



REPUBLIC OF KENYA

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

Divorce Cause 57 of 1992

N.S.G.....PETITIONER/APPLICANT

VERSUS

S.C.GRESPONDENT

RULING

Before me is a Chamber Summons dated 23rd October 2006 filed by Judy Thongori & Company Advocates on behalf of the applicant/petitioner N.S.G. It was filed under certificate of urgency. The respondent is named as S.C.G. The application was brought under Rule 3(3), 58 and 59 of the Matrimonial Causes Rules. It seeks for five orders, one of which has been spent, that:-

- a) spent
- b) This Honourable court be pleased to order the committal of the respondent herein in jail for failure to pay arrears of maintenance amounting to Kshs. 679,950
- c) This Honourable court be pleased to order the attachment of a third of the respondents salary in respect of maintenance with effect from 30th October 2006
- d) The Honourable court be pleased to give such further or other directions as it may deem fit and just to grant
- e) The costs of this application be provided for.

The application has grounds on the face of the Chamber Summons and is also supported by the affidavit of N.S.G sworn on 23rd October, 2006.

The grounds of the application are that by a ruling delivered on 17th October 2000 Hon. Justice Rawal ordered the respondent's to pay the applicant for maintenance and rent an amount of Kshs 30,000/- per month; that the respondent reluctantly made part payments until 2nd June 2004; that the respondents application for suspension, modification and/or variation of the courts orders was heard and dismissed by Hon. Justice Koome on 18th November, 2005; that the petitioner faced eviction within two weeks for failure to pay outstanding rent for four months, that the outstanding amount as at 1st October 2006 was Kshs.679,950/-; that the respondent had always defaulted in paying maintenance and it was in the interests of justice that his salary should be attached directly; and finally that it was in the interests of justice that the orders sought should be granted. The supporting affidavit highlights the circumstances giving rise to the application. The application is opposed and a replying affidavit of the respondent sworn on 21st November, 2006 was filed. In the said replying affidavit the respondent denied owing the applicant any maintenance. He also deponed that the application herein was res judicata, and denied having been served with the court's order as alleged in paragraph 10 of the supporting affidavit.

At the hearing of the application Ms. Thongori for the applicant submitted that the parties were divorced since 7th June 1994. On 17th October, 2000 Justice Rawal ordered that the respondent pays maintenance for the applicant. An application was filed to set aside the Judge's maintenance orders, which application was dismissed on 18th November, 2005. She submitted that the respondent used to pay for the maintenance of the applicant, mainly through attachments. A huge amount had now accumulated and was unpaid as shown in he documents filed in the application. She submitted that the respondent should be compelled to pay the money by being jailed, as he was deliberately refusing to pay the money though he was actually employed. She further submitted that the applicant wants the respondent's salary to be attached with the regard to future payments. She emphasized that the applicant was in arrears of rent and the credit that she had obtained for her upkeep.

Mrs Wambugu for the respondent opposed the application. She submitted that though the applicant and the respondent were divorced, it was the applicant who filed proceedings for divorce. She contended that in the decree nisi there were certain orders. The order for maintenance was to be effective up to the finalization of the case for division of matrimonial property. On 1st March 1998 parties filed a consent varying the maintenance order to payment of Kshs. 40,000/- per month. Later, in an application dated 4th December, 2000 the respondent herein filed an application for variation of the maintenance order. On the basis of that application, Hon. Justice Rawal varied the figure for maintenance to Kshs. 30,000/- per month. This was the order that has given rise to this application. The learned Justice Rawal also ordered that parties file affidavits of means.

She submitted further that the applicant had filed an originating summons for division of matrimonial property. However, she withdrew that application on 28th October, 2004. On 18th November, 2005 the application for variation of the maintenance orders was dismissed.

She submitted that this court lacks jurisdiction to hear this application. It was her contention that when the applicant withdrew the Originating Summons, the order for maintenance issued on 7th June, 2004 lapsed on the date of withdrawal, that is 28th October, 2004. The court became functus officio unless a fresh application for division of property was filed. She sought to rely on section 25 of the Matrimonial Causes act, and asserted that an order for maintenance could be imposed by the court. The case or cause for the division of matrimonial property having been terminated on 28th October, 2004, the respondent did not owe any money to the applicant.

On locus standi it was her contention that marriage had been dissolved and a decree absolute issued in 1998. Therefore in the absence of specific orders commanding the respondent to maintain the applicant for life, it followed that the applicant lacked legal standing to bring this application. She also contended that the application was an abuse of the process of the court. The applicant having participated in all the legal proceedings herein, she had no reason to come to court as she knew that there was nothing which was pending in court.

She also submitted that the matter was res-judicata and sought to rely on section 7 of the civil Procedure Act (cap. 21). She contended that a similar application dated 2nd December, 2005 seeking similar orders was decided by the court on 9th September, 2006. She also sought to rely on the case of **WILLIE –vs- MUCHUKI NALARLARN High Court Civil Suit No. 163 of 2004 (O.S)**.

