



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 74 of 2007

SK PETITIONER

VERSUS

BZ RESPONDENT

RULING

The Petitioner/Wife filed a Chamber Summons dated 1st February 2008 to seek alimony pending suit and maintenance against the Respondent/husband as well as custody, care and control of the children of the marriage and their maintenance. The Chamber Summons is filed under sections 21, 25(i), 26(ii) and 30(i) of the Matrimonial Causes Act (Cap 152) and under Rules 38, 39 and 44(1) of Matrimonial Causes Rules.

Over and above the above prayers, she also seeks full costs for the education of the children as well as secured provisions for herself and for the children of the marriage.

The Chamber Summons is supported by the affidavit of the Petitioner sworn on 1st February, 2008. She has given details of her maintenance and other needs in paragraph 11 of her said affidavit. She has averred that the Respondent has neglected or refused to pay school fees for their eldest daughter who is studying in London and she has to bear the educational expenses, travelling expenses and her upkeep.

The Respondent is opposing the application and has sworn a lengthy affidavit on 27th February, 2008. In response to the said affidavit the Petitioner swore another affidavit on 3rd March, 2008.

The counsel consented to lead oral evidence in support and in opposition of the said application.

The Petitioner reiterated her affidavit in support and further affidavit. She stated that since June, 2005, they are living separately when the Respondent moved out of the matrimonial home to live in an apartment along Arboretum Drive. According to her he now lives with the woman named in her petition along with her youngest daughter. He older boys live in an apartment below his. She specified that according to her the woman named and her children are his family and he looks after them by spending around Shs.300,000 to Shs.400,000 per month. Their own two children live with her since separation and she on her own looks after their daily needs. The older daughter, with the consent of the Respondent who signed her school forms, studies in United Kingdom since September, 2006. The Respondent paid fees for two terms and thereafter has refused to pay the school fees and she on her own is paying her educational and other expenses. The Respondent pays school fees for the younger son. His Music lesson's fees are shared by both of them. The daughter's Tennis expenses are mostly paid by the Respondent, sometimes she also pays. The annual school fees for the daughter which is US\$.26,100, is paid by her.

Moreover, she has been sacked by the Respondent from her position of the Managing Director of R[*particulars withheld*] Travels (a family concern). There are several suits pending in the civil courts between the two in respect of family businesses.

She further averred that her efforts to have settlement meetings were made fruitless as Respondent has not availed

himself. She has agreed, however, that a man called NS is her friend and lives in her house when he is in Kenya. He owns an aviation company named 5[*particulars withheld*] Airlines. She refused the claims that he pays for the children's needs and stressed that it would be demeaning for herself and for the Respondent to suggest that she would expect him to contribute towards her children's needs or expenses. She proudly put it that she has always been a hard working woman and has looked after herself and the family.

On the other hand she stated that the Respondent runs and benefits solely from the family businesses and she estimated his income at Shs.1,250,000 per month. She claims Shs.350,000 per month as a maintenance since July, 2005 for herself and the children over and above the payment of school fees.

She also claims the return of the passport of their son, which the Respondent is holding and refusing to give it to her. She lamented that due to his refusal their son could not accompany her to watch her sister play in Africa Junior Tennis Tournament in Botswana.

In cross-examination, she reiterated that she had lived with the Respondent for 15 years and she knew the life style they were living and she also ran companies and knew what was the family income. She knows also of his overseas Account. Although she has not produced proof, she was informed by her son that the named lady and the Respondent live under one roof. She accepted that her male friend NS lives in the same house on average of six months in a year and that he is a director of 5[*particulars withheld*] Airlines along with one H. Since April 2008 she has been working with E[*particulars withheld*] Travels as a Manager earning net monthly salary of Shs.110,000, though she conceded that she did not disclose this fact in her affidavit. She insisted that it was she who opened, ran and developed R[*particulars withheld*] Travels on her own. She could not agree that the Respondent is incapable of paying the claimed sum. She at present is surviving on the loans taken from NS and Company on trust that she would repay when Respondent settles her claim. She denied that she has stolen US\$.800,000 or any sum from R[*particulars withheld*] Travels. The matter is before the court and thus is a pending issue.

