



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY COURT
DIVORCE CAUSE NUMBER 88 OF 2014

M M.....PETITIONER

VERSUS

N A.....RESPONDENT

RULING

The Petitioner filed Notice of Motion on 4th May 2016, brought **under Section 84 (1) of the Marriage Act 2014 and other enabling provisions of law** and sought a temporary injunction restraining the Respondent whether by agents, servants, invitees from molesting, harassing, intimidating, threatening, provoking, annoying, trailing, inciting or otherwise interfering with the Applicant's peaceful habitation and living pending hearing and determination of this Petition.

He also sought; the Court to grant the Applicant/Petitioner leave to amend the Petition for divorce dated 22nd April 2014 as drawn in the annexed affidavit.

PETITIONER'S CASE

The Petitioner and Respondent were married on 3rd September 1994 in France. They lived and cohabited in France, Italy and Burkina Faso. They have one child of the marriage L M born on 21st September 1997. The Petitioner and Respondent have been residents in Kenya from 2011. They separated hence the pending divorce proceedings in Court.

On 16th June 2016, Mr Omari learned Counsel for the Petitioner stated the Petitioner's complaint is that during the pendency of divorce proceedings, the Respondent has sent him unsavory and threatening emails; the bundle attached as **MM1** to the application.

The Respondent has jeopardized the Petitioner's professional standing by sending disparaging and undignified emails to the Italian Consulate in Cairo where he works and resides now. The Respondent has requested withdrawal of his passport as evidenced by email marked **MM2** attached to the application.

The Respondent influenced their son L M to write similar emails to the Italian Consulate in Cairo annexed is an email marked **MM3** attached to the application.

On 14th June 2015, assorted electrical items were stolen from his apartment in Westlands and he reported the matter to the Kileleshwa Police Station. The Petitioner is reasonably apprehensive that the Respondent was involved as some of the photographs sent to him were from the stolen computers. These incidences

have adversely impacted on him and occasioned him untold suffering and mental anguish and his safety is in jeopardy. He therefore seeks orders prayed for.

RESPONDENT'S CASE

The Respondent, wife to the petitioner and mother of their son who was unrepresented filed what this Court will refer to as Reply on 2nd June 2016 to the Petitioner's application. She denied in *toto* the allegations of harassing, intimidating and threatening the Petitioner, the complaints are unfounded and defamatory.

The Respondent denied any knowledge or involvement in the alleged robbery or theft from the Petitioner's apartment. The information about his new job in Cairo and pictures she used in her e-mails to the Petitioner were provided by their son Lorenzo who at the time visited the Petitioner in his apartment. She deposed that she sent e-mails to the Petitioner for failing to pay alimony and maintenance as ordered by the Court. The Court should understand that such action on her part is as a result of legitimate anger and unbearable feeling of betrayal by the Petitioner.

On 16th June 2016 the Respondent told the Court that she lives in Kenya with their son who is a student in **[particulars withheld]** High School. She stated she wrote e-mails to her husband the petitioner out of frustration. They have been separated for 5 years, when she instituted divorce proceedings in France, the petitioner said the court lacked jurisdiction and agreed to divorce in Italy. While in Italy, he refused jurisdiction and came to Kenya and now he moved to Cairo, Egypt. In all 5 years he has failed to comply with Court orders from the Court in France, Italy and in Kenya; **Children Court Case Number 416 of 2014**. He failed to pay alimony and maintenance for their son and when he pays it is late and he deducts a huge amount from the stated figure. Their son's school fees is in arrears there are school expenses not paid, she is unemployed and in frustration she wrote to the Italian Consulate to enforce the court's orders under Italian law. She stated the only alternative in their difficult situation was to write to Italian Consulate as they are suffering and are frustrated to be kind.

