



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS - FAMILY DIVISION**

**DIVORCE CAUSE NO. 13 OF 2014**

**BETWEEN**

**M J S D.....PETITIONER**

**AND**

**P K D..... RESPONDENT**

**RULING**

**INTRODUCTION**

This Court heard and determined the divorce petition filed by the Petitioner. The hearing of evidence from both the Petitioner and Respondent culminated with the following orders;

- 1) The marriage between Petitioner and Respondent solemnized on 12<sup>th</sup> September 1997 is hereby dissolved. A decree nisi to issue within 30 days and decree absolute 3 months. The Petition and Cross petition are both upheld.**
- 2) The personal effects and possessions listed in the letter dated 6<sup>th</sup> January 2014 shall be released to the Petitioner as it was established these properties were acquired and inherited by the Petitioner before 1997 when he and the Respondent were married. Section 5 of the matrimonial Act 2013 excludes such property as matrimonial property.**
- 3) The Petitioner father of the child of the marriage J K D shall contribute half of the child's upkeep, educational and subsistence expenses as required under Section 24 and 28 of the Children Act 2001 and Article 53 (1) ( e) Constitution.**
- 4) All other issues regarding properties, funds and Companies shall be ventilated in another forum where the pleadings for division of matrimonial property are filed.**
- 5) Being a family matter, no orders as to costs each party shall bear its own costs.**

It is from these orders that the Petitioner/Applicant through learned Counsel approached the Court under a certificate of urgency. The Application was filed pursuant to Chamber Summons dated **3<sup>rd</sup> March, 2016** under **Article 45 (3)** of the **Constitution**, **Section 25** of the **Matrimonial Causes Act**, **Chapter 152** of the **Laws of Kenya**; and **Rule 38** of the **Matrimonial Causes Rules**.

The Applicant sought orders that;

**1. That the Respondent pays a monthly sum of Kshs.500,000/= to the Applicant as maintenance pending the hearing and determination of the matrimonial property claim, HCC 18 of 2014, M J S D vs. P K D.**

**2. The Court to stay order (3) in the decree nisi issued on 10<sup>th</sup> February, 2016 pending the determination of the matrimonial property dispute suit HCC 18 of 2014.**

### **THE APPLICANT'S CASE**

The grounds for the Application are that the Applicant has no fixed income and has been living off friends and well-wishers. He contended that the Respondent admitted to taking for her own personal use USD 368,544/= that was held in a joint account. He stated that there is currently pending hearing in the **High Court HCC 18 of 2014** the matrimonial property suit for hearing and determination. He averred that the Respondent removed USD 368,544/= from a joint account which the Respondent admitted to taking during the hearing without informing the Applicant. He stated that he earned his living through participation in family companies which the Respondent has complete control over and has declined to provide him with a stipend. The Petitioner/Applicant is perturbed since he is now facing destitution and struggles to cater for his basic needs and cannot raise school fees for their child in view of the fact that Respondent is under a constitutional, moral and statutory duty to maintain him as a result the willful neglect. He further averred that he has a substantial claim in the matrimonial property suit against the Respondent for over Kshs.200 million.

He currently has no income or means of survival and he require his possessions and personal effects to enable make a livelihood and carry out his daily activities but the Respondent refuses to release them in order to frustrate him. He further stated that he tried on three (3) different occasions to access their matrimonial home for purposes of collecting his personal effects and possessions in accordance with the Decree Nisi issued by the Court but access has been denied by the Respondent on all occasions.

He has communicated to the Respondent his frustrations in enforcing the order of this Court for the period about 6 months but no positive response has been forthcoming from the Respondent. Attached MSD 3 Copies of the emails sent to the Respondent. He alleged that he cannot gain access to his matrimonial home without the assistance and protection of the police as the Respondent has changed the guard at their matrimonial home and issued specific instructions that he should not be granted access. He further contended that, it would be in the interest of justice that this application be allowed as prayed.