Lastly, she stated that she is aware that the Respondent has not borrowed any money from one HH who she knows very well as well as who is their daughter's God father. Moreover, the Respondent is HH's very close friend and they had many businesses in common till he moved to South Africa since about 10 years. She also insisted that she still is a shareholder of Z[*particulars withheld*] Holding, which is holding 60 per cent shares in R[*particulars withheld*] Travels by maintaining that she was removed only as a Managing Director of the said company. She reiterated that she was moved from R[*particulars withheld*] Travels when the annual turnover was around Shs.950,000,000 and the profit thereof could be 4 to 6 per cent of the said income. Respondent now runs that company as a Chief Executive and other subsidiary companies of Z[*particulars withheld*] Holdings. A known company named B F[*particulars withheld*] products is also its subsidiary.

On the other hand, the Respondent started his evidence by stating that he was ready to pay reasonable sum of Shs.30,000 per month as maintenance plus the son's school fees which according to him is Shs.255,000 per term. The fees are paid by BF[*particulars withheld*] Products Ltd. against his account. He also pays extra sum of about Shs.15,000 per month on his extra activities. He, as well as, pays for medical insurance of US\$.450 per annum per child.

He categorically stated that he was against their daughter going to school in U.K. at a tender age of 13 years as that would improperly expose her to Western culture without any guidance. He said if she starts schooling in Kenya he is prepared to pay for her school fees.

As for the Petitioner, he stated that he was not willing to pay for the Petitioner as she was well looked after. He vacated matrimonial home to enable the children to remain in the very house they grew up.

He reiterated his reasons for refusing the daughter to be exposed to negative western morals in cross-examination but did agree that before the separation, he had an extra marital affair with one A and he is a co-respondent in a Divorce petition filed by A's husband. He also admitted that he had seen the daughter only for few hours around January, 2008, and stated that she is **'probably 15 years of age now'**.

This A is the lady who lives with her children in the same block of flats. He agreed she is working with B F[*particulars withheld*] Products earning Shs.100,000 per month. She is a consultant by profession but he did not specify in which field. He admitted they started friendship in October, 2005 after knowing her in December, 2004, and close relation started during latter part of 2005. He also knew the rent of her flat, where her children go to school, how much fees they pay, but denied that he or B F[*particulars withheld*] Products pays their rent or fees. He admitted the cost of his food alone is between Shs.12,000 to Shs.15,000 per month.

He also agreed that he has interest in five companies, Z[*particulars withheld*] Holding being a holding company for all others (para.7 of his affidavit).

He gave reasons why the Petitioner was removed as a director of R[*particulars withheld*] Travels but agreed that allegation of deletion by her of company records was made for the first time only during testimony.

He agreed that he, his company has not filed any suit against the petitioner to recover the alleged stealing of money but had reported the matter to the police as well as to Immigration office.

As far as his signature on the school form for the daughter is concerned, he explained that he did not sign for admission but only for scholarship for the school in U.K. I must comment at this point that, if his refusal was to shield the daughter from Western negative morals, why even sign a form for scholarship for U.K. School? The fact is that he did sign on a form for U.K school and told the court that he had to check whether he could have paid some fees for her from his German overseas Account. He agreed that he has an Account in India and a flat in Spain but denied that he has any property in India or any Account in Singapore. However he agreed that he has not since paid any school fees for the daughter up to-date. He has also not filed any affidavit of means although notified to do so on the service. He explained though that his affidavit filed in the winding up petition and annexed as B2 is as per him, his affidavit of means, and denied that he did not file the affidavit in means to hide his income.

As regards the matrimonial house which he claimed was left to the petitioner to occupy with children, he agreed that he received US\$.92,000 from the Petitioner so that he could transfer his share to her but added that total amount of his share was US\$.240,000 to US\$.250,000 and then said it could be US\$.211,000. They have a joint account in foreign investments called F[*particulars withheld*] provident fund (U.K) Ltd, together with M[*particulars withheld*] Investments Account and the f[*particulars withheld*] for Euros 60,000 which is meant for the education of the children. He agreed to continue holding the said sum for that purpose, while agreeing that he has not paid any sum for their subsistence.

