



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI

DIVORCE CAUSE NO. 31 OF 2011

C Y C.....PETITIONER

VERSUS

K S Y.....RESPONDENT

RULING

1. On 23rd May 2013, the parties hereto appeared before me and argued the application dated 20th March 2012. The said application seeks three principal prayers – custody and control of the minor children of the marriage, maintenance for the said children and alimony for the respondent pending the determination of the divorce cause.

2. The cause herein is for dissolution of the marriage between the petitioner, C Y C, and the respondent, K S Y, contracted on 9th May 1994 in South Korea. After the celebration of the civil marriage, the parties hereto cohabited in Nairobi, Kenya, where they took up residence and established a matrimonial home. The couple have two children – born on 27th April 1995 and 16th April 1997. The divorce petition is premised on desertion and cruelty.

3. Upon being served, the respondent cross- petitioned for divorce grounding her claim on cruelty and adultery. She prays for custody and control of the children of the marriage, maintenance of the children and alimony for herself.

4. The petition was amended on 21st September 2011 to add more details. The most significant was that the parties had entered into a post-nuptial agreement in the following terms:-

(a) that the petitioner would pay the respondent a sum equivalent to USD 320,000.00 in full and final settlement of the respondent's maintenance and support.

(b) that the respondent was out of that amount to provide for the upkeep and education of the children of the marriage.

(c) that the respondent was to leave Kenya immediately for Korea upon receipt of the said amount and she was to live there permanently together with the children.

It is averred that once the respondent received the sum of UDS 320,000.00 she left Kenya for Korea in 2005, where she invested the money in various ventures, but she subsequently came back to Kenya without notice.

5. The respondent responded to this new averment through the amendments effected to the answer to the

petition on 2nd March 2012 in the pleading filed in court on 8th March 2012. The respondent does not in principle deny the post-nuptial agreement but avers that she did not sign it freely, the same was illegal and a nullity and she was not in any event paid the sum mentioned in the agreement. She prays in the cross-petition that the said agreement dated 29th November 2005 be declared inadequate illegal and a nullity.

6. The Chambers Summons dated 30th March 2012 seeks interlocutory reliefs founded on the prayers sought in the cross-petition. Prayers 2,3 and 4 of the Chamber Summons mirror prayers (b), (c), (d) and (g) of the cross-petition. In her affidavit in support of the application the respondent avers that although the petitioner had been served with a notice of application for ancillary relief, he has neglected to respond to it. She avers that the petitioner is an industrialist and real estate investor in the East African region. She asks for maintenance and of herself in the following terms:-

- (a) a 4 bedroom mansion or apartment in a decent neighborhood or rent at Kshs.300,000.00 per month or thereabout,
- (b) furniture, house ware and home necessities or Kshs.3,000,000.00 or there about for purchase of such items,
- (c) Kshs.2,000.000.00 per month for living expenses to cater for electricity, water, food, clothing and sundry expenses.
- (d) school fees for the two children at the International School of Kenya and such other school related expenses as may be necessary,
- (e) Kshs.2,000,000.00 per annum to cater for the children and respondent's annual holiday together with three (3) return air tickets to South Korea or any destination of their choice,
- (f) unlimited and the children, and
- (g) the return or replacement of the Prado and Lexus cars to the respondent for her daily use.

7. The appellant has responded to the application through a Notice of Preliminary Objection dated 27th April 2012 and a replying affidavit sworn on 17th May 2013. The notice of objection raises issues on the children, while the replying affidavit is confined to alimony.

8. Regarding the preliminary objection the petitioner argues that this divorce court has no jurisdiction to deal with matters touching on custody and maintenance of children since jurisdiction over these matters has been taken away by the Children Act and conferred upon the Children's Court. He also argues that by virtue of *Section 31* of the Matrimonial Causes Act the application is premature as the orders sought with respect to the children can only be granted at the conclusion of the cause and not in interlocutory proceedings.

9. Regarding alimony pendete lite, the petitioner reiterates the post-nuptial agreement dated 29th November 2005 and pleads that upon being paid the agreed sum of USD 320,000.00 the respondent left Kenya as agreed for Korea at the understanding that was a full and final settlement. The respondent is said to have gone back to Korea and invested the money in a business from which she gets returns from which she is able to comfortably take care of herself and the children.

10. The allegations made in the petitioner's replying affidavit have not been responded to by the respondent.

11. I will deal first with the issue of custody and maintenance of the children. This aspect of the application is premised on *Section 30* of the Matrimonial Causes Act. The provision relevant to these proceedings in subsection (1) of *Section 30* of the Act which provides:-

“In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children of the marriage of whose parents is the subject of the proceedings, or if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court.”

