



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

DIVORCE CAUSE NO. 150 OF 2002

L.N.K.....PETITIONER

VERSUS

D.K.M.....RESPONDENT

RULING

The respondent in this Judicial Separation Cause has filed an application by way of Summons brought under Order 44 Rule 1(1) (b) of the Civil Procedure Rules seeking for an order of review or setting aside of a consent order given on 30th August 2002.

The application is premised on the grounds that:

The consent order contravenes the law in as far as it purports to divide the matrimonial property and that the order constitutes an error on the face of the record.

I have read the supporting affidavit sworn by counsel for the respondent the gist of which highlights the grounds stated in the body of the application.

The consent order sought to be set aside provides as follows

1. That there be stock-taking of the business in issue by an independent person to be agreed upon by counsel for both parties, the said stock-taking to be done within seven (7) days from today
2. That the petitioner is to take possession and running of the business after the aforesaid stock-taking, and apply the proceeds of sales of the current stock towards the settlement of debts owed by the business to creditors
3. That the respondent is to have and retain the motor vehicle registration number [.....] which, unless mutually agreed by the parties, will not be sold or otherwise disposed of without an order of the court in that respect
4. That notwithstanding the foregoing express orders, either party shall be at liberty to seek further orders of the court when necessary.

According to the respondent there is no law that allows the determination or division of the matrimonial properties before the parties are divorced. Counsel argued that order No. 3 effectively divided the matrimonial property and there is no such provision under the Matrimonial Causes Act or Rules made thereto.

This application was strenuously opposed by the petitioner who relied on the grounds of objection and replying affidavit. Firstly, the petitioner contends that the application is misconceived and has no merit, it offends the provisions of Order 44 of the Civil Procedure Rules which details the circumstances under which an application for review may be made.

An application for review can only be made when there is discovery of new and important matter which was not within the knowledge of the applicant or when there is some mistake or error apparent on the face of the record.

Thirdly the application for review should be made without unreasonable delay. This consent order was entered into in August 2002 and there is no explanation why it has taken the applicant so long to bring the application it can only be an after thought on the part of the applicant.

The petitioner also argued that there is no justifiable reason why the consent order should be set aside. A consent order is like a contract and any review or setting aside can only take place if there is proof of fraud.

There is no law that bar parties from entering into interlocutory arrangements pending the finalization of the divorce/separation in order to maintain peace and tranquility and in order not to disrupt their lifestyles. The parties are still husband and wife the consent order notwithstanding.

I have given due consideration to the matters raised in this application. Firstly I am not at all convinced that the consent order contravenes the provisions of the law. A consent order can be entered into at an interlocutory stage, to preserve harmony or status quo pending the finalization of the matters in dispute. A consent order is like a contract between the parties. I am not at all persuaded that there is any irregularity or illegality arising out of this consent order.

The issues of the division of the matrimonial property, custody of children and maintenance issues are matters that are routinely settled before the final orders of divorce or separation. In any event, the respondent has not been able to persuade this court that he has fulfilled the conditions set out under order 44 of Civil Procedure. There are no new facts, and there is no error/mistake apparent on the face of the record. The parties willingly entered into a consent order. There is no allegation of fraud, misrepresentation or coercion that is alleged. The principles upon which a consent order can be set aside are well settled and the respondent has not been able to establish any in support of the application.

Accordingly the application dated 15th March 2004 is hereby dismissed with costs to the petitioner.

It is so ordered.

Ruling read and signed on 1st July 2004.

MARTHA KOOME

JUDGE