



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO.7 OF 2004

A.A.....PETITIONER/RESPONDENT

VERSUS

M.H.....RESPONDENT/APPLICANT

R U L I N G

1. I have read the record in this matter and I note that the parties were husband and wife until their marriage was dissolved on 12th July 2007. On the same day they filed a Consent in the following terms;

- “1) That the term “Petitioner” will refer to A.A while the term “Respondent” will refer to M.H for purposes of this consent.***
- 2) That all and every term of this maintenance and matrimonial property division consent is to take effect from the date of a grant of a judgment dissolving the marriage in Divorce Cause No.7/2004 aforesaid and thereafter on such dates as are set out in the respective terms on the Consent.***
- 3) That both parties have agreed, that subject to 2 above the Petitioner shall pay the Respondent an equivalent of four Hundred Thousand United States Dollars (USD 400,000) in full and final settlement of any claim the Respondent would have against the Petitioner, including claims of maintenance and sub-division of matrimonial properties on the following terms;***
- 4) USD 100,000 to be paid within 30 days of the divorce judgment.***
- 5) USD 100,000 to be paid before the expiry of Ninety (90) days of the divorce judgment.***
- 6) That USD 90,000 to be paid from the Petitioner’s share of the proceeds of the apartment in France that the parties own jointly provided that the said apartment is sold within six months from the date of the divorce judgment failing which the five months which the property should have been sold will be increased by the period that the Respondent’s son remains in possession.***
- 7) For the avoidance of doubt, if the apartment is sold as aforesaid the Respondent will in addition to the USD 90,000.00 shall receive as provided for in paragraph “6” above also get another USD 90,000 representing 50% of the apartment as a joint owner.***
- 8) In the event that the apartment is not sold within six months as a consequence of which the Petitioner pays to the Respondent the USD 90,000 from his other sources as aforesaid, that apartment will remain in the market for sale but in the meantime, the property will be rented out and the rental net proceeds shared equally between the two parties until the same is sold whereupon the sale proceeds***

will be shared equally.

9) For the avoidance of doubt the USD 90,000 payable by the Petitioner aforesaid will be part of the USD 400,000 due and payable.

10) That the balance of USD 100,000 will be paid by the Petitioner to the Respondent over a period of six years with effect from 30 days of the divorce judgment at the rate of USD 1,389 per month directly from the Petitioner's pension through a standing order placed with the petitioner's pension account at (particulars withheld) pension system pursuant to this consent order.

11. The Petitioner will maintain the Respondent's health insurance with the (particulars withheld).

12. That the household goods will be retained by the Respondent except for the Pool table which will be kept by the petitioner within thirty days from the date of the divorce judgment.

13. That the Respondent will keep the Nissan pathfinder while the Petitioner shall keep the BMW.

14. That the Petitioner shall ensure that his employer, (particulars withheld) does procure transportation of the Respondent's personal effects provided that the Respondent shall avail all documents and particulars for this purpose, and on time, for lodging of the claim.

For avoidance of doubt the petitioner acknowledges receipt of remittance of Tickets and Boarding passes on account of the said object, and shall advise the Respondent on any other or further documents required.

15. That each party shall bear their own costs.

16. in default of any of the above amounts as stipulated the same to be recoverable from the Petitioner's pension account at (particulars withheld) pension system within a period of eight years pursuant to this consent order.

17. That these terms of the consent shall constitute the full and final terms of the divorce, maintenance and division of the matrimonial properties thereof and any obligation that arose from the marriage and the Respondent particularly renounces any other claim including all claims in Nairobi high Court Originating Summons No.17/2005 or any other benefits whatsoever from the Petitioner."

2. Apparently, the Consent was not honoured and before me presently is an Application dated 16th February 2011 by the Respondent/Application seeking Orders that;

"i) By a Consent Order in this Cause, the Petitioner herein undertook to pay USD 400,000 (equivalent of Kshs.27,600,000) over a defined period of time.

ii) Clause 16 of the said consent provides that in default of the petitioner paying the maintenance to the Respondent/Applicant, the said amounts are to me recoverable from the petitioner's pension account at (particulars withheld).

iii) The Petitioner has defaulted in paying the maintenance to the Respondent/Applicant.

iv) Despite repeated requests to (particulars withheld) by the Respondent/Applicant and despite being aware of the above orders, (particulars withheld) has refused and/or failed to comply with the above orders and has further refused to release the said funds to the Respondent/Applicant unless specifically ordered by this honourable court.

v) The Respondent/Applicant is soon becoming destitute and is likely to suffer substantial loss if the said orders are not granted.

vi) *It is in the interest of justice that the said orders be granted.*”

3. In the grounds in support of the Chamber Summons premised on the provisions of **Rule 3(3)** of the **Matrimonial Causes Rules** and the Applicant’s Supporting Affidavit sworn on 16th February 2011, her case is that the Respondent in furtherance of the consent, paid USD 72,000 in August 2007 and USD 100,000 was to be paid in monthly installments of USD 1,389. That to date no such payments have been made and therefore **Clause 16** of the Consent Order reproduced above was invocable upon such default.

4. The Applicant has annexed a letter dated 11th June 2010 in which the Chief Executive Officer of the **(particulars withheld)** has intimated that without a Court Order, he will not release the funds as severally requested by the Applicant through her Lawyers, hence the present Application.

5. The Respondent’s answer to the Applicant’s claim is contained in a Replying Affidavit sworn on 28th March 2011 and he depones therein that it is the Applicant who has breached the terms of the Consent Order and that the **(particulars withheld)** has already considered the matter and has therefore decided to make no payment to the Applicant. Further, that he is aggrieved by the Consent Order, and will seek to be discharged from it. He also argues that the Application is without merit and should be dismissed with costs.

