REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION 339 OF 1981

PHOEBE WANGUI KAMORE .....PLAINTIFF

V E R S U S

JAMES KAMORE NJOMO.....DEFENDANT

R U L I N G

When the Plaintiff filed this suit in September 1981, she had been married to the Defendant under statute since May, 1974. It appears that serious differences in the marriage arose in early 1981, and the couple became estranged. It appears, further, that they are still estranged, but there is no evidence before the court that the marriage has been dissolved.

The couple had three children as follows:-

1. **HILARY MWANGI……..born on 14.01.1975**

2. **DUNCAN NDURACHA…….born on 28.12.1978**

3. **PETER MACHARIA……..born on 01.03.1980**

The Plaintiff brought the suit under the Guardianship of Infants **Act, Cap 144** (since repealed). She sought against the Defendant orders for custody and maintenance of the children. She also sought orders to restrain the Defendant from approaching her or her residence.

On 29th November, 1984 the court (Platt, J) ordered, *inter alia*, that the Defendant do pay maintenance for the children of the marriage in the sum of KShs. 2,500/00 per month commencing 1st December 1984. It would appear that the children were then in the custody, care and control of the Plaintiff.

In a ruling delivered in September 2000 upon an application by the Plaintiff for leave to attach the Defendant's properties to recover arrears of maintenance (which application was granted), the court (Ole Keiwua, JA (he delivered the ruling after he had already been elevated to the Court of Appeal) found that the Defendant had paid only three installments totaling KShs. 7,500/00 towards the maintenance. He also noted that a Deputy Registrar of the Court had on 12th September, 1997 computed and found that the arrears of maintenance owed were KShs. 390,000/00 plus interest thereon.

With regard to interest, I must state at the outset that no interest was awarded in the original order for maintenance of 29th November 1984, and the Deputy Registrar had no jurisdiction to award any. Interest is a matter of law as set out in section 26 of the **Civil Procedure Act, Cap. 21**. It must be specifically awarded (at the discretion of the court) and cannot be presumed. In the present case, no interest was

awarded by Platt, J on 29th November 1984, and none can be charged.

As already noted, the order for maintenance was made under the Guardianship of Infants Act (since repealed). Such order would lapse in respect of each child, at best, upon that child attaining majority at 18 years. We have already seen when the children were born. They attained their majorities as follows:-

1. HILARY MWANGI…….on 13.01.1993

2. DUNCAN NDURACHA…..……..on 27.12.1996

3. PETER MACHARIA…….on 28.02.1998

The children have since moved on. The court was told that they are all educated up to university level and are in good jobs or occupations. But their parents are still doing battle against each other in this suit.

The court record is voluminous. There are many applications and counter-applications. Because of the age of the suit, some of the original pleadings are old and tattered, and the court record can only be perused with considerable difficulty. During hearing of the latest application, the subject of this ruling, it was apparent that the parties still hate each other with a passion.

What then is the latest battle about? It is simply this. The Plaintiff wants the Defendant to pay her arrears of maintenance for the children and interest amounting to KShs. 1,021,500/00. That is what she executed for in September 2006. Auctioneers went in and attached by proclamation the Defendant's motor vehicle and other goods.

The Defendant rushed to court by notice of motion dated 25th September, 2006. He sought an order to set aside the attachment. He also sought an order that the matter be referred to a Deputy Registrar of the court to adjudicate whether any sum is due to the Plaintiff. His case as set out in his supporting and supplementary affidavits is that:-

1. Another motor vehicle of his had been attached and sold on a previous occasion in execution of the order for maintenance, and no credit was given for the proceeds realized.

2. The children attained majority at different times, and there ought to have been *pro rata* reduction of the maintenance sum.

3. In any event, the children were living with the Defendant during the period that the Defendant was required to pay for their maintenance.

The application is brought under the inherent jurisdiction of the court, and also under **Order 21, rule 22(2)** of the **Civil Procedure Rules** (the Rules).

An issue has been raised for the Plaintiff whether the application has been properly brought under that sub-rule. I am of the view that this is a dispute which should not be resolved upon technicalities. Indeed, at the hearing the court was urged to settle the dispute finally and without reference to a Deputy Registrar of the court. I shall proceed upon that basis.

The Plaintiff has opposed the application as set out in her grounds of opposition and replying affidavit filed respectively on 16th and 9th October, 2006. The main grounds are:-

1. That the Defendant has not proved that any previous motor vehicle of his was attached and sold in execution herein.

2. That the issue of interest was settled by the Deputy Registrar.

3. That it is not true that the children left the custody of the Plaintiff and went to live with the Defendant.

4. That the application is an abuse of the process of the court.

The submissions of the learned counsels for the parties were mainly along the positions taken in the respective affidavits of the parties. But learned counsel for the Defendant raised the issue of limitation. He relied upon the Court of Appeal decision of **Malakwen arap Maswai –vs- Paul Kosgei, Eldoret Civil Appeal No. 230 of 2001, reported at [2004] eKLR**. It was held in that case, *inter alia*, relying on some English and local decisions, that the term "**action"** as used in **section 4(4)** of the **Limitation of Actions Act, Cap. 22**,

