



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Divorce Cause 04 of 2005

S KPETITIONER

VERSUS

R W KRESPONDENT

R U L I N G

The amended Chamber Summons application dated 13-11-09 is made under section 58 and 59(1) and section 26(1) of the Matrimonial Causes Rules, section 101 (1), (1) (a), (b) 5 and 7 of the Children Act 2001, and section 3 A of the Civil Procedure Act. It seeks that warrant of arrest do issue for the arrest and imprisonment of the Respondent/petitioner for failing, defaulting and/or willfully neglecting to make payments to the applicant as ordered by this court on 13th December 2005, now amounting to Kshs. 1,865,000/-.

Further, that the court do make inquiries of the respondent's true pension as regards the number of pensions he draws and the respective amounts, from the German Pension Scheme, through the German Embassy, as the respondent has willfully and deliberately concealed or misled the court as to the true nature and extent of his income.

Also, that this court do make inquiries into the Petitioner/ Respondent's Bank account No.[.....]at Raiffeisen Bank Biz [.....]in Germany and account No.[.....] at Barclays Bank of Kenya, Malindi Branch. Once this is done, applicant urges this court to issue an order for the attachment of the respondent's pension in her favour.

The same is premised on grounds that:

1. The petitioner was on 13th December 2005, ordered by this Honourable Court to pay the applicant alimony pendente lite and maintenance to the daughter of the marriage in the sum of KShs. 50,000 per month.
2. The petitioner failed, refused and/or neglected to pay the same and an application was filed on 10-3-06 by applicant's advocate for enforcement of the said orders and/or the arrest and imprisonment of the respondent for non payment of the maintenance sum which by then stood at Ksh. 220,000/-. The court ruled that respondent do pay the sum plus any further outstanding sums, within one month from the date of the ruling. The respondent had filed an application dated 10-5-06 seeking for variation, modification and reduction of the order for maintenance but the same was dismissed on 23-10-07 – respondent filed a notice of appeal dated 26-10-07 but has since taken no further steps.

Thereafter, respondent begun making payments but stopped in May 2006, and is currently in arrears at Ksh. 1,865,000/-. Applicant states that respondent defiantly told her, he would not pay her a single cent and that he has no intention of obeying the court orders.

The respondent's usual lifestyle of eating, drinking beer and merry making has not stopped.

That although the petitioner/respondent disclosed to court that he only earns a monthly pension of 552.20 Euros, he told applicant that he earns pension of 3000 Euros and that applicant will never be able to access it as he has banked the same in his German Bank and ex-wife sends the money to him through Western Union at his request.

In January 2009, the applicant wrote to the German Pension Scheme to disclose the respondent's pension entitlements but was advised that such information fell under the Social Secrets and could only be possible through a court order directed at the German Embassy.

In the affidavit sworn by the applicant supporting the application, she deposes that respondent has willfully defaulted in paying maintenance as ordered by the Court in December 2005. She attributes this non compliance to a deliberate scheme by respondent to ensure that applicant abandons her claim for maintenance and end up in divorce without him paying any maintenance. She refers to annexures of correspondences written by her requesting for details of respondent's pension from the German Pension Scheme.

She laments that her daughter who is now in school is almost a destitute as applicant has to struggle to get her school fees or even food and clothing for her, yet she has no source of income. Applicant explains that she took long in filing this application as she had all along hoped that the respondent would change – he has instead become worse.

The application is opposed, and the respondent denies willfully disobeying the court orders saying he is not able to satisfy the same since his only income now comes from his pension which stands at 552.20 Euros which translates to Kshs. 50,000/- and cannot even provide for the intended household needs. He explains that he previously operated a *tuktuk* business which collapsed and he even had to solicit for funds from relatives in Germany to make the earlier payment of Kshs. 270,000/-.

He blames his former advocate, Omagwa Angima who he claims received Kshs. 900,000/- on his behalf and was to pay Kshs. 400,000/- to applicant but this did not happen.

He denies boasting to applicant that he receives more pension than he disclosed to the court or vowing not to obey the court orders and explains that due to difficulty in complying with the court order, he filed an application seeking to reduce or modify the order for payment but this was dismissed on grounds that he had failed to comply with the earlier orders and he thus instructed his advocate to file an appeal.

The appeal has not been filed due to delay in obtaining proceedings despite several reminders to the court.

He insists that he has selflessly endeavoured to provide for the applicant and their daughter with whatever possible provisions out of his small pension earnings and their daughter's school fees. He has no objection to the court making all the necessary inquiries regarding his income. He deposes that he rarely goes out drinking and states that applicant is misleading the court saying an order for imprisonment would not be the best way forward. He denies operating an account with Barclays Bank, Malindi saying the account number given is new to him – he had an account (SK3) which was closed years back and his only true account is the one at Raiffeisne Bank BLZ.

At the hearing, Miss Njoroge, on behalf of the applicant, reiterated the grounds raised in the application, pointing out that respondent has persistently failed to comply with the court orders of 13-12-05 requiring him to remit Ksh. 50,000/-.

