



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

Divorce Cause 39 of 2009

R.W..... PETITIONER

VERSUS

H.C.B..... RESPONDENT

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JUDGEMENT

Before court is the Petition dated 1<sup>st</sup> July 2009 by which the Petitioner **R.W** seeks the following orders –

- “(a) THAT the marriage between the Petitioner and the Respondent be dissolved and Petitioner be separated from the Respondent forthwith***
- (b) THAT the costs of this cause be borne by the Respondent***
- (c) Any other relief this Honourable Court may deem fit and just to grant”***

The Petition was filed in this court on

2<sup>nd</sup> July 2009. Thereafter Notice to enter appearance was duly filed on the Respondent **H.C.B**, and on 31<sup>st</sup> July 2009 the firm of **Opullu and Company Advocates** did come on record for the Respondent. However despite entering appearance the Respondent did not file any answer to the Petition. On 30<sup>th</sup> June 2009 Hon. Justice Sergon did grant to the Petitioner leave to file his petition notwithstanding the fact that three (3) years had not elapsed since the celebration of his marriage to the Respondent. The matter than proceeded before me by way of Vive Voce evidence on 18<sup>th</sup> March 2010. On that day the Petitioner and his Advocate were in court. The Respondent did not appear either in person or by way of legal counsel. The Petition therefore proceeded as an undefended cause.

In his evidence the Petitioner told the court that he is a German national who resides in Mombasa Kenya where he carries out business in the furniture industry. He states that he and the Respondent met and got married at the Registrar’s office in Mombasa on 9<sup>th</sup> May 2008. He produces the copy of their Marriage Certificate as evidence of this fact **Pexb1**. The couple lived in V but their union was not blessed by any offspring. The Petitioner tells the court that from 18<sup>th</sup> June 2008 to 8<sup>th</sup> July 2008 he traveled to Germany to visit his family and upon his return to Kenya he discovered that the Respondent had been engaged in an adulterous relationship. Four (4) days after his return to the country the Respondent left the matrimonial home. The Petitioner later traced her to Embakasi in Nairobi but she was not willing to return to the matrimonial home. The Petitioner also claims that the Respondent removed and stole from his bank account the sum of Kshs.5.5 million. He then brought this Petition seeking the dissolution of their marriage. The Petitioner relies on the grounds of Adultery and Cruelty in support of his petition for divorce. Both are grounds which are duly recognized by S. 8 of the Matrimonial Causes Act Cap 152 Laws of Kenya, as valid grounds for dissolution of a marriage. The fact of the marriage itself is not in any doubt. It is effectively proved by the

existence of the Marriage Certificate Serial No. [...]**Pexb2**.

In his evidence the Petitioner alleged that the Respondent had engaged in adultery whilst he was away visiting his family in Germany. He claims that upon his return he found men's underwear in his house. The Petitioner has not named the Respondent's alleged partner in adultery. The finding of male underwear in his house is not conclusive proof of the same. The Petitioner also tells the court that his workers informed him that the Respondent would spend the night away from the matrimonial home in his absence. Again the identity of these workers is not revealed to the court and none of them has come to testify as to what they saw, to corroborate the Petitioner's evidence. This therefore amounts to hearsay evidence which cannot be relied upon by this court. Lastly on this allegation, the Petitioner produces in court an e-mail which he claims the Respondent sent to him in which she apologized for her infidelity. There is no evidence adduced to prove that this e-mail did actually originate from the Respondent's e-mail account, much less any proof that the Respondent was actually the author of said e-mail. This again is merely an unproven allegation. Despite having alleged adultery as against the Respondent the Petitioner has not enjoined any person as Co-respondent. I therefore find that this allegation of adultery has not been sufficiently proved. Mere rumours and hearsay will not suffice. This ground fails.

The second ground which the Petitioner relies upon is cruelty. Once again this is a valid ground provided for in Cap 152. The Petitioner alleges that the Respondent's acts of adultery have subjected him to great stress and mental trauma. However as I have already found above this ground of adultery was not in my view sufficiently proven. The Petitioner also claims that the Respondent has been stealing from him. He claims that she siphoned a sum of Kshs.5.5 million out of his account. This is not an amount to sneeze at. If indeed he lost this sum then why did the Petitioner not report the theft to the police so that action may be taken against the Respondent? The Petitioner has not stated when this money was stolen. He has not explained how the Respondent gained access to his account. The Petitioner has not availed any bank document to prove that he ever had this amount of money in his account much less that a sum of Kshs.5.5 million was ever removed from said account. Where was the account held? Which bank and which branch? The Petitioner has omitted to provide any of these relevant details. To merely fling around accusations of theft is not enough. It is trite law that he who alleges must prove. The Petitioner has taken no steps to prove this alleged theft from his account. I therefore find that this ground of cruelty has not been proved and I do dismiss the same.

The final ground upon which the Petitioner grounds his petition for divorce is that of Desertion. This ground is provided for in S. 8(1) of the Matrimonial Causes Act. The Petitioner tells the court that four (4) days after 12<sup>th</sup> July 2008, when he returned from Germany the Respondent left the matrimonial home and has not returned to date. He tells the court that he has met and spoken with the Respondent since then but she is not willing to return to the matrimonial home. In the case of **M vs M Divorce Cause No. 3 of 1993**, Hon. Lady Justice Roselyn Nambuye held that:-

***“Desertion is proved if evidence shows that the spouse left the home without the authority of the husband having made up her mind never to return ...”***

In this case the Petitioner states that the Respondent walked out of the matrimonial home in Mombasa and moved to Embakasi. The parties had not discussed or agreed that she should so leave. The evidence of the Petitioner in this regard has not been controverted at all since the Respondent did not bother to file an answer to the petition. It is obviously impossible to maintain a marriage where one spouse moves over several hundred kilometres away and will not return. The essence of a marriage is companionship and unity. The separation denies the Petitioner this. Not to mention that conjugal relations are impossible in such a situation. The Respondent's action in unilaterally moving away amounts to constructive desertion. On his part the Petitioner tells the court that the marriage has irretrievably broken down and that he too is not willing to take back the Respondent. Attempts at reconciliation have not borne any fruit. It is clear to this court that what remains is a mere shell of a marriage. If the Respondent had any cause to leave the matrimonial home she has not told the court what it is. In view of her abandonment of the matrimonial home and her refusal to return I am

satisfied that this ground of desertion has been sufficiently proven. On this basis I do allow this petition for divorce. Decree nisi to issue to be made absolute within three (3) months of today's date.

**Dated and Delivered at Mombasa this 7<sup>th</sup> day of May 2010.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mrs. Kipsang for Petitioner

**M. ODERO**

**JUDGE**

**7/05/2010**