



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
DIVORCE CAUSE NO.106 OF 2001

M.M.....PETITIONER/RESPONDENT

VERSUS

J.O.M.....RESPONDENT/APPLICANT

RULING

The applicant is the respondent in this Separation Cause. He has sought for orders of stay of execution of the attachment order made on 19th December, 2003 and also the orders made on 16th May 2002 requiring him to pay a sum of Ksh.26,050/= being maintenance to the respondent and the issues of the marriage.

In the alternative the applicant seeks for the review or variation of the orders made on 16th May 2002. The application is premised on several grounds that are enumerated on the body of the application and other matters that are deposed to on the supporting affidavit. The applicant complains that by the time the order of maintenance was issued, he was only earning Ksh.31,000/= and therefore the payment of Kshs.26,050/= is oppressive. According to his payslips he earns a net of Kshs.2,000/=. During the hearing when the order was made, his Advocate failed to attend court and failed to bring to the attention of the court pertinent matters, he submitted that the mistake of his lawyer should not be visited upon him. As a result of this failure by his Advocate to attend court, the order of maintenance was made not based on evidence, as the application was heard ex parte. Moreover the sum ordered also exceeds the mandatory one-third of the applicants' salaries and there was no regard of the applicants income, of Kshs.14,467/=. Since the issuance of the orders the circumstances of the Petitioner have changed, she has since migrated to France and the children have been moved to an upcountry school where the fees is less and also living expenses are reduced. The applicant therefore sought for the variation of the orders to factor in those new circumstances.

On the other hand, the respondent maintained that the applicant is the cause of his own predicament (if any) as he chased the respondent from the matrimonial home and hence she was forced to seek for maintenance and the applicant should be the consequences of the separation. Secondly the applicant failed to attend court to oppose the application, the respondent then based her application on matters that were based on her own knowledge. She believed that the applicant earned Ksh.40,000/= per month and the court cannot be faulted for making an order based on the available evidence. The house rent was payable, school fees was also payable and the applicant has been persistently trying to circumvent the

order of maintenance. Indeed as for order that was issued on 16th May 2002 it was only in July 2004 that the respondent has been able to recover the sum ordered and there is an accumulated arrears of Kshs.450,000/=. Due to failure by the applicant to obey and honour the maintenance order, the respondent was exposed to undue hardships and she had to personally remove the children from M[...] to a local school in Kisii under the care of her parents. The respondent had also to go to France to pursue further education in order to improve her economic and social status; she has been on Study leave, whereby she also had to organize her own finances to enable her pursue her course. The study leave shall end on 31st October, 2004. The respondent is desirous of transferring the children back to the same school in Nairobi. The order of school fees was made in respect of one child and now the other child has also joined school and requires school fees. The respondent also attached her pay slip. She earns a monthly net salary of Kshs.14,467/75. She therefore urged the court to consider the welfare of the children as of paramount consideration and also regard the application for review upwards or alternatively review the sum payable upwards in order to meet the rising costs of the children's needs.

I have carefully evaluated this application the affidavits both in support and in opposition. It is noteworthy that the applicant had failed/neglected to comply with the court order until only in July 2004, when the respondent sought the attachment of his salary from the employer. I am satisfied that due to the applicant's failure to comply with the court order the respondent was forced to transfer the children to a rural school under the care of her parents. On the other hand there is no explanation why the applicant failed to attend court and oppose the application for maintenance. Why did he fail to provide an affidavit of means in order to assist the court come up with a realistic assessment. I have carefully considered the applicant's application of means, I have taken into cognizance the fact that he is willing to pay the respondent's and children's medical expenses. I must point out that his affidavit of means is less than candid, there is over kshs.20,000/= that is committed to voluntary deductions that could have been considered as part of disposable income. I agree with counsel for the respondent that the loans incurred by the applicant are self inflicting, as none of the proceeds thereto has been paid towards the maintenance. The respondent had to execute and attach the salary of the applicant.

In this regard therefore I would reluctantly review the order of 16th may 2002 bearing in mind that the applicant has been uncooperative, he has used every method available to circumvent the orders of this court, he has frustrated the respondent and the children. However due to the fact that he the applicant agreed to take over the medical expenses and considering that the applicant will reunite with her children by the end of October 2004. I am inclined to take this factor in consideration and review the order of 16th May 2002 by a sum of Kshs.6,050/= with effect from 1st November, 2004.

Accordingly the following are the orders of the court:

1. The order of maintenance and school fees made on 16th may 2002 be and is hereby reviewed from Kshs.26,060/= per month to Kshs.20,000/= per month with effect from 1st November, 2004.
2. The applicant to include the respondent and children of the marriage under the Employer's Staff Medical Cover with effect from 1st November, 2004.
3. I decline to grant a stay of executive of the orders made on 19th December, 2003 which should remain in force until due fulfillment, the executing authority to be notified of the amount adjusted.

It is so ordered.

Ruling read and signed on 15th October, 2004.

MARTHA KOOME

JUDGE