REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 100 OF 2013

BETWEEN

R G N …….……...….PETITIONER

AND

J R K N .....……...…….....……..RESPONDENT

RULING

1. The application that I am called upon to determine is dated 25th November 2013. It is brought at the instance of the Respondent to the divorce cause herein. The said application seeks the transfer of all proceedings in **Nairobi Milimani CMCDC No. 30 of 2004** to the High Court for consolidation purposes and for the adoption of the maintenance orders made in that cause. There is also the alternative prayer that the Petitioner in the instant cause do pay maintenance to the Respondent.

2. The grounds upon which the application is predicated are set out on the face of the application as well as in the affidavit in support sworn on 25th November 2013 by the Respondent. In summary, she says that she had initiated **CMCDC No. 8 of 2004** and obtained maintenance orders there in where the Petitioner herein was ordered to pay her monthly maintenance of Kshs. 150,000.00 per month which was later reviewed to Kshs. 70,000.00 by the High Court in **CA No. 29 of 2004**. The said appeal in **HCCA No. 29 of 2004** has since been withdrawn. On 13th May 2013 the trial court in **CMCDC No. 30 of 2004** declared that it no longer had jurisdiction over matters of the nature of the matrimonial proceedings before it. The Respondent avers that following the orders of 13th May 2013 the Petitioner herein ceased to pay maintenance and she is now in dire straits.

3. She has attached to her affidavit in support of the application various documents. There are copies of the plaint and the amended plaint filed in CMCDC No. 30 of 2004. A copy of the maintenance order made on 20th April 2004 in CMCDC No. 30 of 2004 is also attached. There is a copy of the application filed in CMCDC No. 30 of 2004 on 13th August 2013 with respect to maintenance. There are also copies of orders made in **HCCA No. 29 of 2004, HC Misc. Civil Application No. 532 of 2004 and HCCC No. 19 of 2005 (OS)**, and the pleadings in **HCDC No. 100 of 2013**.

4. Upon being served with the application, the Petitioner filed grounds of opposition on 27th February 2014. He avers that since the lower Court had declared that it had no jurisdiction to hear the matter the cause before it was as dead as a dodo and therefore there was nothing to be transferred to the High Court. He states that the orders sought on maintenance offend the provisions of Article 45(3) of the Constitution of Kenya.

5. In addition, he filed a replying affidavit sworn on 17th July 2014. He concedes that the two of them cohabited from 1984, though intermittently, and had two children between them. The portrait he paints of the Respondent is that of an irresponsible person who has made no effort to sustain herself economically. He details the efforts he made towards getting her to be financially stable, but to no avail. He avers that he is the one who cares for the children of the union, and concludes that at 52 years of age the Respondent is strong enough to fend for herself.

6. When the matter was placed before Kimaru J. on 25th February 2014, the parties recorded a consent to dispense with prayers 2 and 3 of the application. That left prayer 4 on alimony. Parties were to hold out of Court negotiations thereon and were to report back to Court and to record a consent. A consent was not forthcoming and on 5th June 2014 it was directed that the application be disposed of by way of written submissions, to be highlighted. On 23rd October 2014, the highlighting of the submissions was dispensed with.

7. Both sides did file detailed written submissions. The Respondent's written submissions are dated 22nd September 2014. She also filed a list of authorities, complete with copies of the authorities that she was relying on. The Petitioner's written submissions are dated 22nd October 2014 and were filed in Court on 23rd October 2014. The Petitioner too filed a list of authorities complete with copies of the authorities cited.

8. The Respondent also filed an affidavit of means sworn on 5th August 2013. She gives a background of her relationship with the Petitioner from 1980 to 2004. She also identifies the properties acquired by the parties during the alleged cohabitation, as well as the businesses that the parties allegedly started and ran together. She has also dealt at length with her employment history and the lifestyle and expenses of the Petitioner.

9. In her written submissions, the Respondent summarises the facts set out in her affidavits with regard to their family history and background, their career and professional lives, acquisition of property and their respective lifestyles. The tenor of the submissions is that the Petitioner is sitting on assets running into millions of shillings, while she wallows in poverty for she has no income of her own.

10. On the law, the Respondent relies on the provisions the Matrimonial Causes Act, now repealed, and the rules made there under, as well as the Marriage Act, 2014. Section 25 of the repealed Matrimonial Causes Act allowed the wife to apply for alimony pending suit, and empowered the Court to thereupon make such orders as it thought fit. Under Section 32 of the same Act, the Court was given discretion to vary maintenance orders from time to time. These provisions are echoed in the new law, the Marriage Act, 2014 at Section 77 thereof.

