



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

Matrimonial Cause 122 of 2006

MSA..... PETITIONER/APPLICANT

VERSUS

PKA..... RESPONDENT

RULING

This Ruling relates to notice of motion by MSA the petitioner dated 17.10.06 and filed the same day under Order XXXIX rule 4 and Order L rules 2 and 17 of the Civil Procedure Rules as well as under sections 3, 5, 25, 32 and 39 of the Matrimonial Causes Act, Cap. 152 Laws of Kenya and also under rules 3 (1), 38, 43, 44 and 48 of the Matrimonial Causes Rules applying for the following orders:-

1. That for reasons to be recorded this application to discharge and or set aside the ex-parte orders granted by this honourable court on 13.10.06 be heard ex-parte before the hearing of respondent's application dated 12.10.06 inter-partes.
2. That in the alternative and for reasons to be recorded the ex-parte orders granted by this honourable court on 13.10.06 be stayed ex-parte pending the hearing of respondent's application dated 12.10.06 inter-partes.
3. That the ex-parte temporary injunction granted by this honourable court on 13.10.06 be discharged.
4. That the petitioner/applicant be at liberty to apply to the honourable court for any such further directions and orders for purposes of meeting the ends of justice.
5. That the costs of this application be provided for.

Numerous grounds were cited for the application but for purposes of this Ruling only the following may suffice as samples:-

- a) That the honourable court has jurisdiction to discharge the orders made on 13.10.06 ex-parte before the hearing of the respondent's application dated 12.10.06 ex-parte.
- f) That the orders made on 13.10.06 were obtained through non-disclosure of material facts and/or obtained on the basis of suppression of material facts:-
 - i. The claim for custody, care and control and the issue of welfare, educational needs, extra-

curricular activities and expenses, medical needs of the child, ASA cannot be reagitated in the High Court of Kenya as the same are the subject of a suit proceeding and orders of a court of competent jurisdiction, to wit, the Children's Court at Nairobi Case No.278 of 2006; In the Matter of ASA (Minor), MSA -vs- PKA.

ii. The orders made on 13.10.06 are an irregular and unprocedural challenge and negation of the orders already granted by a court of competent jurisdiction, to wit, the Children's Court at Nairobi Case No.278 of 2006; In the Matter of ASA (Minor), MSA -vs- PKA.

iii. The attempt to reagitate the issues of welfare, educational needs, extra-curricular activities and expenses, medical needs of the child, ASA in this cause are a gross abuse of the court process.

h) That the cross-petition dated 06.10.06 and application dated 12.10.06 by the respondent, on which the orders of 13.10.06 are premised, are contrary to law and seeks to enforce and reward the bigamous relationship and conduct of the respondent and is therefore contrary to the written law of England and Kenya and violates public policy of Kenya.

m) That the petitioner has been condemned unheard.

n) That there is no presumption of marriage or declaration for a valid marriage that can arise out of the cohabitation that is founded on the crime of bigamy by the respondent/cross-petitioner.

p) That the honourable court has no jurisdiction to grant any of the reliefs claimed as all of them are founded on the criminal conduct of the respondent/cross-petitioner and she is seeking to profit from the crime.

q) That the honourable court has no jurisdiction to grant orders of declaration of property rights out of the cohabitation that is founded on the crime of bigamy by the respondent/cross-petitioner.

r) That the cross-petition and application by the respondent/applicant (in the chamber summons dated 12.10.06) are an abuse of the court process.

s) That the honourable court has jurisdiction to discharge and or set aside the orders made on 13.10.06 ex-parte before hearing of the respondent's application inter-partes.

t) That the honourable court has jurisdiction to stay the orders made on 13.10.06 ex-parte before the hearing of the respondent's application inter-partes.

The notice of motion application is supported by the applicants affidavit sworn on 17.10.06 in which the petitioner/applicant, MSA had a lot of nasty things to say about the respondent, Papinder Kaur Atwal.

The orders made by this court on 13.10.06 following the ex-parte chamber summons application dated 12.10.06 are prayers 2 and 4 in the said chamber summons and they were framed as follows:-

2. That the honourable court be pleased to restrain the respondent, his servants and/or agents from interfering with the life of the applicant and the child at school, work or socially with their peaceful and quiet enjoyment of the matrimonial home at (Particulars withheld) – Nairobi.

4. That the honourable court be pleased to order the petitioner/respondent herein to pay *alimony pendente lite* to the applicant pending the hearing and determination of this cause.

The chamber summons application is supported by the grounds on the face of the application and the affidavit of the respondent/applicant PKA sworn on 12.10.06 in which the respondent, PKA also had a lot of nasty things to say about the petitioner, MSA. No reasons or grounds were, however, recorded for the chamber summons being heard ex-parte and for prayers 2 and 4 above being granted ex-parte. Order XXXIX rule 3 (1) provides:

‘3. (1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex-parte.’