In reply Ms Thongori stated that it was the order of Justice Rawal issued on 17th October 2000 for payment of Kshs 30,000/- per month that the respondent made an application for its variation. That showed that this was the operating order, and it was dismissed by Justice Koome. She also submitted that the order of 17th October, 2000 did not refer to any issue of proceedings for division of matrimonial property. She submitted also that the issues raised by the respondent in this application were the same issues canvassed and considered by Justice Koome. She also submitted that there was an appeal pending, and unless determined, the order of Justice Koome still stands. She stated that Justice Koome referred in her ruling to the pending issue of division of property.

On locus standi, she submitted that the fact that the marriage had been dissolved did not remove locus standi. The respondent himself had sought for review orders in 2004 after the decree had been made absolute.

She contended that there was no abuse of the process of court, as they were merely seeking to enforce valid orders of the court.

On res-judicata she submitted that this was a matrimonial cause and was not a suit as envisaged in section 7 of the civil Procedure Act. She contended that when their application was dismissed, the court granted leave to file a proper application. In any case section 7 presumes that the matter is heard and determined on merits, not on technicalities the way the said application was dismissed. In any event on 29th July 2005 a consent was recorded between the parties for payment of an undisputed amount, therefore the respondent could not claim that maintenance ended in 2004.

I have considered the application and the arguments of both counsel for the parties. I have perused the court record and the case of **WILLIE –vs- MUCHUKI & OTHERS (2004) 2 KLR 357** that was cited by Mrs Wambugu, learned counsel for the respondent.

This appears to have been a long protracted matter. In my view, the issues that arise are whether there is a maintenance order that is in force. Whether the applicant has a locus standi to bring this application, whether the application is an abuse of the process of the court, and whether this application is res-judicata; and whether this court can grant the prayers sought in the application.

The first issue is whether there was a maintenance order in force at the time of filing the application. Learned counsel for the applicant Ms Thongori has argued that such a maintenance order for payment of Kshs 30,000/- per month to the applicant by the respondent was in force at the time of filing the application and had been in force but the respondent has been defaulting and continues to default to comply with the court's order. It was her contention that that order was last varied to Kshs.30,000/- by Hon. Justice Rawal. She contended that that order did not lapse on 28th October, 2004 when the applicant withdrew her Originating Summons for division of matrimonial property. She contended that since the application for variation of maintenance orders was dismissed by Hon. Justice Koome on 8th November, 2005 and there was an appeal filed, which was pending the orders of maintenance were still alive and had to be complied with by the respondent.

Learned counsel for the respondent Mrs Wambugu has argued that the maintenance orders were given by the court, subject to finalization of the Originating Summons of the applicant for division of matrimonial property. Since that Originating Summons was withdrawn on 28th October, 2004 and no other Originating Summons was filed, then there were no maintenance orders in existence, in spite of the ruling of the court dismissing the application for variation of the maintenance orders on 18th December, 2005 by Hon. Justice Koome.

There does not appear to be any dispute that the applicant filed an Originating summons for division of matrimonial property and withdrew the same on 28th October, 2004 and did not file a fresh Originating Summons.

I have perused the judgment for the decree nisi which was issued by Owuor J. (as she then was) on 7th June 1994. The judgment has a number of conditions. Condition 4 states this:-

“4. Respondent to pay to the wife and children a sum of Kshs.10,000/- for food, electricity, water, telephone, etc. He will also pay a further sum of Kshs 8,000/- for rent till the finalization of the matrimonial property issue.”

The decree nisi was made absolute on 23rd March 1998. However, the parties were in and out of court several times thereafter. The two amounts above were by consent agreed to be reviewed to Kshs.25,000/- towards maintenance and Kshs.15,000/-towards rent per month. That amount was reduced on application for variation, by Hon. Justice Rawal to Kshs.30,000/- per month on 17th October, 2000. Thereafter the Judge on 21st November, 2002 declined to grant further review on the ground that the information given or filed was lazy. The learned Judge allowed the parties to file further affidavit and ordered that the pending application dated 5th December 2000 be fixed for hearing thereafter on urgent basis. The application was heard by Hon Justice Koome and a ruling delivered on 18th November, 2005.

Having perused the ruling of Hon Justice Koome delivered on 18th November 2005, it is my humble view that the respondent cannot raise the issue of withdrawal of the Originating Summons and ... to file another Originating summons as reason enough that the orders for payment of rent and maintenance lapsed. That issue was infact considered by the learned Judge and her Ladyship had this to say in the said ruling:-

“With tremendous respect to counsel for the respondent the order for maintenance cannot be said to have lapsed. The property suit has not been determined. It was withdrawn with the leave of the court with liberty to parties to file a fresh suit. Until this suit between the same parties is determined and the petitioner is put in possession of her share, in my humble view the arguments that there is a different new civil suit between the same parties over the same property is only academic and not a valid reason for this court to terminate the order of maintenance.”

