

**IN THE SUPREME COURT OF**  
**THE REPUBLIC OF VANUATU**  
**(CIVIL JURISDICTION)**

**MATRIMONIAL CASE NO. 07 OF 2013**

**BETWEEN: CARLOT ALBERT**  
**Petitioner**

**AND: KALTAK LITONG**  
**Respondent**

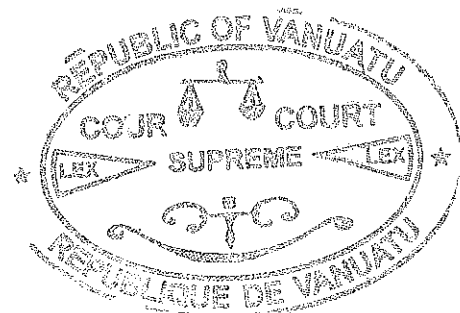
Coram: Justice Mary Sey

Counsel: Less John Napuati for the Petitioner  
Pauline Kalwatman for the Respondent

Date of Decision: 17 December 2014

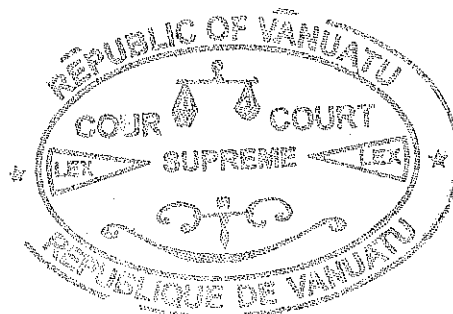
**JUDGMENT**

1. The Petitioner seeks a decree of dissolution of the marriage celebrated between him and the Respondent on the ground of desertion.
2. The Amended Petition which was filed on 26 November 2013 shows that the parties were legally married on 19th July 1991 at Erakor Presbyterian Church of Vanuatu. They co-habited together at Erakor village after the marriage. They have 3 biological children, namely, David (aged 30), Jessica (aged 24) and Matthew (aged 22). The parties also have 2 adopted children.
3. On 1 August 1991, the Petitioner was offered a job at the Pacific Islands Forum Fisheries Agency in the Solomon Islands. Consequently, the

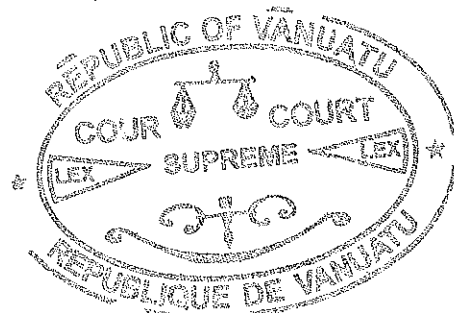


Petitioner and the Respondent left for the Solomon Islands with their two children.

4. The Petitioner alleges that sometime in the month of June 2000, the Respondent and the children left Solomon Islands due to the ethnic tension between the people of Malaita and Guadalcanal but the Respondent did not return after conditions returned to normal.
5. The Petitioner further alleges that he left the Solomon Islands in 2004 and took up employment in Port Moresby, PNG. He then went to the Federated States of Micronesia where he says he has moved on with his life with another woman and he now wants to divorce the Respondent. The Petitioner further alleges that during the course of their relationship they built a house and purchased four vehicles and that he has agreed that the Respondent should manage the vehicles in order to maintain the children. Further, that the house be kept in trust by the Respondent for their youngest son Matthew.
6. The Petitioner further alleges that after the Respondent left Solomon Islands for Vanuatu in 2000 they have been living separately and the Petitioner has withdrawn and abandoned the marital relationship. He states that he does return to Vanuatu occasionally only to visit the children but with no intention of continuing the relationship with the Respondent.
7. For her part, the Respondent vigorously contests the claim of desertion. She submits that during the tension in the Solomon Islands it was the Petitioner's agency that facilitated her repatriation back to Vanuatu with her two children.



8. In her evidence, the Respondent said that she and the Petitioner had both agreed on their long distance relationship which has been in place since 2000. She said that she and the Petitioner had obtained a loan from the VNPF to purchase their matrimonial home and both of them had arranged that she remains in Vanuatu with the children and do business to repay the loan and take care of the children while the Petitioner travelled to the Federated State of Micronesia to work there.
  
9. The Respondent further submits that in the year 2008, the Petitioner travelled to Vanuatu and then they both travelled to Fiji and Australia for about 2 weeks for leisure purposes. She said that at no time has she deserted the Petitioner and that he returned to the matrimonial home once or twice each year for holidays.
  
10. She also denies the Petitioner's allegation that their relationship has been strained. She said she has remained at the matrimonial home since she returned to Vanuatu with the children in 2000 and at no time did she refuse to allow the Petitioner to come home. The Respondent said that around March 2011, the Petitioner returned to Port Vila specifically to renew his passport and they both did all the required documentation. She said that it was in July 2011 that she received the Petition for divorce and she clearly could not understand the basis why it had been filed as she had never deserted the Petitioner.
  
11. During cross examination, the Respondent was asked why she did not want the divorce and she responded that anytime the Petitioner came home in 2011 they slept together as husband and wife and had sex. She denied counsel's allegation that she was telling lies and she went on to say that she was the one who took him to the airport and saw him off. When it was put to her that her husband has already moved on, the Respondent said that the



Petitioner can be with the other lady but that she does not want a divorce because they were married in church for life.

12. In her oral submission, counsel for the Respondent submitted that the marriage had not broken down irretrievably and that the Respondent is not at fault to warrant the Petitioner to be granted a divorce.

