



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Divorce Cause 31 of 2009

V.J.S.....PETITIONER

VERSUS

N.V.J.S.....RESPONDENT

R U L I N G / D I R E C T I O N S

The Petitioner, lodged this Petition on 13th May, 2009 seeking the dissolution of his marriage with the Respondent and a restraining order against harassment, interference or threats to the Petitioner.

He pleaded that on the 30th March, 1995, as a bachelor he lawfully married the Respondent who was then a Spinster. The marriage was at the Registrar's Office in Bombay in the Republic of India.

The Petitioner and Respondent resided and cohabited in Mombasa since the celebration of the marriage. They had no children from the wed-lock. The Petitioner cited the grounds for the petition for dissolution of marriage to be cruelty by the Respondent. The particulars of cruelty given were as follows:-

- *That the Respondent is abusive and has constantly used threats of physical harm against the Petitioner.*
- *That the Respondent has regularly abused the petitioner verbally in the most vulgar manner thus causing the Petitioner to suffer anguish embarrassment and humiliation.*
- *That the Respondent had on several occasions failed to maintain a proper maintenance of the matrimonial home in Kizingo.*
- *That the Respondent is overly suspicious wife and regularly accused the petitioner of being involved in adulterous relationships without any foundation or proof thus exposing him to shame and ridicule before his relatives and friends.*

The Respondent in opposition to the Petition filed an Answer to the Petition on 10th June, 2009. She denied the alleged cruelty and particulars thereof. Instead, she pleaded that it is the petitioner who was guilty of cruelty. She pleaded that:-

1. *That the petitioner knowingly concealed from the Respondent the fact that he had been physically unwell and had difficulty in having sex.*
2. *That on several occasions the petitioner subjected the Respondent and himself to unnecessary medical treatments and fertility tests both at home in Kenya and abroad when he knew or ought to have known that there was nothing wrong with the Respondent thereby causing her anguish and suffering torture to her;*
3. *Rejected the Respondent persistently by discouraging her from touching him.*
4. *Ordered the Petitioner time and again to leave the matrimonial home and go back to her mother in India or get somebody else to marry her or go to a house of destitutes thereby denying the Respondent any love and affection and by his somewhat strange and offensive behavior he caused suffering anxiety and anguish.*
5. *Transferred all his properties and assets into joint names with his brother without consulting the Respondent or informing her and has refused to provide to her any pocket money and or any financial assistance for her upkeep and has restrained her using the insurance medical cover, thereby denying her medical treatment and causing anxiety and financial insecurity and loss of hope for the Respondent to live in peace.*
6. *Keeping in secret custody her passport and repeatedly threatened her that he would report to the Immigration Department and cancel her Dependant's Pass, in any way for self actualization and instead withdrawing workers*

from the matrimonial home thereby subjecting the Respondent into condition of servant hood in exchange for mere supply of simple needs and shelter (accommodation) in the matrimonial home and two meals per day.

- 7. Openly flirting with other women and working making advances in the presence of the Respondent with the intention of teasing and torturing her which adversely affected her health.*
- 8. Telling the relatives and family friends and well-wishers that he the Petitioner, had tolerated and allowed her to cohabit with him in the matrimonial home simply because she usefully assisted and looked after his old parents, sister-in-law Daksha and her children who all lived in the matrimonial home and who needed to be cared and looked after.*

At the hearing the Petitioner testified on oath. However, the Respondent did not wish to offer any evidence. The Advocates produced a Deed of Settlement dated 24th February, 2010 under Part VI Section 26 (1) or (2) and Section 27(1) and (2) of the Matrimonial Causes Act. This court noted paragraph (f) provides that the Respondent would not contest the petition or will not prosecute her petition in Divorce Cause No.[.....]. Alimony was agreed at Kshs. 5,750,000/- which was subject to the terms in the Deed of Settlement.

In contemplation of the Deed of Settlement, the Respondent withdrew her Petition. Upon considering the evidence of the petition and his petition and upon perusing the Answer to the Petition and the Deed of Settlement, I do find that the election of the Respondent not to offer any evidence was deliberate and suggestive of a subtle understanding of convenience to allow the Petition herein.

Upon considering the contents of the Answer to the petition, the court is not comfortable with the parties arrangement. It appears that there is some arrangement but yet it appears that it could be based on coercion or undue influence. The allegations in the Answer and possibly in the withdrawn petition by Respondent refers to acts of servitude and persecution.

My conscience as a Judge does not allow me to indirectly approve of the arrangements herein. If I suspect possible arrangement is based on inequity, oppression and unfairness based on gender discrimination, unequal financial positions and cultural prejudices.

I think that the Respondent ought still to defend her case in an atmosphere of fairness and equity. This should not affect any intended alimony. While it appears that the marriage has broken down yet this court will not allow dissolutions by positive default, if the wrong person will be found to be guilty of cruelty on very wrong premises. The matter ought to be heard on its merits.

I would propose to set aside the proceedings and start de novo. I do order that the proceedings be set aside. The hearing shall take place de novo. The exhibits returned to the petitioner. In the meantime, I do order that the firm of Pandya & Talati Advocates do hold the sum of Kshs. 5,750,000/- which they have in their possession and not to release the same pending further orders of the court. Liberty to apply is granted.

Dated, Signed and Delivered at Mombasa this 14th day of March, 2010.

**M. K. IBRAHIM
J U D G E**

ORDER BY CONSENT

Upon consultation with counsel it is agreed that the proceedings herein start de novo as directed by the court. The parties to procure an order setting aside the withdrawal of Petition in Divorce Cause No. 46 of 2009 and an order of consolidation of the two petitions to be heard together.

IBRAHIM, J