11. She submits that in exercise of authority under Section 77 of the Marriage Act, 2014, the Court should consider the conduct of the spouses during the course of the marriage, the period that they have been in marriage, whether both are working, who controls the matrimonial property, the ages of the parties, their current living situation and their standard of living during the course of the marriage. She pleads that she should be awarded Kshs. 50,000,000.00 as a one-off payment to help set herself up, complaining that she contributed to the accumulation of the family wealth that the Petitioner is now enjoying alone.

12. The Respondent relies on the decisions made in ***Peter Mwendwa Kithome –vs- Teresia Njeri Kinyari (2007)eKLR, S.K –vs- B.Z (2009)eKLR, G.W –vs- AZK (2009)eKLR and W.M.M. –vs- B.M.L (2012)eKLR***. The decision in ***Peter Mwendwa Kithome –Vs- Teresia Njeri Kanyari*** turned on the filing of affidavit of means out of time. In ***S.K –vs- B.Z*** the husband had left his wife and school-going children at the matrimonial house to live alone in separate premises. There was evidence that the wife used to work in the family business but was subsequently thrown out by the husband. The Court in that case ordered the husband to pay what it described as family maintenance. The decision in ***G.W. –vs- A.Z.K*** turned on division of matrimonial property in

divorce proceedings.

13. The wife in ***W.M.M. –vs- B.M.L*** was 54 years old at the time of the decision; she was a holder of a doctorate degree and had worked for universities in Kenya. She had no children with the husband and had a substantial sum of money sitting in a bank overseas. The decision turned on the fact that the wife was capable of engaging in gainful employment but was refusing to work, which conduct was found to be oppressive to the husband. The Court cited Article 45 (3) of the Constitution on equality of spouses which points to equal treatment under the law. In the end the Court ordered the husband to pay to the wife monthly maintenance for a period of six (6) months from the date of judgment in the matter or until two pending suits on division of matrimonial property were determined, whichever came first.

14. On the other hand, in his written submissions the Petitioner zeroes in on what he considers to be the central issue for determination – maintenance of the Respondent. He argues that he has been single-handedly supporting the children of the marriage, even into their adulthood, helped out the Respondent with resources to set up businesses of her own and the fact that the Respondent has sufficient qualifications and skills which can get her gainful employment. On matrimonial property he points out that there is a pending suit on division thereof.

15. On the law, the Petitioner relies on Article 45(3) of the Constitution, as read with Article 21(3) thereof. Article 45(3) talks of parties to a marriage being entitled to equal rights at the time of marriage, during marriage and at its dissolution; while Article 21(3) states that the man and the woman have right to equal treatment, including the right to equal opportunities in the political, economic, cultural and social spheres.

16. His submission is that the rights enshrined in Article 45(3) connote equality of spouses in a marriage, and the provision is intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms. He further submits that Article 45(3) does not create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it. He concludes that the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself.

17. He cites two decisions to buttress his submissions – ***W.E.L –vs- J.M.H (2014)eKLR*** and ***W.M.M. –vs- B.M.L (2012)eKLR***. In ***W.E.L –vs- J.M.H*** it was stated that a spouse who is capable of supporting herself ought not be allowed to evade that responsibility and turn the other into a money making machine. It was stated in that decision that maintenance should be ordered only where warranted. In ***W.M.M. –vs- B.M.L*** it was observed that granting maintenance must make sense, must be affordable, not enrich the person being paid nor oppress the person paying it.

18. It is not in dispute that the parties herein cohabited for many years in an arrangement that amounted to marriage. Both acknowledge as much as is clear from the instant petition and in the pleadings in **Milimani CMCD No. 30 of 2004**. The relationship produced two children who are now adult. It would appear from the papers on record that the children are presently the sole responsibility of the Petitioner. There is also no dispute that the parties have been living apart since 2002.

19. The matter for determination is whether or not interim maintenance ought to be awarded to the Respondent. The record reveals that the Respondent filed **Milimani CMCDC No. 30 of 2004** and obtained orders on maintenance. The said orders remained in place until 2013, when the lower Court declared that it had no jurisdiction on the matter, whereupon the Petitioner herein stopped making maintenance payments. He then moved this Court in this cause for termination of the relationship. The application dated 25th November 2013 is really for reinstatement of the maintenance orders that lapsed in 2013.

20. Maintenance of a wife pending and after divorce is grantable under the legislation governing marriage. It is ordered at the discretion of the Court, meaning that the same is dependent on the

circumstances of each case. It is not available as a matter of course, in the sense of it not being automatically grantable in any divorce matter where maintenance is prayed for.

