



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 108 OF 1994

J.G.K.....PLAINTIFF

VERSUS

G.K.T.....RESPONDENT

J U D G M E N T

The parties herein were married on 2nd July, 1988 at the Holy Family Cathedral, Nairobi under the rites and provisions of the African Marriage and Divorce Act Cap.151 Laws of Kenya. A copy of the Marriage certificate on record confirms this.

As at the time of the said marriage, the petitioner had one daughter namely E.W born on 2nd March, 1986. Out of her marriage with the respondent there are two female children namely E.W2 born on 10th April, 1989 and D.W born on 24th August, 1990/

After the said marriage the couple cohabited at Riruta in Nairobi and moved to Ongata Rongai until September, 1994 when the petitioner left the matrimonial home never to go back.

There is now before me a divorce petition seeking the dissolution of the said marriage, custody of the children of the marriage, maintenance and costs. in the said petition, Jessie Gakenia Kibathi has set out the grounds upon which she seeks the dissolution of the said marriage. They are all related tot he cruelty melted out on her by the respondent and unbecoming conduct which eventually made her desert the matrimonial home amid threats that the respondent would kill her.

The respondent filed an answer to the petition in which he denied all those allegations and sought order for the dismissal of the petition and restitution of conjugal rights.

Both parties gave evidence in support of their respective pleadings. The petitioner repeated more or less what she has set out in her petition and produced medical documents to prove assault on her. She also produced correspondence written to her by the respondent. One such letter was addressed to her Employer, Kenya Commercial Bank Ltd by the respondent.

Pw2 M.W.K is the sister of the petitioner who also gave evidence of the cruelty that the respondent subjected to the petitioner.

The respondent denied that he ever beat the petitioner. He said he was not the cause of her running away and that even as at the time of the hearing of this petition he loved his wife and the children. According to him the petitioners family especially the father has driven a wedge between them. Above all the petitioner condoned everything she said.

I have considered all the evidence adduced before me. I also watched the demeanour of the parties. The petitioner has expressed fear for her life. I could read genuine apprehension of danger. She said she does not love the respondent any more and there is no reconciliation possible. Hers was constructive desertion as she deserted the matrimonial home for fear of being killed.

On the other hand the respondent wrote to the petitioner calling her all sorts of names. I have read that letter produced by the petitioner calling her all sorts of names. I have read that letter produced by the petitioner as an Exhibit. The words used, most of which are unprintable, cannot be said to have come from a man who loves his wife and children. In any case the court cannot compel two unwilling parties to live together as husband and wife.

At the end of it all, I have come to the conclusion that the marriage between these two parties has irreparably broken down and cannot be salvaged. It must therefore be dissolved and it is so ordered.

The children of the marriage are still young. They have lived continuously with the petitioner since September, 1994. Prior to that they must have witnessed the stormy relationship between their parents. In considering matters of custody of the children, their welfare is of paramount consideration. The interests of both parents are secondary. The Petitioner has a stable job as a banker while the respondent says he is a farmer earning about shs 200 per day. He does not pay for the maintenance of these children. He does not clothe them. He does not pay for their school fees. All these responsibilities are shouldered by the petitioner. In my judgment it will be in the interest of the said children if custody is given to their mother the petitioner herein. That shall be so.

The respondent as the father of the said children is entitled to access but he does not even know where the children live. Access cannot be given in a vacuum. As and when he knows where the children live he shall be at liberty to come to court and apply for the relevant orders.

The petitioner does not want any maintenance as this will involve contact.

And so, the end result of these proceedings is that the marriage herein is hereby dissolved forthwith. The petitioner shall have the legal custody of the children of the marriage with leave to the respondent to apply for access. There will be no orders as to maintenance. Each party shall bear own costs. Orders accordingly.

Dated and delivered at Nairobi this 5th day of June, 1998

A. MBOGHOLI MSAGHA

JUDGE