The petitioner urged the Court that the application for maintenance is well within the law and referred to the case of **K.M VS ATTORNEY GENERAL [2012] eKLR, Petition 458 of 2012** where it was observed that a husband can apply for maintenance from the wife. This position has further been clarified by the **Constitution** under **Section 7 (1)** of the **Sixth Schedule**.

The Applicant submitted further that in considering a claim for maintenance, it is important for the Court to be guided by **Article 45(3) of the Constitution of Kenya** which provides 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.***

The Applicant relied on the case of **K M VS ATTORNEY GENERAL Case (supra)** where it was observed that:

***“An application of Section 7(1) of the Sixth Schedule to the Constitution entitles the Court to read into the Act words that would bring the Act in conformity with the Constitution. In the circumstances, Section 25 of the Matrimonial Cause Act which applies to the wife is now to be read as “spouse” to bring it in conformity with Articles 27 and 45 of the Constitution and Section 25 of the Act shall be read with all the necessary alteration to make it gender neutral.”***

In addition, the Applicant also relied on the case of **W M M vs B M L. Divorce Cause No. 179 of 2008**

where it was held that:

***“Under The Constitution, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself.....no spouse who is capable of earning should be allowed to shirk his or her responsibility to himself or herself or turn the other spouse as 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 the deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”***

Furthermore, the Applicant placed reliance on the case of **R.P.M vs P.K.M [2015] eKLR** where the criteria that the Court should consider when making orders for maintenance were outlined to include:

- 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.***

### **RESPONDENT’S CASE**

The Respondent filed Replying Affidavit through Learned Counsel on 9<sup>th</sup> May, 2016 and objected to the Application on the grounds that:

- a) The Application was brought in bad faith, unmeritorious and an afterthought and intended to convolute issues**
- b) The Application was initiated solely with a view of evading the Court order to provide for maintenance for their child.**
- c) The Applicant should not have the Court’s audience as long as he has not obeyed the existing Court orders.**
- d) The Applicant should not claim maintenance at this stage of proceedings, as the claim was not pleaded during the divorce proceedings.**
- e) The Applicant is not destitute nor does he lack income as he alleged. The Applicant received USD 30,000 in March 2014 in full and final settlement of any claim from Fred Black Company.**

The Respondent relied on the following grounds and she stated that, she works at [particulars withheld] Insurance Brokers Limited as the CEO and she earns a monthly gross salary of Kshs.500, 000/= where the [particulars withheld] not a family company and is aware that the Applicant was paid a sum of USD 30,000 in full and final settlement of any claim he had against the Company in March, 2014.

Accordingly, that the Applicant has no right to any money and/or the sum of USD 368,544 as alleged since the Applicant had claimed the same amount in the Division of Matrimonial property which she has denied.

She contended that there is no doubt that the Applicant has the means to live as he has been doing so since he moved out of the house in 2013. The Respondent averred that the record will show that the Applicant never claimed any maintenance in the divorce case. She further said that the Applicant is a business man with the majority holding in [particulars withheld] and has failed to provide any information about the same though during Applicant's cross examination on 28<sup>th</sup> May, 2015 he stated that he had several businesses from which he would start receiving income in two months' time from that date. Moreover the Respondent is shocked that the Applicant can allege that he has no means to live, yet he requires Kshs.500,000/= for his own rent, transport and food.

She claimed further that this Court stated in its judgment in the divorce that, issues of property and funds should be ventilated in the pending property matter.

The Respondent also argued that she takes care of all the child's expenses which as shown in the annexed documents marked Exhibit 2 and also maintains the home which the Applicant has claimed in **HCC 18 OF 2014**. However, with regard to the personal property that the Court ordered to release to the Petitioner, she believes it would be unfair to release the same to Applicant without his meeting his part of the responsibility in the same order for that reason the effects should be sold to at least contribute towards the child's expenses.

The Respondent further contended that the Applicant did not comply with orders to pay half of their child's educational and subsistence expenses for the Child is in the UK studying and the tuition costs and upkeep expenses amount to GBP 36,118, as such, she has to shoulder the responsibility single handedly.

