



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

DIVORCE CAUSE NO. 154 OF 2008

R.P.M..... PETITIONER

VERSUS

P.K.M..... RESPONDENT

RULING

The facts emerging in this application are not in dispute. They are that on 24.5.2010, custody of the children of the marriage between the Petitioner and the Respondent was given to the Petitioner. The court also ordered the Respondent to pay Shs.250,000/= monthly to the Petitioner as maintenance for the Petitioner and the Children which would be scaled down to 150,000/= when the children were not in the custody of the Petitioner. The Respondent was also ordered to refund Shs.2,750,000/= to the Petitioner. The Respondent sought review and/or variation and/or stay of these orders on 29.6.2010 but the court (Hon. Lady Justice Nambuye) declined to grant the orders sought. The Respondent however did not pay the maintenance ordered and consequently on 21.10.2010, the Petitioner moved the court by an application dated 21.10.2010 (filed in court on 25.10.2010) for an order that the Respondent should show cause why he should not be committed to civil jail for failure to comply with the court orders of 24th May 2010 requiring him inter alia to pay maintenance. The Respondent was, in the finding of the court (Nambuye Judge) unable to show cause why he should not be committed to civil jail and his property attached. The court observed that its orders made on 24.5.2011 had not been upset on appeal or reviewed and that there was no order for stay of those orders. The court observed that the Respondent had not demonstrated inability to pay the maintenance order. Accordingly, the court (Nambuye Judge) gave the Respondent 30 days from the date of service of the order to pay the amount ordered failing which the Petitioner was at Liberty to apply for his committal to civil jail.

The ex parte application before the Hon. Mr. Justice Ombija, the Respondent sought an order “to vary, review and/or set aside its orders committing him to civil Jail.” He obtained ex parte orders granting him leave to appeal against the orders. Stay was also ordered on condition that the Respondent paid the Applicant Shs.60,000/= as monthly maintenance pending the hearing of the application inter partes.

Mrs. Thongori submitted that the court has jurisdiction to make the order sought to forestall the suffering before the inter partes hearing. She told the court that the application was erroneously shown to be premised on section 30 instead of S.32 of the Matrimonial Causes Act. She sought amendment and submitted that the court had jurisdiction to vary or modify or change the orders. She contended that this was a matrimonial matter. Section 32 of the Matrimonial Causes Act, Cap 152 stipulates:

S.32 “the court may from time to time vary or modify any order for the periodical payment of money made under this Ordinance either by altering the times of payment or by increasing or diminishing the

amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the thinks just.”

It was Mrs. Thongori’s submission that as Justice Ombija is no longer in Family Division, any judge in the division could vary or review the orders. She contended that the judge (Ombija Judge) was a vacation judge when he made the ex parte orders and was not therefore seized of the matter as such. **Mulla on code of Civil Procedure, 17th Edition vol.4, page 676 para 26** was quoted by Mrs. Thongori to buttress her contention that the court can vary and/or review the orders made by Justice Ombija since he is not attached to Family Division. Mulla states at pg 676 para 26:

“An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing”.

Under Rule 2 of order 45 of the Civil Procedure Rules which Mrs. Thongori referred to, an application for review of a decree or order of a court (other than an application grounded on the discovery of such new and important matter or evidence as is referred to in rule 1 of order 45 or on the existence of a clerical or arithmetical mistake or error on the face of the decree) can be made only to the judge who passed the decree or made the order sought to be reviewed **but under sub rule (2) if the judge who passed the decree or made the order is no longer attached to that court at the time the application comes for hearing, the application may be heard by any other judge.** The ruling by Chief Justice Chunga in civil case No.10 of 1980 (Francis Origo & another vs. Joseph K. Mungala was referred to. It was Advocate Thongori’s submission that periodical payment for maintenance such as was made in this case is normally variable on account of either party’s change needs or resources. (see page 1059 of Bromley’s Family Law, 9th Edition). It was contended on behalf of the Petitioner that procedural technicalities should not be had regard to and Article 159 (2)(d) of the Constitution was invoked in this regard. The court was further urged to grant the enhancement on the further ground that the orders for payment of Shs.250,000/= by Justice Nambuye were not varied or disturbed by the stay orders but instead were left intact with a requirement that the Respondent should pay a further Shs.60,000/= for stay to be granted.

