



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Suit 93 of 2006**

**A.S.B.....PLAINTIFF**

**AND**

**S.P.B.....1<sup>ST</sup> DEFENDANT**

**R.I .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The Applicant and the Respondent are husband and wife who became estranged leading to various legal proceedings being referred to the courts.

After lengthy litigations, the Court of appeal with the consent of the parties resolved most of the disputes/cases and gave directions in others.

In Civil Application Nos. [.....] of Mombasa in which a global consensual decision was made, the Court of Appeal ordered inter alia, as follows:-

“

(a) .....

(b) **MR. S.P.B shall adequately maintain MRS. A.S.B and in so doing shall provide her with the following:**

**a. Housing**

**b. Medication**

**c. Clothing**

**d. Food and/or subsistence**

**e. Car”**

The said order was made on 27<sup>th</sup> July 2007.

The plaintiff in this suit which dealt with the matrimonial disputes has lodged this application on 31<sup>st</sup> March 2009 under Section 25,26 and 27 of the Matrimonial Causes Act. On the basis of the decision of the Court of Appeal, she seeks the following orders:-

1. *That this court do order the Defendant to pay a monthly maintenance to the plaintiff.*
2. *That the honourable court do assess the monthly maintenance payable by the plaintiff to the defendant.*
3. *That the court do determine the plaintiff's property.*
4. *That the costs of this application be provided.*

The applicant claims that the defendant has refused and/or neglected

to provide the maintenance and she has been rendered destitute and is wholly dependent on her family. She says that she is sickly and requires medical attention on a regular basis.

In her supporting affidavit she deponed as follows:-

- That the Defendant has not been co-operative and has offered to pay shs.50,000/- per month.
- That she is currently accommodated in a small room in her brothers house while the defendant is enjoying their matrimonial home on Plot No. [.....] The property is owned by a company called B[PARTICULARS WITHHELD]Properties Ltd. in which the defendant/respondent and herself are the only directors and shareholders.
- That in 2007, she was diagnosed with Cancer in the abdomen which required extensive medication and hospitalization and the defendant refused to pay some of the bills.

The defendant filed a Replying Affidavit sworn on 9<sup>th</sup> June 2009 and a further affidavit sworn on 15<sup>th</sup> June 2009. He asserted inter alia:-

- That in line with the consent Order in the Court of Appeal the Applicant and himself agreed that he would pay Shs.50,000/- monthly for her housing and clothing and subsistence fees.
- That he paid her Shs.500,000/- through a Cheque dated 24.07.2007 to purchase a car.
- That soon after the consent, the plaintiff fell ill and was diagnosed with cancer. He said that he arranged for the plaintiff an urgent flight to Nairobi for specialized treatment. That he spent over Shs.3,289,623.85 towards the plaintiff's medical bills and related expenses.
- That he had agreed with the Defendant that he would never hesitate to cater for the plaintiff's medical needs whenever she was sick.
- That the following the agreement the plaintiff received shs.50,000/- monthly for the maintenance. That this went on for several months until the month of August 2008 when she stopped to collect the monies.
- That he sent a cheque through her advocate who returned the same.

The record shows that the parties filed written submissions. Counsels

also made oral submissions before me. The plaintiff initially prayed to be paid Shs.500,000/- p.m. all inclusive for maintenance. However during submissions her counsel Mr. Khatib proposed Shs.300,000/- p.m. the Respondent has offered to continue to pay Shs.50,000/- per month at most.

In his submissions and reply the respondent had questioned the legal basis for the application. He said that there was no suit on which it could start since all matters had been settled in the Court of Appeal.

While there was an order of withdrawal of all matters between the parties yet Order (c) of the Court order in the Court of Appeal provides as follows:-

**“(c) all the cases listed hereinabove to be mentioned before the High court at Mombasa within 30 days for further and specified orders.”**

This part was never exhausted. It is a fact that the present matrimonial file is still open and the orders of the Court of Appeal not fully implemented. The consent orders are binding. I do find and construe that the orders of maintenance by the Court of Appeal could be implemented and enforced in this suit. This would save precious judicial time and expense. It would be unreasonable for the Applicant to institute fresh proceedings. The Court of Appeal directed in effect that its orders be implemented in the respective files.

I will start with the question of the medical care of the Applicant. The Applicant does not dispute that the Defendant has provided for her treatment of her cancer condition. He has incurred over Shs.3 million for her chemotherapy and treatment. This is commendable and is a sign of the Respondent's care and concern for his wife. He should be encouraged to continue. I do not find any default with the said medical care. The Applicant should forward any pending medical bills legitimately incurred through her advocates to the defendant's Advocates for settlement.

With regard to the car, I do find that the cheque for Shs.500,000/- was issued on 24-07-07. It is not clear that it was in contemplation of the consent order which came later. In the absence of such a claim or evidence I do find that the Cheque for shs.500,000/- was not for purchase of a vehicle. On a balance of probability, I accept the Applicant's position that it was in respect of previous maintenance.

In the premises, the Defendant is obliged to honour the order for purchase of a car. The applicant has not placed before this court any documents, proforma, etc to indicate the make, type and size of car that would be reasonable for her use. This court has not been assisted by the parties as to the prices of motor vehicles or valuations. Is it to be a new car or second hand?