In response, Mr. Mrima for the respondent submits that although the Children Act gives this court power to make inquiries regarding respondent's financial position, he argues that an attempt to do so through the foreign embassy could be offending the question of immunity since a foreign mission is considered as part of the sending State and the Embassy is immune under the Privileges and Immunities Act and a member of Diplomatic Mission cannot be called upon to give evidence in court as per Article 1(2) – so this court might end up issuing orders in vain.

He insists that what the respondent has revealed is the truth regarding his finances and applicant's prayer is speculation based on the hope that there may be some money elsewhere. Further, that the 552 Euros (Kshs. 50,000/-) which respondent receives, is what he uses to pay electricity bills, servants, and shopping, so he has nothing to spare to meet the court orders. He still intends to appeal against the orders, although he did not obtain an order staying the contested order herein.

In response, Miss Njoroge states that when the court made the orders on 13-12-05, it was satisfied that respondent could meet the terms and draws to this court's attention the fact that the court did not direct respondent to do shopping or pay electricity bills and the court was fully

aware that the parties were living together, so if the court had wanted applicant to pay for utilities and do shopping, it would have clearly said so.

Miss Njoroge argues that respondent just wants things to be down his way – she urges this court to take into account the child’s welfare.

This is a unique situation where the parties are living under the same roof, respondent occupies the first floor of the matrimonial home, whilst applicant and their daughter occupy the second floor. It is not denied that respondent has not been remitting the sums as had been ordered by the court.

Rule 59(1) of the Matrimonial Causes provides for enforcement of orders where a person has defaulted in remitting money as ordered by the court – in the present situation, this is not the first time that respondent is defaulting. His initial attempt to have the sum scaled down failed precisely because he had failed to comply with those very orders. When the court made the orders for maintenance pende lite, it must have taken into consideration whatever financial challenges the respondent had including the fact that the parties lived in the same home and so were bound to share certain utilities such as water and electricity. Respondent is in arrears – which he attributes to his other commitments such as paying servants, shopping and paying utility bills. The child does not seem to feature anywhere in his list of commitments. Section 101 of the Children Act addresses the issue concerning enforcement of maintenance orders and allows the person in whose favour an order for maintenance has been made to apply for any arrears. The court can either summon or issue a warrant of arrest of the defaulting party after due notice. In this instance, the respondent was summoned but the applicant prayer is for his arrest and committal to civil jail – The respondent insists his income is only 552.20 Euros which is approximately 50,000/- but applicant says this is not correct – that he has other financial resources in Germany. I think before the court can exercise any of the options available under section 101 (5), the court is duty bound to make enquires under section 101 (4) (a) and (b)

Could it be true that the applicant genuinely lacks the financial ability to meet the terms set earlier by the court, or is he just being preposterous?

Section 101(4) a provides that

“Prior to the making of an order under this section, the court may hold an enquiry as to the means of the respondent...the court may direct that:

- a) enquires be made as to the means of the respondent by such person as the court may direct.***
- b) The respondent’s income, assets and liabilities be searched to establish such information as the court may require to make an order under this section.”***

Before this court can order for the respondent’s arrest and committal to prison, it must be satisfied that respondent has willfully and deliberately concealed or misled the court or any other person appointed or directed to carry out enquiries and in fact section 101 (7) binds this court not to issue warrant of arrest for imprisonment unless the court is satisfied that the failure to make payment has been without reasonable cause – this is where the second part of the applicant’s prayer comes in – an enquiry into respondent’s pensions and his bank accounts.

It is now being said that such a process is not workable because the German Embassy has Diplomatic Immunity. Actually what the court seeks has nothing to do with interfering with the Embassy’s Immunity at all and if it is not workable for whatever legal reasons, then I am certain the Embassy would be able to respond in an appropriate manner.

So far it has been sufficiently demonstrated that applicant has failed to make the monthly payments of Kshs. 50,000/- to applicant.

I direct that the German Embassy based in Kenya do make inquiries as regards the respondent’s true pension position, with a view to confirming the number of pensions he draws, and the respective amounts, from the German Pension Scheme.

(2) The Embassy do take steps to inquire into the petitioner/respondent’s bank account No. [.....] at Raiffersen Bank BLZ[.....] in Germany, to confirm the status of that account in terms of monthly deposits, monthly withdrawals and the balance in the account.

(3) A confidential report by the German Embassy be filed in this court on (1) and (2) above on 19th May 2010.

(4) The manager Barclays Bank of Kenya Malindi Branch, do file confidential report regarding the status of account No. [.....confirming current balance, the monthly deposits and monthly withdrawals, who the account holder is and the report be filed in this court on 19-5-2010.

I will therefore not order for arrest and committal of the petitioner at the moment pending outcome of the report before making further

orders.

Mention on 19th May 2010.

The Deputy Registrar to ensure this ruling is extracted and orders be served both on the German Embassy Nairobi and the manager Barclays Bank of Kenya (Malindi).

Written, delivered and dated this 21st day of **April 2010** at Malindi.

H. A. OMONDI
JUDGE

Mr. Mrima for Respondent
Miss Njoroge for applicant