



**REPUBLIC OF KENYA**

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

**DIVORCE CAUSE NO. 210 OF 2014**

**BETWEEN**

**BDG.....PETITIONER**

**AND**

**BBG .....RESPONDENT**

**RULING**

1. BDG (the Respondent) petitioned this court for dissolution of the marriage between him and BGG (the applicant) on 29<sup>th</sup> October, 2014. He is yet to prosecute the said petition.
2. Despite the delay in the prosecution of the divorce cause, it appears that the parties have continued to have issues in their marriage culminating in the respondent and members of his family moving houses while the applicant was away at work and without her knowledge leaving the applicant's belonging at the old house which situation resulted in the application subject matter of this ruling which was filed by the applicant on the 10<sup>th</sup> of March, 2018.
3. In the said application the applicant seeks an order restoring her back to family home which is now in Westlands, pending hearing and determination of the suit. In the alternative the applicant seeks for the husband to provide alternative shelter for her or pay rent pending hearing and determination of the suit.
4. The application is predicated on grounds that the two got married in July 2000 and had lived together as husband and wife until 18<sup>th</sup> March, 2018 when the husband and his family moved houses while the applicant was at work, and the applicant's attempted to join the family was thwarted as she has been locked out of the new home.
5. In an affidavit in support of the application the applicant states that between 2007 and 2010 she was in employment but had to leave the said employment so that she could take care of the respondent who was unwell, further that in the recent past she had a job that was not well paying and at the hearing of the application she had no job at all and she cannot therefore afford to maintain herself. She claims that she is now homeless.
6. The application was objected to by way of a replying affidavit dated 26<sup>th</sup> March 2018, wherein the respondent stated that his family move out of the old home due to the behaviour of the applicant which had caused the family humiliation and embarrassment; further that they had also received a notice to vacate the premises from the landlord. He also claimed that the applicant was cruel to him and the children. As relates to maintenance of the applicant, the respondent contended that he is currently dependant on his brother financially as he has not been paid by his employer for several months and is therefore not in a position to maintain or pay rent for the applicant. He also claimed that the applicant is not mentally sound and should not be allowed to be near the children or other family members.
7. Both parties filed their affidavit of means and both maintained that they are not in gainful employment. At the time the divorce cause was filed the Respondent described the applicant as a housewife. Though at the time of making the application the applicant contended the family relocated while she was at work. The applicant states also that she came to Kenya upon marriage and has no family around. From the averments of the parties they all lived in an extended family unit as is usual with the Indian community.
8. It is not clear why & when the applicant left employment if at all. On the part of the husband in support of his assertion that he has no income currently, he attached copies of email communication from his end claiming to request for unpaid salary. The same were addressed to an individual. The court was not told why the communication is between individuals yet in the Petition the respondent described himself as a procurement manager at Rapid Communication Limited.
9. In **P K M v R P M [2017] eKLR** the Court explained the purpose of filing of affidavits of means to be as follows:

**“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.”**

10. In terms of maintenance from the respondent the applicant has sought for; -

House rent of	Kshs 25,000
Utility bills of	Kshs 4,000
Food	Kshs 10,000
Medical expenses	<u>Kshs 2,500</u>
Total	<u>Kshs 41,500</u>

11. For determination is whether or not to order the respondent to restore the wife into the family home and if not whether to order that he pays for her maintenance and up keep pending hearing and determination of the suit.

12. The issue herein must be considered based on the rights and obligations of spouses to themselves and for each other during the subsistence of marriage against the backdrop of the Constitution, statute and caselaw.

In W. M. M. vs B. M. L. [2012] eKLR Kariuki J (as he then was) stated as follows:

***“it (Article 45(3) of the Constitution) relates to and recognizes the personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender. Article 45 (3) is in harmony with Article 21(3) which enshrines equality of men and women ...in light of Article 45(3), the criteria in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals, and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where as here, spouses have no children, a wife does not enjoy advantage over a husband or vice versa and the age-old tradition which men were deemed to be sole breadwinners and to carry the burden of maintaining their spouses does not hold true anymore. 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 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...”***

In Pamela Ann Walker Munro vs Charles Michael Angus Walker Div. Cause No. 1 of 2010 the court state that; under the 2010 Constitution a wife who is not incapacitated has an obligation to make a living to provide for herself and her family. She cannot sit pretty while continuing to demand that her husband supports her completely without making any effort herself.

14. The above Authorities emphasize the concept of equality in a marriage including in the maintenance and upkeep of spouses and the need for a spouse to take care of himself/herself when able to. However, that is not to say that the law has taken away the right to be maintained or obligation to be maintained where necessary fully, or partially by a spouse who has no means and when the other is capable

15. As such the Marriage Act No. 4 of 2014 provides for maintenance in **Sections 77 - 83**.

16. In MEK AND GLM CIVIL APPEAL NO. 66 OF 2015, the Court of Appeal stated in part;

***“In the absence of any statutory guidelines of specific factors to be taken into account in exercising discretion to grant maintenance to a spouse, the courts will no doubt consider all the circumstances of the case and exercise the discretion judicially. The specific factors stipulated in section 25(2) of the repealed Matrimonial Causes Act, that is, the fortune of the spouses, the ability of the spouse and the conduct of the parties will continue to be relevant. Other relevant factors include the income of the respective spouses, financial needs, obligations and responsibilities present and in future and the duration of the marriage.”***

17. From the pleadings and interaction with the parties in an attempt to arrive at an amicable solution, it appeared that there is much hostility between them at the moment, and directing the respondent to accommodate the applicant in the family home would not be the most efficacious way of resolving the current situation. In my considered opinion for now, it would be best that the parties to stay apart and therefore the next question would be whether to order for maintenance and up keep and if so, how much.

18. I must say that it is such a tragedy that a family would move houses whilst one of them, a daughter-in-law/ sister in law and or wife is away at work and leave her belongings in a house where notice to vacate had issued. The action taken by the respondent and his family smacks of malice, was in human and cruel to say the least. This is more so because the applicant has no other family in Kenya and more particularly because she moved to this country to be with the respondent and his family. In a civilised society like the one we live in it would call for more civility and for her Kenyan family to have been more humane.

19. In the instant case the applicant is currently unemployed, which has not been denied, is a destitute and the husband who brought her

from her home land to Kenya has kicked her out of the only home she has in Kenya. On the other hand, though the respondent claims to have no income, the documents produced in evidence claiming non-payment of salary are not authentic, are not believable as they emanate from him to an Individual, yet from his own documents he is a procurement manager in a reputable company. He certainly has an obligation towards the applicant under the law. Having said the above, the applicant on her part cannot sit pretty and wait to be fully catered for, she too has an obligation towards herself and doing the best in the circumstances I am of the view that she can not wholly and fully expect to be maintained, She is able and capable of working and earnestly search for a job. With the above in mind I will order as follows;

**20. a) The respondent shall pay the applicant the sum of Kshs 45,000 a month being her maintenance and up keep for the next three months.**

**b) Thereafter the respondent will pay the applicant Kshs 25,000 a month being partial maintenance and upkeep until the divorce is heard and determined.**

**c) Costs to the applicant in any event.**

**DATED, SIGNED and DELIVERED at NAIROBI this 22<sup>ND</sup> DAY OF NOVEMBER, 2018.**

.....

**ALI-ARONI**

**JUDGE**

In the presence of:

Petitioner .....

Respondent.....