

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL REFERENCE NO. 8 OF 2012

J N A APPLICANT

V E R S U S

S O RESPONDENT

R U L I N G

The applicant filed the Notice of Motion dated 10.4.2012 seeking orders that the order of the Senior Resident Magistrate in Vihiga Separation and Maintenance Cause No.4 of 2004 be declared as unconstitutional and a violation of the applicant's fundamental rights. The applicant contends that the order was made without jurisdiction. The application is supported by the applicant's affidavit sworn on the same date. The respondent filed a replying affidavit sworn on the 12.11.2012. Parties relied on their respective pleadings.

The background information is that the parties herein were married under the Marriage Act on 27.11.2000. The respondent filed a *Separation and Maintenance Cause No. 4 of 2004* four years after the marriage. The court granted separation and ordered that the applicant provide monthly maintenance totaling **KShs.7,500/=** to the respondent. From the affidavit of the respondent it is clear that he failed to pay that amount and an application to attach 1/3 of his salary was made and granted. For the last eight years the applicant's salary has been deducted and by March 2012 a total of **KShs.225,500/=** had been paid. The applicant contends that they had no child and since then everybody has been living his separate ways. He would like to have the attachment lifted.

On her part the respondent contends that the applicant failed to pay maintenance and an order to attach his salary was made in November 2007. The applicant appealed but the appeal was dismissed since it had been filed out of time. The applicant filed an application to vary the initial court order but the same was dismissed on 23.11.2012. The applicant took parental responsibility of the respondent's son who appears to have been born before the marriage.

It is clear that the parties are no-longer living as husband and wife. It is not clear to me why none of the parties has filed for divorce. For the last eight years the respondent has been receiving 1/3 salary of the applicant. There is no child out of the relationship. When the matter was filed before the Vihiga court the respondent indicated that the applicant had failed to provide for upkeep for her son **N M** who aged 11 years at that time. By now the child is over 20 years and does not fall within the definition of a child under the Children Act. It is also clear that the respondent is living on her own and she should not perpetually benefit from the applicant's salary. She has had enough of that money and should be satisfied with what she has so far received. It would not be prudent to order a refund of the money so far paid. The endless deduction of the applicant's salary goes against his rights. It can be concluded that although there is no divorce there has been no relationship between the two parties for the last eight years. Each party should benefit from his/her own sweat. Although the appeal and application for review were dismissed, it does not mean that the deduction of the applicant's salary should continue until his retirement.

In the end I do find the Reference to be merited and the same is granted. The attachment of the applicant's 1/3 salary is hereby stopped and the orders made by the Vihiga SRM's Court in Separation and Maintenance Cause No. 4 of 2004 are hereby set aside. No orders as to costs.

DATED AT KAKAMEGA THIS 19TH DAY OF JUNE 2014

SAID J. CHITEMBWE

J U D G E