



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 26 OF 2018

BETWEEN

HKM.....APPELLANT

AND

MNK.....RESPONDENT

(Being an Appeal from the Ruling and Order in Thika Divorce

CauseNo. 38 of 2017 by Hon. G. Omodho (SRM) on 24th January, 2018)

JUDGMENT

Background

1. By a Petition dated 05th September, 2017 filed on 05th September, 2017, the Respondent petitioned for an order of dissolution of the marriage between her and the Appellant and distribution of matrimonial property.
2. Simultaneously with the cause, the Respondent filed a notice of motion seeking maintenance at Kshs. 100,000/- per month pending the hearing and determination of the petition on the ground that the Appellant had evicted her and the issues of the marriage from their matrimonial home.
3. The application was vehemently opposed by the Appellant who denied evicting the Respondent and the adult issues of the marriage from their matrimonial home and averred that he did not have the means to pay maintenance.
4. After hearing both parties, the court in a ruling dated 24th January, 2018, the court ordered Appellant to pay the Respondent maintenance in the sum of Kshs. 60,000/- per month pending the hearing and determination of the cause.

The Appeal

5. The Appellant being dissatisfied with the lower court's ruling and order preferred this appeal and on 11th April, 2018 filed the Memorandum of Appeal dated 15th February, 2018 which he raises four (4) grounds that:

- 1) **The Learned Magistrate misdirected herself in finding that the Respondent is a person in need of maintenance when she is a retired teacher and on pension**
- 2) **The Learned Magistrate failed to find that the Respondent is the one living in the matrimonial home**
- 3) **The Learned Magistrate failed to find that the Appellant is also a pensioner without means to pay Kshs. 60,000/-**
- 4) **The Learned Magistrate misdirected herself in awarding maintenance where no affidavit of means was filed**

SUBMISSIONS BY THE PARTIES

6. The appeal was argued by way of written submission duly filed by both parties.

Appellant's submissions

7. Appellant submitted that both him and the Respondent are retired and on pension and that the Respondent is able, healthy and can work to support herself. Appellant placed reliance on the following authorities

a) P K M v R P M [2017] eKLR which cited W.M.M vs. B.M.L [2012] with approval where Kariuki, J. stated that:

“Under the Constitution, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the respondent to support herself. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

8. Concerning the Respondent's failure to file an affidavit of means and the court's failure to require the filing of affidavit of means by the parties, Appellant relied on P K M v R P M (supra) where the court held that

The provisions in Rule 44 of the Matrimonial Causes Rules requiring spouses to file affidavits setting out full particulars of property and income (generally referred to as affidavit of means) where alimony or maintenance is sought must be seen in this light. They are to assist the court to make an informed decision. Indeed under Rule 48 of those rules for example, the court is empowered to undertake “investigation” and has power to order discovery and production of any document or call for further affidavits.

Respondent's submissions

9. Respondent submitted that the Respondent who was Appellant's spouse did not have a permanent residence and was in need of medical care that cannot be catered for by her merger pension and that under the provisions of Section 77 (1) (c) of the Marriage Act, she was entitled to payment of maintenance during the course of the matrimonial proceedings so that she is not left destitute for the duration of the suit. In support of this argument, reliance was placed on N B R v J O [2014] eKLR and W.M.M V B.M.L(supra), where the court in the latter case held:

“In considering a claim for maintenance, regard must be made to the provisions of Article 45 (3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage”. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

ANALYSIS AND DETERMINATION

10. I have carefully perused the record before me and considered the grounds of appeal and submissions on behalf of both parties.

11. I am mindful of my duty as an appellate court which is grounded in Section 78 of the Civil Procedure Act to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own conclusion. (See Selle v Associated Motor Boat Co [1968] EA 123).

12. In addition, as the appellate court, this court can only interfere with the lower court's finding if the same is founded on wrong principles of fact and/or law (See Nkuba – Vs – Nyamiro [1983] KLR 403).

13. In support of the application for maintenance, the Respondent deposed as follows:

Paragraph 12: That I am now short of cash andI have no social and or financial support from any quarter and I seek court's intervention for maintenance from the Respondent

Paragraph 15: That in the deprived life I now find myself in, I seek this court to grant me maintenance from the Respondent as he is a businessman in town making a tidy sum of money from our joint investments.....

14. The evidence on record disclosed that the Appellant and Respondent are both retirees on pension and Respondent's averment that she has no financial support from any quarter was therefore untruthful. The evidence also disclosed that the couple's children are all adults and that the parties herein have no other responsibility other than themselves.

15. In the impugned ruling, the learned trial magistrate summarized the application in the following words:

In the present case, the Applicant says she has been thrown out of the matrimonial home and denied access to the family resources that she contributed to acquisition of. She has now put up with the daughter which is not only demeaning but also shameful. The Applicant has sought upkeep during the pendency of the divorce proceedings. The Respondent does not demonstrate why these should not be paid save that he denied throwing the Applicant out of the matrimonial home and cannot afford to pay.

16. With due respect, it is trite that any court making an order as to whether a spouse should pay maintenance and if so, how much, must of necessity consider the financial capacity of the parties before making the order. (See **R P M v P K M (Supra)**). Clearly, there was no evidence concerning the financial capacity of the parties before the court ordered the Appellant to pay the Respondent a monthly maintenance sum of Kshs. 60,000/-.

17. The Respondent's averments that the Appellant is a businessman in town making a tidy sum of money from their joint investments was without proof and was of no probative value and my finding is that the trial court erred in making an order that was based on no evidence. In this case, the Respondent failed to demonstrate that she was deserving of spousal support by not presenting before the court the financial circumstances of both parties upon which the court would have considered in granting the relief by way of maintenance and the quantum thereof.

18. In addition, the trial court failed to have a substantial inquisitorial element when it failed to exercise its power to call or compel the parties to disclose their financial affairs and thus based its order on pure speculation.

19. The parties' averments concerning occupation of the matrimonial home was one party's case against the other and the trial court's finding that the Appellant had thrown the Respondent out of the matrimonial home was against the weight of evidence.

20. Further to the foregoing, the trial court failed to appreciate the provisions of Article 45(3) of the Constitution that parties to a marriage are entitled to equal rights at the time of the marriage; during marriage and at the dissolution of marriage and thus failed to treat the parties herein as equals with neither having a greater or lesser obligation than the other in relation to maintenance.

21. As much as the Respondent is still the Petitioner's wife, the age-old tradition in which men were deemed to be the sole breadwinners and to carry the burden of maintaining their spouses does not hold true anymore.

22. In the absence of evidence that the Appellant had the means to support the Respondent, the Respondent's view that all her financial needs can only be met by the Appellant is not valid for the reason that the Respondent has a duty to support and maintain herself and there is no greater obligation on the part of the Appellant to support the Respondent than there is on the part of the Respondent to support herself.

DISPOSITION

23. In the end and for the reasons given on the assessment above, the appeal is allowed. The order dated 24th January, 2018 directing the Appellant to pay the Respondent a monthly maintenance of Kshs. 60,000/- is set aside in its entirety.

24. The Respondent shall bear the costs of this appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 25TH DAY OF OCTOBER, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

For the Appellant -N/A

For the Respondent -Ms. Etole