21. Section 77(1) of the Marriage Act, 2014, which is the provision governing maintenance of a spouse, states as follows-

"The Court may order a person to pay maintenance to a spouse or a former spouse-

a. **If the person has refused or neglected to provide for the spouse as required by this Act;**

b. **If the person has deserted the other spouse or former spouse, for as long as the desertion continues;**

c. **During the course of any matrimonial proceedings;**

d. **When granting or after granting a decree of separation or divorce; or;**

e. **If, after making a decree of presumption of death, the spouse or former spouse is found to be alive."**

22. The above provision is misleadingly titled "*grounds for orders of maintenance*," yet it does not set out any grounds for granting of the orders of maintenance. What it does is to enumerate the circumstances under which maintenance may be granted – where there is refusal or neglect to provide, where a spouse is deserted, during course of matrimonial proceedings, when making grant of decree of separation or divorce, or if a spouse who had been presumed dead is found to be alive. Grounds would bespeak the reasons or motive or basis for making a maintenance order, while circumstances point to the fact or condition or occurrence in time or place or manner or cause or event surrounding the making of the order.

23. The provisions on maintenance in the Marriage Act, 2014 are silent on grounds or reasons upon which a maintenance may be made. They do not set out the factors to be taken into account; or the criteria to be used in determining whether to order maintenance. Section 25 of the repealed Matrimonial Causes Act, at subsection 2, requires the Court to take into account the wife's fortune, if any, the husband's ability to pay and the conduct of parties. In the absence of clear provisions in the new legislation the Courts will not doubt continue to be guided by the spirit of Section 25(2) of the Matrimonial Causes Act.

24. The provisions of Section 77 of the Marriage Act, 2014, and 25(2) of the Matrimonial Causes Act, are subject to Articles 21(3) and 45(3) of the Constitution. The two underline the constitutional imperative that men and women are equal before the law and therefore in the marriage arena they are to be accorded equal rights both during and at the dissolution of the marriage.

25. Of the several decisions cited by the parties in support of their respective cases, I find ***W.E.L –vs- J.M.H*** and ***W.M.M. –vs- B.M.L*** more relevant to the circumstances of the instant case. In both cases the Court applied the principles set out in Section 25(2) of the Matrimonial Causes Act and Articles 21(3) and 45(3) of the Constitution.

26. The principle emerging from both decisions is that upon marital breakdown both parties ought to rise up, pick up the pieces and move on. Both underline the fact that the paradigm with respect to spousal maintenance has shifted. The age when men were viewed as sole bread winners is gone. Husband and wife are equal partners in marriage. They have equal responsibilities during marriage. Both are entitled to equal treatment. This extends to the period after break up. None bears the burden of caring for or providing for the other spouse after break up. Each of them is expected to be on their own after brake up. None of them should be a parasite to the other; neither should any of them be turned into a slave for the other.

27. The old dispensation had its origins in English law. Even there the ground has shifted as evident from the recent decision in ***Wright –vs- Wright (2015) WCA Civ. 201***. The Court of Appeal in that matter declined to interfere with a High Court decision which had ordered that the former wife's spousal maintenance should cease. It was stated that the former wife ought to take steps to contribute financially to her own future. In short, she was advised to look for work to support herself as many other women with children were doing.

28. The old order was no doubt founded on the economic and social circumstances then prevailing. It traces its origin to the period before the Industrial Resolution. At the time wives stayed at home, begot children and cared for the family; the husbands were sole breadwinners. They toiled to provide a roof over the heads of their family members, to place food on the table and clothes on their bodies. Women then did not have much access or control over property. In the event of a marriage break down they were no doubt exposed to grave adversity and therefore the necessity to afford them legal protection by way of ordering their former spouses to continue maintaining them even after dissolution of their marriages.

29. The circumstances have vastly changed since then. The Industrial Resolution happened, bringing with it profound social, political and economic changes. The socio-economic dynamics of society mutated forcing the law to reform to accord with the times.

30. The material placed before me indicates that the Respondent underwent training at [particulars withheld] College, IAT and even in the United States of America. She no doubt acquired knowledge and skills that propelled her into the labour market, where she worked at various places before landing high profile jobs with Pan American Airlines, Sabena Belgian Airways and East Africa Airlines. She had opportunity to access both fortune and experience, although I have little material upon which I can conclude that she did indeed amass a fortune. The Respondent is clearly an employable person given her professional training and experience.

