

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Divorce Cause 1 of 2003

S N K PETITIONER

VERSUS

DWM RESPONDENT

J U D G M E N T

This Divorce cause was originally filed in the Chief Magistrate's Court at Nyeri as Divorce cause number 5 of 1998. However by an application dated 11th December 1998 the Petitioner sought and was granted leave to transfer the same to this court. The order transferring the cause to this court was made by **Juma J** as he then was on 10th May 2001.

In the Petition presented as aforesaid **SNK** hereinafter referred to as "*the Petitioner*" sought the dissolution of his marriage to **DWM** hereinafter referred to as "*the respondent*" on the grounds of cruelty and desertion. The Petitioner's story is that the two were married on 30th October 1982 at the Registrar's office Nairobi. The two were blessed with two issues namely, **FM** a girl born in 1982 and **MM** also a girl born in 1984. Since the Celebration of the marriage however, it has not been a bed of roses for the Petitioner. The respondent has continuously been guilty of wilful neglect to provide reasonable maintenance to the Petitioner and their two issues aforesaid. In 1991 she locked out the Petitioner from their Buru Buru residence and he was forced to spend a night in the cold. Thereafter the respondent left the matrimonial home aforesaid for a whole week without telling the Petitioner where she had gone to. In 1993 the petitioner left for India and despite having left behind enough money, the respondent refused to pay school fees for one of the issues of the marriage or even buy food for the family. Instead she just squandered the money. The respondent too refused to cook for the family nor talk to the petitioner. Instead she became a habitual drunkard. Finally in 1995 the petitioner was transferred to Nanyuki. However the respondent refused to accompany him. Instead she chose to stay alone and at large.

From the foregoing, it must be clear that those particulars are in support of ground of cruelty in the petition. The petitioner however also seeks dissolution of the marriage on the ground of desertion since the respondent had deserted him for 3 years before he presented this petition for divorce.

As far as the Petitioner is concerned the marriage between him and the respondent has irretrievably broken down and there are no chances of reconciliation. He denied that the petition was presented or prosecuted in collusion with or in connivance with the respondent. Nor was he an accessory to or condoned the matrimonial offences set out in the petition. Accordingly, the petitioner prayed for the dissolution of the marriage, custody of the two issues of the marriage and costs of the petition.

Upon being served, the respondent reacted by filing a memorandum of appearance and an answer to the petition. Her answer was two fold; the petition had been filed in court without jurisdiction and secondly, that the petition had not been signed personally by the petitioner as required by the Matrimonial Causes Act and the rules made thereunder.

On 20th November 1998, the Respondent filed an application seeking to have the petition struck out on the aforesaid grounds. The application came up for hearing on 14th December 1998. By then however, the petitioner had filed an application seeking the transfer of the Divorce cause to the High Court. As already stated the said application was subsequently duly granted dealing a fatal blow to the respondent's answer to the petition aforesaid.

By an application dated 7th February 2007 and filed in court the following day, the petitioner sought and was granted Registrar's certificate in terms that the pleadings were in order, the petition would be defended and will be heard by this court for one day. On the day of the hearing however, neither the respondent nor her lawyer turned up. Being satisfied that the respondent had been served with the hearing notice going by the affidavit of service on record, I directed the Petitioner to prosecute his petition the absence of the respondent and or her lawyer notwithstanding.

In support of the petition, only the petitioner testified. He testified that he was a c[particulars withheld] in the armed forces of this country. He then proceeded to reiterate what he had stated in the petition, only adding that the two issues of the marriage were now adults and he was therefore no longer pursuing their custody. As far as he was concerned their marriage was okay until 1986 when the respondent started being cruel to him. She would nag him by making unnecessary noise from 3 a.m. to 5 a.m. The Petitioner could thus not sleep properly and his health as a result deteriorated. He developed ulcers. Being a pilot he was grounded as a result. In 1993 the petitioner was transferred to Nanyuki. When he asked her to accompany him, she refused. He proceeded to Nanyuki alone but on coming back after a week, he found that the respondent had deserted the matrimonial home. Since then they have been residing apart. They have lived apart for 16 years now. His attempts at reconciliation have met with no success. The marriage has thus irretrievably broken down. He accused the respondent of having sent to him very rude letters some of which she even had the audacity to send to his superiors. In those circumstances,

he does not see how reconciliation is possible.

I think that the fate of this cause can be determined on one ground only; desertion. The law requires that for the ground of desertion to succeed, the desertion should have occurred three years or more before the presentation of the divorce petition. Further the party seeking divorce on such ground should not have precipitated the desertion. That is to say that he should not be the one in constructive desertion. In the circumstances of this case, there is unchallenged and uncontroverted evidence by the Petitioner that the respondent moved out and deserted the matrimonial home in sometimes in 1993. Indeed she deserted the matrimonial home whilst the Petitioner was on duty in Nanyuki upon transfer. Since then it has been 16 years. They have not at any given time resumed cohabitation. This divorce cause was filed in 1998, five years after the respondent had deserted the matrimonial

home. On the evidence on record, it is safe to conclude that the petition for divorce was filed in court 3 years after the respondent's desertion. There is no evidence that the petitioner made the conditions in the matrimonial

home so difficult that the respondent was forced to move out, in which event then the Petitioner would be the one in desertion. Indeed during the hearing of the petition, the respondent described himself as a humble and good person. There is nothing on record to persuade me otherwise. I am therefore satisfied that the petitioner has made out a case for the grant of the prayers sought in the petition. There is no evidence that the petitioner has presented or prosecuted the petition in collusion or in connivance with the respondent. Neither am I able to say that the petitioner had been an accessory to or condoned the respondent's desertion.

That being my view of the matter, a decree Nisi shall forthwith issue to be made absolute within the statutory period. There shall be no order as to costs and custody.

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

M. S. A. MAKHANDIA

JUDGE