



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 25 OF 2014

N B R.....PETITIONER

VERSUS

J O.....RESPONDENT

JUDGMENT

By an application dated 13th May, 2014 the respondent in this Divorce Cause **J O** seeks the following orders:

1. **THAT the Honourable Court do grant the respondent alimony pending suit of Kshs. 1,000,000/= per month.**
2. **THAT the costs of this application be borne by the petitioner in any event.”**

The petitioner in the Divorce Cause **N B R** has opposed this application by way of a replying affidavit dated 19th June, 2014. The application was disposed of by way of written submissions. Both parties did duly file their submissions.

Briefly the facts of this case are that the parties got married to each other on 7th June, 2012 at the Office of the Hon. Attorney General in Mombasa. Annexed to the Divorce petition filed on 3rd April, 2014 is a copy of their marriage certificate serial No. [particulars withheld]. Their union is blessed with one child – a daughter **S A R** who was born on 29th December, 2012. Sometime in early 2013 after the birth of the said child disagreements occurred between the couple. The respondent left the matrimonial home with the child. The reason and circumstances of her leaving remain contentious as the respondent contends that she was forced to leave and that she was denied access to the matrimonial home in Nyali, Mombasa. She initially stayed at Windsor Hotel in Nairobi. She later took up residence at Bliss Hotel in Mombasa. Eventually she settled in an apartment at Kilima Gardens in Nyali where she resides to date. As stated earlier the petitioner filed in the High Court in Mombasa a petition for Divorce dated 2nd April, 2014. The respondent on her part filed an Answer to Petition and Cross Petition dated 13th may, 2014. On the same date the respondent filed this Notice of Motion seeking to be paid alimony ‘*pendente lite*’ i.e. pending suit.

I have carefully considered the submissions filed by both parties. I have also carefully perused the annexures thereto. Both parties addressed in their written submissions the question of whether the petition is properly before the court. The petitioner sought and obtained leave to file the petition for Divorce before the expiry of the mandatory three (3) year period of marriage had lapsed. The court

granted him leave on 26th March, 2014 and directed that the petition be filed and served within seven (7) days thereof. The petition was thereafter filed in court on 3rd April, 2014. Counsel for the respondent **MS. OKATA** submits that the petition having been filed out of time is not properly before the court. Counsel for the petitioner **MS. WASUNNA** counters that the petition was filed within the seven (7) day period and is properly before the court. I do agree with counsel for the petitioner that taking day 1 as the day following the grant of leave i.e. 27th March, 2014 and excluding Sundays in the computation of time pursuant to order 50 rule 2 of the Civil Procedure Rules then 3rd April, 2014 marked the 7th day and that is the day the petition was filed. It was therefore filed within the seven (7) days allowed. In any event Article 159 (1) of the Constitution exhorts courts to administer justice **“without undue regard for technicalities”**. The question of the date of filing is to my mind such a technicality and ought not lead to the striking out of the petition. I find that this petition was filed within time and is properly before the court.

The basis of the application dated 13th May, 2014 is the prayer for alimony. The basis for an order for maintenance ‘*pendente lite*’ is to be found in section 77 (1) (c) of the Marriage Act 2014 which provides as follows:

“77(1) The court may order a person to pay maintenance to a spouse or a former spouse

- a.
- b.
- c. **During the course of any matrimonial proceedings.”**

The concept of Alimony is a common law concept and is stated in my earlier case of **WN vs. PB (2013) eKLR**.

“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.” [my emphasis]

Thus the purpose of alimony was 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 i.e. the state. The purpose of alimony **is not** 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, nor is such order 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.

As it is the respondent herein is already receiving a sum of Kshs. 175,000/= pursuant to a consent order entered into by the parties in Tononoka Children Case No. 81 of 2014. It is telling that the respondent failed to disclose this fact to the court in her application. The existence of this consent was only brought to light by the petitioner. Although this was an order made in the Children’s Court, it is nevertheless a sum which is remitted to and is available to the respondent on a monthly basis. I am not persuaded that the child who is aged only about 1 ½ years old requires a sum of Kshs. 175,000/= for her needs on a monthly basis.

Article 45(3) of the Constitution of Kenya provides.

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

This constitutional provision emphasizes the equality between spouses. No one spouse has a right to be maintained by the other simply by virtue of his/her gender. The question that immediately comes to mind is what efforts if any is the respondent making to provide for her own upkeep. She is an able bodied woman and is perfectly capable of seeking some form of sustenance for herself. The purpose of

maintenance is **not** to financially punish or cripple one party at the expense of the other. Nor is its purpose to make one spouse a human ATM machine. No spouse who is capable of earning a living ought to be allowed to shirk his/her responsibility to do exactly that.

The respondent has made much of the fact that the petitioner benefits from the profits of a company known as Kenya Risk Consultants Limited in which both are directors. The question of what share if any of that company's assets and profits are due to the respondent is one that will be determined if and when a claim for division of matrimonial property is made. To make such a demand at this stage is premature.

I have considered what finances are currently available to the respondent. These are:

1. A sum of Kshs. 6,000,000/= which the respondent concedes has already been paid out to her in pursuance of a prenuptial agreement between the parties. The respondent alleges that these funds were deposited in the name of the child and are not immediately available for her use. I note that this is correct as the Fixed Deposit dated 10th March, 2014 is in the name of **S A R** (minor).
2. The sum of Kshs. 175,000/= per month paid in pursuance of a consent order from the Children's Court. This order I note was made in the Children Court which at the time was dealing exclusively with the question of maintenance for the child and **not** for the mother.

This is to be weighed against the current expenses of the respondent which must be **reasonable**. There include:

1. Rent of Kshs. 65,000/= for the apartment she currently occupies in Nyali.
2. Daily food, clothing, medical and other miscellaneous expenses.

The petitioner has stated that he has taken out medical insurance for his spouse and child. Although the respondent counters that this insurance has expired, I find that the petitioner has indicated a willingness to cater for such medical expenses as and when they arise. Indeed my perusal of e-mail correspondence between the parties has persuaded me that the petitioner has a genuine and deep fatherly love for his daughter and he will be willing to provide for all that she needs – indeed he has demonstrated this through the consent order entered into at the Children Court.

I have given this matter careful thought. I will allow that the respondent has certain personal expenses to meet e.g. car maintenance, petrol, utilities, etc. for which she needs a reasonable sum in maintenance pending the determination of this suit. I will therefore make the following orders

1. The petitioner to continue remitting the monthly payment of Kshs. 175,000/= per month as per the consent in the Children Court.
2. I order that in addition to (1) above the petitioner pay to the respondent a sum of Kshs. 100,000/= per month as maintenance '*pendente lite*' effective from November, 2013 until this suit is heard and finalized.

Each party to meet its own costs.

Dated and Delivered in Mombasa this 18th day of December, 2014.

M. ODERO

JUDGE

In the presence of:

No appearance by either side