



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT
DIVORCE CAUSE 176 OF 2011
IN THE MATTER OF THE MATRIMONIAL CAUSES ACT

B.K.L..... PETITIONER

VERSUS

Z.J..... RESPONDENT

R U L I N G

This application is brought by a Notice of Motion dated 18th January, 2012 and taken out under **Section 32 of the Matrimonial Causes Act**. The Applicant seeks orders that the order of this Court issued on 20th December, 2011 be set aside or varied, and that the costs of the application be provided for.

The application is supported by the annexed affidavit sworn on 18th January, 2012 by B.K.L, the Applicant himself, and is based on the grounds that –

- 1. This Honourable Court issued an order on 20th December, 2011 against the Petitioner compelling the Petitioner to pay maintenance of Kshs.50,000/= with effect from the 30th December, 2011 to the Respondent.***
- 2. The order for maintenance was made ex parte on application by the Respondent dated 9th December, 2011.***
- 3. On 15th December, 2011, the Respondent served a hearing notice originating from this Honourable Court indicating that the aforesaid***

Chamber Summons application for maintenance was slated for hearing on 19th December, 2011.

- 4. On 19th December, 2011, the Respondent's application by way of Chamber Summons dated 9th December, 2011 was not listed for hearing.***
- 5. The Petitioner was not given any hearing before arriving at the figure of Kshs.50,000/=.***
- 6. The Petitioner and the Respondent are still staying together at Jamhuri Estate.***
- 7. The issue of maintenance cannot arise if parties are still staying together.***

Opposing the application, the Respondent filed a replying affidavit sworn on 25th January, 2012. In that affidavit, she avers, *inter alia*, that the order which is sought to be set aside or varied was made as a result of an *ex parte* application which was later served on the Petitioner. She states further that the Petitioner has intentionally omitted the fact that he collects rent from some 16 rental houses in Eldoret. Regarding the Petitioner's residence in the matrimonial home, she avers that the Petitioner only brought back a few of his clothes to the matrimonial home after learning of the maintenance application. Otherwise he is living with another woman.

During the hearing of the application, Mr. Onindo for the Petitioner submitted that the order sought to be set aside was made without taking into consideration the earnings of the Petitioner and that he earns only Kshs.85,000/= per month. A payment of Kshs.50,000/= is therefore a burden to the Petitioner. In any event, the Respondent has admitted that the Petitioner has been sending money but complains that it is too little. He urged the Court to allow the application as prayed.

On her part, the Respondent told the Court that she had requested maintenance for Kshs.70,000/= per month but she was given only Kshs.50,000/=. It was her case that the Petitioner receives rental for about Kshs.40,000/= and earns Kshs.250,000/=. The parties do not live together as the Petitioner lives with another lady since the filing of the Separation Cause. He lives in the children's room and the spouses do not share the same bed.

After considering the pleadings and the submissions of both parties, I note that the order which is the subject matter of this application was made by Judge Maraga, as he then was, on 19th December, 2011. Before making the order, the learned Judge had just recorded the arguments of the Applicant/Respondent who had stated thus –

“The Respondent has left the matrimonial home and gone to live with another woman. He has given notice that he will not pay rent. I do not know how I will live with the children. I am a house wife with no source of income. The Respondent earns Kshs.250,000/= and collects rent of Kshs.40,000/= per month. Rent in our house is Kshs.26,000/=.”

Flowing from these observations, the learned Judge's notes read as follows –

“Certificate of Urgency granted. Application to be heard on 17th January, 2012. In the interim the Respondent to pay maintenance of Kshs.50,000/= with effect from 30th December, 2011.”

It is clear from these notes that in making the order for maintenance at Kshs.50,000/= per month, the learned Judge took into account the statements by the Respondent alone. The Respondent's case is firmly embedded on the ground that the Petitioner earns a monthly salary of Kshs.250,000/= and collects some rent amounting to Kshs.40,000/= month. This information was before the learned Judge as he made his orders. Annexed to the application is a copy of the Petitioner's pay slip for November, 2011. That payslip discloses that his gross salary is indeed Kshs.250,000/=. From that sum, however, deductions are made in respect of PAYE, NSSF, NHIF, High Education Loans Board, Sacco contributions, Sacco loans, CBA loan, lunch contributions and staff welfare contribution. The total sum of the deductions amounts to Kshs.164,959.50 leaving the net pay at Kshs.85,040/=. To be able to earn a net salary of Kshs.250,000/=: the Petitioner would have to stop the deductions, the heaviest of which are statutory and compulsory, and that cannot be allowed.

The Respondent gave Judge Maraga the impression that her husband had left the matrimonial home and gone to live with another woman. As of today however, the position seems to have changed but the Respondent is contradicting herself on that position. Before this Court, she said that the two of them don't live together and that he lives with another lady since the filing of the Separation Cause. In the same breadth, she says that he lives in the children's room since the filing of the application for maintenance, and they don't share the same bed. As long as parties are living under the same roof they cannot be said not to live together. If the Respondent's complaint is that her husband sleeps in the children's room, that is a different issue altogether which can only be cured by an application for restitution of conjugal rights. However, that is a different kettle of fish altogether.

The Respondent also told Judge Maraga that the husband had given notice that he would not pay rent. However, he subsequently paid it. It is my considered opinion that the total effect of the assertions made by the Respondent before the learned Judge contributed to his ordering the payment of interim maintenance in the sum of Kshs.50,000/=. A party who comes to a Court of equity seeking and *ex parte* order has the onerous duty of making a full and complete disclosure of all the relevant facts to the Court. Where he or she does not do so, the orders so obtained are liable to be set aside. If the learned Judge had known that the parties herein were living in the same house irrespective of the bedrooms, and that the net salary of the Petitioner was only Kshs.85,040/=:, and that the Petitioner had paid the house rent, and that he was paying school fees for the children, it is unlikely that he would have ordered the payment of maintenance in the sum of Kshs.50,000/= or any other sum at all.

In the circumstances, I am satisfied that the order made by the learned Judge ought to be interfered with and it is hereby set aside. Each party will bear its own costs of this application.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of February, 2012.

L. NJAGI
JUDGE