



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

DIVORCE CAUSE NO. 1 OF 1995

K O A.....PETITIONER

VERSUS

M S MRESPONDENT

RULING

1. By an Application dated 22.3.17, S M S (**the Applicant**) seeks to be enjoined in the proceedings herein. She also seeks that the sum of Kshs. 1,200,000/= held in the parties lawyers' joint account together with interest accruing therefrom be applied/used to pay for her education.

2. The background of this case is that the Court on 16.11.98 made an order that **M S M, the Respondent do deposit** the sum of Kshs. 1,200,000/= into a joint account of his advocates and **the advocates of K O A, the Petitioner**. The accrued interest was to be drawn monthly for the maintenance of the Petitioner and the parties' children following the dissolution of the marriage. The monthly maintenance sum was set at Kshs. 6,000/=. Pursuant to an application dated 11.10.16, the Court on 17.3.17 ordered that the said sum be released to the Respondent.

3. The Applicant, a daughter of the parties herein is aggrieved by the decision. She avers in her affidavit sworn on 22.3.17 that she was preparing to enrol at [Particulars withheld] College, London for a post graduate course in cardiovascular, cell and molecular biophysics and needed the funds for her education. She further stated that she graduated from [Particulars withheld] University and University College for her Masters. Her studies were wholly funded by her mother the Petitioner and her grandfather. The only amount contributed by the Respondent was Kshs. 6,000/= which was not enough. Her sister S M S is a student at Murdoch University, Australia studying business law. She claims that the release of the sum of Kshs. 1,200,000/= would have a devastating effect on their education. The Respondent lives happily in the United Kingdom as a refugee while the Petitioner struggles to educate the children on her own.

4. The Respondent in his Replying Affidavit sworn on 30.4.17 avers that there is no evidence of the Applicant's admission for post graduate studies. What is exhibited by the Applicant is neither a fee structure nor an admission letter but return mail showing a fee structure. The Applicant has done undergraduate and post graduate studies meaning that she has enough resources to pursue her educational endeavours. The Applicant has not explained the devastating effect that will be caused to her education should the sum of Kshs. 1,200,000/= be released to the Respondent. The Applicant's choice for further studies does not bind a parent as part of parental responsibilities. He fulfilled his obligation which was to deposit Kshs. 1,200,000/= the interest from which was to be applied for maintenance. Neither the Applicant nor the Petitioner has ever approached the Court to seek further maintenance orders or that the said sum be used for her education and the Applicant has made this Application just because the Respondent applied to have the money released to him. The Application is therefore an afterthought and an abuse of the Court process. He prayed that the Application be dismissed.

5. I have given due consideration to the Application and the rival submissions. The Applicant is a child of the Respondent and the Petitioner. Upon the dissolution of the parties marriage, the sum of Kshs. 1,200,000/= was deposited by the Respondent so that the interest accrued therefrom would be applied towards the maintenance of the Petitioner and the parties' 3 children who include the Applicant.

6. The Law relating to addition of parties to proceedings is stipulated in Order 1 Rule 10 of the Civil Procedure Rules. Sub-rule 2 provides:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

7. The Court of Appeal in J M K v M W M & another [2015] eKLR had this to concerning the above provision:

Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

8. The Applicant is a child of the now dissolved marriage of the Petitioner and the Respondent. The order of 16.11.98 directly affected her as it related to her maintenance together with that of her mother and siblings. She is therefore a necessary person for the complete adjudication of the matter herein. Further, her right to a fair hearing is guaranteed by the Constitution of Kenya, 2010 at the Article 50(1) which provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

9. Guided by the foregoing, I do find the Applicant's prayer for joinder is merited.

10. I now turn to the prayer for release of the sum of Kshs. 1,200,000/= together with interest accruing therefrom for her education. In order to determine this issue, it is necessary to look at the order for the deposit of the said sum. The Court of Appeal in Civil Appeal No. 126 of 1997 in its Judgment of 25.7.97 reduced monthly maintenance of the Petitioner and the 3 children from Kshs. 25,000/= to Kshs. 6,000/=. On 16.11.98, Hayanga, J. ruled as follows:

My view is that the order of inhibition by Hon. Ang'awa, J made on 14-4-97 against Plot No. 276/Sec.XXI/MI inhibiting registering of any dealings with the land until further orders is hereby revoked, but before any such revocation and in its stead the Respondent shall deposit an amount of KShs. 1,200,000/= in a deposit account in the joint names of both his advocate and the advocate of the Petitioner forthwith. That the interest accruing from this amount deposited be drawn monthly for the maintenance of the Petitioner and the children. That parties to deposit the said amount either with Barclays Bank of (sic) E. A Building Society.