Be that as it may, the court has to make a decision using its discretion and considering the station in life of the parties, the ability of Defendant and circumstances of the case. Under section 25 of the Act, the court is obliged to have regard to the fortune of the applicant if any, to the ability of her husband, the defendant and to the conduct of both parties.

Considering the suggestion by the Defendant that he had given the cheque for Shs.500,000/- for purchase of a car, I deem it that the Defendant believes that such amount is sufficient to purchase a car for the applicant. I take judicial notice of the fact that such a figure cannot purchase a new Saloon Car. It can only purchase a used car of substantial age.

In exercise of the court's discretion and the parties social status and also the indicators of financial stability of the family and assets through the family companies, I do order that the defendant either pays Shs.750,000/- for the purchase of a car by the Applicant or procures the acquisition by the Applicant of a reasonable saloon car of her choice to be selected by her from at least two established car dealers that he may direct her to and for which he still pay the price thereof. This shall be done within the next 45 days.

I have also considered the question of housing. The plaintiff and defendant are still married though estranged. The disputes between them are in the process of resolution and/or determination. The defendant lives in the matrimonial home with the son of the couple. The Defendant has offered the plaintiff to go back and live in the house since he has now divorced from the second wife he had married. The Applicant appears not willing or ready to go back.

In the meantime, the court must decide on what is reasonable house and accommodation. The Applicant is an elderly lady staying with her brother at the moment. From a perusal of the material or record, I form the view that the couples herein were financially secure and they own substantial assets. The matrimonial house is in the Mkomani area which is an affluent area for the well to do in society. In the circumstances, this court would expect that the Applicant is housed in a reasonable premises that is comparable to the standards of her matrimonial house. The court however must consider that she is now alone and may not need a big house. I do hold that a two bedroom flat or apartment is reasonable housing for the applicant. It is my view considering all and considering the knowledge gathered by me when the Deputy Registrar was locating premises for the station judges, a rental sum of shs.50,000/- per month would avail a reasonable two bed-roomed flat or apartment for the Applicant. I do order that the defendant pays a sum of Kshs.50,000/- p.m. to the applicant to cover her monthly rent. This shall be with effect from 1<sup>st</sup> December 2009 and thereafter on the first day of each successive month until the disputes are resolved or further orders of that court.

The Court of Appeal also ordered through the consent order that the Defendant provides clothing food and/or subsistence to the applicant. In my view “subsistence” is a wide term. In Black’s Law Dictionary, it is referred to as:

“Support; means of support. See **Necessaries**”

This means that subsistence would include the provision of **Necessaries**. “Necessaries is defined in the same dictionary as:-

“Things that are indispensable to living ..

Necessaries include whatever food, medicine, clothing or personal services are usually considered reasonably essential for the preservation and enjoyment of life, to the extent that a person having a duty of protection must furnish them .....

· The term includes whatever is reasonably needed for subsistence health, comfort and education, considering the person’s age station in life and medical condition.”

In the light of the said definitions, the Applicant being from a wealthy

background and having been used to such a life and having pending claims, in the companies being run by the husband, would be entitled to some reasonable income to subsist on. The medical condition would require that she has a house-help at the very least. I take into account that she would be required to pay for electricity and water. She would require to fuel her car and to maintain the same. She would require some provision for entertainment and social interaction with family members considering her health condition and that she is alone.

In all, and doing the best I can in the circumstances I think that an award of Shs.100,000/- would be reasonable and fair. I do order that the defendant do pay Shs.100,000/- per month to the Applicant for food and/or subsistence and clothing with effect from 1<sup>st</sup> December 2009 and thereafter on the first day of each successive month until the disputes are resolved and/or further orders of the court.

It is my view that their application could have been avoided had the parties particularized, itemized and specified the provisions for housing clothing, food and/or subsistence in the consent order. As a result these shall be no order as to costs.

The net results is that I do order as follows:-

### 1. Housing

*A sum of Kshs.50,000 being monthly rent with effect from 1<sup>st</sup> December 2009 and thereafter on the first day of each successive month until the determination of the dispute or further orders of the court.*

## **2. Medication**

*The court has confidence that the defendant will honour this obligation and commitment and that he has adequately demonstrated of his wish that his wife gets the best medical care he can afford despite the differences. He is commended for this.*

## **3. Clothing, food and/or Subsistence**

*A sum of Kshs.100,000/- with effect from 1<sup>st</sup> December, 2009 and thereafter on the first day of each successive month until the disputes are resolved or further orders of this court.*

## **4. Car**

*A sum of Kshs.750,000/- or procurement of a reasonable saloon Car of the Applicant's choice to be selected by her from at least 2 established car dealers that the Defendant may direct her to and for which he shall pay the price. This provision shall be complied with within the 45 days from the date hereof.*

## **5. Costs**

*There shall be no order as to costs.*

## **6. Liberty to apply is granted.**

**Dated and delivered at Mombasa this 26<sup>th</sup> day of November 2009.**

**M. K. IBRAHIM**

**J U D G E**

**Coram:**

Mr. Ibrahim, J

Kazungu – court clerk

Mr. Khatib for the Applicant

Mr. Okemwa for Mr. Kaluma for the Respondent

**Ruling delivered in their presence**

**IBRAHIM, J**