L M now 18 years testified in Court that his parents separated in 2011 when he was 13 years old. The petitioner pays school fees direct to School and his mother pays for school expenses. The Petitioner relocated to Egypt to work for a company Italian Cooperation in Cairo and yet he told him he was retiring and would not be able to pay his fees. He saw the e-mails his mother wrote and her desperation and he on his own volition wrote to the Italian Consulate to intervene and have the Petitioner pay his school fees and expenses. They live in a flat and rely on friends to help and sometimes borrow money from them. It has been hard and they are suffering.

ISSUE

1) Should this Court grant temporary injunction against the Respondent to protect the Petitioner from being harassed and intimidated due to adverse professional impact and mental anguish?

DETERMINATION

The E-mails that are the genesis of this matter and are in contest are as follows;

a) From N A to M M 10th October 2015 reads in part;

'Now listen carefully, it is the last time we accept spending a weekend with no money at all; having to borrow to survive, pay internet or even feed the dogs.

We know you do not pay on time on purpose because it gives a great sense of power and sweet satisfaction to know we are suffering.

I refuse to pay 700 euros per month for school when you do not spend anything on your son never, Even for his health.....

Try one of your dirty tricks again and L and I will fall on you at full strength making sure to spoil your reputation (with undisputable facts duly documented) everywhere you go, everywhere you have been and everywhere you wish to go....

2nd e-mail from N A to D T (Italian Consulate- Nairobi) dated 7th October 2015 reads in part;

My name is N A and I am M M's spouse. We have a son L who is now 18. L and I live in Nairobi, Kenya where he finishes high school this year. I am unemployed. I began divorce procedure in Italy in July 2013. The President of High Court of Sulmona (Italy) issued Court order attached.

We know though he did not inform us that M is now team leader of [particulars withheld] in Cairo.

My husband is not very keen on respecting Court orders, he actually thinks he is above laws, which is probably true because in 5 years of most enraged procedure (previous suit filed in France before) I have never managed to convince the Italian Embassy of Nairobi to help us.

My son and I are entitled to a monthly maintenance of 2500 euros a month.....

The 3rd e-mail is from L M to D T in Italian Consulate reads in part;

I am L M, the son of M M. I am writing to you to let you know I support my mother regarding all matters which she brought before you. And I would like to emphasize the following;

That my father is subtracting a big chunk of our alimony from his monthly payments.... That he did not inform us of his new job in Egypt.

That he has been lying to my face since February, telling me that his plan is to go on retirement hence he'd have little funds available to support me....

I humbly ask for some sort of assistance on behalf of the Embassy in forcing my father to uphold his familiar duties, as he will not do so without outside intervention.

I do not mean in any way to waste your time.”

This Court outlined excerpts of the e-mails so as to appreciate the import of the letters. Whereas the authors are not polite to the recipients, the content is factual on emerging events that have led to the current state of affairs. Mother and son are abandoned in foreign land, with meager resources for subsistence and school fees and school expenses. Their only source of income is maintenance and alimony payment awarded by the Sulmona High Court in Italy pending divorce proceedings.

From In the circumstances of this case, it is uncontested that the maintenance Order was duly issued by the Sulmona's Court of Law (Italy) on 2nd March 2014. Similarly, the French Court as well granted orders in its decision rendered on 15th February, 2011. The French Court made various orders among them being that Mr. M M, the Applicant herein, is to pay maintenance and education of the child, L, at a sum of 800 euros, which must be paid in advance to the domicile or residence of the mother, over and above family services.

On the other hand, the Sulmona Court partly held that:

“(7) The husband shall pay the wife a monthly allowance of Euro 1,500.00 for her alimony and additional allowance of Euro 1,000.00 for the support of the son.

(8) Both allowances shall be paid by the 5th day of every month through bank transfer payable to

the account that shall be communicated by the plaintiff.

(9) Said allowances shall be reassessed annually according to the (STAT indices on consumer price trends.

(10) Each spouse shall be liable for 50% of any extraordinary expenses required for the son's upbringing education and medical care."

Based on the material before this Court, it is uncontested that the Applicant has failed and/ or neglected to comply with the above orders and has instead filed the present Notice of Motion Application in which he seeks for restraining orders against the Respondent. Do the circumstances of this case warrant the grant of the said orders?

