



REPUBLIC OF KENYA



KENYA LAW
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**JNM v CWN (Civil Appeal E284 of 2023)
[2024] KEHC 11915 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E284 OF 2023
TW OUYA, J
SEPTEMBER 24, 2024**

BETWEEN

JNM APPELLANT

AND

CWN RESPONDENT

(Being and Appeal from the Ruling and orders of the Chief magistrate's Court of Kenya at Kiambu. The Honourable M.A Opondo (MRS) Principal Magistrate dated 28th July 2023 in Kiambu Divorce Case No E014 of 2022 in respect of the application dated 18th Kiambu Divorce No E 014 of 2022 in respect of the application dated 18th November 2022)

RULING

Background

1. This is an appeal emanating from the orders of the Chief Magistrate Court at Kiambu delivered on 28th July 2023 in Kiambu Divorce Cause No. E14 of 2022.
2. The Appellant has filed his memorandum of appeal raising four grounds:
 - i. That the learned magistrate erred in law and in fact by allowing the Respondent's application dated 18th November 2022 and arriving at a decision that was wholly against the weight of evidence adduced by the Appellant/Applicant in Kiambu Divorce Cause No E014 of 2022 in opposition to the application dated 18th November 2022 and in so doing arriving at a wrong decision.
 - ii. That the learned magistrate erred in law and in fact by directing the Applicant/ Appellant herein to pay the Respondent maintenance to a tune of Ksh. 100,000/= monthly from the date of delivery of the said ruling in disregard of the facts, statutory provisions and case law



governing the same on 13th April 2022 and orders dated 27th April 2022. The impugned orders were made after a determination of an application dated 30th March 2022.

- iii. Learned magistrate erred in law and fact by failing to arrive at a decision that the Respondent's application was *re judicata* as the question of maintenance had already been determined by the same court vide its ruling delivered on 30th March 2022
 - iv. Learned magistrate erred in law and fact in failing to consider the submissions by the Applicant/Appellant in Kiambu Divorce Cause No E014 of 2022 on why the application dated 18th November 2022 should not be allowed
3. Orders proposed as follows:
- i. That the Appeal be allowed
 - ii. That the Ruling dated 28th July 2023 in favor of the Respondent be set aside.
 - iii. That consequently, this Honourable Court be pleased to order that this matter be certified ready for hearing and proceed for hearing with the pleadings and documents filed.
 - iv. That costs of this appeal be in the cause.
 - v. That the Court do make such orders or further orders as it may deem fair and just in the interests of justice.
4. The Respondent opposes the appeal and prays that the appeal be dismissed with costs and the ruling delivered on 28th July upheld. She states that she had made an application dated 30th March 2022 seeking a restrain orders against the Appellant from disposing their matrimonial properties and orders for her maintenance and shopping in the sum of kshs. 200,000 per month. That the court granted the restrain orders but failed to address itself on the prayer regarding maintenance.
5. That on 18th November 2022 the Respondent filed another application seeking for maintenance orders in her favor in the sum of kshs. 100,000 per month. The application was heard, determined and prayers granted vide ruling delivered on o 28th July 2023
6. The Respondent submits that the issue of *res judicata* does not arise as the trial court did not address itself on the issue of maintenance in the first ruling dated 30th March 2022 and that the circumstances had changed as at the time of her second Application.
7. This court has considered the pleadings, submissions and authorities by the parties in this matter. I have also taken time to review the entire evidence this being the court of first appeal. I note that the applications giving rise to the instant dispute emanated from a Kiambu Divorce Cause No. E14 of 2022 CWN v. JNM where the Appellant is the Respondent and the Respondent herein the Petitioner. The subject applications were interim requiring interventions which are normal in the course of divorce proceedings.
8. The issues for determination are:
- i. Whether the maintenance prayers and subsequent orders were *res judicata* with reference to an earlier application and orders
 - ii. Whether the respondent is entitled to maintenance.
9. In determining the above two issues, I have looked at the pleadings of the main suit which is the Divorce Cause No. 014 Of 2022 and noted that the prayers sought in the petition were:



