



**REPUBLIC OF KENYA**

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

**DIVORCE CAUSE NO. 62 OF 2012**

**K N.....PETITIONER**

**VERSUS**

**R W W.....RESPONDENT**

**RULING**

1. The application for determination is a Chamber Summons dated 25<sup>th</sup> May 2012, taken out by the respondent, R W W, under Sections 25, 26 and 30 of the Matrimonial Causes Act and Rules 3(3), 38 and 39 of the Matrimonial Causes Rules. The applicant seeks from court an order that the petitioner be ordered to provide the respondent with alimony pending suit.
2. The grounds upon which the application is premised are set out on the face of the application, and the facts are deposed in the affidavit sworn by the respondent, on 25<sup>th</sup> May 2012, in support of the application. It is stated the petitioner evicted the respondent, together with the children of the marriage, from the matrimonial home sometime in or before August 2008. He is the one now fully in possession of the matrimonial property and is collecting all income from the property and using it for his own benefit. She argues that the matrimonial property was acquired with her contribution and support.
3. The petitioner has opposed the application vide affidavits sworn on the 17<sup>th</sup> July, 2012 and a 17<sup>th</sup> July 2013. He avers, among others, that the respondent is not entitled to any support and the orders sought should not be granted as he does not have the income claimed by the respondent. He states that the respondent has the ability and resources to sustain herself, she is maliciously trying to extort monies from him by giving a distorted picture of the situation to the court, the issue of maintenance was settled in the Children Court, vide **Nairobi Children's Case No. 758 of 2008**, most of the issues regarding maintenance, income and expenditure had already been determined in the said children's case, the respondent is no longer living with the children, and he is solely responsible for the children's upkeep and maintenance.
4. The application was disposed of by way of written submissions. The respondent's submissions were filed on 12<sup>th</sup> February 2015, while those of the petitioner were filed on 18<sup>th</sup> March 2015.
5. Counsel for the respondent has raised two principal issues for determination. One, is whether the petitioner should pay for the respondent's maintenance and if so, how much should he pay? Two, is whether maintenance has been paid by the petitioner to cater for the needs of the respondent and of the children of the marriage.
6. It is submitted that the applicant has no capacity to maintain herself, and has been running a small business which earns her approximately Kshs.15,000.00 per month, which is said to be far less than what

is required to cater for her needs and those of the children of the marriage. As a result, the respondent has been forced to dip into her savings in order to sustain herself and the children of the marriage. It is further submitted that during the parties' cohabitation they had accumulated several income generating assets, and it is the petitioner who is now in exclusive possession and control of a substantial part of the said assets. It is contended that the petitioner is capable of catering for the maintenance sought, and that she is deserving of the orders sought and should be maintained at the standard of life she was accustomed to before separation

7. The decision of GBM Kariuki J. in *WMM vs. BML* (2012) eKLR has been cited in support. It was said therein that -

- i. ***“In considering a claim for maintenance, regard must be had 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.”***

8. On whether there has been any maintenance paid by the petitioner for the respondent and the children of the marriage, it is submitted that since her eviction from the matrimonial home, the respondent has received no provision from the petitioner. It is further contended that though the petitioner had been ordered to provide for the children's maintenance, this has not been forthcoming.

9. On who should pay the costs of this suit, it is contended that the petitioner should bear the costs as he is responsible for the breakdown of the marriage and because the costs became very high as a result of his refusal to obey court orders resulting in multiple applications and court attendances.

10. On behalf of the petitioner, it is submitted that the matter is *res judicata* as the issue of maintenance for both the respondent and the children was brought up in **Nairobi Children's Cause No. 758 of 2008** in an application dated 27<sup>th</sup> November 2008. The respondent is said to be seeking to extort money from the petitioner, and thereby abusing the court process, as the petitioner is liable for maintaining the respondent and the issues of the marriage as per the consent order recorded in court on the 16<sup>th</sup> August 2011. The respondent is also said to have been offered a two-bedroom flat in Kiserian and thus should not claim rent. The petitioner is said to have renovated the property in Rongai, from which the respondent is collecting rent, and that she was running two parallel businesses worth millions of shilling prior to leaving the matrimonial home. It is the petitioner's position that the application is vexatious, scandalous and an abuse of the court process, and the same should be struck out.

11. I have noted what GBM Kariuki J. said on maintenance in the case of ***WMM vs. BML* (supra)**. The relevant portion of the judgment of GBM Kariuki J. in that matter has been cited in extenso here above. In another decision, in ***WN vs. PB* (2013) eKLR**, it was said that alimony is a common law concept. **The purpose of an award of alimony pending suit is to provide temporary support to a spouse so that she is not left destitute for the duration of the suit.** The purpose of alimony is to provide for those situations where a divorced or separated wife has absolutely no means to provide for herself, and to prevent such a wife becoming a charge on the common purse, the state. The purpose of alimony **is not** to provide for a spouse who is not making any efforts to provide for herself nor is its purpose to provide a luxurious living to such spouse, nor is such order made to allow a spouse to maintain the lavish lifestyle she may have enjoyed during the marriage. Alimony *pendent lite* is to provide basic sustenance to a wife pending the determination of the matrimonial cause.

12. This court was told that the respondent was offered a two bedroom flat in Kiserian and further that she is collecting rent from the property in Rongai, in addition to running businesses. The respondent has not placed any material before this court showing that she is incapable of earning, and thus making her deserving of maintenance from the petitioner.

13. In the circumstances, it is the considered view of the court that the respondent is not deserving of maintenance by the petitioner and is therefore not entitled to the orders sought. Accordingly, the application for alimony dated 25<sup>th</sup> May 2012 is not merited and the same is dismissed.

**DATED, SIGNED and DELIVERED at NAIROBI this 26<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**W. MUSYOKA**

**JUDGE**