REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

DIVORCE CAUSE NO. 1 OF 2019

GDM.....PETITIONER

VERSUS

CMM.....RESPONDENT

RULING

1. **Section 77 of the Marriage Act** grants this court the discretion to issue a maintenance Order during the cause of any matrimonial proceedings. Among the parameters this court ought to consider is *a) if the person has refused or neglected to provide for the spouse or former spouse as required by this Act b) if the person has deserted the other spouse or former spouse, for as long as the desertion continues.* The parameters however have to align to the provisions of Article 45(3) of the Constitution of Kenya which recognizes 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".

2. In the case of **WMM v BML [2012] eKLR, Justice GBM Kariuki** (as he then was) observed that:

> **"No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce".**

See also **R P M v P K M [2015] eKLR, P K M v R P M [2017] eKLR**

3. This court being Conversant with the underlying principles ordered a maintenance Order in favour of the petitioner for a sum of Kshs. 150,000/= per month pending the hearing and determination of this cause. The same would however be compromised by the consent entered between the parties which was in effect that the Respondent shall pay to the petitioner Kshs 130,000/=within seven (7) days and would further pay Ksh. 130,000/= monthly the same amount being acquired from rental income in properties proposed by the Respondent.

4. The Respondent only complied with the first part of the consent Order. He failed to remit the monthly proceeds as proposed. At the time the petitioner took out a notice to show cause the amount stood at Kshs. 920,000/=. The respondent became evasive and a warrant of his arrest was therefore issued. On 22/7/2020, when brought to court the Respondent cited that he is ill and his resources had been depleted.

5. Vide the Courts Ruling dated 29/7/2020 the court noted the conduct of the Respondent as being evasive and adamant to obey the court orders. It therefore ordered the Respondent to be detained for a period of one month at Meru GK prison. It also ordered the petitioner to establish the particulars of the tenants that are occupying the residential premises from which the Respondent had earlier proposed to get Kshs. 130,000/= per month for the maintenance of the petitioner so that they can be served directly with the orders to remit the rents die to the court directly.

6. The Respondent now seeks this court to review/set aside/vary the Orders issued on 29/7/2020 committing the Respondent to civil jail and allow his immediate release on the bond terms. That this court also sets aside the orders issued for the collection of rent in one of the properties.

7. It is the Respondents case that the court failed to consider his age (61years) and the fact that he was ailing from high blood pressure. That there are other properties i.e. **NKUENE/TAITA/937,XXXX, ONTULILI/ONTULILI, BLOCK1/KATHERI/XXXX, NKUENE/UKUU/XXXX**, m/v/ reg. No.s **[particulars withheld]** where the petitioner could have executed the consent order other than taking the course of committal to civil jail which ought to have been the last resort. It was his contention that the petitioner is free to live in **NKUENE/TAITA/XXX** which has a fully furnished residence. That he has no financial income to pay the alimony since there are no rent paying tenants in the properties mentioned in the Ruling, he has financial obligations with various institutions with a high risk of being auctioned and he equally has children of tender years with the second wife who he is taking care of.He denied being on the verge of selling some of the unrestricted properties e.g. Nkuene/Taita/XXXX and averred that the petitioner has equally placed a restriction on Nkuene/ taita/XXXX. He urged the court to remove the inhibition and injunction over the suit properties.

8. The petitioner in opposition to the application averred that the respondent is mischievous in filing the application since he filed the application instead of purging the contempt. That the application is a non-starter as a party cannot appeal against his own consent. That the respondent created two companies, Rise Up limited &Fricham Investments Limited, charged the matrimonial properties i.e. Nkuene/Taita/XXXX &Nkuene/Taita/XXX for a total sum of Kshs. 55,060,087 without her consent and which is the subject of a forgery investigation with the Director of Criminal Investigation. ThatNtima/Ntarika/XXX is the property the applicant agreed to collect rent and remit to the petitioner has 30 rooms and 4 shops all with tenants and fully occupied. Nkuene/Taita/XXXX which the Respondent wanted to sell also has a tenant who runs a hardware. The motor vehicles have also been grounded for three years. She also cited that she is also taking care of their granddaughter hence she is living in desolate conditions.

9. The application was canvassed by way of written submissions. Both parties have since filed their written submissions which I have dully considered.

Analysis and Determination

10. Order 45 Rule 1(1) provides in more detail the instances under which an application for review can be made. It states:-

> **"Any person considering himself aggrieved –**
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> **i) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **ii) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

11. I first have to point out that the respondent was only committed to one month to civil jail. This was on 29/7/2020, the one month period has since lapsed. The prayer for his immediate release has therefore been overtaken by events.

12. The first ground of discovery of new and important matter or evidence envisages a new matter or evidence that was in existence at the time of hearing or reaching the decision sought to be reviewed and not subsequent events. **(See O .O. A v H. O. O [2011] eKLR)**.

