



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 27 OF 2013**

**BETWEEN**

**M D M B M.....PETITIONER**

**AND**

**R S S..... RESPONDENT**

**F M.....CO-RESPONDENT**

**RULING**

1. The application that I am asked to determine is dated 6<sup>th</sup> February 2013. The applicant seeks in the main that the respondent pays maintenance for her and the child of the marriage and alimony to her pending hearing and determination of the pending divorce petition.

2. The applicant swore an affidavit on 6<sup>th</sup> February 2013. The parties married in 1996 but are currently separated as the respondent moved out in 2009 and cohabits with the co-respondent elsewhere. During the time the parties were living together the respondent provided for her and her child, but the maintenance ceased after he left them in 2009. She puts the maintenance at Kshs.350,000.00 per month. The parties executed a deal of settlement and memorandum of understanding on 6<sup>th</sup> October 2010. The respondent is accused of breaching the same, hence exposing the applicant to destitution. She avers that she has been surviving on the generosity of friends and well-wishers. The breach is explained to be refusal by the respondent to repair a motor vehicle for the applicant for her personal use, forcing her to rely on car-hire vehicles.

3. The applicant has attached serving documents to her affidavit to support her contention. Annexure 'A' is a bundle of returns to the Kenya Revenue Commission indicating that she did not earn any income and relied exclusively on the respondent. Annexure 'B' is a bundle of documents to evidence her monthly expenses, covering electricity, daily provisions and holidays. Annexure 'C' are copies of dependant's pass. Annexure 'D' is the deed of settlement executed by the parties on 6<sup>th</sup> October 2010. Annexure "E" is a bundle of receipts in respect of car hire. Annexure 'F' is correspondence between the parties lawyers on maintenance.

4. The respondent swore his affidavit on 25<sup>th</sup> March 2013 in reply to the application. He concedes the marriage, the child of the marriage and the deed of settlement and memorandum of understanding. The deed set out the responsibilities of either party. The respondent was to secure accommodation for the applicant and issue from the sale of the **[particulars withheld]** House, meet the educational needs of the child, the medical care and use of motor **[particulars withheld]** by the applicant. The applicant was to pay rent for the house she was occupying prior to the purchase of a new one, and for her maintenance she

was to rely exclusively on the proceeds from the family business known as *[particulars withheld]*. He asserts that he has fully complied with the terms of the deed – he pays school fees and related expenses, provides full medical cover, released motor vehicle *[particulars withheld]* to the applicant who had an accident in it, and he sold the *[particulars withheld]* house and purchased another for the applicant's exclusive use. He states that the applicant and issue are not in need for the *[particulars withheld]* business is thriving and in any event the applicant has another property in Spain from which she derives a rental income. He avers that he has other expenses and his income is erratic.

5. He has attached documents to his reply to support his case. There are fee notes from the *[particulars withheld]* Academy, policy renewal advices from the AAR Health Services, bills from the Aga Khan Hospital (Nairobi), a police abstract and motor assessors report in respect *[particulars withheld]*, an agreement of sale in respect of the *[particulars withheld]* house, an agreement of sale in respect of the property bought for the use of the applicant and issue, lease agreement for the premises occupied by the respondents and a bundle of receipts for the rent paid on the said premises.

6. The reply prompted the applicant to file a further affidavit sworn on 19<sup>th</sup> June 2013. The further affidavit dwells at length on matters that are not germane to the issue of maintenance, although she does dwell on some relevant issues. She denies that the *[particulars withheld]* business is thriving. She further denies owing property in Spain.

7. Attached to this affidavits are several documents meant to support her case. Annexure C is a bundle of documents showing that the applicant surrendered the rental space occupied by *[particulars withheld]* at Yaya Centre, *[particulars withheld]* Shopping Mall and *[particulars withheld]* Mall. Annexure D is the bundle of bank documents showing that the respondent has an income capable of supporting the applicant's claim. There is also a letter from the Registrar of Companies showing the respondent as the principal shareholder in a company known as *[particulars withheld]* Air Conditioning Limited.