Mr. E. Ondieki, learned counsel for the Respondent contended that it is fatally defective because the wrong section of the law, to wit, section 30 of the Matrimonial Causes Act, Cap 152, was quoted instead of Section 32 of the said Act. It was Mr. Ondieki’s submission that the orders by the Hon. Mr. Ombija were conditional and that the application for stay is slated for inter partes hearing on 27.10.2011. He contended that no prejudice will be suffered by the Petitioner if the orders sought are not granted. In any case, he said, the installments of Shs.60,000/= ordered by the court have

The issues for determination in this application are whether etc I have jurisdiction to vary or review the order for Shs.60,000/= and thus grant the Petitioner reasonable maintenance and if so, whether a case has been made out for the enhancement sought. I have carefully considered the facts and the law and the submissions made by Advocate Judy Thongori and Advocate E. Ondieki for the Petitioner and the Respondent respectively. If the court has power to vary the order, I have also considered whether any prejudice or injustice will be caused to any party if the court exercises its power to vary the order. In making this determination, I am cognizant of the fact that as a public officer, I am enjoined to observe and apply national values and principles of governance enshrined in Article 10 of the Constitution whenever applying or interpreting the Constitution or interpreting the law. These values and principles of governance include the rule of law, equity and social justice. I am also mindful of the fact that parties to a marriage are entitled under Article 45(3) of the Constitution equal rights during marriage. In exercising judicial authority this court, like all other courts, is alive to the constitutional principle in Article 159 (2) (d) that justice shall be administered without undue regard procedural technicalities. The application quoted the wrong section of the law. But the Petitioner’s advocate made an oral application to correct this

and she drew the attention of the court to the fact that the correct provision of the law that should have been invoked was Section 32 of Matrimonial Causes Act, Cap 152 and not Section 30 of that Act. I am minded to allow the amendment which Mr. Ondieki had opposed.

Section 32 of the Matrimonial Causes Act gives the court discretionary power to vary. As the Hon. Mr. Justice Ombija who made the order is no longer attached to the Family Division, any judge in the Family Division is competent to vary the order. Rule 2(2) of order 45 of the Civil Procedure Rules shows that if the judge who made the order is no longer attached to the court in this case, the Family Division, the application to vary may be heard by any other judge in the Family Division at the time the application comes up for hearing. It is patent that the rules recognize the practical problems that would ensue if the position was otherwise. Mr. Ondieki submitted that if the court varies and enhances the amount of Shs.60,000/=, this will add to confusion as the matter is slated for hearing on 27.10.2011. I have given this point anxious consideration. I have considered whether it is in the interest of the welfare of the children of the marriage to decline to deal with the matter and instead defer it to 27.10.2011. It is not the fault of the children or indeed that of the Petitioner that the hearing of the application was not immediate and I realize that payment of house rent and basic needs for the Petitioner and the children cannot await the hearing of the application on 27.10.2011 and subsequent determination. Life must go on. The courts are there to ensure that rights are enforced so as to give redress. If the courts were to fail to enforce rights they would be failing in their duty. For these reasons, notwithstanding that there are applications for hearing on 27.10.2011, it is my finding that the welfare of the children and the need to ensure that the Petitioner is able to keep a roof over her head supersedes the consideration for the matter to be heard on 27.10.2011. In any case, even though the application for stay is slated for hearing inter partes on 27.10.2011 the issue of maintenance must for the reasons slated be addressed regardless of the outcome of the stay application. It is imperative that the court examines whether there is need to order maintenance so as to ensure that the children and the Petitioner are able to keep a roof over their head and to sustain themselves. I have said enough.

Has the Petitioner made out a case for variation by way of enhancement of Shs.60,000/= to Shs.250,000/=. For starters the order for Shs.60,000/= was ex parte. The application for variation has been argued inter partes and both parties through their respective advocates had opportunity to ventilate their cases.

Dated at Milimani Law Courts, Nairobi, this 21st day

Of October 2011.

G.B.M. KARIUKI, SC

JUDGE

COUNSEL APPEARING

Judy Thongori, Advocate for the Petitioner

Ondieki & Ondieki, Advocate for the Respondent

Mr. D. Mutisya, Court Clerk