"**embraces all kinds of civil proceedings, including execution proceedings".**

Section 4(4) aforesaid provides:-

"**An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date in which the interest became due."**

In the present case, the Defendant paid only three installments as noted by Ole Kuiwua, JA in September 2000. It is not clear from the court record when the latest of the three installments was paid. The maintenance order directed payment of money at recurring periods. I am unable to discern from the record exactly when the Defendant defaulted for purposes of the said section 4(4) of Cap. 22. But from the Defendant's own documents (paragraph 7 of the supplementary affidavit) there was execution in November 1985. That was only a year or so after the maintenance order was made.

Then there was the execution that a Deputy Registrar dealt with on 12th September, 1977. That was before 12 years lapsed since the last execution. And then the application that Ole Keiwua, JA dealt with in September 2000. The latest execution was in September 2006.

Were it not for the difficulty in perusing this old court record, I am sure other instances can be found when the Plaintiff tried to execute the order for maintenance. It is not as if the Plaintiff waited for over 12 years since the order was made to execute it. I am thus not satisfied that section 4(4) of the Limitation of Actions Act has application to this matter, and I so hold.

There are three other issues raised by the Defendant that I must deal with now:-

1. Whether there was a previous execution in which the Defendant's motor vehicle was sold and the proceeds of the sale unaccounted for, and if so, what those proceeds might have been.

2. Whether the children were living with the Defendant during subsistence of the maintenance order.

3. Whether there ought to have been an automatic *pro rata* reduction of the maintenance sum as each child attained majority.

With regard to the previous execution, as already seen, there is a proclamation annexed to paragraph 7 of the Defendant's supplementary affidavit by which the Defendant's motor vehicle, registration number **KPY 653** was attached on 5th November 1985. The proclamation states that the motor vehicle would be sold on 20th November 1985.

The Plaintiff has not denied this attachment. It has not been urged on her behalf that the motor vehicle was subsequently released to the Defendant. I have already commented about the difficulty involved in perusing this large, old and tartered court record But I am satisfied, on balance, that indeed the

Defendant's motor vehicle KPY 653, then valued at KShs. 120,000/00, was attached and sold in execution herein. However, it is not likely that it fetched in a public auction its full value. Doing the best I can, I estimate that it probably fetched about half of its value in the sale, that is KShs. 60,000/00. The auctioneer's charges must be factored in. I estimate these to have been about KShs. 5,000/00 in 1985. I therefore hold that the proceeds of sale of motor vehicle KPY 653 that must be credited to the Defendant is KShs. 55,000/00.

Were the children living with the Defendant during subsistence of the maintenance order? The Defendant has simply not offered any evidence of this. In any event, as Ole Keiwua, JA observed in his ruling of September 2000, nothing would have been easier than the Defendant applying for the setting aside or variation of the maintenance order if at some point the children left the custody of their mother and went to live with him. He did not so apply. I hold that the children were in the custody, care and control of the Plaintiff during subsistence of the maintenance order.

The same argument applies to the Defendant's claim that there ought to have been automatic reduction of the maintenance sum as the first two children attained majority. Why did he not apply to court for such variation? This does not contradict my observation early in this ruling that the maintenance order lapsed in respect of each child as that child attained majority. In an application for variation in that event, reduction of the maintenance sum would not necessarily have been automatic. The court would have had to consider other factors, including whether there had been any rise in the cost of living in the meantime. As the Defendant did not apply for any variation, the maintenance sum of KShs. 2,500/00 remained in place from 1st December, 1984 to the end of February 1998 when the last child attained majority.

I will now do the arithmetics. In the supplementary affidavit filed on 23rd July, 2007 the Defendant has calculated at paragraph 6 that the total sum of maintenance payable during the children's minority was KShs. 334,033/00. I get a slightly different figure.

The total amount due from the Defendant upon the maintenance order from 1st December, 1984 to 28th February, 1998 is

KShs. 2,500/00 x 159 months = KShs. 397,500.00.

From this sum will be deducted the three installments that the Defendant paid (KShs. 7,500/00) and the net sum of KShs. 55,000/00 that I have held the sale of his motor vehicle KPY 653 realized. The amount outstanding and due from the Defendant is thus **KShs. 335,000/00**. I have already held that no interest is payable upon the maintenance sum.

I direct that the Defendant pays the said sum of KShs. 335,000/00 to the Plaintiff within fourteen (14) days of delivery of this ruling. In default, the Plaintiff shall be at liberty to execute for it. In the circumstances of this case the parties will bear their own costs of the application.

I hope this ruling will put to rest this long-standing dispute between the parties. They were young and vibrant when the dispute came to court in 1981. They now appear to be well-past middle-age. They ought to move on with their lives.

DATED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 25TH DAY OF SEPTEMBER, 2009