11. The foregoing orders required the Respondent to deposit the said amount in an account in the joint names of the parties' advocates. The interest accruing therefrom was to be drawn monthly for the maintenance of the Petitioner and her children. I note from the order that the sum of Kshs. 1,200,000/= was never intended for the maintenance of the Petitioner and the children. The record shows that the said sum was deposited as directed.

12. The Applicant avers that she was preparing to enrol at [Particulars withheld] College, London for a post graduate course in cardiovascular, cell and molecular biophysics. She exhibited what she referred to as an admission letter. However a close look at the exhibit reveals that it is an email addressed to her by one Helen Rudkin the PA to Director and Secretary to Randall Division of Cell and Molecular Biophysics, Faculty of Life Sciences and Medicine at [Particulars with College London. The email appears to be an answer to the Applicant's query on the cost of self-funding. It cannot be said to be an admission letter as claimed by the Applicant.

13. The record contains a copy of the Applicant's birth certificate which shows that she was born on 29.5.1992. This means that when she filed the Application on 22.3.17 she was almost 25 years old and is now 26 years old. This means that the Applicant is no longer a child within the meaning of Section 2 of the Children Act which provides:

“child” means any human being under the age of eighteen years;

14. What the Applicant in effect seeks in this Application is extension of the Respondent's parental responsibility beyond the age of 18 years. Parliament recognised that circumstances do exist that necessitate the extension of parental responsibility beyond a child's 18th birthday and came up with provisions to cater for the same. Section 28 of the Act provides:

1. Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made:

Provided that the order may be applied for after the child's eighteenth birthday.

2. An application under this section may be made by—

- a. the parent or relative of a child;**
- b. any person who has parental responsibility for the child;**
- c. the Director;**
- d. the child.**

15. An order for extension of parental responsibility beyond the age of 18 years may be made by the Court of its own motion or upon

application by any of the persons listed in Section 28(2) of the Act. The order is discretionary and it may be made upon the Court being satisfied that special circumstances exist to warrant the order.

16. Proviso (b) to Section 91 of the Act also allows a person who has attained the age of 18 years to apply for maintenance and lists the circumstances under which such application may be made as follows:

(b) a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for a maintenance order to be made in his favour in the following circumstances—

(i) The person is or will be involved in education and training which will extend beyond the person's eighteenth birthday; or

(ii) the person is disabled and requires specialised care which will extend beyond the person's eighteenth birthday; or

(iii) the person is suffering from an illness or ailment and will require medical care which will extend beyond the person's eighteenth birthday; or

(v) other special circumstances exist which would warrant the making of the order.

17. An application under the foregoing provision may however only be made with the leave of the Court. In the instant case, the Applicant has not sought or obtained the leave of the Court as required by law.

18. Education that extends beyond the age of 18 years is listed as one of the circumstances under which an application for maintenance beyond the age of 18 years may be made. From her exhibits, the Applicant holds a Bachelor of Science degree in Medical Physiology from the University of [Particulars withheld] and a Master of Research in Brain Sciences from University College London. As stated earlier, there is no evidence that the Applicant has secured admission at [Particulars withheld] College to pursue any studies. The email is a response to her email (which was not exhibited) setting out the cost of self-funding. The email does not even refer to the program the fee structure is in respect of. The Applicant states that the release of the funds to the Respondent will have a devastating effect on her education. She has however not indicated in what way the funds not being made available to her will have a devastating effect on her education. The Court notes that the Applicant seeks a second post graduate qualification. The Court further notes that the Applicant is not seeking the Court's intervention in respect of basic undergraduate education that would help her have a chance in life. She is already highly educated and should be able to secure decent employment with her current qualifications. In any event, even if she did have an admission letter, the sum of Kshs. 1,200,000/= would be a drop in the ocean compared to the £110,516 indicated in the email. In the premises, I am not satisfied that special circumstances exist to warrant the grant the orders sought.

19. The Applicant states that the sum of Kshs. 6,000/= contributed by the Respondent was inadequate and that her education was wholly funded by her mother and grandfather. It is instructive to note that since the orders of 1998 were made, neither the Petitioner nor the Applicant returned to Court seeking a revision or enhancement of the maintenance order. It is therefore the view of the Court that the Application is an afterthought and it would appear that the same was provoked by the Ruling of 17.3.17 in which the Court allowed the release to the Respondent of the sum of Kshs. 1,200,000/=.

20. Taking into consideration all the facts of this matter, the Court has come to the conclusion that the prayer in the Application dated 22.3.17 that the sum of Kshs. 1,200,000/= be used for the education of the Applicant lacks merit. It is hereby dismissed but with no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 26th day of October 2018

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

.....for the Respondent

.....Court Assistant