8. The respondent reacted to the further affidavit sworn by the applicant by swearing and filing his own further affidavit. On the *[particulars withheld]* business he states that he was under no obligation to stock the shop as the applicant received a sizeable amount of money from the sale of the *[particulars withheld]* property, which could be utilized to stock the said shops. He reiterates that the applicant was a woman of means for she had recently disposed of her *[particulars withheld]* business at a sum of Kshs.9,000,000.00. He reiterates that she owns property in Spain. He asserts that the bank records attached to her further affidavit are not clear and do not reflect the current state of affairs of the documents attached to the affidavit, it is the correspondence on the disposal of the assets and stocks of *[particulars withheld]* Ltd that are relevant to support the claim that the business was disposed of at Kshs.9,000,000.00.

9. The applicant filed a further affidavit sworn on 13<sup>th</sup> March 2014 in response to the respondent's further affidavit. She states that the respondent is still in possession of motor vehicle *[particulars withheld]* and does not meet the applicant's expenses on food, clothes, utility bills and school related expenses. She explains that her share of the money realised from the sale of the *[particulars withheld]* property was utilised in restocking the *[particulars withheld]* shops. She denies that the three *[particulars withheld]* shops were sold for Kshs.9,000,000.00 and states that she disposed them for Kshs.2,100,000.00. She renounces the documents attached to the respondent's affidavit on the said sale. She once again denies owing a property in Spain, saying that the same had been used to secure a loan for purchase of the *[particulars withheld]* property but was sold when the payments for the *[particulars withheld]* property were not completed. She denies having healthy finances.

10. Attached to the applicant's affidavit is a sale agreement in respect of the *[particulars withheld]* Ltd stocks showing the sale price as Kshs.2,100,000.00 There is also a document in Spanish which has not been translated.

11. It was directed on 28<sup>th</sup> March 2013 that the application be disposed of by way of written submissions and the cross-examination of the deponents of the affidavits on record.

12. The applicant testified on 3<sup>rd</sup> April 2014. She stated that respondent has breached the terms of the deed of settlement and memorandum of understanding. He was said to have failed to provide for the applicant and issue. He had availed vehicle **[particulars withheld]** but he subsequently took it away after it had an accident. On the **[particulars withheld]** shops, she denied selling the business for Kshs. 9,000,000.00 reiterating that she sold the same for Kshs.2,100,000.00 only. On the **[particulars withheld]** property, she stated that she utilised the surplus in opening a shop, which she later sold. She stated that the respondent pays school fees and related expenses for the child, and medical expenses, however she averred that he did not meet these expenses in 2013. She said she was not able to share the expenses with him because she was not working. She stated that the Spain property was sold for the acquisition of the **[particulars withheld]** property.

13. On re-examination, she stated that her husband used to meet all her expenses together with those of the child. That changed with the execution of the deed. The deed did not provide for holidays. On the vehicle **[particulars withheld]**, he case was that it used to be repaired by the respondent at his garage during happier times. After the accident he took the car and said that there were charges to be paid.

14. On his part the respondent stated that the Spain property was mortgaged to raise funds to pay for the **[particulars withheld]** house. The respondent stated that the applicant was fully dependent on him in terms of his meeting all family expenses before the breakup of the marriage. On **[particulars withheld]** Ltd, he stated that the applicant handled everything and therefore he had no details on how the business was faring. He conceded that he stopped stocking the shops after the deed was signed, and that the applicant continued to depend on him. He would not commit on whether the applicant was living at the same standard as before. He conceded that he no longer pays for her holdings, although he does go on holiday with the issue. On the cars, he stated that she had access during happier to several cars and the applicant did not have to pay for insurance, repairs and the rest. He has a garage where he repairs cars, and the applicant took the car **[particulars withheld]** to the garage after it had an accident, but he declined to repair it. He averred that the deed did not provide for the restocking of the shops by the respondent and the applicant's holidays. He asserted that the applicant should pay for her own car repairs and insurance. He stated that he did not give her a car in his name, but his own car for her use. He added that he was still holding on to the car for the repair work was still in progress. He stated further that he spent Kshs.8,813,436.00 on the applicant for two (2) years after separation and it is the money that he wanted her to refund. He conceded that she could not afford to spend that amount of money from her own resources.

15. On cross-examination, the respondent reiterated that the applicant was fully dependent on him, but she used to assist him with the business. He reiterated that she earned her own money from the **[particulars withheld]** business. He denied being a part of the **[particulars withheld]** Holdings Limited, and says the air conditioning business was doing badly. He ran a sweets shop from which he makes about Kshs.50,000.00 a month. He said on the whole for 2013 he made a profit of Kshs.3,000,000.00 to Kshs.4,000,000.00.

