



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
FAMILY DIVISION - MILIMANI LAW COURTS

HCCC CASE NO. 14 OF 2015

BETWEEN

A N M.....APPLICANT

AND

P M N.....RESPONDENT

RULING

INTRODUCTION

This Court rendered a Judgment on an Application that had been filed on 19th March, 2015 by the Applicant, and among the issues for determination was whether the Respondent was responsible for the children of the marriage between him and the Applicant. The court granted the following orders;

“(6) The Respondent to pay maintenance of Kshs. 15, 000/= a month to the Applicant and children of the marriage.

“(7) The payment of school fees for the children shall be determined upon presentation and service of the official fees structures to the Respondent and application in Court.”

APPLICANT'S CASE

The Applicant sought by application filed on 7th April 2016 that the Respondent take up and facilitate payment of school fees and school expenses for their child P W M. The Applicant contended that their child who was studying in [particulars withheld] University accumulated fees arrears of Ksh 425,561/= and for her to continue studying in the said institution she requires Ksh 4,000/- every month as pocket money, Ksh 5,000/- quarterly to buy clothes and other expenses that total to 26,000/= The child requires a laptop for her studies too.

The Applicant contended that the Respondent had paid school fees for their eldest daughter G W in the same institution and she successfully completed her studies.

The Applicant stated that they were wealthy, she ran 3 Chemists, they had Immovable properties registered in the Respondent's name only, a fleet of cars and substantial funds in their accounts. The Respondent took away all the properties and she struggled with the Chemists which were finally closed down. She retained the matrimonial home, where she resides with her children.

The Applicant struggled to pay for P to Study at the said institution until finally her resources were depleted. She separated with the Respondent who lives with another family. There are pending matters with regard to divorce and division of matrimonial property in other Courts.

The Applicant is aged 54 years and ailing from ill-health. She gave 30 years of her life to their marriage with the Respondent and contributed to the properties of the family then and she is in pain to see their last born daughter struggle to study. The Applicant works as a nurse and earns Ksh 13,000/- a month. With the paltry sum she cannot make ends meet.

The said daughter of Applicant and Respondent informed Court that she was studying Bachelor of Business and Information Technology (BBIT) and had to stop at 3rd year 2nd semester due to lack of fees and related expenses.

The Applicant prays the Court orders alimony pending hearing of the pending matters in Court.

RESPONDENT'S CASE

The Respondent through Counsel sought hearing of the application filed on 18th December 2015 seeking the court to vacate orders of 6th November 2015. The orders of 11th December 2015 were not served on them.

The Respondent's contention is that the Respondent was not served with the Applicants applications of 9th March 2015 and 2nd April 2015

With regard to the order that the Respondent pays Ksh 15,000/= to the Applicant for his first family's upkeep, he stated that he is 63 years old on retirement and earns pension of Ksh 90,000/- a month. He is diabetic as per medical reports attached, and has no income, he is not employed, he has no rental houses as alleged and the motor vehicles do not exist as alleged by the Applicant. He has matrimonial home where the Applicant resides.

Therefore the order to pay Ksh 15,000/- he was condemned un heard and the said order ought to be set aside and the matter be heard and determined on merit.

On the issue regarding payment of school fees for the younger child, the Respondent reiterated the same facts. He added that he has been sick and obtained funds for treatment from well wishers and friends.

The Respondent admitted that while he was in employment he was able and did educate the first born G W up to Masters degree, but now he has no resources to educate P W. Secondly he was not consulted as to where P would go to study and was not involved in her studying in [particulars withheld] University. Therefore In view of documents filed the Respondent is not able to pay school fees for the Child.

ISSUES

The issue is whether the Respondent ought to pay alimony and maintenance and if so Ksh 15,000/- more or less.

The next issue is whether he should contribute to their child P W education.

DETERMINATION

Article 45 (3) Constitution prescribes;

Parties to a marriage are entitled to equal rights at the time of the marriage and at the dissolution of marriage

Section 77 of the Marriage Act 2014 provides for provision of maintenance pending hearing and

determination of the divorce proceedings and those relating to division of matrimonial property.

In the case of RPM vs PKM [2015] eKLR sets the criteria and guideline that should apply in determining application for maintenance;

- a. The present and future assets, income, and earning potential of the parties*
- b. The ages and professional qualification of the parties*
- c. The financial needs and obligations of the parties*
- d. The duration of the marriage and the duration of time in which the parties lived separately*
- e. The standard of living prior to the breakdown of the marriage*
- f. The contributions of the parties to the welfare of the family and*
- g. The conduct, where relevant, of each party in relation to the eventual background of the marriage.*

In the instant case it is not contested that the Applicant was married to the Respondent for almost 30 years and have 2 children of the marriage who are adults. It is not contested that throughout the marriage both Applicant and Respondent were engaged in gainful employment and as such contributed towards acquisition of matrimonial property. What is in issue is who contributed how much for what and the fact that properties were registered solely in the Respondent's name. It is on record that due to the Respondent's acts of cruelty the Applicant and children left the matrimonial home in 2012 and resumed staying in the said home in 2014 to date.

