



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 17 OF 2015

BETWEEN

S R S VPETITIONER

AND

P H.....RESPONDENT

RULING

1. The Petitioner, SRSV has brought a Notice of Motion dated 19th January 2015 seeking that the court do make an interim maintenance order as it deems appropriate in the circumstances. The application is premised on grounds that the Petitioner is in dire financial constraints and is unable to afford basic needs; that the Respondent has refused/failed and or neglected to provide for the Petitioner, who is a foreigner and is thus unable to lawfully engage in any gainful employment, and that the Respondent is a man of great means and is therefore able to provide for the Petitioner.
2. The Petitioner filed a supporting affidavit dated 19th January 2015 in which she deponed that she and the Respondent started cohabitation in 1998 and formalized their marriage on 2nd January 2012 in Bandra Court, in India. They later returned to Kenya and lived as husband and wife. That for the last eleven (11) years, she has been on resident visitors pass and therefore was not able to engage in any lawful employment and the Respondent has been her breadwinner.
3. The Petitioner avers that during the subsistence of their marriage, the Respondent has mistreated her through both physical and emotional battering until in January 2015 when she decided to end the marriage by moving into a different room in their matrimonial home. Despite moving to a different room, the respondent continues to threaten her and all efforts to seek help have been futile. The Respondent refuses to provide for her and she has been surviving on goodwill from friends and neighbours. The Petitioner prays that since the Respondent is a man of great means, he is capable of providing for her requirements totalling to Kshs.690,000/- per annum.
4. The Respondent in his replying affidavit dated 17th February 2015 denies having been violent or abusive physically or emotionally to the Petitioner as alleged or at all. He avers that he has not neglected the Petitioner either now or at any time following their marriage, but has provided her with a fully insured and serviced Toyota Harrier registration KBR no. [particulars withheld]. That on the contrary the Petitioner is the one who has neglected and the Respondent and her matrimonial responsibilities.

5. The respondent averred that the Petitioner is not employed but leaves the home every morning and returns between 7.00 and 8.00 p.m. That they have no issues of the marriage. That the amount of money the Petitioner seeks as maintenance is too high and unjust as compared to what the two of them spend at home together with their three domestic help and three dogs. The Petitioner has declined to engage in any business or income earning activity including employment and therefore the Respondent finds it unfair to have the burden of maintaining her while she is a person with the potential to earn an income.
6. The Respondent further averred that between the year 2012 and 2014, the Petitioner had a work permit but declined to work. She stayed outside the country until the said permit expired in August 2014 and it is not true that the Petitioner has always been on visitors pass and without the ability to earn an income. He states that he should not be punished to maintain the Petitioner because she had her own intention to leave their matrimonial home for some time. That she has removed all the jewellery and clothes indicating that she wished to live away from the Respondent. He also averred that he and two others work as Directors of Payal Industries Limited where they share the income between the three of them. That the amounts the Petitioner seeks per annum is much higher than the net profit of the Company from which he earns an income.
7. Mr. Sheikh, learned counsel for the Petitioner submitted that in an application of this nature, the court ought to consider the respective parties means and expenses. That the Applicant is a foreigner married to the Respondent and has no valid work permit and therefore cannot engage in any economic activity. That the Petitioner has relied on the Respondent for all her expenses. Mr. Sheikh contended that the relationship between the Petitioner and the Respondent has been frosty for some time and it is for this reason that the Petitioner moved to her own room.
8. Counsel submitted that there was enough evidence that the Petitioner has been a victim of domestic violence perpetuated by the Respondent. One incident was reported to the Police and a P3 form duly filed. That the house helps who filed affidavits against her were expected to appease their master lest they lose their jobs. Their evidence was devoid of truth as it was not possible for them to have failed to hear noise that was emanating from their master's house.
9. Mr. Sheikh argued that the Respondent has willingly attempted to conceal his financial position to appear that he is a man of small means and this is evident from the many telegraphic transfers of funds he did. He urged the court to allow the application as prayed.