- a. That there be a Decree of dissolution of the marriage between the petitioner and the respondent herein.
 - b. That an order do issue against the Respondent to provide the petitioner with a monthly maintenance to the tune of Kshs 250,000/=
 - c. That this Honourable court be pleased to order the Respondent to vacate the matrimonial property for the safety of the petitioner.
 - d. That this Honourable court be pleased to order the Motor vehicle registration No KDA XXXX remain solely in possession of the petitioner.
 - e. That the respondent be condemned to pay costs of these proceedings.
 - f. That such order be made as this Honourable court may deem fit and just
10. In the 30th March 2022 Application, the Respondent had sought for restraining orders against the Appellant with regard to various properties and a motor vehicle KDA XXXX in addition to kshs.200,000 per month for maintenance and shopping.
11. In the 18th November Application, the Respondent specifically prayed:
- “That this honorable court be pleased to order the Respondent to provide maintenance to the petitioner in the sum of Kenya shillings one hundred thousand (ksh.100,000/-) per month pending the hearing and determination of the cause.”
12. In making the above application, the Respondent relied on among other grounds:
- “That the Respondent (Appellant) entered into an agreement with the Applicant (Respondent) and it was agreed that the Respondent be providing the Applicant with a monthly allowance of Kenya Shillings Eighty Thousand (ksh 80,000/-) which was later increased to Kenya Shillings one Hundred Thousand (Ksh 100,000/-)”
13. It was also deponed in the supporting affidavit dated 18th November 2022 that the Appellant faithfully remitted the amount from 2019 up to June 2022 when he stopped.
14. In regard to the first issue as to whether or not the matter before the trial court was res judicata, I have carefully perused the two applications namely 30th March 2022 and 18th November 2022 noted that whereas the first application included a prayer for Kshs 200,000 per month for maintenance and shopping, the court did not render itself on the same but proceeded to grant the other prayers. It would have been prudent for the Applicant (Respondent) to apply for a review of the orders so as to address the issue at hand.
15. The question to ask is whether or not failure to apply for a review would render the matter as spent and whether proceeding on a new application would amount to res judicata. I have noted above that this was an interlocutory application within a divorce cause. It is therefore in order for any party at any time of the proceedings to apply for maintenance or any other orders as the need arises during the pendency of the divorce cause. It is noteworthy that one of the final prayers in the divorce petition is maintenance.



16. The test to determine whether a matter is res judicata was laid down in the case of *DSV Silo v. The Owners of Senar* (1985)2 All ER104 and reiterated in the case of Bernard Mugo Ndegwa v. James Nderitu Githae and 2 Others (2010) eKLR. The applicant alleging res judicata must prove that:
- a. The matter in issue is identical in both suits
 - b. That the parties in the suit are substantially the same
 - c. There is a concurrence of jurisdiction of the court
 - d. The subject matter is the same and finally,
 - e. That there is a final determination as far as the previous decision is concerned
17. The *Civil Procedure Act* under Section 7 also addresses the subject of res judicata and provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
18. *Black’s Law dictionary* 10th Edition defines *res judicata* as:
- “An issue that has been definitely settled by judicial decision... the three essentials are 1. An earlier decision on the issue
2. a final judgement on the merits and,
 3. the involvement of the same parties, or partes in privity with the original parties”.
19. From the foregoing, I make the following distinctions from the two applications;
- i. That whereas the subject matter was the same in that both touched on maintenance, the prayers were not identical. In the first instance, the Respondent prayed for kshs.200,000 for shopping while in the second instant she prayed for kshs.100,000 per month for maintenance.
 - ii. The court did not render itself on the subject matter in the first instance neither was any final determination made on the same.
- Based on the criteria provided by the authorities above, my observation is that the issue in the instant case had not been heard and finally decided as at the time it was considered by the trial court.
20. Further to the distinctions above, this court observes that the issue of *res judicata* does not arise because no final judgement or decision had been made on the subject matter and in any case, the order for maintenance as granted by the trial court is of an interim nature. I am therefore persuaded that the trial court was not in error by entertaining and granting the application for maintenance in favor of the Respondent.
21. The next question for consideration is whether the Respondent was entitled to maintenance. Maintenance is a right recognized under Section 77(1)(c) of the *Marriage Act*,2014 that either spouse



can upon dissolution of a marriage, seek to be maintained by the other. This obligation is reciprocal and applies to either of the parties. This is in line with the provisions of *the constitution* article 45(3) that:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

22. A case in point is *WN v 2013* eKLR where it was held that:

“The purpose of an award of alimony pending suit is to provide temporary support to a spouse so that she is not destitute for the duration of the suit.”

23. The evidence on record is that the parties were previously engaged in a joint family business to wit, a medical facility. This was no longer the case at the time of the trial as the business was now in the control of the Appellant. The Respondent having been left with no other source of livelihood, made the right decision to apply to court for an order for maintenance. Prior to the application, the parties had an arrangement where the Appellant paid the Respondent a monthly allowance of kshs.80,000 which was later enhanced to kshs.100,000. That the Appellant did this faithfully from 2019 up to June 2022 when he suddenly stopped. The prayer for maintenance by the Respondent and the orders by the trial court were therefore in line with the parties’ practice which had given the Respondent a legitimate expectation and a basis for the application.

24. It is worthy to note that the trial court orders delivered on 28th July 2023 are interim in nature, to provide the Respondent with a means of living during the pendency of the divorce cause. It does not in any way take away the right of the parties to ventilate every aspect of the petition including the prayer for maintenance, and for them to be determined to a logical conclusion.

25. Determination and Disposition

In conclusion, this court makes the following finding:

- i. The trial court was not in error in entertaining the application and granting the orders for maintenance in favor of the Respondent.
- ii. The Respondent was entitled to an order for maintenance on an interim basis pending the determination of the divorce cause.
- iii. The Application leading to the impugned order was not *res judicata*

26. This Court therefore determines that:

- i. The Ruling delivered by the trial court on dated 28th July 2023 is hereby upheld.
- ii. This appeal is hereby dismissed.
- iii. Each party to bear their cost for the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF SEPTEMBER, 2024.

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Respondent Miss Wambugu

For Appellant Miss Mwangi



