



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 126 OF 2003**

**E.W..... PETITIONER**

**VERSUS**

**A.W.M..... RESPONDENT**

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

On 25th August, 2003 E.W filed this Petition against A.W.M for dissolution of their marriage formally solemnized on 12th March, 1996. Prior to formal solemnization of the said marriage, the Petitioner and the Respondent had cohabited as man and wife under the applicable customary law since 1992 in Gilgil Township, Rift Valley Province.

The Petitioner's marriage to the Respondent was formally conducted at the Office of the Registrar of Marriages, Attorney-General's Chambers, Nairobi under the provisions of Marriage Act (Cap 150). A certificate of marriage number [...] serial number [...] was consequently thereto issued by the presiding Registrar of Marriages. Subsequently, the Petitioner and the Respondent continued cohabitation as man and wife, but never were able to establish a matrimonial home because of their respective careers which entailed constant transfers in the field. The cohabitation and marriage was blessed with one issue namely DWW (born in 1992). The Petitioner, seeks for dissolution of the said marriage to the Respondent on ground of adultery as particularized in paragraph 6 of the said petition. Upon being served with a copy of the petition and Notice to Appear the Respondent duly Entered Appearance together with her Answer to the Petition. In her said Answer to the Petition, the Respondent denied the alleged adultery and prayed for the dismissal of the said Petition and *inter-alia* sought custody of the child of marriage, maintenance, costs of the suit and such other further relief as this court may grant.

In his testimony taken *de bene esse* the Petitioner stated that since formal solemnization of the said marriage to the Respondent they have not cohabited together as a man and wife because between February, 1996 and September, 1998 he was stationed in West Pokot whereafter he proceeded for further studies on International Development in the Republic of Ireland in 1998 to June 1999. Upon return to Kenya, the Petitioner testified that he was once again posted to West Pokot while the Respondent, by reason of her employment, all along resided either at Thika Town or in Nairobi and that subsequently in September, 2000 he proceeded for further studies in the United Kingdom where he is currently working permanently for gain.

The Petitioner further testified that on 19th August, 2000 he travelled from West Pokot and went to the Respondent's house in Pangani Nairobi at about 5.30 a.m. and found a man, in her bed. In his

testimony, the Petitioner stated that he was not able to identify the said man but only saw his clothes hanged on the wall and the seats, and concluded that the Respondent was involved in an adulterous affair with the said man.

Thereafter, the Petitioner testified that he had no option but to commence these present divorce proceedings. In the circumstances, the Petitioner testified that he was compelled to terminate any relationship with the Respondent but denied that he had deserted the Respondent and the child of marriage and further testified that he regularly visits his daughter who in turn visits him in the United Kingdom every Christmas.

The said Petitioner testified that he is prepared and continues to meet all the maintenance and financial needs of the said child of marriage. The said Petitioner finally testified that his marriage to the Respondent has irretrievably broken and cannot be salvaged under any circumstances considering also that the Petitioner and the Respondent have not physically lived together as man and wife since solemnization of their said marriage. The said Petitioner further denied having condoned, colluded or connived the said adultery.

The Respondent, in her testimony, denied that she was ever adulterous. The Respondent however admitted that the Petitioner did visit her residence at Pangani in the very early hours of 19th August, 2000 but she could not let him in because she was worried about her welfare as she had rarely seen the Petitioner since February, 2000. The Respondent testified that by virtue of Petitioner's employment in the field services, he was very irregular at home even after formal solemnization of their marriage in March, 1996 and that while not studying overseas, he was permanently located in West Pokot. In the circumstances, the Respondent testified that she and her husband rarely shared expected marital bliss or consortium. According to the Respondent, the Petitioner was a different man when he returned from Ireland in 1999 and that with effect from February, 2000, the Petitioner terminated all forms of conjugal relation with the Respondent and even ceased paying house rent, and that for all purposes, the Petitioner was leading his own life elsewhere. Notwithstanding the said apparent desertion, the Respondent testified that the Petitioner continued to maintain constant communication with the daughter of marriage, paid for all her essential needs and even annually invited at his cost the said child of marriage to visit him in the United Kingdom every Christmas. The Respondent testified that her marriage to the Petitioner has not irretrievably broken down and that she has made several unsuccessful attempts at reconciliation notwithstanding the aforesaid desertion on the part of the Petitioner, and thus is convinced that their said marriage can be salvaged.

I have carefully considered testimony of the Petitioner and the Respondent. I have further scrutinized and inquired into the alleged ground of divorce as contained in the petition filed herein. I am not satisfied that the Petitioner has proved to the expected standard the said ground of adultery as pleaded in his petition. The alleged adulterer was not identified even by name nor was he made a co-respondent as required in law. I accordingly dismiss the said Petition to the extent of the said unproven ground of divorce. The Petitioner is said by the Respondent to have deserted the Respondent on or around February, 2000 without any provocation or reasonable cause when the said Petitioner terminated all forms of conjugal relationship with the Respondent. The said desertion culminated in the vague and hazy incident of 19th August, 2000. The Petitioner, is according to the testimony of the Respondent, said to have deserted the Respondent for no good reason whatsoever, apart from his desire and wish to lead his own life and career in International Development, reasons whereof the said Petitioner is presently permanently stationed in London, in the United Kingdom. I hold that dictates of ones career cannot under reasonable circumstances justify denial of expected consortium in marriage. I am thus satisfied that the Petitioner has without cause deserted the Respondent for a period of more than three years prior to the presentation of this Petition and also by reason of circumstances described in paragraphs 12, 16 and 17

of the Answer to the Petition. I am satisfied that the Respondent has not in any manner whatsoever contributed to the said desertion, and that the Petitioner thwarted all efforts made at reconciliation by the Respondent.

I am thus satisfied that the major elements that must be present before desertion can be proved that is, the *de facto* separation of spouse, the *animus deserendi*, the absence of consent on the part of the deserted spouse and the absence of any reasonable cause for withdrawing from cohabitation on the part of the deserting spouse have conclusively been established. In pursuance of the provisions of section 12 of the Matrimonial Causes Act (*Cap 152*), I am satisfied that the said marriage of the Petitioner to the Respondent has irretrievably broken down on singular ground of desertion by the Petitioner as particularly more pleaded in the said Answer to the Petition. I am satisfied that there has not been any connivance or condonation on the part of the Respondent and further that no collusion exists between the Petitioner and the Respondent. Lastly, I am satisfied that the Petition has not been presented or prosecuted in collusion with the Respondent and further that there has not been unreasonably delay in presenting or prosecuting the Petition.

I am satisfied on the basis of the evidence adduced that the case for the Respondent has in accordance with the standard set in ***Wangari Mathai -Vs- Mathai (1980) KLR 154*** been proved beyond reasonable doubt. I hereby therefore pronounce a decree of divorce and order that the marriage between the Petitioner and the Respondent be and is hereby dissolved. A *decree nisi* shall henceforth issue, the same to be made absolute upon application.

I grant custody of the only child of marriage to the Respondent with unlimited access to the Petitioner. I order and direct the Petitioner to continue paying the school fees of the said child of marriage. I further order that the said Petitioner do and be paying a monthly maintenance allowance in the sum of Kshs.25,000/= to the Respondent to be paid at any rate on or before the 5th day of every month and accordingly grant leave to the Respondent to execute. Parties are granted liberty to apply. The Petitioner shall meet the costs of this petition suit.

**It is so ordered.**

**DATED, DELIVERED AND SIGNED at Nairobi this 14th day of July, 2005.**

**P.J. KAMAU**

**JUDGE.**



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