



AA v ZY (Matrimonial Cause E009 of 2022) [2022] KEKC 167 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEKC 167 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
MATRIMONIAL CAUSE E009 OF 2022
IA HUSSEIN, PK
JUNE 29, 2022**

BETWEEN

AA PETITIONER

AND

ZY RESPONDENT

JUDGMENT

1. The Petitioner herein moved this court vide a petition dated April 7, 2022 and filed on the same date. The salient features of the same are that: The Petitioner and the Respondent celebrated their marriage under the provision of Islamic law sometime in the year 2019 within Isiolo County. The said marriage is not blessed with any issues and the two lived and cohabited as man and wife in Bulla Pesa within Isiolo.
2. The Petitioner seeks an order compelling the Respondent to go back to the Matrimonial home and an order compelling the Respondent to respect the Petitioner and ask her to go for an HIV/AIDS test.
3. It is on record that the Petitioner took out a summon to enter an appearance and had it served on to the Respondent alongside the petition and on May 24, 2022 while the Respondent was in attendance she was directed by the Honorable court to file and serve her answer to the petition, witness statements and evidence within 14 days when the matter was called for a pretrial conference, the Respondent did not file an answer to petition as directed.
4. Trial commenced on the 21st of June 2022 with both parties testifying orally. The petitioner gave evidence as PW1. He reiterated the content of his petition and then stressed the following; Confirm the celebration of the marriage and that the Respondent deserted the matrimonial home without his consent and neglected her matrimonial responsibility. The Respondent mentally abused the Petitioner by depriving spousal love despite elders' attempts to reconcile the two and the Respondent's mother has refused any reconciliation and insists on her daughter being given talaq.



5. Because of the aforesaid complaints, the Petitioner is of the view that the marriage has not broken down and needs urgent intervention. Despite the non-filing of an answer to the Petition, she stated her objection to going back to her matrimonial home citing non-support by the Petitioner prayed to the court for dissolution of marriage.
6. I have carefully considered the testimony of the Petitioner. I have scrutinized the alleged grounds raised by the petitioner as contained in his Pleadings. Marriage is often described as one of the basic civil rights of a man/woman, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife. Three elements of marriage are (1) agreement to be married (2) living together as husband and wife, and (3) holding out to the public that they are married. Sharing a common household and duty to live together form part of the ‘Consortium Omnis Vitae’ which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of a marital relationship, as per law, in the matter of inheritance of property, successions, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences that flow out of that relationship.
7. It is the view of this court, that if the husband either deserts a wife or neglects to perform his marital obligations without any proper reason, then the wife can apply for restitution of conjugal rights, and even a husband can apply for restitution of conjugal rights. But the court can refuse to grant an order of restitution of conjugal rights for the following reasons- Cruelty by the husband, On failure by the husband to perform marital obligations, On non-payment of prompt dower by the husband if proven on a required standard.
8. In *Moonshee Buzloor Ruheem v. Shamsoonnisa Begum*, (1866-67) 11 Moo Ind App 551(PC) the court observed that:

“That if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the court might refuse to send her back. It may be too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might if properly proved, afford good grounds for refusing to him the assistance of the court.....”
9. Conjugal Rights are rights that the husband and the wife have, to each other's society, when one of them makes a hindrance in the enjoyment of the companionship rights of the other by ceasing to cohabit with the other party, then the aggrieved party has a right to file a suit for the restitution of his or her conjugal rights. Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage regulated by law, for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into a marriage, therefore, is to enter into a relationship that has public significance as well and parties cannot choose to exit the marriage by a constructive withdrawal whenever one wishes and the same can only be exited through the same door.



10. Accordingly, nothing has been proven to dis-afford the Petitioner with the assistance of the court. Thus, the Petitioner is entitled to a decree of restitution of conjugal rights in his favour, and the Respondent is ordered to rejoin the company of the Petitioner at her matrimonial home.
11. Regarding the issue of compelling the Respondent to undergo an HIV/AIDS test the attention of the court is drawn to Section 13(1) of the [HIV and Aids Prevention and Control Act](#) provides that; “Subject to this Act, no person shall compel another to undergo an HIV test.”
12. In addition, section 14 of the [Act](#) further provides that; “Subject to sub-section (2) no person shall undertake an HIV test in respect of another person except with the informed consent of that other person.”
13. It is evident that section 13 of the [Act](#) prohibits compulsory testing of HIV. The operative word in this section is compelling and according to the Black’s Law Dictionary, the word compel means “to induce, oblige, or coerce someone to do something.” In this case, the Respondent cannot be compelled to undergo HIV testing without her consent.
14. On the Premises, I make the following orders-
 - I. That the Respondent be and is hereby ordered to rejoin the company of the Petitioner at her matrimonial home.
 - II. That in alternative to ordering (I) above the Respondent is to release herself through a *kbul’a* by compensating the Petitioner.
 - III. That the Respondent cannot be compelled to undergo HIV/AIDS test without her informed consent.
 - IV. No, order, as to, cost

Dated and Delivered at Isiolo this 29th day of June 2022.

AJ Ishaq Hussein

Principal Kadhi

Ms. Fatuma -C/A

