



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 8 OF 2018**

SN.....APPELLANT

**-VERSUS-**

GM.....RESPONDENT

*(An Appeal from the judgment and decree of Hon. E.A. Nyaloti (Mrs.) Chief Magistrate in Nairobi Milimani Commercial Court Divorce Cause No. 390 of 2014)*

**JUDGMENT**

1. The appellant SN. and the respondent GM. begun to live together as husband and wife in 1995. The marriage was solemnized on 5<sup>th</sup> December 2007 at Karuri in Kiambu under the **African Christian Marriage Divorce Act (Cap. 151 – now repealed)**. They lived together in Mombasa and at Kawangware. The marriage was blessed with a son (born on 10<sup>th</sup> September 1997) and a daughter (born on 9<sup>th</sup> August 2007). On 10<sup>th</sup> September 2014 the appellant filed a divorce petition at the Chief Magistrate’s Court at Milimani. He sought the dissolution of the marriage on the grounds of desertion and cruelty. On 6<sup>th</sup> October 2014 the respondent filed answer to the petition and also cross-petitioned for the dissolution of the marriage. She denied the allegations of cruelty. Her cross-petition was grounded on cruelty and adultery. She sought divorce, custody of the children, alimony and maintenance at Kshs.50,000/= from the date of final decree, and she be granted their matrimonial home in Mombasa.
2. The petition and cross-petition were heard by the learned Chief Magistrate (Hon. E.A Nyaloti) who on 19<sup>th</sup> December 2017 delivered a judgment. She found that the marriage had irretrievably broken down and ordered its dissolution. An order was made for the joint custody of the children; that the appellant to pay school fees for the children and maintenance for the respondent; and she found that the respondent was entitled to 50% of the value of the Bamburi house.
3. It should be pointed out that, while the cause above was proceeding the respondent filed a motion seeking that the appellant pays school fees and maintenance for the children, pays her maintenance of Kshs.50,000/= per month and she be allowed to stay in their matrimonial home at Kawangware. A ruling was delivered on 13<sup>th</sup> February 2015 by the learned Senior Principal Magistrate (Hon. Teresia Ngugi) granting the prayers. The appellant felt aggrieved and appealed in **Civil Appeal No. 20 of 2015** at Family Division, High Court in Nairobi. A judgment was delivered on 9<sup>th</sup> October 2015. The appellant was ordered to continue paying fees, school expenses and medical care for the children; to pay Kshs.20,000/= monthly towards the respondent’s maintenance for food, shopping and utilities for the home and the children pending the hearing and determination of the cause; and for the respondent not to be evicted from the matrimonial home until the hearing and determination of the cause.
4. The appellant was aggrieved by part of the judgment delivered on 19<sup>th</sup> December 2017 in the Divorce Cause. He was dissatisfied with the order that he pays for the maintenance of the respondent, and the order that she was entitled to 50% of the Bamburi house. He asked that the two orders be set aside. His case was that the two orders were as a result of misdirection on the part of the trial court on the law and facts; that there was no proof that the respondent had contributed to the acquisition and development of the house; and that the court had not considered the pleadings and the evidence.
5. The appellant was represented by M/s Njagi and the respondent was represented by Mr. Wesonga. Each filed written submissions on the appeal, and relied on authorities. I have considered them.
6. The lower court had asked that the respondent be maintained to the tune of Kshs.50,000/= per month until the cause was heard and determined. The High Court reduced the amount to Kshs20,000/= per month. The Kshs.20,000/= was to cover the respondent’s maintenance –

**“for food, shopping and utilities of the home and the children.”**

So, that was not really money solely meant for her personal maintenance. It was for her and the children. The order was to subsist until the hearing of the cause in which she was to prove that, upon divorce she was entitled to maintenance (alimony) from the appellant.

7. In his evidence in the trial court, the appellant stated –

**“I am willing to provide for the children and pay maintenance for Grace.”**

It was on basis of that evidence that he was ordered to pay maintenance for the respondent.

8. Quite unfortunately, however, the trial court did not determine how much money in maintenance the appellant was going to pay. The order just read:-

**“The petitioner to pay school fees and maintenance for the respondent.”**

It was not indicated whether it was a one-off payment of maintenance or a monthly payment. The Kshs.20,000/= per month payment ended when the judgment was delivered.

