



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**DIVORCE CAUSE NO. 5 OF 2017**

**M. W.....PETITIONER/RESPONDENT**

**VERSUS**

**R. K. N.....RESPONDENT/APPLICANT**

**RULING**

**[Notice of motion dated 27<sup>th</sup> April, 2017]**

1. Through the Notice of Motion application dated 27<sup>th</sup> April, 2017, the Applicant, R. K. N. seeks an order directing the Respondent, M. W. to pay her monthly maintenance to the tune of Kshs. 80,000. In the Petition itself the Applicant is the Respondent whereas the Respondent is the Petitioner.
2. The affidavit sworn by the Applicant in support of the application is brief. She avers that she got married to the Respondent on 25<sup>th</sup> April, 2015 under the Marriage Act and that during the marriage she provided shelter to him while he catered for all other expenses for running the home. She further avers that during the marriage she wholly depended on the Respondent for her maintenance. She states that the income of the Respondent is pension of more than Kshs. 250,000 per month.
3. It is the Applicant's case that after filing the Petition the Respondent has refused to support her financially.
4. The Applicant also swore an affidavit of means and needs disclosing her monthly expenses as Kshs. 55,000/= for food, house help, electricity and water bills; Kshs. 10,000 for clothing and transport; and Kshs. 15,000 for entertainment and medication. She also avers that she abandoned her tailoring business after the Respondent convinced her to do so.
5. The Respondent's opposition to the application is by way of a replying affidavit sworn on 31<sup>st</sup> May, 2017. He avers that the Applicant has been working as a tailor all along. He denies that his income is Kshs. 250,000 per month. His position is that the Applicant is only after getting money from him.
6. When the application came up for hearing the advocates for the parties opted to rely on the submissions which they had filed in support of their positions.
7. The Applicant's case is that there is no dispute that she is legally married to the Respondent. It is her case that the Respondent's averments are not supported by any evidence.

8. The Applicant contends that the Respondent filed the Petition for divorce after gaining Kenyan residency using the marriage. It is her case that the Respondent is a person of means and he should not be allowed to evade his matrimonial responsibilities.

9. On behalf of the Respondent, it is submitted that it is the actions of the Applicant which forced the Respondent to move out of the house and subsequently file the Petition for separation.

10. The Respondent's case is that there is no basis to make a provision of maintenance to the tune of Kshs. 80,000 as she stays in her house and there is no child from the marriage.

11. Further, the allegation by the Applicant that the Respondent stopped her from working has no basis. According to the Respondent, the Applicant is operating a big tailor shop in Malindi and that is where the pleadings in this matter were served on her. In support of his contention that the Applicant is in employment, the Respondent cited Paragraph 7 of the Applicant's reply to his Petition in which the Applicant avers that:-

**“The Respondent avers that on the morning of 20<sup>th</sup> December, 2016, she prepared and left for work as daily routine....”**

This according to the Respondent is evidence that the Applicant is employed. He therefore asserts that the Applicant lied under oath.

12. Further, that if indeed he had committed any transgressions in the marriage then the Applicant ought to have sued for divorce instead of waiting for him to do so.

13. It is the Respondent's submission that orders for maintenance will be issued depending on the circumstances of the case. Relying on the decision of Musyoka, J in **S.M.R. v P.H.S. [2013] eKLR**, the Respondent asserts that in light of Article 45 (3) of the Constitution, husband and wife are treated as equals and neither of them has a greater or lesser obligation than the other in relation to maintenance.

14. The question is whether the Applicant has established the conditions for the issuance of an order of maintenance. In **P. K. M. v P. R. M. [2017] eKLR** the Court of Appeal noted the factors to be taken into account in deciding whether to make an order of maintenance. The Court stated: -

**“34. The grant of relief and the determination of the quantum of maintenance under Section 25 (2) of the repealed Matrimonial Causes Act involve the exercise of discretion by the court....**

**37. In our view, the learned Judge correctly summarized the legal principles that should inform the exercise of discretion by the court under Section 25 (2) of the repealed Matrimonial Causes Act when he stated in his judgement that:**

**“... The common law rules that govern post-divorce maintenance derived from Kenyan as well as comparative case law indicate that the exercise by this Court of its discretionary power to award maintenance must be informed by an examination of all the circumstance (sic) of the case including: the present and future assets, income, and earning potential of the parties, taking into account their ages and professional qualification; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family; and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage.”**

**30. Ougo, J. expressed similar views in another High Court decision in P. M. A. V. vs. G. M. L. [2016] eKLR where she stated that in seeking to ascertain maintenance, the court should have regard to existing and potential means of the parties, their respective earning capacities,**

**financial needs and obligations, the duration of the marriage, the conduct of the parties prior to divorce, their conduct that led to the breakdown of the marriage remembering that both parties have equal rights under Article 45 (3) of the Constitution.**

**39. In order to properly and judiciously exercise its discretion when considering an application for maintenance, the court must delve into the financial affairs of the spouses before deciding whether to make an order for maintenance, and if so, the quantum....”**

15. The Court went ahead to stress the necessity for the parties to file affidavits of means disclosing all their financial affairs before concluding that: -

**“55. Whether a spouse is deserving of spousal support is a matter dependent on the circumstances of each case based on the evidence presented to the court. The court must carefully and proactively examine the financial circumstances of both parties when considering whether to grant relief by way of maintenance and the quantum thereof....**

**60. We venture to suggest that whenever a court is faced with an application for maintenance, whether seeking interim relief or upon dissolution of the marriage, it must direct the parties to furnish the court with comprehensive information by way of affidavit relating to their respective financial circumstances. The affidavits should detail the assets, income, expenditure and liabilities of each party over the relevant period and should be supported by necessary evidence. If there is contest over such information, an inquiry or investigation must then be scheduled where the parties are subjected to cross-examination on their affidavits in order for the court to make an informed decision. On making orders for maintenance, the parties must be accorded the liberty to subsequently apply for variation of such orders should the circumstances of the parties materially change to warrant such variation.”**

16. I have quoted the decision of the Court of Appeal at length in order to demonstrate that the application as presented to the court does not meet the requirements of such an application. The Applicant has not detailed in her affidavit of means her assets, income, expenditure and liabilities. As pointed out by the Respondent, she averred in her statement of defence that as late as December, 2016 she was working. There was therefore need to have her cross-examined on her averment that she had closed her shop upon the prodding of the Respondent.

17. The Respondent’s reply to the application did not disclose his assets, income, expenditure and liabilities. There was need for him to file a more detailed affidavit conveying the said information.

18. Had the Applicant’s affidavits been detailed enough, I would have called for more information from the Respondent. However, I note that the application before me is bare and the best way to go is to dismiss the same. The application is dismissed. In view of the relationship between the parties, I direct each one of them to meet own costs of the application.

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of Sept., 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**