



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
DIVORCE CAUSE NO 1 OF 2012

R N K.....PETITIONER

VERSUS

J O O.....RESPONDENT

JUDGEMENT

[1] R N K, the Petitioner, has come to court seeking nullification of the marriage between her and J O O, the Respondent. Both married under the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya. The marriage was solemnized at Redeemed Gospel Church at Garissa on 25th November 2006 as per the attached Certificate of Marriage No. [Particulars Withheld].

[2] The Petitioner testified that the two of them had lived together as husband and wife and cohabited prior to solemnizing their marriage and that they had got one issue of marriage namely B B O born on 2/8/2005. After the Church wedding they got another child namely N M O born on 26/6/2008. Both children live with the Petitioner.

[3] The Petitioner testified that they lived Garissa where both were working. She has raised two grounds, namely adultery and cruelty. She has added neglect to cruelty. She testified that problems between the two of them started when she was transferred to Mombasa where she lived with the issues of marriage. The Respondent stopped supporting her and the children, paying school fees and stopped visiting them. He also stopped calling her and whenever she called he would fail to pick the call. She found out that he was living with one M A in Garissa. She said that her efforts to have parents from both sides meet and reconcile them were thwarted by the Respondent who was not cooperative. She testified that when the Respondent went to visit them in Mombasa he became violent towards her and broke her phone; that while she was away on a course the Respondent went to Mombasa and harassed her nephew who had been left taking care of the children and attempted to take the children away.

[4] She has pleaded that she did not connive or condone the adultery and cruelty and that there are irreconcilable differences between them leading to irretrievable breakdown of the marriage. She asks the court to dissolve the marriage, grant custody of the two children to her and costs of the Petition.

[5] The Respondent cross petitioned for dissolution of the marriage between the two. He admits that both lived together as husband and wife before solemnizing their marriage in Church on 25/11/2006. He admitted there are two issues of the marriage. He however denied that he has been cruel to the Petitioner stating that the Petitioner has exaggerated the particulars of cruelty. He also denied committing adultery with known or unknown persons.

[6] He alleges that the Petitioner has deserted the matrimonial home for the last four years and has failed to reconcile with him and return home.

[7] In his testimony he stated that he has been working as a casual at Garissa Provincial General Hospital and this presented him with a challenge because he could not seek a transfer to Mombasa where the Petitioner was transferred. He said that he was earning little money but despite that he used support his family; that he used to visit the family at least once or twice a month but the Petitioner failed to understand and claimed he was misusing the money; that he tried reconciliation without success; that when he visited Mombasa she threw his belongings outside and was hostile towards him; that he found text messages in her phone belonging to a man and found out that she had been seeking help from another man and he confronted her over this. He denied smashing her phone. On cross examination he testified that the Petitioner denied him conjugal rights.

[8] The Respondent is seeking dissolution of the marriage between them; that he be granted children's visitation rights and that each party pays its own costs.

[9] Section 8 (1) of the Matrimonial Causes Act provides the grounds for divorce as:

- a. Adultery
- b. Cruelty
- c. Desertion
- d. Unsound mind
- e. Rape, sodomy or bestiality in cases where the Petitioner is a woman.

[10] The Petitioner has pleaded adultery and cruelty. She is the only witness. She told the court that the Respondent has been cruel to her after she was transferred to Mombasa. The Respondent has denied this but admitted scrolling down the Petitioner's phone and finding texts from a man. The Petitioner did not call her nephew to confirm her evidence that the Respondent smashed her phone. On the issue of adultery too, it is the Petitioner's word against that of the Respondent. However on observing them as they testified, I noted some hostility against each other. Both want this court to dissolve the marriage between them. To my mind this does not amount to collusion between them to have this marriage dissolved.

[11] While I find that the evidence in support of the grounds of adultery and cruelty has been adduced by the two parties to this cause and therefore it is the word of one against the other, it is my finding that on a balance of probability, the Petitioner has proved this case. The two have lived apart for four years and there has been breakdown of communication. The Respondent has testified to having financial challenges lending credence that he has not been able to support the family. Both have attempted reconciliation without success. Although the Respondent seems to suggest that the Petitioner deserted the matrimonial home, this is not true. Evidence shows that she went to work in Mombasa on transfer and according to him he could not follow her there since he worked as a casual and could not seek transfer. To me the two do not seem keen to reconcile and while the sanctity of marriage should be encouraged and upheld, it is not possible to force two grown up people into a relationship they are not interested in. Where the court finds that a marriage has broken down irretrievably, the court has discretion to put the parties out of misery and declare such marriage dissolved.

[12] After due consideration of the evidence before me, I am satisfied on a balance of probabilities that there has been breakdown of communication, reconciliation has failed and the two have lived separately for four years. I therefore find that this marriage has broken down irretrievably and I hereby make the following order:

- i. That the marriage between R N and J O O be and is hereby dissolved. To that end a decree nisi shall issue and shall be made absolute upon application by either party.
- ii. Custody of the issues of the marriage namely B B O and N M O shall remain with the mother, Petitioner.

- iii. The Respondent is granted visitation rights and this shall be implemented in consultation with the Petitioner and in such a way that it does not inconvenience the children or infringe on their rights.
- iv. Maintenance of the children shall remain the responsibility of both parents Petitioner and Respondent and where both cannot agree on this or where one party fails to contribute to the maintenance the other party shall be at liberty to apply to the Children's Court for orders.
- v. Each party shall bear its own costs of this Petition.

I make orders accordingly.

S. N. MUTUKU

JDUGE

Signed, dated and delivered this 4th day of November 2013.