



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 5 OF 2012

BETWEEN

S M R.....PETITIONER

AND

P H S.....RESPONDENT

RULING

The respondent in this divorce cause has moved the court under **rules 25 and 29(1) of the Matrimonial Causes Rules**. She prays for alimony *pendente lite* at the rate of Kshs.190,000.00 per month to be paid by the petitioner, return of wedding gifts that were given to the respondent at the time of the wedding, provision of a vehicle and provision of furniture.

Her case is that she was forced out of the matrimonial home by the petitioner and she is now residing with her father. She does not work and does not have income and therefore she cannot pay for rent, her maintenance and is unable to pay for her own upkeep. She would like to be independent of her father, by renting a house that she can move into. Her rent and living expenses work out at Kshs.190, 000.00 per month, covering rent, food, clothes, utilities, house help, health insurance, vehicle running, insurance and maintenance. She says she has identified a house whose rent is Kshs.85,000.00 per month. She would like Kshs.1,200,000.00 to purchase furniture for the said house. She is also asking for Kshs.1,100,000.00 for a motor vehicle. She would like the petitioner to fund this. She avers that the petitioner holds shares in blue-chip companies valued in the region of Kshs.8,000,000.00. She concedes that she is unaware of what the petitioner earns.

The petitioner has replied to the application. He avers that he and the respondent were accommodated by his father in Westlands, Nairobi, where they occupied one bedroom, with the rest of the house being occupied by the rest of the family. He puts his income at a gross salary of Kshs. 63,800.00 per month from his job as a sales representative for G P Ltd. After deductions his rent comes to Kshs. 40,000.00. He contributes Kshs.15, 000.00 to the domestic budget at his father's house, leaving him with Kshs. 25,000.00. He has attached copies of his payslips. He avers that he has no other sources of income. He states that the respondent had access to a family car which was available to other female individuals within the family. On the gifts, the petitioner states that the same were meant for both of them and in any event the respondent removed most of them when she left the matrimonial home. He further argues that the gifts were akin to property and the divorce court has no jurisdiction to determine issues relating to the respective spouse's entitlement to a share in the property acquired during coverture. He offers her a room at his father's house and access to a family pool car.

The application was argued on 11th October 2012 before Njagi J. The parties agreed by consent to open the safe deposit box at the CFC Bank and to divide the contents between them based on the ownership thereof. This disposed of the issue of the wedding gifts. It was argued for the respondent that she needs some money to keep her afloat, while it was argued for the petitioner that his disposable income is insufficient to cater for the respondent's demands.

The application is predicated upon **rules 25 and 29(1) of the Matrimonial Causes Rules**. I have carefully gone through these rules and noted that they are wholly irrelevant to what is before the court. **Rule 25** is on evidence, while **Rule 29(1)** is on the Registrar's certificate. Perhaps the respondent intended to move the court under **Sections 25 and 29(1) of the Matrimonial Causes Act**, which provide for alimony *pendente lite* and for protection orders with respect to property of a wife in which the husband has acquired an interest. **Section 29 of the Matrimonial Causes Act** does not appear to be relevant to these proceedings as the respondent is not claiming that the petitioner has acquired an interest in her property. If the property being referred to here with respect to **Section 29 of the Matrimonial Causes Act** is the wedding gifts, then the consent entered into at the hearing of the application 11th October 2012 has taken care of the matter, and the provision has therefore become wholly irrelevant.

This leaves **Section 25 of the Matrimonial Causes Act**, which empowers the court to make such orders as it may deem just in the event of being confronted with an alimony application such as the one now before me. Under this provision the court may order provision for a wife by her husband. The order will depend on the circumstances of each case.

In this case the respondent avers that she does not know how much the petitioner earns. The only thing that she points at is the shares that the respondent allegedly owns in quoted companies. It appears that the couple was living with the petitioner's family in the petitioner's father's house. It would appear that the couple was living communally with other members of the family of the petitioner. They had a bedroom in the said house and shared the rest of the facilities. The respondent is said to have had access to a family car like any other female member in the household. From this evidence, it would appear that the respondent was not enjoying the sort of lifestyle that she is proposing for herself in the application before me. There would therefore, in my view, be no basis for ordering the petitioner to pay for her accommodation and furniture.

She would like the petitioner to avail a car to her. There is no evidence that the petitioner himself owned one during coverture or even thereafter. It is not disclosed by both parties who owned the car that the respondent alleges was available to her during the time she was living with the petitioner's family. I am persuaded that the said car did not belong to the petitioner. There is therefore no justification for the respondent to claim to have a car availed to her.

It is my view that **Section 25 of the Matrimonial Causes Act** ought to be read together with **Article 45(3) of the Constitution**, which provides:-

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

My understanding of this provision is that none of the parties to a marriage has a superior right to another. Rights are matched by corresponding duties. Equal rights translate to equal responsibilities. Each party upon break up of a marriage, in my view, ought to care for himself. **Article 45(3) of the Constitution** clearly points to the fact that days when wives separated from or divorced by their husbands expected a lifetime of maintenance are now gone. **Article 45(3) of the Constitution** has had the effect of blunting the power given to the court in **Section 25 of the Matrimonial Causes Act**. GBM Kariuki J, as he then was, was of a similar view in **WMM vs. BML** (2012) eKLR where he construed **Article 45(3) of the Constitution** to 'connote equality of parties in a marriage' and that the provision is 'intended to ensure that neither spouse is superior to the other.' His Lordship stated in that decision: –

'In light of Article 45(3), the criterion in determining the rights of spouses in a marriage must treat the husband and wife as equals and neither has a greater or lesser obligation than the other'

in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or vice versa and the age-old tradition in which men were deemed to be the sole breadwinners and to carry the burdening of maintaining their spouses does not hold true anymore. Under the Constitution, the respondent has a duty to support and maintain herself no less than the petitioner has to support himself and there is no greater obligation on the part of the petitioner to support himself than there is on the part of the respondent to support herself. No spouse who is capable of earning should be allowed to shirk 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 before separation or divorce. The financial capacity of the spouses has to be examined before the court makes a ruling as to whether a spouse should pay maintenance and if so how much.'

I have taken note of the fact that the parties did not have children, and that they are still fairly young. During cohabitation the couple was living with the petitioner's father at his house. They did not have a house of their own. The respondent did not have a personal car at her disposal, but she had access to a car that was available to other women in the family. After separation, she went to live with her father. To move around she relies on her father's car. It would appear that the life she is now living with her father is not different from that she had with the petitioner. Her standard of living has not therefore been affected by the separation. The respondent has a duty to support herself, and should be in a position to do so. She appears to be in good health and was previously in employment.

In view of what I have stated above concerning the effect of **Article 45(3) of the Constitution** on **Section 25 of the Matrimonial Causes Act**, and the evidence that has been placed before me concerning the circumstances of the parties hereto, I find that the summons dated 11th July 2012 is without merit. I hereby dismiss it. Each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF August, 2013.

W. M. MUSYOKA

JUDGE