



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT NAIROBI MLIMANI COMMERCIAL COURTS**

**MATRIMONIAL CAUSE NO. 30 OF 2015**

**G R.....PETITIONER**

**- VERSUS -**

**I M.....RESPONDENT**

**J U D G E M E N T**

The Petitioner herein moved this court vide a petition dated 2nd March,2015 and file 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 on 7<sup>th</sup> December,2012 Nairobi .

The said marriage was blessed with one(1) issue namely;

**G G - 2 years old.**

After the marriage the two lived and cohabited as man and wife in Juja Road, Nairobi.

The Petitioner seeks for an order compelling the Respondent to go back to the Matrimonial home and custody, care and control of the issue of the marriage named herein above, and a restraining order against Petitioners mother in law from interfering with the said marriage.

It is on record that the Petitioner took out a summon to enter appearance and had it served on to the Respondent alongside the petition. The return of service traced on the file reveals that a process server by name Antony M. Ngotho deponed a R/S on 17<sup>th</sup> March 2015 and filed on the same date, to effect that he had duly served the Respondent who accepted the and signed it.

No entry of appearance and filing of Answer to petition was effected within the requisite period , forcing the matter to proceed by way of undefended cause.

Trial commenced on the 3<sup>rd</sup> June 2015. 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 physically and mentally abused the issue of the marriage and the Petitioner by depriving the minor of paternal love.
- The Respondent mother has refused any reconciliation and insist on her daughter being given talaq.

By reason of the afore said complaints, the Petitioner is of view that the marriage has not broken down and needs urgent intervention.

I have carefully considered the testimony of the Petitioner. I have scrutinized into the allege grounds

raised by the petitioner as contained in his Pleadings.

It could be clearly evinced and gauged from ex-parte evidence of the Petitioner that it is the Respondent who has drifted away from him without reasonable cause and excuse and has failed to perform her marital obligation which she is legally bound to perform.

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. even a husband can apply for restitution of conjugal rights. But the court can refuse to grant order of restitution of conjugal rights for the following reasons:

- Cruelty by husband.
- On the failure by the husband to perform marital obligations.
- On non-payment of prompt dower by the husband.

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 the properly proved, afford good grounds for refusing to him the assistance of the court....."*

I am therefore satisfied that there is no reason to disbelieve the unchallenged, unrebutted and uncontroverted testimony of the Petitioner (husband). He has been deserted by the Respondent (wife) on her own without any lawful reason and she has failed to perform her marital obligation .

Conjugal Rights are rights which the husband and the wife have, to each other's society , when one of them makes a hindrance in the enjoyment of the conjugal 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.

Accordingly, the Petitioner is entitled to a decree of restitution of conjugal rights in his favour and the Respondent is ordered to re-join the company of the Petitioner at her matrimonial home.

In regard to the issue of the marriage the court is pleased to grant the Petitioner the right to visitation and access of the issue of the marriage named herein above.

No order as to cost.

**Dated and Delivered at Nairobi this 17<sup>th</sup> day of June,2015.**

**Hon. A. I. Hussein**

**Kadhi II/RM**