### Discussion

13. The Petitioner contends that the petition has been brought on the ground of desertion by the Respondent. He avers in paragraph 7 of his sworn statement dated the 25th day of January 2013, that he tried persuading the Petitioner to stay with him and the children but "she made up her mind to leave so she deserted me".

Also, in paragraph 12 of the same sworn statement, the Petitioner deposed as follows:

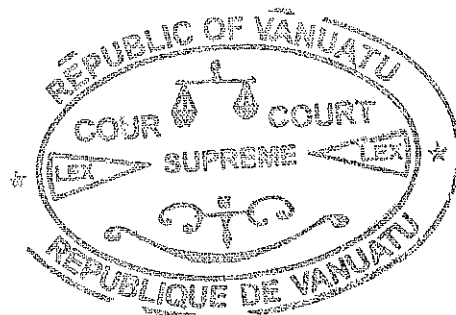
*"Finally, the respondent has deserted me for over 10 years now so I seek the court's indulgence to grant the orders sought in this application."*

14. **Matrimonial Causes Act Cap. 192 section 6 (1)** provides:

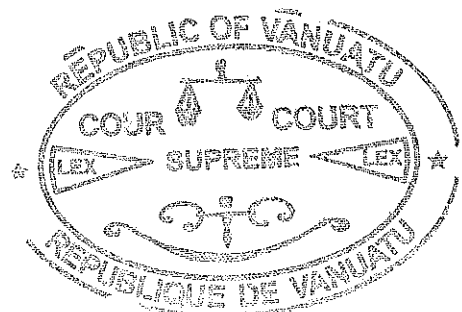
*"No petition for divorce shall be presented to the court unless at the date of the presentation of the petition 2 years have passed since the date of the marriage....."*

**Section 5.** *"Subject to the provisions of section 6, a petition for divorce may be presented to the court either by the husband or the wife -*

- (a) on the ground that the respondent -  
(i).....(ii).....  
(iii) has deserted the Petitioner without just cause for a period of at least 3 years immediately preceding the presentation of the petition; or  
(iv)....."



15. To my mind, it is indisputably clear that the section implies that the petition may be presented on the ground that the "**Respondent has deserted the Petitioner .....**" and not otherwise.
16. It is noteworthy, however, that in paragraph 11 of the Amended Petition, the Petitioner claims constructive and actual desertion on his part so as to divorce the Respondent. (Underlining mine).
17. Regrettably, such ground of "constructive and actual desertion on the part of the Petitioner so as to divorce the Respondent" has not been catered for in the Matrimonial Causes Act Cap. 192 and nowhere in the said Act has provisions been made for this ground. Rather, it is clear that what the Petitioner is required to prove under the Act is that the Respondent has deserted the Petitioner without just cause for a period of at least 3 years immediately preceding the presentation of the petition.
18. The Petitioner places reliance on an observation made by His Lordship Spear J. in this matter on 28 February 2012, when he said: "*whether or not what occurred was a desertion is now probably of academic interest only. The reality is that the parties have been apart now for approximately 12 years, and they live in completely different countries. What is left is a marriage by name only.*"
19. This may well be the case but the Petitioner is still required to prove desertion by the Respondent pursuant to **section 5 (a) (iii) of the Matrimonial Causes Act** in order to succeed in his claim.
20. It is trite that he who alleges must prove. Judging from the affidavit evidence as well as the oral evidence adduced by the parties, I find that the Petitioner has failed to prove the ground of desertion by the Respondent as alleged.

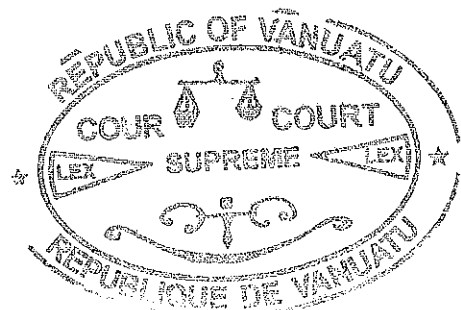


21. The Petitioner's counsel has referred me to the Supreme Court of Papua New Guinea case of **Kiruhia v Kiruhia** (1992) PNGLR 30 (22 November 1991) where the Court held the view that *"It would be most unfair to compel the marriage between the parties to continue when, in fact, they would continue to live apart. It will only be an empty shell and is no use enforcing it."*
22. It is counsel's submission that the above case confirms the Petitioner's position and that this Court should exercise its inherent jurisdiction to grant the petition.
23. I have read and carefully considered the case of **Kiruhia v Kiruhia** but suffice it to say that I find it distinguishable from the present case in that the ground alleged therein was the ground of separation under s. 17 of Matrimonial causes Act Ch. 282. The section reads:

*"Subject to this Division, a petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be based on one or more of the following grounds:*

*that the parties to the marriage have been separated and afterwards have lived separately and apart for a continuous period of not less than 5 years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."*

24. This present petition specifically alleges the ground of desertion pursuant to **section 5 (a) (iii) of the Matrimonial Causes Act Cap. 192**. As I mentioned earlier on in this judgment, I find from the totality of the evidence adduced before this Court that the Petitioner has failed to make out any of



the allegations of desertion as couched in the Amended Petition. His claim is therefore dismissed.

25. In the circumstances, **Orders** are made accordingly as follows:

1. The Amended Petition in Matrimonial Case No. 07 of 2013 is hereby dismissed.
2. The Respondent is entitled to costs against the Petitioner on the standard basis. Such costs shall be taxed failing agreement.

**DATED at Port Vila, this 17th day of December, 2014.**

**BY THE COURT**



**M.M. SEY**  
Judge

