



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Divorce Cause 13 of 2007**

**J.W.A.....PETITIONER**

**VERSUS**

**A.H.L.....RESPONDENT**

**JUDGMENT**

Under a divorce petition dated 10<sup>th</sup> September 2007 the petitioner, **J. W. A** prays that her marriage to the respondent, **A.H.L** be dissolved. In addition, she prays that she be granted the following reliefs:

1. *Custody of the issues of the marriage.*
2. *That the respondent be ordered to pay maintenance to the petitioner and to provide upkeep for the children of the marriage.*
3. *That there be an injunction restraining the respondent from evicting the petitioner from the matrimonial home.*
4. *That an injunction do issue against the respondent restraining him from selling any of the matrimonial properties.*
5. *Costs of the suit and interest thereon.*

The petition for divorce is founded on grounds of adultery and cruelty as set out in paragraph 6 of the petition, wherein the petitioner cites a purported marriage of the respondent to one **I.A** during the

subsistence of his marriage to the petitioner and singles out six incidences of cruelty towards her. The petitioner states that despite efforts to salvage the marriage between herself and the respondent through negotiations, the same has irretrievably broken down with the respondent persistently demanding that the petitioner vacates the matrimonial home.

In his Answer to the Petition filed on 27<sup>th</sup> November 2007 the respondent has denied the particulars of cruelty and blames the petitioner for not desiring that their marital differences be resolved out of court. He avers that he has been supportive of the petitioner by personally and single handedly settling her medical bills and paying school fees for the children of the marriage. On 23<sup>rd</sup> January 2008 a consent order was recorded to the effect that the respondent would continue paying the children's school fees and to support them pending the determination of the petition.

On 12<sup>th</sup> May 2008, in answer to a chamber summons filed by the petitioner seeking an attachment of part of the respondent's salary, the respondent filed an affidavit by which he bound himself to meet the costs of education and maintenance of the four children of marriage "*until they complete school and (become) self reliant.*"

The respondent did not attend at the hearing and therefore did not give any evidence. The marriage and the issues thereof are not disputed. In support of her case the petitioner testified and produced the relevant marriage certificate and the birth certificates of the four children of the marriage. She told the court that differences between herself and the respondent emerged in the year 2003 when the respondent entered an extra-marital affair with one **E.A** with whom he now cohabits in one of the family's matrimonial properties. She testified that during the subsistence of the marriage she and the respondent acquired the following properties which were registered in the respondent's name:

1. NAKURU MUNICIPALITY BLOCK 1/1147 (LANGALANGA)
2. A plot in PHASE 10 (NGATA)
3. NAKURU MUNICIPALITY BLOCK 25/862 (*since sold*)
4. MARAMA/SHIRO TSA/1331
5. An unspecified plot, now developed but with no title

The existence of the said plots and the fact that they are registered in the respondent's name is not denied. To support the grounds of cruelty the petitioner testified that the respondent has made a will by which he has attempted to disinherit her whilst bequeathing matrimonial property to his children, including those of the extra-marital union. She produced the same as an exhibit, stating that the same was given to her by her first born daughter, Linda Nyangweso Lubanga whom the court notes is the named executor. Needless, perhaps, to say so here but the exhibit does not appear to have been validly executed. Other than the making of the will, the petitioner testified that the respondent lives with the girl friend on a matrimonial property. When questioned by the petitioner about it, he beat her up, causing her injury for which she sought police assistance. She produced a copy of a P.3 form and a casualty record card dated 21<sup>st</sup> January 2008 as proof of the assault. Additionally the petitioner testified that the respondent has never made any attempts towards reconciliation and that his having left her for another woman is proof enough that the marriage has no future.

The petitioner claims Shs 30,000/= per month for the children's maintenance and alimony. In this respect, she tendered a copy of her payslip of November 2008 as an exhibit which shows that her net salary is Shs 7,460/= as well as a copy of the respondent's payslip for July 2008 showing a net salary of Shs 61,294/=. Under cross examination by Mr. Githui, learned counsel for the respondent, the petitioner told the court that in addition to her salary, she gets a rental income of Shs 5,000/= which she collects from rental units built on the plot in which she lives with the children of the marriage. She contends, however that her total income is incapable of meeting the cost of food and bills.

At the close of the hearing, counsel applied to file written submissions and the same have been duly considered. Counsel for the petitioner, **Ms Nancy Njoroge** has submitted that the respondent, having not controverted the petitioner's evidence, then this court should find that he is guilty of the matrimonial offences cited against him, namely cruelty, adultery and bigamy, which the court should find have been proved on the balance of probabilities. Counsel has asked the court to also find that, except for educating and maintaining the children, the respondent has neglected his responsibilities towards the petitioner and should be ordered to give her Shs 20,000/= monthly as maintenance and to continue meeting the children's school fees as agreed. She has submitted further that there was sound basis for the marriage herein to be dissolved and for orders of injunction to be issued against the respondent as prayed in order to restrain him from harassing the petitioner or evicting her from the matrimonial home, in addition to protecting the matrimonial property from being disposed of by the respondent to the prejudice of the petitioner.