This provision was not complied with. The respondent/applicant Papinder Kaur Atwal in the chamber summons asked for and was granted ex-parte an order to be paid Kshs.177,000/= being maintenance allowance per month. The petitioner’s rejoinder has clarified that he is catering for the food of the child between him and the respondent. The implication is that the cost of the child’s food should not have formed part of the expenses included in the respondent’s workings which brought the maintenance allowance claimed by her to Kshs.177,000 per month for which the food expenditure in respect of the child should have been deducted. Closer examination of the respondent’s affidavit sworn on 12.10.06 reveals that she herself stated vide paragraph 24 that while cohabiting with the petitioner, her monthly expenditure was Kshs.177,000/= and she claimed that amount. This implies that she alone spent that much per month on her maintenance including food. The petitioner’s rejoinder is to the effect that the respondent’s expenditure requirements as projected by her are inflated and intended to finance unnecessary luxuries. The petitioner adds that he would like to cross-examine the respondent to expose her exaggerations.

In any case, there is the technical hitch that even where there is no dispute regarding a wife’s status as a wife, alimony pending suit is by virtue of section 25 of the Matrimonial Causes Act limited to one-fifth of the husband’s average net income for the three years next preceding the date of the order. The petitioner has sworn an affidavit of means to the effect that his gross monthly salary from Aquila Development Company Limited is Kshs.292,212/= and that Aquila Development Company Limited is his only source of income. The respondent disputes this and says she would like to cross-examine him on the matter.

I declined to grant the petitioner’s prayers to set aside the orders granted to the respondent ex-parte on 13.10.06 and directed that the petitioner’s notice of motion be heard inter-partes. At the inter-partes hearing which started on 09.11.06, the petitioner/applicant was represented by learned counsel, Mr J.O. Oduol while the respondent was represented by learned counsel, Mrs M.N. Michuki I gave directions that I wanted to be addressed by both parties on the issue of validity or otherwise of the ex-parte orders issued on 13.10.06 and to get that issue out of the way first. In the course of arguments and counter-arguments, counsel for the parties brought out the issues I have summarized and highlighted above.

I have given due consideration to the arguments and counter-arguments of the parties. I have also borne in mind the various authorities they cited.

One of the complaints raised by the petitioner during arguments on the notice of motion was that this case came to this court irregularly because there are no written notes by Rawal, J referring the case to this court plus her reasons for doing so. I confirm that Rawal, J spoke to me on telephone on 12.10.06 and asked me to hear the case as she knows the parties. The respondent and her counsel came to this court the same day in the afternoon. I was in the middle of hearings that afternoon and I told them verbally to come next day, i.e. 13.10.06 and they did. For the information of the petitioner and his counsel, Rawal, J is the Presiding Judge of the Family Division and it is she who allocates cases to Judges in the Division. I am not aware of any rule which dictates that allocation of cases must be in writing. As petitioner’s counsel was unable to point out any such rule to this court, his complaint is without merit and it is dismissed.

In view of the provisions of Order XXXIX rule 3 (1) vis-a-vis what transpired in this case and in view of section 25 of the Matrimonial Causes Act vis-a-vis the monthly award of Kshs.177,000/= granted to the respondent at the ex-parte hearing on 13.10.06, the orders issued on 13.10.06 cannot stand. Accordingly, the said orders are hereby discharged.

This matter has so far proceeded on affidavit evidence. The irreconcilable contentions of the parties and their own demands to cross-examine each other on crucial matters of fact point out clearly that the central issues in this cause cannot be comprehensively addressed and determined on affidavit evidence alone. The affidavit evidence on record will of necessity require to be supplemented by oral evidence, at

least in cross-examination. One of the crucial issues to be determined is whether or not the relationship between the parties had been bigamous and, if the answer is in the affirmative, whether only the respondent knew of that situation and withheld it from the petitioner, or whether both knew of it but closed their eyes to it until their relationship subsequently went sour. A determination on issues such as this must, of necessity, go to trial.

In the meantime I think it is fair that a measure of maintenance allowance be awarded to the respondent. The only indicative figure available to court at this stage on which such allowance may be calculated is the figure of Kshs.292,212/= which the petitioner has given as his gross monthly salary. Since he has not indicated what his net monthly salary is, I shall deem the Kshs.292,212/= to be his net salary. One-fifth of that figure comes to approximately Kshs.58,400/=. I note from the petitioner's affidavit sworn on 17.10.06 (paragraph 33) that the respondent has always had her own vehicle Reg. No. KAJ 300G, make BMW 318 i at her disposal. I also note from the petitioner's same affidavit (paragraph 37) that he deposes that it is not true that the respondent has been evicted from the residence at Riverside Drive but that upon her return from the U.K. on 13.09.06, she opted to stay with her sister at the petitioner's parents' house within the residence compound and that she (respondent) has complete freedom to move to any house within the said compound and has not been restricted as alleged or at all. On the other hand, the respondent painted the opposite picture before this court. It is shameful for the parties, who are adults, to paint of themselves the negative image of inability to agree even on such simple facts.

I make the following orders:-

1. That petitioner/applicant shall pay to the respondent a monthly maintenance allowance of Kshs.58,400 pending substantive hearing and determination of the chamber summons dated 12.10.06 and the notice of motion dated 17.10.06 as the response thereto.
2. That motor vehicle Reg. No. KAJ 300 G, make BMW be at the disposal of the respondent for her use and that the respondent provides for its reasonable fuelling and maintenance expenses pending substantive hearing and determination of the above chamber summons and notice of motion.
3. That the respondent be at liberty to stay at 'the residence' at (Particulars withheld) pending substantive hearing and determination of the above chamber summons and notice of motion.
4. That costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 20th day of November, 2006.

B.P. KUBO

JUDGE