She averred that she has to run and maintain the matrimonial property House number [particulars withheld], Karen in terms of utility bills, insurance and general maintenance to half a million annually.

The Respondent also alluded to the fact that the responsibility to maintain the home, their daughter and also the Applicant would be unfair and a much bigger burden to carry and yet the Applicant continues to disobey the Court order to supplement their child's expenses.

She argued that the Applicant did not give the breakdown of the Ksh 500,000/- a month he claimed as maintenance to the Court and in any event, he confirmed, during the hearing, that he was involved in other Companies and had several businesses that would generate income in 2 months.

The Respondent therefore sought that the Application be dismissed as the issue of division of matrimonial property is in another Court and further averred that this Court ordered that matters relating to division of matrimonial property shall be canvassed in another forum where the relevant pleadings are filed.

Finally, the Respondent sought to have the Applicant's personal belongings that were to be released to him instead to be valued and disposed of to support their child's education in lieu of his contribution as he has not complied with the Court orders.

In her Written Submissions, the Respondent submitted on each of the issues as follows:-

On **whether this Court is the proper forum to determine this application**, she submitted that this Court is not the right forum. That the Applicant seeks orders for maintenance pending the hearing and determination of the **HCC No. 18 of 2014** and he avers that under the Matrimonial Property Suit he will be entitled to money and property. The application is in the nature of an interim application that should be made in the Cause in which the final orders are expected.

The Respondent further submitted that the prayers as framed show that the Applicant has no right to maintenance from the Respondent outside of what he expects to get in **HCC No. 18 of 2014**; evidently, the Applicant's claim is not a claim for maintenance but a claim for an advance payment on monies that he alleges that he is owed.

On **whether the Applicant is entitled to maintenance**, the Respondent stated that the criteria to be

considered by the Court in determining whether maintenance of a spouse should be ordered is set out at **Section 77 of the Marriage Act, 2014** and the Applicant has fallen short of proving that he fits within such criteria. Furthermore, that the Applicant has failed to demonstrate that the Respondent is obliged to maintain him that she has capacity to maintain him or that he is deserving of maintenance.

The Respondent relied on the following cases; **R.M.O VS J.O.O, DIVORCE CAUSE NO. 3 OF 2014** where Justice J.W. Okwany stated;

*“In her prayers seeking orders of maintenance, the Petitioner did not provide the Court with the specific particulars of the payments sought. Furthermore, in her testimony, the Petitioner did not state or prove the particulars of the amount she required the Court to order in terms of money due for the Children’s and her upkeep – vis a vis the Respondent’s earnings. Under those circumstances, this Court is unable to grant the orders sought. I will therefore make no orders in respect to maintenance.”*

The Botswana case of **BOLOKWE VS SEREMA 2002 (2) BLR 132 (HC)**, where the Judge held as follows;

*“The p700 figure and the items in respect of which a half is being claimed are not included in that letter of demand. It is as such difficult for the Court to assess the validity of this claim. Even at the hearing of this application the applicant’s attorney had difficulty in shedding light as to how the Court could make a reasonable assessment of the basis of that party of the claim. The Court is left with the impression that the said figure was just thrown in ‘for good measure’.*

The case of **D.K VS A.W.N, DIVORCE CAUSE NO. 35 OF 2011** where Kimaru J. stated;

*“Having carefully evaluated the facts of this application, it was clear to this Court that the Respondent did not make a case for this Court to compel the Petitioner to pay her maintenance pending the hearing and determination of the divorce case. There are gaps in the Respondent’s story: she did not give a cogent explanation how she was able to support herself in the ten (10) year period that she has been separated from the Petitioner. Her claim that she was a person of ill health was not supported by documentary evidence. In this Court’s assessment, it is apparent that the Respondent has concealed her source of livelihood which has enabled her to support herself in the past ten years that she has been separated from the Petitioner. This Court can only issue an order of maintenance when it is established, to the satisfaction of the Court, that indeed the person seeking to be maintained has been previously supported by the other spouse, and if the support is withdrawn, it would render the person destitute. This Court is mindful of Article 45(3) of the Constitution.”*