12. *Section 30* of the Act falls in Part VI of the Act which provides for ancillary reliefs, that is reliefs that are supplementary or secondary to the primary or principle prayers in the petition. The ancillary reliefs cannot be sought independently of the principal prayers. Most of these reliefs can only be made either at the stage of the making of the decree *nisi* or at decree absolute. This is the effect of *Section 31* of the Act. A proviso to *Section 31(1)* of the Act is to that effect. It states-

“Provided that no order under any of the said sections and under the said subsection (other than an interim order for the payment of alimony under Section 25 of this Order rule) shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settle made in pursuance of any such order shall take effect unless and until the decree is made absolute.”

This provision affects *Sections 25, 27, 28 and 30(3)* of the Act. The restriction by the provision however does not affect the proviso of *Section 30(1)* of the Act to which their proceedings relate. It does not cover *Section 26* of the Act, which too deals with maintenance of children. There is therefore jurisdiction under the Matrimonial Causes Act for the making of interim orders relating to custody and maintenance of children.

13. The Children Act was passed in 2001. It carries provisions that cover the matter of custody and maintenance of children, the same matters that are the subject of *Sections 26 and 30* of the Matrimonial Causes Act. The two statutes have parallel provisions on the subject. The question is whether any of the two statutes takes precedence over the other. The Children Act is the latter in time, but I do note that none of its provisions repeals the provisions of the Matrimonial Causes Act which provide for custody and maintenance of children. This means that parliament intended the provisions in the two statutes to remain in force – one being general, to cater for custody and maintenance of children in general; and the other specific, to cover custody and maintenance of children in situations of divorce or judicial separation. It leaves it to the discretion of the parties to elect between moving the court under the Children Act or under the Matrimonial Causes Act. Similarly, there is discretion to the court to opt between the two statutes – it may entertain an application under the Matrimonial Causes Act or direct the parties to pursue the issue of custody and maintenance of children under the Children Act. In short the provisions of the Children Act do not override those of the Matrimonial Causes Act over the matter.

14. The respondent has placed an application before me under the Matrimonial Causes Act on the issue of custody and maintenance of the children of the marriage the subject of these proceedings. As mentioned earlier, there is jurisdiction vested in me to make the orders sought under *Section 30(1)* of the the Matrimonial Cause Act. Should I exercise such jurisdiction? I note that one of the children has since attained eighteen (18) years of age. He has ceased to be a child and has become an adult, and the provisions of *Section 30(1)* of the Act can no longer apply to him. I cannot therefore exercise discretion under *Section 30(1)* of the Matrimonial Causes Act in his favour. That leaves me with only one of the children. I am reluctant to exercise dissolution under the Matrimonial Causes Act in favour of one child. The provisions of the Children Act are broader and there is room there to extend parental responsibility over someone beyond their eighteenth birthday. I have power under *Section 30(1)* of the Matrimonial Causes Act to direct that proper proceedings be taken regarding the welfare of the children so far as custody and maintenance are concerned.

15. On alimony pending suit I do note that the power to order interim maintenance of wives is not limited by the proviso to *Section 31(1)* of the Act to the time of making decree nisi. I can exercise that discretion at the present stage in the determination of the application now before me.

16. The petitioner has argued that the issue of alimony *pendete lite* was resolved in the agreement dated

29th November 2005 as the payment the subject of that agreement was meant to cater for

the maintenance of the respondent and the children. The respondent argued that such agreements are not recognized under Kenya law and in any event the petitioner did not make payment under the agreement as stipulated. The submissions by the respondent cannot be right. Such agreements or settlements are recognized under *Section 28* of the Matrimonial Causes Act, and it would appear that the settlement made on 29th November 2005 is a matter that this court can entertain. However going by the provisions of *Sections 28* of the Act, such settlement can only be considered after pronouncement of the decree for dissolution of the marriage the subject of the proceedings. This court cannot make an inquiry into such settlement before then.

17. The respondent asks me to make provision for her in terms of paragraph 12 of her affidavit. The petitioner's means have not made available to me by either side. The respondent merely says that he is an industrialist and realtor with investments through East Africa and in South Korea. The petitioner had been served with a notice of ancillary application but he did not furnish court with full particulars of his property and income by way of affidavit as required. I have no other materials to act on apart from what is contained in paragraph 12 of the respondent's affidavit.

19. In the end I make the following orders:-

(a) That the matter of the children's custody and maintenance shall be placed before the Children's Court.

(b) That the petitioner shall provide for the respondent as follows pending the determination of the divorce petition:-

(i) a 4 bedroomed mansion or apartment in a decent neighborhood in Nairobi or monthly rent at a sum between Kshs.150,000.00 and Kshs250,000.00,

(ii) furniture, house ware and home necessities or Kshs.1,500,000.00 for purchase of such items,

(iii) Kshs. 300,000.00 per month to cater for living expenses and utilities,

(iv) return by the petitioner to the respondent of the either the Prado or Lexus vehicle that had previously been placed at her disposal or in the alternative provision of another car of similar range or standard.

(c) Costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE