REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO.32 OF 2001

CMW.....PETITIONER

VERSUS

FWJL.....RESPONDENT

RULING

Application dated 16th October 2002 came up for hearing on 19th November 2002 before Hon Justice Ouna when it was ordered that the parties would proceed with a preliminary objection which had been filed by the Respondent against the same application. The same preliminary objection was heard on 26th November 2002 and 28th November 2002. The application is seeking alimony pending suit in the sum of KSh.60,000/- per month and is seeking further that the Respondent be ordered to secure and make available the matrimonial apartment at Simba Paradise on Plot Number 372 Diani Beach for the exclusive occupation of the Petitioner and her children pending the hearing and determination of this application. It is also seeking costs of the same application to be borne by the Respondent.The Notice of Preliminary objection dated 13th November 2002 and filed into the court on 14thNovember 2002 states as follows:

> *"TAKE NOTICE that the Respondent herein shall raise preliminary objection to the Petitioner's application dated 16 th October 2002 on the following grounds inter alia :-*
>
> *1. That the application is bad in law and incurably defective.*
>
> *2. That the application is incompetent and does not lie.*
>
> *3. That the application offends clear provisions of Statute and Rules."*

This Ruling is only on that Preliminary objection.

As can be seen, the Respondent has not specifically stated in the Notice of Preliminary Objection the precise legal points that necessitated the objection and the objection as drawn is vague. However, during the submissions, the learned counsel for the respondent, Mr. Njoroge raised four points in support of his objection to the hearing of the Application and sought to have the application struck out as incompetent and seriously defective.

Mr. Njoroge's first point was that the application is brought under Rule 3(1) of the Matrimonial Causes Rules. That rule deals with commencement of the Petition and not with interim application as is the case in this matter.Further he submitted that under Rule 3(2) (a) of the Matrimonial Causes rules, this application should have been by Notice of Motion and not by Chamber Summons. Second point was that

under rule 7(2), there should be an affidavit of means filed as well particularly as the Application was filed after the Petition had been filed. In the absence of the same, the application is incompetent and is incurable and further no notice has been issued requiring the Affidavit of means. Third point was that whereas the application refers to children and the ages of the said alleged children are given, the definition of child in the matrimonial causes act shows that the people referred to in the application as children are no longer children under the act and are not covered by the definition IN the act.The fourth point Njoroge raised was that whereas the application is based on Sections 25 and 26 of the Matrimonial Causes Act, Section 26 does not relate to alimony pedente lite. Section 26 only deals with maintenance of children. Under Section 25, alimony can only be granted after a decree nisi has been issued or after decree absolute has been issued, and according to Mr. Njoroge, Section 31 of the matrimonial causes act qualifies Section 25 by requiring that an application for alimony can only be raised when Petition for divorce is premised on insanity and as ground for divorce is adultery, the application for alimony is incompetent as it breaches Section 31 of the act.

Mr. Kimani, the learned counsel for the Applicant submitted that the application for alimony pedente lite falls under the exceptions under Rule 3(2) (a) as there was a prayer for alimony in the Petition.He therefore contended that Chamber summons was proper. He maintained that as the Respondent had complied with Rule 44 by filling Affidavit as to his means and affidavit in reply and ground of opposition no prejudice has been occasioned. He also submitted that the Applicant has complied with Rule 7(1) as her notice to appear incorporates Form No.3 and Form No.4 and that Rule 7(2) only applies in cases covered by Rule 3(2). On ground 3, Mr. Kimani submitted that the age limited in the matrimonial causes act is either unconstitutional or a colonial relic as the other acts came into play much later after the matrimonial causes act and they must be taken to have amended the Matrimonial Causes Act and lastly he stated that alimony pedente lite can be brought before and can continue after decree nisi.