On **whether the Court ought to stay order (3) in the Decree Nisi**, she reiterated that the stay ought not to be granted as it will not serve the best interest of the child but the interests of the Petitioner. The judgment ordering him to pay the child’s maintenance was granted on 6<sup>th</sup> November, 2015 and if it was the case that the Applicant could not pay, he should have appealed or sought to stay it sooner but instead, he waited till March, 2016 to make the Application, only after the Respondent made a relevant application. Furthermore, if he wanted to pay college fees he could have agreed to have the personal property used to meet his share of the college fees.

In that regard, she placed reliance on the holding in **V.S vs S.S.B, DIVORCE CAUSE NO. 50 OF 2012**, where this Court rendered the position thus:

*“This Court has come to this finding after taking into account the uncontroverted evidence that the Respondent has neither supported the Petitioner financially nor maintained the child in this matter in spite of a Court order to that effect. It is not the failure per se by the Respondent to comply with those orders that has informed this Court’s decision, but rather the consequences of the persistence of such non-compliance on the best interests of the child. If this Court were to postpone the final decision in this matter in order to make further inquiry as to the*

*financial status of the parties, the ends of justice will likely be impeded by the Respondent's willful lack of cooperation which has been evident throughout the prosecution if this case”.*

## **DETERMINATION**

This Court has considered the evidence on record and will address the matter as follows;

The parties relied on legal provisions and case-law to support rival submissions on the issue of granting maintenance and staying the order to contribute to the child's education and related expenses. On the one hand, the Petitioner relied on the cited cases which awarded maintenance upon detailed evidence of income, benefits, savings, properties, debts and obligations of each party. In some cases, the Court relied on proposed negotiated sum and other, the Court considered all properties and granted maintenance.

The difference with the instant case is that the issue of maintenance was not raised during divorce proceedings so as to call for detailed evidence on the issue.

The Court heard and determined the petition for divorce which included provision for education and upkeep of the child of the marriage and return or retention of personal heirlooms. The Court granted divorce and the parties to contribute to the welfare of the child and the heirlooms be returned to the Petitioner. It is on record that neither of the two orders have taken effect or been complied with by both parties.

Instead new developments are that the petitioner ought to be granted maintenance and the Respondent be allowed to dispose of the Petitioner's belongings so as to offset the contribution from the Petitioner towards the child's welfare.

This Court is informed of the grounds for granting maintenance to either spouse as prescribed by **section 77 of the Marriage Act, 2014**. However, it finds that there ought to be compliance of the Court orders before new issues are canvassed. It appears that the Applicant seeks to have the said Orders stayed and hence he has not made attempts to comply with the same. The Respondent has also not complied and seeks variation of the said orders. It should be remembered that Court Orders ought to be complied with even if a Party is dissatisfied. This position was affirmed by Ibrahim J. in **ECONET WIRELESS KENYA LTD VS MINISTER FOR INFORMATION & AND COMMUNICATION OF KENYA AND ANOTHER [2005] 1 KLR 828**, where the Learned Judge expressed the view thus:

*“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”*

Just as the parties complied with the order granting divorce; similar effort ought to have been made by each party complying with their respective obligation. Both parties shall comply with the Court orders.

Secondly, this Court has been asked to address a new issue and matter albeit related to the instant case. The issue of maintenance for the Petitioner to be paid by the Respondent. It is on record that during the divorce proceedings this Court informed of various cases in different Courts with related matters. However, in the course of adducing oral evidence each party alluded to accounts, properties, companies, personal effects that each party owned bought, formed or contributed to during the subsistence of their marriage. In this Court's view, these were matters that could only be adequately addressed in the relevant forum, where pleadings regarding acquisition and maintenance of matrimonial property were filed.

