



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MATRIMONIAL CAUSE NO. 8 OF 2013

W N.....PETITIONER

VERSUS

P B.....RESPONDENT

RULING

Before court is the chamber summons dated 5th February, 2013 which the applicant seeks the following prayers:

“(a) This application be certified as urgent and be heard ex-parte in the first instance.

(b) The respondent be ordered to provide security for the petitioner’s costs of these proceedings in the sum of Kshs. 320,000.00 pending the hearing and determination of these proceedings.

(c) The respondent be ordered to pay to the petitioner the sum of Kshs. 852,520.00 to help the petitioner to find and furnish her own accommodation pending the hearing and determination of this suit.

(d) The respondent be ordered to pay to the petitioner for her maintenance a monthly sum of Kshs. 131,000.00 with effect from 20/7/2012 until the hearing and determination of these proceedings.

(e) The respondent be arrested and brought to court to show cause why he should not provide security for this claim pending the hearing and determination of this application.

(f) The respondent’s properties at Mtwapa including the matrimonial home and the empty plot, the respondent’s cars and all his bank

accounts in various currencies at Imperial Bank Ltd, Kenya Commercial Bank, Barclays Bank of Kenya Ltd. and any other bank be attached as security for the petitioner's claim in terms of prayers © and (d) hereinabove pending the hearing and determination of this application.

(g) The respondent be restrained from selling,

offering for sale, charging, pledging, subdividing or in any manner dealing with the matrimonial house and plot and the adjoining empty plot belonging to the petitioner pending the hearing and determination of this application.

(h) The respondent be restrained from

withdrawing, transferring, pledging or borrowing against any sums standing to his credit in any and all of his Swiss, Euro and Kenya Shilling accounts at Imperial Bank Ltd. Mombasa, his Kenya Shilling and Euro accounts at Barclays Bank of Kenya Ltd. and his Kenya Shilling account at Kenya Commercial Bank Ltd. until the hearing and determination of these proceedings or until he secures the petitioner for her claim in terms of prayers © and (d) above and such order be served upon Imperial Bank Ltd., Barclays Bank of Kenya Ltd. and Kenya Commercial Bank Ltd. for enforcement pending the hearing and determination of this application.

i. The respondent's properties at Mtwapa

including the matrimonial home and the empty plot, the respondent's cars and all his bank accounts in various currencies at Imperial Bank Ltd., Kenya Commercial Bank Ltd., Barclays Bank of Kenya Ltd. and any other bank be attached as security for the petitioner's claim in terms of prayers © and (d) hereinabove pending the hearing and determination of these proceedings.

(j) The respondent be restrained from selling,

offering for sale, charging, pledging, subdividing or in any manner dealing with the matrimonial house and plot and the adjoining empty plot belonging to the petitioner pending the hearing and determination of these proceedings.

(k) The respondent be restrained from

withdrawing, transferring, pledging or borrowing against any sums standing to his credit in any and all of his Swiss, Euro and Kenya Shilling accounts at Imperial Bank Ltd. Mombasa, his Kenya Shilling and Euro accounts at Barclays Bank of Kenya Ltd. and his Kenya Shilling account at Kenya Commercial Bank Ltd. until the hearing and determination to these proceedings or until he secures the petitioner for her claim in terms of prayers © and (d) above and such order be served upon Imperial Bank Ltd., Barclays Bank of Kenya Ltd. and Kenya Commercial Bank Ltd. for enforcement pending the hearing and determination of these proceedings.

(l) Any order made in terms of prayer (j) above

relating to the respondent's banks accounts be subject to such monthly amounts as may be certified by the Court as necessary to meet the respondent's own expenses in Kenya so that he is not rendered destitute.

(m) The respondent be compelled to render a full

and frank disclosure to the petitioner and to the court of the plot numbers and C.R numbers for the matrimonial home and the empty plot adjacent thereto and certified copies of the bank statements of all his bank accounts in Kenya in Swiss Franc, US Dollars, Euros, Kenya Shillings and every other currency detailing all credits and debit entries in those accounts from 9/4/2012 to-date pending the hearing and determination of these proceedings.

(n) Costs of this application be provided for.”

The application is supported by the affidavit of the petitioner/applicant **W N B** sworn on 5th February, 2013. The respondent **P B** opposed the present application by way of a replying affidavit sworn on 25th February, 2013.

The brief background of this cause is that the petitioner and the respondent are a couple having entered into a marriage under the marriage Act in Mombasa on 4th January, 2011. They cohabited as a couple both in Switzerland and Mtwapa where they have a matrimonial home. All was well until 19th July, 2012 when the petitioner moved out of the matrimonial home (she claims that she was forced out) leading to the separation of the couple. On 7th February, 2013 the petitioner filed in court a petition for Judicial separation. Contemporaneously with this the petitioner also filed the present application seeking alimony pending the hearing of her petition for Judicial separation.

The concept of Alimony originated in England. A wife was deemed to be totally reliant on her husband and would not own property or earn money to support herself. As such upon divorce alimony would provide an economic means to enable the divorced wife to support herself and to prevent her from becoming a public charge. In the Kenyan legal system payment of alimony is recognized and specifically payment of alimony known as ‘*alimony pendente lite*’ pending suit, is provided in section 25(1) of the Matrimonial Causes Act which provides:

**“25(i) In any suit under this Act, the wife may
apply to the court for alimony pending the
suit, and the court may thereupon make
such order as it may deem just.**

Provided that alimony pending the suit shall in no case exceed one fifth of the husband’s average net income for the three years next preceding the date of the order, and shall continue in the case of a decree nisi of dissolution of marriage or of nullity of marriage until the decree is made absolute.”