I have anxiously considered this preliminary objection. I have considered first whether the preliminary points raised before me are pure points of law which were argued on the assumption that the facts pleaded in the application are correct, in an attempt to see if the Preliminary objection falls within the case of ***MUKISA BISCUIT MANUFACTURING CO.*** **LTD VS. WEST END DISTRIBUTORS LTD** (1969) EA 696 where it was stated at page 701 as follows:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasions, confuse the issues. This improper practice should stop."*

In my humble opinion, I do feel the points raised are pure points of law and I will now consider the objection in substance. The first point raised was that this application is not properly before me because it is brought under Rule 3(1) and (3) of the Matrimonial Causes Act and it is brought by way of Chamber Summons. This application as I have stated above is seeking alimony pending suit. Rule 3(1) of the Matrimonial Causes Rules states as follows:

> *"3(1) Every matrimonial cause shal l be commenced by filing a petition addressed to the court."*

This rule is not relevant in the application before the court for the Petition had been filed and this rule provides for the commencement of proceeding in matrimonial causes. Rule 3(3) of the same rules states:

> *"Except where these rules otherwise provides every application shall be made to, and any leave or direction shall be obtained from, a judge by summons in chambers."*

This rule can only be applicable where the rules set out in Rule 3(2) (a – f) do not provide for a way of commencing an application. Before one applies it, one has to go through all the rules in Rule 3(2) ((a) – f) to see if these rules do not otherwise provide for a way out. Rule 3 (2) (a) says concerning an application for alimony pending suit (which is the application before the court) as follows:

"3(2) Every application in a matrimonial cause for ancillary relief that is to say every application for – (a) alimony pending suit; except where a claim for such relief is made in the original petition …….…… shall be by notice in form 2 in the appendix issued out of the Divorce Registry."

My understanding of this rule is that an application for alimony pending suit made where a claim for alimony is made in the original Petition need not be by notice in Form 2 in the appendix. It thus falls under Rule 3(3) for it is not otherwise provided for in the rules 3 (2) (a-f) and thus it can be made by summons in chambers. In saying so, I must not be seen to endorse the authority of ***Rosemary Joan Williams – Meyrick vs. Anthony Julian*** (or John) ***Stewart Williams –Meyrick. 20 (2) K.l.R. 36*** . That case is in my opinion not relevant on the point before this court.I do however feel on first point that as the claim for alimony is made in the Petition, this application arising out of the same claim in the Petition falls under Rule 3(3) and was properly brought by way of Chamber Summons.

The next point raised is in my opinion valid. Under Rule 7(2) of the Matrimonial Causes Rules it is provided as follows:

"7(2) A notice of an application for any ancillary relief a nd every copy thereof for service shall, if the respondent to the application has not already entered an appearance to the Petition in the matrimonial cause in which the application is made, contain a notice to appear in form 5 in the appendix."

The Petition in this case was filed on 24.9.2002. The Application was field on 30th October 2002 and what appears next to it as Notice to Appear is not having court's date stamp and is not a valid document for all intents and purposes as it is in any event not properly in the file. The Respondent filed Memorandum of appearance on 4th November 2002. The Respondent says and it is not denied that the relevant Notice under Form 5 in the appendix had not been served upon him by the time he entered appearance. Respondent therefore says no notice had been served upon him requiring him to file affidavit of means in this application which is an application for auxiliary relief. Mr. Kimani says that as the Respondent has complied with Rule 44 by filing an Affidavit as to his means, no prejudice has been caused to the Respondent by the omission. I do not think that saves the situation.As Mr. Njoroge rightly says, Respondent's Affidavit was filed pursuant to the Petition and not to the Application as the procedure as far as the application is concerned was not complied with as is required.

The next point is also well taken. The application is brought under Rule 3(1) and (3) of the Matrimonial Causes Act. It does not invoke any other law. Prayer 1 is seeking minimum KSh.60,000/- per month being alimony pending suit; for petitioner's upkeep, and comestibles and education for the Petitioner's school going children. Prayer 3 is seeking that the Respondent should be ordered to secure or make available the matrimonial apartment at Simba Paradise on Plot Number 372 Diani Beach for the exclusive occupation of the Petitioner and her children, pending the hearing and determination of this petition.There is in my understanding no quarrel on the application in so far as it is seeking alimony pedente lite for herself and in so far as it is seeking a place for her to live. That part of the application is in my mind properly brought. Mr. Njoroge however feels that the part of the prayers seeking upkeep for what the Petitioner calls children is not properly before me. He contends that the persons named as children in the application are not children according to the Matrimonial Causes Act as the first one **PNK** was born on 10.2.1980 and is thus over 22 years old, whereas **RW** was born on 1.9.1984 and is now well over 18 years and **RM** was born on 3.12.1986 and was above 15 years by the time the Petition was filed.