In the written submissions filed on behalf of the respondent, learned counsel Mr. Githui has submitted on only two issues namely:

*i) The injunction restraining the respondent from selling or evicting the petitioner from matrimonial property.*

*ii) Payment of maintenance to the petitioner and upkeep of the children.*

On (i) counsel submits that this court lacks the jurisdiction to issue any orders in regard to the matrimonial property since the claim cannot, according to counsel, be brought in a matrimonial cause. He cites **section 17** of the **Married Women's Property Act** as the applicable law, stating that a party wishing that property be declared matrimonial property ought to move the court by way of an originating summons brought under the said section. That this court, having not been thus moved, cannot restrain the transfer of the property as sought. As regards the maintenance Mr. Githui submitted that the prayer for alimony is premature since a decree for divorce has not yet issued. He submitted that in this respect, the court ought to be moved by way of a chamber summons under **Rule 3(3)** of the **Matrimonial Causes Rules** and only after a decree for divorce has been issued.

Whereas Mr. Githui is right in submitting that **section 17** of the **Matrimonial Causes Act** is the applicable law for the determination of the question of what constitutes matrimonial property and the mode of its distribution in the case of a divorce, I am of the view that since, as was held in the Court of Appeal decision of **AHN vs. OPENDA [1982] KLR 88**, the **Married Women's Property Act** is to be applied subject to the provisions of the **Civil Procedure Act (Cap 21)** and the **Civil Procedure Rules**, the proposition that this court lacks the jurisdiction to entertain the prayer for injunction is not tenable. In the persuasive decision of Shields J in **OBUYA vs. OBUYA [1986] KLR** it was held, inter alia, that the jurisdiction under **section 17** of the **Matrimonial Causes Act**

*"is to be exercised in accordance with the principle that disputes between husband and wife as to the ownership of property which at one time they have been using in common are disputes which may very well be dealt with under the rule that orders should be made which appear to be fair and just in the special circumstances of the case."*

Guided by the above authorities, I am of the considered view that by virtue of the unlimited inherent jurisdiction of this court under **section 3A** of the **Civil Procedure Act**, this court is well placed to issue the injunction sought in the interests of justice, pending the filing and determination of a formal application as appropriate.

Regarding the prayer for alimony I am not inclined to accept the respondent's counsel's submission that the same is prematurely brought, even considering the wording of **Rule 3(3)** which I think ought to be read with **Rule 3(2) (a)** and **(b)** of the **Matrimonial Causes Rules** which provide as follows:

"3(2) Every application in a matrimonial cause for ancillary relief, that is to say every application for -

(a) alimony pending suit, except where a claim for such relief is made in the original petition

(b) maintenance of any children of the marriage in these rules referred to as maintenance of the children), except where a claim for such relief is made in the petition

shall be made by notice in form 2 of the Appendix issued out of the Divorce Registry."

As rightly submitted by counsel, the mode of making an application under the rules, other than in situations otherwise provided for is by way of a chamber summons under **Rule 3(3)**. Considering the provisions of **Section 25** of the **Act**, it is clear to me that an order for alimony, where the same is made in the petition itself may be granted at the time of pronouncing the decree nisi, provided that the alimony so ordered shall not be more than  $\frac{1}{5}$  of the respondent's average net income for the three years preceding the date of the order.

Considering the respondent's testimony, which has not been rebutted, I find that the marriage herein has irretrievably broken down and the petitioner has proved her case against the respondent on the balance of probabilities. Her marriage to the respondent is hereby dissolved. Her claim for the custody of the minor children, having not been contested, the same is allowed. The respondent shall continue maintaining the children and to pay their school fees. I find that the proposed figure of Shs 20,000/= per month for the children's upkeep to be quite reasonable. The respondent shall pay to the petitioner alimony as calculated under the provisions of **Section 25** of the **Act** until the decree of divorce is made absolute.

The status quo currently obtaining as regards the matrimonial properties shall be maintained pending the filing of a formal application by the petitioner under the **Married Women's Property Act**. The injunction sought under prayer (d) of the petition is granted. I award costs of the petition to the petitioner plus interest thereon at court rates until payment.

A decree nisi to issue.

**Dated signed and delivered at Nakuru this 16<sup>th</sup> day of November 2009**

**M. G. MUGO**

**JUDGE**