16. Although there were directions with respect to the filing of written submissions, only the applicant filed submissions, these are dated 7<sup>th</sup> May 2014. There is a list and bundle of authorities by the applicant similarly dated 7<sup>th</sup> May 2014.

17. The application before me is premised on *Sections 25(1) and 30 of the Matrimonial Causes Act (Cap 152, Laws of Kenya)*, now repealed, and *Rules 3(3) 38 and 39 of the Rules made thereunder*. *Section 25(1)* allows the wife to apply for maintenance pending suit and empowers the court make such orders as may be just. The only rider is that the alimony shall not exceed one-fifth of the husband's average net income for the three year's preceding the date of the order and should continue until decree *nisi* is pronounced or until the decree is made absolute. *Section 30* provides for orders on custody of children and their maintenance. The court is empowered to make orders therein from time to time during the pendency of the suit. The rules cited state the procedure for making to applications such as the present one.

18. I have considered the court papers filed in respect of the application, inclusive of the annexures, the

oral testimony of the parties and the written submissions filed by the applicant. I note that the parties are still in matrimony for divorce is yet to be decreed. I note too that the applicant hinges her application on the provisions of the relevant law on maintenance, while the respondent relies on the deed of settlement and memorandum of understanding.

19. For starters, I do note that the said deed was executed after the parties separated. It is not anchored on a court order, in the sense that it was not executed on the strength of a court order nor has it been adopted as an order of the court. In effect it did oust just the provisions of **Sections 25 and 30** of the Matrimonial Causes Act. I do note that the parties have not sought to have it adopted as an order of the court. My hands are not tied by the terms of the said deed of settlement.

20. It is not in dispute as to the responsibilities and obligations of a husband towards wife and children. The respondent acknowledges these and states that the applicant and issue were fully dependent on him during the happier times. He concedes his duties to the issue, but says that he is not obliged to provide for the applicant in view of the deed of settlement. Yet he states that even after the execution of the said deed, he continued to support the applicant. He claims he spent Kshs.8,813,436.00 on her maintenance when he ought not have and he is seeking a refund of that amount from her. This figure covered a period of two (2) years. He concedes that the applicant cannot afford that amount on her own.

21. My assessment of the above is that the applicant, who is still the spouse of the respondent, is needy to the tune of Kshs.8,800,000.00 for two years – about Kshs.366,666.70 per month. The respondent has paid this amount in the past. He is able to pay.

22. On the motor vehicle, **[particulars withheld]**, the respondent avers that the applicant was, prior to the separation, entitled to the use of several cars. She never used to pay anything on the car - repairs, insurance, fuel, *et cetera*. After separation, she was given **[particulars withheld]** for her use. The respondent says that vehicle is still in his name but he expects her to foot the bills for insurance and repairs. He holds on to it after the accident referred to above and he says that it is still undergoing repairs. The legal position is that husband should maintain his wife during separation and ex-wife after divorce to the standard that she was accustomed to during marriage. The parties are still married, the applicant was accustomed to having a car at her disposal. The respondent should provide one for her, fully insured, and should keep it in a good state of repair at all times

23. In view of the totality of the foregoing I will dispose of the application dated 6<sup>th</sup> February 2013 in the following terms:-

- a. That respondent is hereby ordered to pay maintenance to the applicant and the child of the marriage at the rate of Kshs.320,000.00 per month with effect from the date of this ruling, and on the 30<sup>th</sup> day of each succeeding month thereafter pending the hearing and determination of the divorce petition filed herein;
- b. That the respondent shall release to the applicant motor vehicle **[particulars withheld]** in a good state of repair, fully and comprehensively by insured within seven (7) days of the date of this ruling, and he shall pending the hearing and determination of the petition herein be responsible for the repair and maintenance of the said motor vehicle and payment its comprehensive insurance;
- c. That the respondent shall pay school fees and school related expenses for the minor at the **[particulars withheld]** Academy or any other institution mutually agreed upon by the parties, provided that the fees payable shall be capped at Kshs.250,000.00 per term for the time being pending hearing and determination of the petition herein;
- d. That there shall be liberty to apply; and
- e. That costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF November 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Macharia for Miss. Kethi Kilonzo advocate for the applicant.**

**In the presence of Mrs. Rotich for Mr. Kinoti advocate for the respondents.**