10. The Petitioner prayed that the Respondent do provide for maintenance as follows:

- a. Food Expenses130,000/-
- b. Medical Expenses
 - Medicines 30,000/-
 - Doctors check-ups..... 50,000/-
 - Dentist..... 30,000/-
- c. Personal Expenses
 - Toiletries..... 20,000/-
 - Cosmetics 25,000/-
 - Salon.....25,000/-
 - Clothes.....35,000/-
 - Airtime.....15,000/-
 - Temple offerings..... 5,000/-
 - Gym..... 25,000/-
 - Emergency.....50,000/-

d. TV Cable & Internet

- Transmission.....15,000/-
- House Help.....25,000/=
- Laundry.....15,000/-
- Rent.....150,000/-

690,000/=

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11.Mr. Ochieng Onyango for the Respondent submitted that this court has no jurisdiction to hear this matter. The Petition was filed in January 2015 and when the Marriage Act 2014 was in force. The Marriage Act 2014 clearly defines court in Section 2 to mean the Magistrate’s Court that states as follows:

“court” means a resident magistrate’s court established under section 3 of the Magistrate’s Courts Act.

He submitted that the original jurisdiction to grant divorces under the Marriage Act 2014 is on the Magistrate’s Court and not the High Court.

He also submitted that the amounts stated are exorbitant according to the averments by the Respondent in his affidavits. The Respondent contends that the amount the Petitioner is seeking is beyond his means, and way above what the two have always spent and he cannot afford to pay maintenance for the Petitioner.

12.Mr. Ocheing also submitted that the Respondent did everything in his power to ensure the Petitioner lives a comfortable life. That it is very unfortunate for the Petitioner to interpret this to mean that the Respondent is a person of means. The current situation of the Petitioner is that they live together with the Respondent.

13.I have considered the affidavits of both parties and the submissions by the counsels. On the issue of jurisdiction the marriage Act under which this matter does specify that for purposes of the said Act, the court is the Resident Magistrates court. Previously these matters were heard in the High Court, but since the advent of the marriage Act in 2014 the applicable forum is the Resident Magistrates court. This matter however having been filed and heard in the High Court I have proceeded to consider it under the powers conferred upon the High Court by **Article 165(3) (a) of the Constitution**.

14.On the issue of alimony, the principle consideration in granting alimony and maintenance as stated in the case of **W N Vs. P B (2013) eKLR** is as follows:

“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.”

I considered the facts of this cause against this background.

15. 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, that is, the state. It is not intended 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. An order of alimony is not made to allow a spouse. to maintain the lavish lifestyle she may have enjoyed during the marriage. Alimony pendente lite is to provide basic sustenance to a wife

pending the determination of the matrimonial cause. – See **N R B v J O [2014] eKLR**.

16. **Article 45(3)** which states that “parties to a marriage are entitled to equal rights” is in harmony with **Article 27(3)** of the **Constitution** which enshrines equality of men and women and specifically states that “women and men have the right to equal treatment”..... The age-old tradition in which men were deemed to be the sole bread winners and were to carry the burden of maintaining their spouses does not hold true anymore. 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. ...”**neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner.**” – see Justice GBM Kariuki (as he then was) in **W.M.M vs B.M.L (2012) eKLR**.

17. The back ground of this case is that the Petitioner and the Respondent started cohabiting in 1998 and formalized their marriage on 2nd January 2012 in Bandra Court, in India. The Applicant lives in the same house with the Respondent and does not therefore pay any rent or bills for amenities. Further as stated in the Respondent’s affidavit and those of the two maids, the Applicant has chosen not to take meals served in the house. She also has a car at her disposal. Her reasons for not being in gainful employment are that the Respondent has not obtained a work permit for her. The Respondent on the other hand states that when the Petitioner did have a work permit she refused to utilise it for two years. Instead she went to India and stayed away for a year.

18. Upon consideration of the averments and submissions before the court I have come to the conclusion that in the circumstances of this cause the orders sought are not deserved.

The application is therefore dismissed. Costs to be in the cause.

SIGNED DATED and DELIVERED in open court this **12TH** day of **November 2015**.

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L. A. ACHODE

JUDGE