It is clear from the above that on 18th November 2005 the Judge found that the withdrawal of the Originating Summons by the applicant on 12th October, 2004 without filing another Originating summons did not terminate the court orders for payments to the applicant. The only option open to the respondent would be to appeal from that decision of the court and not to raise that issue, which was determined, in this application. Therefore I find no basis for the argument that the orders for maintenance lapsed on the withdrawal of the Originating summons, and I dismiss the same. I find that there is still a maintenance order in force.

I turn to the second issue as to whether the applicant has a locus standi to make this application. Counsel for the respondent argued that as the marriage had been dissolved and the decree for divorce made absolute, she cannot file an application, unless there are specific orders of the court. The case authority relied upon by the respondent counsel was the case of *WILLIE –vs- MUCHUKI – Nakuru High Court civil Suit No.163 of 2004 (O.S)*. That case is distinguishable from the present case. That case was a case relating to an estate of a deceased person, in which the learned Hon. Justice Kimaru applied the decision of the Court of Appeal in the case of *Trouistik Union International – vs- Ms Jane Mbeyu & Another CA Civil Appeal No. 145 of 1990* (unreported), in which the Court of Appeal held that a person can only sue on behalf of the estate of a deceased person, if he has obtained letters of administration. That position is not applicable to matrimonial causes. In our present case, the court having made an order for maintenance under section 25(2) of the matrimonial causes Act (Cap 152) and which I have found is still alive, the applicant has perfect locus standi to make the application that she made.

As for the abuse of the process of court, I have not been given any particulars on such alleged abuse. The fact that someone files an application or a cause in court, whether it has high chances of success or not, in my view, does not amount to an abuse of the process of the court. I find no abuse of the process of court that has been committed by the applicant.

The fourth issue is whether the application is res-judicata. Counsel for the respondent relied on my ruling which I delivered on 9th September 2006. She also relied on the case of *WILLIE MUCHUKI (SUPRA)*.

What constitutes res-judicata is stated under section 7 of the Civil Procedure Act (cap 21). For res judicata to be established three conditions have to be fulfilled. Firstly, that there was a former suit or proceedings in which the same parties as in the subsequent suit or proceedings litigated Secondly that the matter in issue in the later suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matters in controversy between the parties in the former suit.

In my ruling delivered on 9th September 2006 I struck out the application as being incurably defective. I also allowed the applicant to file a fresh application. I did not hear and finally determine the issues in dispute. Therefore the doctrine of res-judicata does not apply in our present case.

Now, can I grant the orders sought? The substantive orders sought are:-

- That this Honourable court be pleased to order the committal of the respondent herein in jail for failure to pay arrears of maintenance with effect from 30th October, 2006
- That this Honourable court be pleased to order the attachment of a third of the respondents salary in respect of maintenance with effect from 30th October, 2006.

· That costs of the application be provided for

On the prayer for committal to jail, applicant depones in paragraph 10 of her affidavit sworn on 23rd October 2006 served with an order and a notice. I have perused the order which was issued by the Deputy Registrar and dated 27th April 2005 and certified as a true copy by the Deputy registrar on 27th April 2006. I see no notice for committal to jail by counsel for the applicant. Instead there is a note written by one R.K dated 9th October, 2006 and addressed to N.S.G which reads:-

“RE: RENT ARREARS

As you are aware you are now 4 months in rent arrears amounting to Kshs 100k. In the circumstances I am contemplating a drastic action I look forward to hearing from you before I take action.:

I see no notice to the respondent to pay the amount now claimed. The court order signed by the Deputy Registrar merely states as follows:-

“2. The applicant be paying Kshs 30,000/- to the respondent/wife instead of Kshs 40,000/-

2. This order be effective from 1st January 2000/-“.

Under Rule 59(2) of the Matrimonial Causes Rules the respondent was to be served with a notice in form 16 of the appendix to the Rules, which would be in the following words:-

“TAKE NOTICE that if you the within – named AB neglect to obey this decree or order within the time herein limited you will be liable to process of execution for the purpose of compelling you to obey the same.

Advocate for the”

In our present case the respondent does not appear to have been served with that notice. In that event, I cannot grant the prayer for committal of the respondent to jail, unless the applicant makes an application after complying with the law. I wish to state here that the applicant can make such a proper application, my rejection of their prayer notwithstanding.

On the attachment of a third of the respondent’s salary, I am not told how much his salary is. However, it is evident that he has defaulted in payment of amounts which are due from ... He has defaulted consistently for a long time. In his replying affidavit sworn on 21st November, 2006 the respondent does not depones to financial difficulty nor to inability to pay. He merely depones that he is not liable to pay any maintenance to the applicant on technical grounds such as the withdrawal of the Originating Summons for division of matrimonial property, res judicata and that the court is functus officio.

I am of the view that the maintenance orders have been and are in force, and I therefore order tht 1/3 of his (respondent’s) monthly income ... Kshs.30,000/- be attached nd be paid to the applicant N.S.C Arrears can only be dealt with in a proper application for committal.

The respondent will pay applicant the costs of this application.

It is so ordered.

DATED and delivered at Nairobi this 22nd day of February 2007.

J.G. NYAMU

JUDGE