It should be borne in mind that the remedy of an injunction is an equitable remedy and as such it is granted in accordance with the Court's discretion based on pertinent facts as was rightly observed by the Court in *JOHN MOSINGI MARUBE VS COUNTY COMMISSIONER KISII COUNTY AND 2 OTHERS, Petition No. 39 of 2015*, thus:

"[13] By definition, a temporary injunction is a provisional order to restrain the doing of a particular act or to require a certain state of affairs to be altered for the time being, either until the trial of the suit, or until further order. (see, Principles of injunctions by Richard Kuloba).

The grant of such injunction is discretionary and since it has the potential to bear a permanent effect, the court must be extremely careful in exercising its discretion to ensure that the justice of the case is not compromised at an interlocutory stage. It is for this reason that guidelines for grant of such injunctions were set out in cases such as American Cyanamid Co.vs. Ethicon Ltd [1975] A.C. 396 and Giella vs Cassman Brown & Co. Ltd. [1973] EA 358. (Emphasis added)

The East African Court of Appeal in the *GIELLA VS CASSMAN BROWN case (supra)* outlined the principles to guide the Court in the granting of interlocutory injunctions. The Court stated that:

"The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a "prima-facie" case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."
(Emphasis added)

What emerges from the above authorities is that the remedy of interlocutory injunctions is an equitable remedy that is granted at the discretion of the Court and an Applicant must demonstrate a prima-facie case with a probability of success, that he/she will suffer irreparable injury which would not adequately be compensated by an award of damages if such orders are not granted, and that if the Court is in doubt, it will decide an application on the balance of convenience.

Applying the foregoing to the present case, I note that the parties to the present dispute have been entangled in endless litigation which has resulted to various orders being granted by Courts in France, Italy and presently in Kenya. This matter has been further complicated by the fact that the parties have been changing their domicile over the period and hence the question of enforcement and the jurisdiction of Courts in these jurisdictions have come to the fore. In that regard, this Court recognizes that it would be a legal hurdle to enforce Kenyan Law especially in matrimonial matters in other jurisdictions. However under **Article 2 (5) & (6) of the Constitution 2010** recognize treaties and conventions ratified by Kenya and general rules of International law as part of Kenyan Law. Kenya is signatory to the **International Bill of Rights. The Universal Declaration of Human Rights** provides every person the right to an effective remedy under the law. **Article 8 of the Universal Declaration of Human Rights, 1948** is to the effect that:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law. “

Additionally, Article 16 (1) thereof states that:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

The foregoing is duly reiterated and was considered by Signatories to the ***European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953***, to which both France and Italy are members. It therefore follows that the law grants every person the right to an effective remedy by the competent national tribunals irrespective of nationality and everyone is equal before the law.

Therefore, the Respondent is legally entitled as a resident in foreign land to seek redress from Court and to enforce orders in any other jurisdiction against the Petitioner, as most sovereign states are signatories to the International Bill of Rights. More so all member states are obligated under the ***Charter of United Nations Article 1(3)*** to;

“ achieve international cooperation in solving international problems of an economic, social, cultural of humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”

In the circumstances of the present case, the Applicant herein moved this Court for various orders despite the fact that he has relocated to Egypt. Despite Court orders from France and Italy on monthly payments to the Respondent for upkeep and their son’s education, the Petitioner neglected and/ or failed to comply with the various orders.

It is also apparent that the Respondent’s efforts to enforce the said Judgments have been frustrated by the fact that her relationship with the Applicant has been strained further and due to the fact that the Applicant has since relocated to Cairo and thereby forcing the Respondent to communicate to him through his employer, the Italian Embassy in Cairo.

The Petitioner did not contest the existence of the said orders from various Courts. If he found them unfair or circumstances changed he did not appeal or seek review from the said Courts pursuant to changed circumstances or new developments that would hinder compliance. Instead the evidence on record strongly suggests that the Petitioner sought to take flight and avoid his responsibility. The Petitioner’s conduct left the Respondent and their son in desperate financial situation.