6. For my part and having read the submissions by Advocates appearing I wish to state as follows;

7. Firstly, the Consent Order dated 12th July 2007 has not been set aside, varied or discharged and whether any party is unhappy with it is not a matter for me to consider at this stage. Neither is it necessary for me to determine which party may or may not have breached the Consent Order as the Orders now sought are not directed at any of them although they will have an impact on both of them.

8. Secondly, although the **(particulars withheld)** is not a party to these proceedings, for obvious reasons, parties agreed that it is the body that was referred to as **“the (particulars withheld) Pension System”** and there was a clear intention that USD 1,389 would be paid for 6 years from that Fund. I can therefore, if it is necessary so to do, make Orders directed at the Pension Fund and I also say so because in the letter dated 11th June 2010 Chief Executive Officer of **(particulars withheld)** had stated partly as follows;

“The Fund can only assist in cases where the obligation on the part of the (particulars withheld) retiree is clear and unequivocal so as to allow the Fund to act. Unfortunately, the Court Orders that you are requesting the Fund to act upon in this case leave some doubt as to what is the final disposition of all terms of the original Consent Order issued in July 2007, in light of the Ruling of Justice K. H. Rawal on 29th January 2009. Following that Ruling, which requested all the parties to prove all material facts to the Court, the Court Orders issued in July and November 2009 only mention the amount of USD 100,000 to be paid in installments; they do not mention whether the rest of the terms of the consent order of July 2007 remain in force or have been nullified. Mr. A has acknowledged receiving the sum of USD 86,000. It is not clear whether this amount should be apportioned towards the USD 100,000 based on the fact that no other amounts due are mentioned in the Court orders of July and November 2009; those Court Orders also fail to make mention of amounts already paid.

Regretfully, the fact that there is no final Court Order clearly setting out the disposition of all the terms of the July 2007 Consent Order, and the disagreement between the parties regarding sums already paid have led me to determine that the Fund cannot take any action to implement your request. The Fund requires clarity regarding the final Court approved settlement between the parties in view of the fact that you are still relying on the July 2007 Consent Order, but the Court Orders of July and November 2009 did not address all the terms specified in that order. (Emphasis added)

Should you obtain a Court Order that clearly specified what Mr.A’s obligations are to you in regard to the final divorce settlement and which requires the Fund’s assistance in fulfilling any

outstanding obligations, the Fund will reconsider any request that you may make on that basis.”

The letter above merely seeks clarity of the Consent Order and subsequent Orders and does not in any way stop this Court from making Orders directed at **(particulars withheld)** and asking it to comply thereof within **Article 45** of its **Regulations**.

9. Thirdly, I need to refer to the Orders issued on 29th January 2009 by Rawal, J. That Order reads as follows;

“1) That the Chamber Summons dated 10th March 2008 is totally incompetent and it is dismissed with costs.

2) That the Decree Nisi extracted and issued on 23rd August 2007 is incompetent and is struck out.

3) That the Application dated 26th March 2008 be and is hereby struck out.

4) That implementation of each and every term of the Consent be and is hereby stayed until and unless the Respondent complies with all the pre-requisites to effect the Consent equitably fairly and justly to both parties.

5) That the Respondent or in her failure the Petitioner do comply with all requisite Orders to give effect to the Consent by disclosing all material facts, pertinent to both the parties within 21 days.

6) That in view of the aforesaid the Court shall not comment on the two Affidavits filed by the parties on 22nd October 2008 and 12th November 2008.

7) That there be no Orders as to costs on Application dated 26th March 2008 and 10th October 2007.”

10. On 17th November 2009, Rawal J. after hearing the parties, ordered partly as follows;

“[I] direct the parties to comply ... [with] Clause 10 of the Original Consent dated 12th February 2007 considering the same in whole.”

11. Reading the two Orders above, it is clear to me that Rawal J. intended that the Contentious **Clause 10** be complied with and that the Consent should be read, and implemented as a whole. There is also no doubt that on 17th November 2009 Rawal, J. set aside the Consent order and parties were to comply with **Clause 10** only. Whether the Respondent obtained USD 96,000 from **(particulars withheld)** is no answer to the fact that the obligation to pay the Applicant has not been discharged and until that is done, if at all, then **(particulars withheld)** must abide by **Clauses 10** of the Consent Order which were specifically directed at it.

12. Fourthly, and having held as above, and contrary to the position taken by both the Respondent and **(particulars withheld)**, there is no ambiguity in **Clause 10** and **(particulars withheld)** ought to fully comply with it.

13. Lastly, the Respondent may be unhappy with the Consent Order as amended by Rawal, J. but unless he moves to vary it or set it aside, it will stand.

14. In the event and for avoidance of doubt, the Application dated 16th February 2011 is clothed with merit and is allowed in the following terms;

“i) That this Court now orders the (particulars withheld) to release USD 100,000 to the Applicant in accordance with Clause 10 of the Consent dated 12th July 2007 and issued on 25th February 2009

which Clause is at page 2 of this Ruling.

ii) *Each party to bear its own costs*

15. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10th DAY OF FEBRUARY, 2012.

10/2/2012

CORAM

BEFORE LENAOLA – JUDGE

MIRON – COURT CLERK

MRS. KALSI FOR APPLICANT

MISS KWAMBAI HOLD BRIEF FOR MR. KATWA FOR RESPONDENT

ORDER

RULING DULY READ.

ISAAC LENAOLA

JUDGE