This Court's attention was drawn to **HCCC 18 of 2014** the suit regarding division of matrimonial property. Therefore the issues of property were left for determination in that case. The petitioner did not

apply for maintenance during the divorce proceedings to enable the Court require each party to file affidavit of means so as to inform the Court on the decision in granting maintenance. Although parties through learned Counsel have filed elaborate submissions on the question of maintenance; this Court cannot conclusively consider and determine the question of maintenance in the absence of cogent evidence from each party. The Petitioner ought to give a breakdown of his resources and obligations; the Respondent similarly outline resources and obligations. On record the Respondent confirmed she earns Ksh.500,000/- a month. She also caters for the child's education and upkeep and maintenance of the matrimonial home single handedly. The Court notes that education and related expenses for the child in UK is exorbitant. The Respondent opposed any money being paid to the Petitioner as she is already shoulders a larger financial burden. Further, there are accusations and counter accusations by each party against the other on monies in an account, capital in Companies and properties. Until evidence is adduced and its veracity tested through cross-examination; it is not clear whether, the properties companies and monies are available to date, who owns what and who should get what. In the circumstances, this issue is best canvassed in **HCCC 18 of 2014**.

Whereas this Court finds the law provides for grant of maintenance to a party pending hearing and determination of the suit for division of matrimonial property, sufficient evidence has not been laid before Court. Also, it is confirmed that there's the suit on division of matrimonial property pending that should be the appropriate forum to apply for alimony and or maintenance pending the determination.

With regard to the second issue that this Court stays the compliance of the Court orders of 1<sup>st</sup> December, 2015 specifically the order that requires the Petitioner to contribute to their child's education and upkeep.

The Respondent persuaded this Court to grant the orders to enforce the petitioner to pay upfront the contribution for their child's welfare as it is in the best interest of the child as this Court held in **V.S VS S.S.B, DIVORCE CAUSE NO. 50 OF 2012**. Yet unlike the cited case the instant case the child in question attained age of majority during the pendency of the matter. There is also the facts alluded to that the Respondent who retained the matrimonial home, the dancing school and other business(s) they operated together with the Petitioner and her own income is better placed to assist in the child's education and upkeep. It is on record the Applicant is straining financially owing to the fact that he awaits division of matrimonial property.

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."***

Ideally each party shall have audience in Court and grant of relevant orders if and when one comes to equity with clean hands. It would be unjust and unfair for a party to seek orders from Court to enforce and protect their rights while using the same forum to violate and curtail the other party's rights. It follows; the Respondent shall not sell the heirlooms or in any other way dispose of them or seek to enforce the orders against the Petitioner unless the personal effects are released to him forthwith.

The Petitioner informed the Court that his financial position has drastically changed; he has no income and subsistence. He has no access to their matrimonial home and cannot access the home to retrieve and collect his personal effects. He has no funds in their joint account as he alleged the Respondent withdrew and spent all the funds. Most of the properties are held by the Respondent and valued to close to 200m. He has no capacity to comply with the Court order at the moment until his financial situation improves.

The Court finds these circumstances disclose the Applicant's dire and desperate situation and reasonably he cannot possibly meet the obligations and comply with the Court order. It is a stalemate between the Applicant and Respondent; the Applicant demands the heirlooms, the Respondent demands the Applicant's contribution to their child's welfare. Clearly, it is a stalemate and until it is resolved the Court

grants stay of the Respondent contribution to their child's welfare until the heirlooms are released and the matter regarding division of matrimonial property is heard and determined.

**DISPOSITION**

- 1. The issue of maintenance and orders regarding division of matrimonial property shall be heard and determined in HCCC18 of 2014.**
- 2. The application is partly allowed on the stay to make contribution to the Child's welfare by the Respondent until the division of matrimonial property is heard and determined and /or the Respondent releases the Applicant's heirlooms.**
- 3. The Application is dismissed on the issue of payment of alimony pending hearing and determination of the matter regarding division of matrimonial property.**
- 4. Each party shall bear own costs.**

**DELIVERED SIGNED AND DATED IN OPEN COURT ON 24TH NOVEMBER 2016**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

Counsel for Respondent

Counsel for Applicant