REPUBLIC OF KENYA

COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO.175 OF 2000

G V D……..……...……....…….PETITIONER

VERSUS

M D…..……...……..……....RESPONDENT

RULING

The Petitioner moved this court by notice of motion pursuant to the provisions of **Sections 25(2) & (3)** and **32** of the **Matrimonial Causes Act** seeking several orders of the court. The Petitioner sought an order that the Respondent be compelled to provide her with the maintenance of Kshs.124,300/- per month as per the budget that she has provided in her supporting affidavit. She further prayed for the court to compel the Respondent to provide her with alimony during their lifetime sufficient to enable her live a life she was accustomed to during their marriage. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Petitioner. The application is opposed. The Respondent filed a statement of grounds in opposition to the application. In essence, the Respondent states that the Petitioner's application was *res judicata* as the issues sought to be reopened had been concluded more than nine (9) years ago. The Respondent also filed a lengthy replying affidavit which in effect gives a historical narrative of the litigation between the Petitioner and the Respondent.

At the hearing of the application, this court heard oral rival submission made by Mary Mungai for the Petitioner and by Mr. Sehmi for the Respondent. The court has read the pleadings filed by the parties herein in support of their respective opposing positions. It has also considered the oral submission made in court. The issue for determination by this court is whether the Petitioner established a case for this court to grant her the maintenance that she has sought in her application. In reaching this determination, this court will have to determine the validity or otherwise of an agreement that was entered between the Petitioner and the Respondent on 25th August 2004. First things first. The Petitioner and the Respondent were divorced pursuant to a decree absolute made by this court (Koome J) on 17th December 2004. This was after the Learned Judge had delivered her reasoned judgment on 3rd December 2004. The issue that has come to the fore during the hearing of this application is the effect of a statement that was made by the Judge in the said judgment. At page 4 of her judgment, after granting the divorce, the Learned Judge stated as follows:

> ***"Each party shall be at liberty to apply in respect of maintenance if no maintenance agreement is reached."***

According to the Petitioner, she making the present application pursuant to the said direction issued by the court.

On his part, the Respondent is of a contrary opinion. The Respondent states that prior to the court delivering its judgment, the Petitioner and Respondent had entered into an agreement whereby the Respondent was to pay the Petitioner the sum of Kshs.4,000,000/- in full and final settlement in regard to the issue of maintenance. This agreement was signed by the Petitioner and the Respondent and also by their then advocates. The agreement was amplified in a further letter written by the advocate for the Respondent dated 28th December 2004 and which was acknowledged by the then advocate of the Petitioner. It will be important for this court to reproduce verbatim the contents of the said letter:

> ***"We refer to the negotiated lump sum settlement in the above matter.***
>
> ***We now enclose our cheque number 101055 dated 28th December, 2004 in the sum of Shs.3,700,000/- being the balance of the lump sum settlement in full and final settlement herein. We have now remitted to you a total sum of Shs.4,000,000/- in terms of the settlement. Please note that it is an express condition of the settlement that neither party has any further claim whatsoever against the other. The above cheque is being sent to you on your professional undertaking to confirm that the payment is being accepted in full and final settlement and that neither party has any further claim whatsoever against the other. Please note further that until such confirmation the cheque is returnable to us."***

The then advocate of the Respondent acknowledged receipt of the cheque and wrote on the page of the letter as follows:

> ***"The terms hereof are accepted and undertaking confirmed."***

In her submission before court, the Petitioner stated that she signed the agreement under duress because at the time she was unwell and required the money for medical attention from the Respondent. In effect, the Petitioner is stating that the said agreement was not binding on her because it was secured by applying undue influence on her. On his part, the Respondent insists that, the agreement was binding because it was his then intention to pay the Respondent a lump sum in full and final settlement of any claim that she may have had at the time.

This court is of the view that the agreement entered between the Petitioner and the Respondent as contained in the consent dated 25th August 2004 and 28th December 2004 is binding on the parties unless it is established that the said agreement is amenable to being set aside on grounds which a contract is normally set aside. In **Wasike –Vs- Wamboko [1988] KLR 429 at pg 431** Hancox JA (as he then was) held as follows:

> ***"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in*** *J M Mwakio v Kenya Commercial Bank Ltd* ***Civil Appeals 28 of 1982 and 69 of 1983. In Purcell*** *v F.C. Trigell Ltd* ***[1970] 2 All ER 671, Winn LJ said at 676***;
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> > ***"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."***

In the present application, it was clear to this court that the issue of the maintenance of the Petitioner by the Respondent was settled when the Petitioner accepted to be paid a lump sum in 2004 in full and final settlement.

From the submission made, it was apparent that the Respondent initiated this agreement because of his age. The Respondent is 82 years old, is retired, and has no source of income. He told the court that he was currently being supported by his son during his sunset years. Although the Petitioner is similarly elderly (she is 68 years), that does not distract this court from reaching the decision that the Petitioner consciously entered into the agreement in 2004 which in effect meant that all the issues regarding her maintenance were settled once and for all. This court was not persuaded by the argument advanced by the Petitioner that she was induced into making the agreement. If that was the case, she should have sought the setting aside of the agreement soon after the same was entered into. The fact that it has taken nine (9) years for the Petitioner to file the present application is sufficient proof that she was fully aware and had accepted the terms of the agreement in full and final settlement of her claim. Her changed circumstance notwithstanding, this court is not persuaded that the Petitioner established a case that the Respondent is bound to maintain her.

The upshot of the above reasons is that the Petitioner's application dated 12th August 2013 lacks merit and hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2013

L. KIMARU

JUDGE