What is in issue is whether the Respondent should financially support the Applicant.

The Court has considered that the Applicant stated at the time they were living as husband and wife with the Respondent; they jointly accumulated wealth; all was in the Respondent's name. It follows that the said properties are in the Respondent's possession or he disposed of them and enjoyed the proceeds. At present, the Applicant has a meagre salary of Ksh 13,000/= as evidenced by payslip attached, she has taken various loans as shown by the loan applications attached, She maintains herself and children, pays for her medical expenses and maintains the matrimonial home as shown by photographs attached to her bundle of documents.

She is also advancing in age and has no other source of income except farming on the land that houses the matrimonial home for subsistence.

The Respondent is retired Veterinary Officer who draws pension of Ksh 90,000/- a month. He has to take of his needs but he has abandoned his first family and also takes care of the 2nd family. He is sick as per the attached documents to his application. He is also in possession of the properties accumulated over 30 years during the marriage and lived with first family.

It is common ground that when parties to a marriage separate and or divorce it becomes a very expensive affair. The consolidated efforts and resources to support a family are depleted to support 2 separate households. The effort is to survive and not prosper. Naturally, in the circumstance, even with massive wealth it is depleted and hardly do both parties maintain the standard of living they had prior to the breakdown of the marriage.

Secondly, the parties herein have been married for 30 years; they are advancing in age and are unlikely to be in gainful employment much longer. The energies to engage in various income generating activities dissipate and therefore have to adjust to a more modest standard of life. However, the prevailing situation does not absolve parties from their responsibilities. So that although the Respondent claims he has no

source of income except pension dues and he is sick and medical care is expensive; this Court notes he is beneficiary to the bulk of the matrimonial property that the Applicant contributed to in the 30 years of marriage.

So to assist the Applicant and their children survive and augment their daily needs, the Respondent shall pay maintenance of Ksh 15,000/- to the Applicant monthly until the existing cases filed in Court related to divorce and division of matrimonial property are heard and determined.

With regard to the 2nd issue, that the Respondent settles the school fees arrears amounting to Ksh 425,561/- accumulated arrears of school fees for the 2nd child P W at [particulars withheld] University.

The Court considered in the earlier Ruling on Preliminary Objection of 5th September 2016, that there was on record a valid application for extension of parental responsibility for a child who attained 18 years old. Parental Responsibility is shared between father and mother of the child (ren) as provided by **Article 53 1(e) of the Constitution**. The child is entitled to right to education as provided by **Article 43 (1) (f)** of the Constitution. Yet as considered above both the Applicant and Respondent cannot sustain the education financial cost for P W. It is not clear from the record if and when the Applicant and Respondent consulted and agreed on the said daughter to pursue studies in [particulars withheld] University and how the fees and related expenses hereto be defrayed. What seems clear, is that P went to [particulars withheld] University as her sister G W did as at the time both parties enjoyed financial stability. Midstream, the parties separated and the fortunes dwindled necessitating the Applicant to shoulder the burden single handedly and finally when the 3 Chemists she was running closed down she was unable to pay for their daughter's education.

Today, it is not feasible to sustain P W at the said University due to exorbitant fees. However, that is not to curtail her attendance to a good Public University and pursue learning.

Therefore since it would be unfair and unjust to visit the payment of arrears of fees on the Respondent alone; as there is no evidence to confirm that he was consulted, both Father and Mother of the child shall settle the arrears. They may approach the University for repayments in instalments and allow her complete her final year of study.

Alternatively both parents shall agree on an alternative University possibly for P W to transfer credits and pursue her education and the Respondent pays school fees and Applicant school expenses. The child may also pursue Higher Education Loans Board for financial support.

COURT ORDERS

- 1. The maintenance payment of Ksh 15,000/- shall be paid each month by the Respondent to the Applicant.**
- 2. The Father and mother of the Child, P W to share repayment of arrears of school fees.**
- 3. The Applicant and Respondent to facilitate P W education in [particulars withheld] University or any other University and the Respondent shall pay fees and Applicant's school expenses.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH NOVEMBER 2016

M.W.MUIGAI

JUDGE.

In the presence of:

Alice Njambi Mutua in person