He conceded that in reality he runs the businesses of all the companies though the shareholdings are different, but Z[*particulars withheld*] Holdings has 60 per cent shares in all, and that they all are running businesses, and dividends are declared. The Directors fees are also paid but the Petitioner was paid for R[*particulars withheld*] Travels only upto February, 2007 and averred that she is no more a director of any of the companies but denied that himself and his sister unilaterally removed her. He reiterated his averments of pilferage and stealing by the Petitioner. Once again that matter is pendente lis and he has not put forth any evidence before this court in proof thereof. What is supported by him is the averments made by him in his supporting affidavit filed in H.C.C.S No.578 of 2006 (Milimani) and the affidavit filed in a winding petition.

In the end, he said it is not within his nature to file any suit as regards US\$.80,000 in consideration for his children and the fact that despite all, he still respects the Petitioner as the mother of his children.

This in brief is the evidence before the court.

In their respective submissions, the learned counsel reiterated what has been on record and testified by the parties.

In short, I may say that the Respondent since leaving the matrimonial home, has not paid anything towards the maintenance of the children and the Petitioner. It is on record and admitted that the Respondent is running the businesses named hereinbefore and they all are all running concern, wherein dividends are declared. I have already observed that R[*particulars withheld*] Travels when run by the Petitioner was receiving very lucrative profit. The contention by the Respondent that the Petitioner has stolen US\$.800,000 is an issue pending before another court and that cannot be a good excuse by the Respondent to deny the maintenance to his family. The Petitioner has conceded that she earns Shs.150,000 per month from early 2007 and the Respondent has not shown any evidence that due to financial constraints his life style is affected. His refusal to pay the school fees of the daughter, as observed hereinbefore cannot be comprehended, and I do find that he has failed to show any justifiable reason for such refusal. The Petitioner having been thrown out by the Respondent from all the family businesses has to rely on her salary which, in any respect, is not commensurate to the life style, she and the children were used to when the family was united.

As regards the other persons' entries in their respective life, they both seem to have moved on in their respective lives. To expect the Petitioner's male friend to give expense for his children is, to say the least, not acceptable and is definitely embarrassing to both of them. The Respondent having accepted that he has close relation with the lady living with her children and he knowing all the details of their schools and rent of her apartment, do suggest he is totally involved with her and her children. Moreover, without disclosing her qualification, he has agreed that he has employed her in his company, and the school fees are paid by B F[*particulars withheld*] Products on her account do really show the true picture of intimate relation between the two.

Be that as it may, and woe to their extra marital relations, but the Respondent cannot shirk his family responsibility. Seeing the incomes of both parties, it cannot be gainsaid that the Respondent is in a far more comfortable position than that of the Petitioner. The failure to pay any maintenance to the children even after filing of this application and long

hearing before the court, the Respondent has not earned any sympathy from the court. His offer to pay Shs.30,000 per month when he spends half of the said sum on his fuel is an added insult to the injury suffered by the family. The Respondent has stated that he is paying for medical Insurance for the children and the court may give him credit for that admission.

I also agree with the submissions made on behalf of the Petitioner that despite the notice given and as required under law, the Respondent has defied that notice and instead of that has filed affidavits in various suits pending between the parties.

I may add that even in those affidavits he has not shown his income from all the companies as well as his expenses so that the court can arrive with ease, the appropriate sum for maintenance against him. His simple denial to the suggestion of the Petitioner that he earns Shs.1,250,000 per month is not traversed appropriately. I also do note the testimony of the Petitioner when she said she has lived with the Respondent for 15 years and does know from her own personal knowledge that the said sum was earned by the Respondent.

I have carefully looked at the items of the expense of the family mentioned by the Petitioner. Many items like school holiday, school books etc. are not the items which are required every month.

Considering very anxiously the whole case, I order that the Respondent shall pay Shs.200,000 to the Petitioner for the family maintenance. He shall further pay the full school fees for the two children.

The above maintenance shall be paid from the date the Respondent left the matrimonial home i.e. July, 2005. The school fees for N shall be paid with effect from the year 2007 as he has paid some fees when she joined the school in 2006.

The prayer of custody, care and control of the children is allowed as prayed, as the Respondent seems to have developed apathy in the welfare of the children.

I shall not grant any other prayers sought in the application which shall be prosecuted at the time of hearing of this Divorce Cause, or afterwards.

The Respondent shall pay costs of this Chamber Summons.

Dated and signed at Nairobi this 22nd day of January, 2009.

K.H. RAWAL

JUDGE

22.1.09