Section 2 of the Matrimonial Causes Act defines "children" as follows:

""Children" means, in the case of Africans (including Somalis, Abyssinians (Arubara, Tigre and Shoa) Mallagasies, and Comoro Islanders, Arab or Baluchis born in Africa, males who have not attained the age of sixteen years and females who have not attained the age of thirteen years, and in the case of all other person unmarried children who have not attained the age of majority."

Mr. Kimani says this definition is either archaic or unconstitutional and should be ignored. It may be archaic, it may be unconstitutional. I cannot go into those aspects in this ruling because I have not been

invited as per application to consider any other alternative and modern provisions and in any case, I am not sitting as a Constitutional court. The most recent act is the Children Act - Act No. 8 of 2001. I have not been asked to proceed under it but even under it the definition of 'child' means any human being under the age of eighteen years. That would also "knock out **PNK** and **RW** " named as children here. Further, Mr. Kimani says as the children act and age of majority act were enacted after the Matrimonial Causes Act, it must be taken that the aspect of Matrimonial Causes Act regarding the age of a child has been amended.I do not think that it would have been a problem if the legislative wanted to amend Matrimonial Causes Act to bring it in line with the rest. Indeed Section 200(1) of the Children Act and Schedule 6 of the same Act specified acts that were repealed by Children Act. I do observe that the legislature has specified different ages in different acts as meets the purpose of the same acts. One sees different definition of child in Matrimonial Causes Act, different definition in the age of majority act, different age in the Children Act and earlier on before repeal, different age in the Children and Young Persons Act. It would not be correct for me to assume that the age in the Matrimonial Causes Act has been amended by the latter acts.It has not been amended and even if it were, I would find it difficult to accept that **PNK** is still a child at the age of 22 and above (now close to 23). There may be a case for seeking help for them as dependants but that is not what is pleaded here. However, as I have stated hereinabove this would not have affected the entire application as there would still have been the maintenance for the applicant herself even if one were to treat the so called children differently.

The last point is not valid. Section 25 (1) and its proviso makes it clear that alimony pending suit can be granted before decree nisi is issued. It reads as follows:

> "*25(1) In any suit under this act, the wife may apply to the court for alimony pending the suit, and the court may thereupon make such order as it may deem just:*
>
> *Provided that alimony pending the suit shall in no case exceed one -fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue in the case of a decree nisi of dissolution of marriage or of nullity of marriage until the decree is made absolute."*

Section 31 makes it clear that interim order of the payment of alimony under Section 25 can continue. What the application is seeking is an order for alimony till the Petition is heard i.e. interim orders. Section 25 makes it clear that such orders for alimony would continue in the case of a decree nisi. One cannot continue what had not been started earlier on.

In conclusion, I have rejected the first and last preliminary points raised by Mr. Njoroge for the Respondent. I have sustained second and third points raised. I have stated that the third point would not have necessitated striking out the application as the prayer for alimony pending suit for the petitioner would still be a matter to be argued.However, on the question of omission to issue notice requiring Affidavit of means to be filed or omission to validly issue a notice under Form 5 of the Affidavit, I cannot see how that can be put right without the Applicant going back to the "drawing Board." I will accept the sentiments ably expressed by Sir Udo Udova, the Ugandan Chief Justice in the case of ***Salome Namukasa vs. Yosefu Bukya (1966) EA 433*** and particularly at page 435 where he stated:

> *"Counsel must understa nd that the Rules of this court were not made in vain. They were intended to regulate the practice of the court. Of late practice seems to have developed of counsel instituting proceedings to this court without paying due regard to the Rules. Such practice must be discouraged."*

I do feel that the Applicant needs to start the application all over again if she is still interested in it. She will also need to consider seriously under what provisions she will claim for the alleged children.

Application struck out with costs to the Respondent. Orders accordingly.

Dated and delivered at Mombasa this 20th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE