriage, not even under kikuyu customary law. If he has done so, and there is no denying that he has not, he is definitely living in an adulterous union with **LN**. Accordingly the ground of Adultery in this divorce cause has been proved to my satisfaction. This ground alone is sufficient to dispose off this cause.

Accordingly, I would grant the divorce sought by the Petitioner on ground of adultery. A decree Nisi shall forthwith issue to be made absolute within the statutory period. I make no order as to costs and custody.

I will now invite parties to take a hearing date for the further hearing of this cause on the question of division of properties acquired during the subsistence of the marriage.

Dated and delivered at Nyeri this 7th day of May 2009

M. S. A. MAKHANDIA

JUDGE