



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**Divorce Cause 4 of 2005**

**SIEGFRIED KERSTEN.....PETITIONER**

**VERSUS**

**ROSE WANGUI KARANJA.....RESPONDENT**

**R U L I N G**

By a Notice of Motion dated 1<sup>st</sup> November 2006, pursuant to the provisions of section 52 of the Matrimonial Causes Act, (Cap 152) Laws of Kenya, Rules 47 and 60 of the Matrimonial Causes Rules and section 99 of the Children's Act No. 8 of 2001 and under all the inherent and enabling powers of the court, the applicant seeks orders:-

1. That this honourable Court be pleased to certify this application as of utmost urgency and service thereof be dispensed with in the first instance.
2. That pending the hearing of this application inter partes and the determination of this application inter partes, this honourable Court be pleased to suspend the currency and the execution of the order made on the 13<sup>th</sup> day of December 2005 requiring the petitioner herein to pay a monthly sum of Kshs. 50,000/= on maintenance including the arrears therefrom;
3. That pending the hearing and determination of the divorce proceedings herein, this honourable Court be pleased to suspend and/or discharge the order on maintenance made on the 13<sup>th</sup> day of December 2005 including any arrears therefrom due;
4. That this honourable Court be pleased to grant any further and other order which is just and fair in the circumstances hereof;
5. That costs be in cause;

The application is based on the ground (a-f)

(a) That it has become impossible for the petitioner to be able to comply with the Court Order made on the 13<sup>th</sup> day of December 2005 requiring payment of Kshs. 50,000/= monthly in that;-

(i) The petitioner's only source of livelihood is from his monthly pension only, which is about kshs. 45,000/=.

- (ii) **The transport business (tuktuk) under Kersten Tours and travel Co. Ltd which used to assist the petitioner was grounded due to high operational costs which the petitioner could not meet;**
- (iii) **The petitioner has no any other source of income and any order towards payment will amount to an impossibility in compliance on his part and will expose him to execution;**
- (b) **That the petitioner is using the said pension to cater for all the household needs including payment of bills, salary for the house help, shopping for the family among other necessities;**
- (c) **That the petitioner and the respondent do stay in the same premises and the respondent and the issue of the marriage have been in total dependence on the petitioner;**
- (d) **That there has been no single time that the petitioner has failed and/or refused to discharge any of the issues in (b) above despite the respondent's cruelty on him;**
- (e) **That the petitioner has to solicit assistance from his friends to enable him and the family lead a more or less decent life.**
- (f) **That it is in the best interests of justice and fair play that the order sought herein be granted.**

The application is predicated upon the annexed affidavit of SIEGFRIED KERSTEN sworn on the 1<sup>st</sup> day of November 2006 and on the grounds on the face of application.

For the applicant, it was argued that on the 13<sup>th</sup> day of October 2005 the honourable court ordered that he should take out a medical cover for his daughter and to pay Sh.50,000/= being monthly maintenance for his family pending the determination of the divorce proceedings herein.

That on 16<sup>th</sup> December 2005 he renewed the insurance cover for the daughter with AAR which is exhibited as "**SKI**" subsequently he forwarded Ksh.400,000/= being maintenance as ordered by the court to his then advocates for onward transmission to M/s Machuka & co. Advocates in satisfaction of the court order. Later on a firm of auctioneers pounced on his property. He then came to learn that his erstwhile advocate had only transmitted Sh. 80,000/=.

That he then hired the service of his present counsel who has advised him to pay Ksh.220,000/= in line with the court order made on 23<sup>rd</sup> June 2006.

That subsequently his business (*Tuk Tuk*) which he operated under the name and style of Kersten Tours and Travels Co. Ltd. collapsed. He then fell back to his pension of Ksh.45,000/=. Evidence of that is exhibited as "**SK-2 a**" and "**SK-2 b**" in German. The English translation of which is exhibited as "**SK-2 c**" and "**SK 2 d**" respectively.

That out of the pension aforesaid he pays power and water bills of Ksh.5000/=, cooking gas of Kshs. 1800/=, month long shopping for the family Kshs. 30,000/= and house boy wages of Shs.5000/= a month. Evidence of this fact is exhibited as "**SK 3**".

On or about June 2006 with assistance of Herman, a friend, he transmitted a further sum of Shs. 50,000/= in satisfaction of the court order aforesaid.

That as matters stand now he is unable to satisfy the court order, more so in the light of the court orders of injunction barring him from dealing in any way whatsoever with household items including vehicles and dealing in any way whatsoever with his house on plot No. 2010 Malindi.

By reason of the foregoing, the applicant sought a review of the court order from Sh. 50,000/= per month to Ksh.20,000/= per month to avoid being committed to civil jail for failing to comply with the court order as aforesaid.

The respondent filed a replying affidavit sworn on 6<sup>th</sup> November 2006 in opposition to the application. It was argued on behalf of the respondent that the applicant is as liquid as ever. He drinks daily along with his friends. That contrary to the allegation that the applicant's transport business failed, in fact the applicant sold the vehicles and hidden the proceeds thereof.

That at one stage the applicant had sought variation of the maintenance order from Ksh. 50,000/= to Ksh.30,000/= then withheld payment thereby necessitating the application for reinforcement of the court order.

The respondents last and final position is that the applicant should be made to pay all the outstanding arrears of the maintenance order as there has been no change in the applicants finances to warrant variation of the court order.

I have carefully analysed the evidence available from either side. It is clear to me that this court made an order that the applicant pays Kshs. 50,000/= maintenance to his estranged wife and to take insurance cover for her daughter from June 2006. The applicant has not fully complied with the court order of 13<sup>th</sup> December 2005. Equally, the applicant has not complied with a further court order requiring him to pay outstanding arrears amounting to Ksh. 220,000/=and to continue paying monthly maintenance of Kshs. 50,000/= from June 2006. The applicant has failed to remit the said payments. Hence the application has been brought in bad faith. It is axiomatic that the applicant should pay all the outstanding arrears. Thereafter the applicant be at liberty to make a fresh application.

In the result this application fails and is dismissed with no orders as to costs.

**Dated and delivered at Malindi this 23<sup>rd</sup> day of October 2007.**

**N. R. O. OMBIJA**

**JUDGE**

Mr. Gekanana for Njoroge } for applicant

Mr. Mayaka for Mumo } for respondent