Section 25(1) provides for alimony ‘*pendente lite*’ in suits under the Act being the Matrimonial Causes Act Cap 152 Laws of Kenya. In this case the applicant has filed a petition for Judicial separation. Such a petition is provided for by section 17 of Cap 152. Therefore this suit having been brought under the provisions of Cap 152 is one in which the court may order alimony ‘*pendente lite*’. Although in making orders for alimony the court must exercise its discretion it must be remembered that what is before this court is a prayer for alimony pending suit and **not** a prayer for permanent alimony. The amount to be awarded in the latter case would require a full interrogation and consideration of the merits of the suit as well as a full enquiry into the income, expenses and needs of each spouse. The purpose of an award of alimony pending suit is to provide temporary support to a spouse (in this case the wife) so that she is not left destitute for the duration of the suit. This distinction was discussed on the Newark Law Review under the heading ‘**ALIMONY PENDENTE LITE IN NEW JERSEY**’ at page 70 as follows:

“.....the problem discussed in this paper shall be confined solely within the limits of the subject alimony pendente lite, or temporary alimony, as it is sometimes called. It is an award of a sum of money to the wife during the pendency of a divorce action, whether it be for an absolute divorce or an annulment action, or judicial separation as distinguished from permanent alimony, an award made to the now ex-wife after the dissolution of the marriage by a court of competent jurisdiction or a wife judicially separated from her husband.”

Since the payment of alimony or alimony pendente lite is premised upon the existence of a husband/wife relationship it goes without saying that proof of a valid marriage is the first pre-condition for such an award. In this case the fact of the marriage is not disputed by the respondent and the applicant did annex

to her petition a copy of the marriage certificate serial No. [Particulars withheld].

In this case the parties had earlier entered into a separation agreement (which agreement the applicant later repudiated) by which the applicant was to be paid Kshs. 15,000/= per month. On his part the respondent avers that he has been paying out this sum which the applicant deems totally inadequate to meet her needs. The law does not require a husband to make **full** provision for all the needs of his wife. In the case of **WMM –VS – BML [2012] eKLR** Justice G.B.M. Kariuki (as he then was) stated that:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage” 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 but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

His Honour went on to state that:

“The financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much.”

Therefore there are a number of factors which a court must put into consideration when making an order for alimony (including an order for alimony pending suit). I have carefully perused the written submissions filed by counsel for the petitioner on 13th June, 2013. It would seem that these submissions tended to address issues which in my view ought to be saved for the hearing of the main petition i.e. allegations of cruelty and adultery. Be that as it may the petitioner claims that she is now out on the streets so to speak and is unable to provide for herself. On his part the respondent alleges that he is currently paying alimony for an ex-wife and also has to cater for the maintenance and upkeep of a young son. He submits that the current payment of Kshs. 15,000/= per month is adequate.

Without going into the merits or otherwise of the alleged separation agreement, and of the main petition, it is my view that by any standards Kshs.15,000/= would in the circumstances of the parties be totally inadequate to enable the applicant fend for herself as she awaits the determination of the main petition. It is my view that she would require funds sufficient to enable her rent a home and buy food, etc. Her claim for Kshs. 832,000/= to furnish an apartment is not only extravagant but is also premature. Similarly at this interim stage I do not find it prudent to make orders for a lump sum payment. The respondent in his replying affidavit paragraph 12 states that he earns an average of 108,000 Swiss Francs per year. He goes on to aver that he expends out of this a sum of 66,000 Swiss Francs as alimony to her ex-wife and together with other expenses he remains with a balance of 23,040 Swiss Francs available to him. The court will not allow alimony payment orders to be used to exact revenge or to financially cripple any party. As such the respondent's expenses and needs must also be taken into account when determining how much alimony is reasonable.

From his own pleadings (by which he must be bound) the respondent earns 108,000 Swiss Francs per year. This at current exchange rates is the equivalent of Kshs. 10,152,000/= per year. This translates to Kshs. 846,000/= per month. Out of this the respondent is obliged to pay alimony to his ex-wife, cater for his son and also make provision for his own upkeep. Counsel for the applicant submits that $\frac{1}{5}$ th of the respondent's stated income amounts to 21,600 Swiss Francs or Kshs. 2,030,400 per annum. This translates to Kshs. 169,200/= per month. Section 25(1) provides that alimony **may** be assessed at a sum **not exceeding** one-fifth of the husband's income. This does not mean that alimony must be assessed at the equivalent of one-fifth of the respondent's income. The one-fifth is simply the upper ceiling. A lower sum if found to be adequate may be ordered. The petitioner has an obligation to seek and find a way to provide for herself as well. The fact that she has been unable to secure a job in Switzerland does not mean that she cannot secure a means of livelihood herein Kenya. She cannot simply sit back and expect

the respondent to provide fully for her maintenance and upkeep. Taking all relevant factors into account I do feel that a sum of Kshs. 100,000/= will suffice as alimony pendente lite. This will enable the respondent to secure modest accommodation and meet other needs in the interim.

The remaining prayers for attachment of the respondent's property, payment of deposit security for costs by the respondent and the injunctive orders are not in my view merited. As I stated earlier the main petition is yet to be heard at which each party shall have the opportunity to adduce comprehensive evidence.

I allow prayer (d) of the chamber summons and hereby make an order under section 25(1) for the respondent to pay the petitioner alimony pending the suit at the rate of Kshs. 100,000/= per month. The remaining prayers in the chamber summons are hereby disallowed. Each party to meet its own costs.

Dated and delivered in Mombasa this 23rd day of August, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Challa for Respondent

No appearance for Applicant

Court Clerk Mutisya

M. ODERO

JUDGE

Ms. Challa:

I pray for 45 days leave.

Court:

The court grants 30 days leave.

M. ODERO

JUDGE

23RD AUGUST, 2013