9. There was no interrogation of the needs of the respondent, and how much maintenance the appellant was able to pay monthly. The cross-petition asked for Kshs.50,000/= monthly for her maintenance upon divorce. The trial court did not order the payment of the sum. There was no evidence led to show she was entitled to that sum. The High Court found that sum to be astronomical, and reduced it to Kshs.20,000/= monthly. Even then, the Kshs. 20,000/= was to cater for her and the two children. The son is now an adult and would not be entitled to maintenance. The daughter is going to be an adult in one year's time. If what the High Court ordered was indicative, and given the facts of the case, I consider that the maintenance of the two should attract much less than Kshs.20,000/= per month. In seeking to determine the quantum of maintenance, I consider that court orders are not made in vain. An order for maintenance that has no quantum is an order that cannot be executed. It is not an effective remedy.

10. I consider that the appellant and the respondent are now divorced. They no longer have a relationship. The court found their marriage had irretrievably broken down. Under **Article 45(3)** of the Constitution, parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The court has found that the respondent be maintained, but there was no finding that the respondent is not capable of being employed or doing business to support herself (**W.M.M. –v- B.M.L. [2012]eKLR**).

11. In **W.N. –v- P.B. [2013]eKLR**, the High Court observed as follows:-

**“The concept of alimony originated in England. A wife was deemed to be totally reliant on her husband and would not own property or earn money to support herself. As such upon divorce alimony would provide an economic means to enable the divorced wife to support herself and prevent her from being a public charge.”**

That English era, I observe, is long gone. Both in England and in Kenya, men and women have an equal opportunity to go to school, work, do business and own property. There has been massive social, economic and political transformation over the last 50 years, especially, that it is now possible for either party to seek alimony after the dissolution of the marriage or, better still, to make the issue of alimony to be irrelevant. Indeed, **section 77 (1)(d)** of the **Marriage Act, 2014** recognizes that either spouse can, upon the dissolution of the marriage, seek to be maintained by the other.

12. Considering all the facts of the case, including the responsibility of this court to reconsider all the evidence and draw own conclusion (**Selle –v- Associated Boat Company Limited [1986]EA 123**), I set aside the trial's court order for the payment of maintenance and in its place there shall be an order that appellant pays a one-off sum of Kshs.500,000/= in alimony to the respondent, and that the payment be within 6 months from the date of this judgment.

13. The next issue was in regard to the house. The trial court stated as follows:-

**“10. On the issue of the matrimonial property, the respondent proved that the house in Bamburi Mombasa was constructed during the subsistence of the marriage. The respondent contributed the construction works. The respondent is therefore entitled to 50% of the value of the house in Bamburi.”**

There was no dispute that the house was constructed during the marriage. The trial court found that the appellant provided the funds and the respondent supervised the construction. There was no finding that the respondent had any specialized knowledge in construction. There was no evidence how much the house cost to put up. It should be considered that under **section 2** of the **Matrimonial Property Act, 2013**, contribution may be monetary or non-monetary and includes domestic work, child care, companionship, management or family business or property and farm work. The couple was married for 22 years and got two children. The appellant always provided for the family and educated the children. He was the source of financial assistance in the family. The trial court did not consider all these relevant facts. Had it done, I find, it would not have found that the respondent's contribution to the acquisition and development of Bamburi house was 50%. Doing the best that I can, I determine that her contribution was 35%, and the appellant's contribution was 65%. I set aside the holding that the respondent was entitled to 50% of the value of the house.

14. Once again, the remedy in regard to matrimonial property was not such that it was going to be executed. It was not effective remedy.

Accordingly, I order the Bamburi house be valued by a valuer to be agreed upon by the counsel within 30 days. Upon the valuation, the appellant will have 6 months to pay the respondent 35% of the value. If that is not done, the house shall be sold, by public auction or private arrangement, and the 35% of the proceeds given to the respondent.

15. In those limited terms, I allow the appeal.

16. Given the facts of the cause, I ask each side to pay own costs.

**DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30<sup>TH</sup> day of APRIL 2020**

**A.O. MUCHELULE**

**JUDGE**