Section 84 (1) of the Marriage Act (2014) states;

“the Court may order a party to refrain from molesting a spouse or former spouse”

The concise Oxford English Dictionary defines molesting as

“assault or abuse sexually pester or harass in a hostile way”

The Petitioner complained of the distasteful emails the Respondent and their son sent him and the Italian Embassy as outlined above which have adversely affected his safety and his employment and professional standing. He has complained of a theft/robbery that occurred in his apartment and he reported to the Police and all these incidents culminate to his fear for his life and safety.

The Petitioner now works and resides in Cairo Egypt and the Respondent and their son live in Kenya. His life is not in danger as there is a safe distance between them. The robbery /theft incident can only be connected to the Respondent after completion of the investigations by the Police.

The Respondent deponed that pictures and other information was from their son who visited his father. The emails though blunt and impolite but at the same time they are factual on the financial situation of the authors arising from valid Court Orders that have not been enforced or complied with. So, based on the circumstances the emails do not amount to molesting the Petitioner.

The emails are distasteful bordering on veiled threats, and was not the right way to resolve issues between them and the Petitioner. Yet, it seems to be the only way for them was to seek help in an urgent and difficult situation. The emails are embarrassing but do not amount to threat of safety of the Petitioner.

Based on these circumstances, in my view, granting the injunctive restraining orders as sought herein would occasion great injustice to the Respondent in her endeavors to enforce the Judgments that had been issued in her favor. The foregoing would further occasion great injustice to the interests of the child of the marriage between the parties herein and hence impede on the rights of the Respondent in enjoying the fruits of the Judgments that had been issued. Additionally, an injunction being an equitable remedy, this Court is further alive to the maxim of equity thus: “he who comes to equity must come with clean hands” and as was pointed out by the Court in KYANGAVO VS KENYA COMMERCIAL BANK LTD AND ANOTHER, (2004) 1 KLR126 thus:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies.”

As such, it would be unjust in the circumstances to grant orders in favor of the Applicant. The Petitioner has failed or neglected to comply with Court Orders from France, Italy and Kenya on monthly payments for alimony and school fees. The failure to comply with Court orders has directly violated the Respondent and their son’s rights. Yet, the Petitioner whose conduct impedes the Respondent from enforcing Court orders against him by fleeing from various jurisdictions; seeks from Court, whose orders he ignores, protection of his rights. This cannot be the basis of granting orders in the Petitioner’s favor.

COURT ORDERS

- 1. In light of my findings above, I am therefore not satisfied that the Applicant has made out a case to warrant the issuance of temporary injunction orders restraining the Respondent from making any contacts with him and to enforce the existing Court orders as such, the Application herein must fail.**
- 2. The Petitioner did not comply with Court orders and by seeking redress from Court he has not come to Court with clean hands to warrant him equitable remedies.**
- 3. The e-mails though unkind and blunt do not amount to threat to the Petitioner’s safety and employment but are factual about a desperate financial situation of the Respondent who is resident in foreign land and unemployed and their son who have to survive on meager means.**
- 4. Deputy Registrar Family Division shall serve this Court Ruling the Italian Embassy in Nairobi and the said Embassy shall transmit a copy to the Italian Consulate in Cairo for enforcement of valid Court orders from France and Italy on payment of alimony and school fees and expenses. This is in line with the fact that all member states are obligated to enforce the International Bill of Rights. Therefore France, Italy Kenya and Egypt are all bound to enforce human rights of all persons under international law.**
- 5. The authorities to intervene and pursue amicable settlement and/or installment payments to secure the Respondent’s upkeep and their son’s education.**
- 6. The Applicant is granted leave to amend the petition for divorce as prayed.**

DELIVERED SIGNED DATED IN OPEN COURT ON THIS 16TH DAY OF AUGUST 2016.

MARGARET W. MUIGAI

JUDGE

In the presence of:

Mr. Omari holding Mr. Jamal for the Petitioner/Applicant

Respondent absent