31. There is material from both sides demonstrating that the Petitioner at various stages of their relationship tried to set up the Respondent in business, but the efforts floundered. He blames it on her, while she blames the conditions that prevailed at the time. There is reference to a restaurant and beauty salon business at the Kilimani area of Nairobi; a shop at [particulars withheld] Plaza and another restaurant at Nairobi West. It is not disputed that nothing came out of these businesses, and the investments went to waste.

32. The Respondent has brought up the issue of the assets acquired during matrimony. Both sides have addressed me exclusively on the same in both their affidavits and their submissions. I cannot pronounce myself on this matter as there is a pending suit between the same parties on division of matrimonial property, being **HCCC No. 19 of 2005(OS)**. The issue of who contributed to the acquisition of that property is to be determined in that suit. The Respondent no doubt expects a share of the assets that she has set out in her prayers.

33. The Petitioner is alleged by the Respondent to be a person sitting on substantial assets and therefore capable of supporting her. He has countered this citing his age, the fact of his approaching retirement and the burden of caring for the children. The Petitioner does not quite renounce the assets that he is alleged to own. My preliminary view of the matter in the circumstances is that he does own the assets in question, or at any rate he controls them. The children of marriage are now all adults and working, and ideally they ought to support themselves. There is no doubt in my mind that the Petitioner has the ability to support the Respondent, even if not at the rate that the Respondent proposes. However, the question that I have to address, in my view, is not whether he is able to provide such support, but rather whether he should be obliged to.

34. One factor to be taken into account is the conduct of the parties. Cohabitation is said to have ceased sometime in 2002 or 2004. The Petitioner says in his petition that the Respondent left in 2002 never to come back. The Respondent counters that, alleging that she left in 2004, forced out

by the cruelty of the Petitioner. Curiously in her plaint, filed in the ill-fated **CMCDC No. 30 of 2004**, the Respondent makes no mention whatsoever to her being forced out of the matrimonial home. Similarly she does not in her answer to petition and cross-petition filed herein on 25th June 2013 breathe a word about being forced out of the matrimonial home in 2004 or at any other time during the course of the marriage. The particulars of cruelty enumerated in the cross-petition do not suggest that the Respondent was in any immediate physical danger from the Petitioner's alleged conduct.

35. It emerges that the Petitioner has been providing for the children of the marriage after the Respondent left, educating them to University level. It would appear that the elder child stayed with him until she got a stable job and moved out to live on her own. He depones that even then he still supports the said child and her child. The other child is still going through the education cycle and is still depending on him. These facts are not disputed by the Respondent.

36. The issue of the age of the Respondent was raised. She was described as elderly and therefore unemployable. The material before me puts her age at fifty-one (51) as of 17th July 2014. She should now be fifty-two (52) or going there. This is not the age of an elderly person. Persons at this age are still active and energetic. The retirement age in public service for some cadres is sixty (60) years of age, for others it is seventy (70). In the private sector, the general age of retirement is sixty-five (65). Quite evidently, the Respondent is far from these ages. It has not been suggested that she is sickly or infirm in any way. Furthermore, the former wives in ***W.M.M. –vs- BMK*** **and** ***Wright –vs- Wright*** were fifty-four (54) and fifty-one (51), respectively, at the time the orders were made in those cases. To my mind, the Respondent is not yet too old for employment purposes.

37. I am conscious of the fact that maintenance orders had been made in **Milimani CMCDC No. 30 of 2004**. The said orders were made on 20th April 2004 and the Respondent enjoyed them until that case collapsed in 2013. The Respondent appears to be seeking reinstatement of the said orders by means of the instant application. She appears to harbour the view that spousal maintenance is an automatic right.

38. I have anxiously considered all the material placed before me by the parties by way of affidavits and written submissions. I have also carefully studied the applicable law as stated in the statutes and applied in the cited authorities. I am conscious of the fact that the case before me is yet to be heard fully and therefore the facts stated in the affidavits have not been presented orally before me and tested by way of cross-examination.

39. I am not satisfied from what is now before me that a case has been made out for grant of the orders sought. Firstly, upon the breakup of the marriage in 2002 or 2004, whichever is the correct one, the Respondent ought to have taken steps to secure her future by either setting up herself in business or seeking employment. Secondly, the children of the marriage are all adults, they do not live with her and therefore they do not depend on her. Thirdly, she ought to have taken the opportunity afforded by the maintenance orders she was enjoying between 2004 and 2013 to re-organise her life and attain financial independence from the Petitioner. I could go on and on.

40. In the result the application dated 28th November 2013 is for dismissal, and I do hereby dismiss the same with costs. The Petitioner shall have costs of the application. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF MAY, 2015.

W. MUSYOKA

JUDGE

In the presence of advocate for the petitioner.

In the presence of advocate for the respondent.