13. The applicant has attached medical records form Meru teaching and Referral Hospital. During the hearing of the contempt proceedings he alluded to suffering from High Blood pressure, at the time he did not avail the medical records. The medical records attached to the application are dated 31/7/2020 this is after the courts determination. The same cannot be ascribed to be new evidence as the same was obtained subsequent to the Ruling of the Court. The medical records attached are also treatment notes and do not assign to the nature of the injuries and the unsuitability of the Respondent continuing to stay in prison. I agree with the authority cited by the petitioner;**National Bank (K) Limited v John KibetCherop [2005] eKLR** where the Court held;

> **"This being an application for release from civil jail on account of ill health, it is for the applicant to persuade this court that he is suffering from a serious illness that will warrant this court exercising its discretion to release him from prison. In my view, the applicant has not done so. He has not produced any medical report that describes the nature of his illness and the unsuitability of his continued stay in prison as a result of that illness. The two letters annexed to the supporting affidavit as "JKC1" and "JKC2" are neither medical reports as they were not signed by a doctor who examined him and diagnosed the nature of illness, nor do they show the seriousness of the illnesses and the unsuitability of the applicant continuing to stay in prison, due to that ill health. The applicant has in any event already been allowed to be admitted to Moi Teaching and Referral Hospital for an operation by prison authorities. The applicant has therefore not satisfied the requirements of section 43 (3) (b) of the Civil Procedure Act (Cap.21) that he is suffering from a serious illness justifying his being released by this court from prison…."**

14. The next issue is whether there was an "error apparent on the face of the record". **Maraga J** (as he then was) in **O .O. A v H. O. O *(supra)*** explained this notion when he stated as follows;

> **"From its very nature, the phrase "an error apparent on the face of the record" has an inherent element of indefinitiveness and cannot be defined precisely or exhaustively. It has to be determined by the court on the facts of each case. The criterion in each case, however, is that the error contemplated under the rule means an error on both points of law and fact which must be obvious and self-evident from the record and does not require to be searched and fished out by a re-appraisal of the evidence on record, or by an elaborate argument or a process of reasoning…."**

15. The Respondent has alluded to the court failing to consider that there are other properties which the applicant can execute its orders. I must first point out that the orders sought herein were made by the consent of the parties. It was the Respondents own intimation that he would obtain the sum of Kshs 130,000/= from rental proceeds in the matrimonial properties. 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. A consent order is like a contract and any review or setting aside can only take place if there is proof of fraud, mistake and misrepresentation. (See **L.N.K vs D.K.M [2004] eKLR).** The respondent has not alluded to there being a mistake or fraud in the making of the consent.

16. The failure to abide by the consent order precipitated the notice to show cause and the subsequent Ruling by the court. The respondent has not shown the steps he has taken to abide to the terms of the consent Order. The orders were clear that the respondent ought to pay the

petitioner sums got from the rental proceeds in the matrimonial properties, there is no linkage to other suit premises for the petitioner to derive his income from the same. The petitioner has cited that the rental premises in **Ntima/Ntarika/XXX** has 30 rooms and 4 shops with tenants, she attached a photograph to prove this assertion. This fact remains uncontroverted. The cases cited by the respondent in his submissions i.e. **Kennedy Hilton v HiltenAhntilal Shah & 2 others (2019) & Vijay Morjajri vs Harris Horn Juniour** relate to ones inability to pay. This is not the case in these proceedings. The income in his case is from a pre-determined source. The source was provided by the Respondent. I do not therefore foresee an error apparent on the face of the record.

17. The last straw is whether there is sufficient cause to review the orders. The applicant has alluded to his inability to pay the sums sought by the petitioner owing to the fact that he has other financial obligations and liabilities. This has been countered by the petitioner who has submitted the respondent as being mischievous by charging the matrimonial properties and taking up loans with registered companies. The loans make for a colossal amount. The same was granted to the Petitioner at the behest of the Respondent.

18. The petitioner has alluded to the petitioner failing to avail records from the two companies in order to hide his intent. The property where the Respondent wishes the petitioner to reside in i.e. **NKUENE/TAITA/XXX** is one of the properties that has been charged in favour of the Respondent and Rise Up Company limited. It is clear to this court that the Respondent used the suit premises for his personal benefits and in deliberate objection to the interest of the petitioner in the suit properties. This does not turn to support any sufficient cause.

19. As I had stated earlier in this Ruling where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. It is more than five years since the Petitioner separated with the Respondent. She has been living in a desolate state while the Respondent enjoys the benefits of the matrimonial properties.

20. I therefore find the application by the Respondent being without merit and the same is dismissed with costs. The Petitioner is hereby given the go ahead to serve tenants occupying L.R.NTIMA/NTARIKA/417 with this court order to deposit rent in A/C No. 1266134794 held in Kenya Commercial Bank in the Petitioner's names forthwith.

HON ANNE ADWERA ONG'INJO

JUDGE

RULING DATED AND DELIVERED BY EMAIL ON THIS 1ST OCTOBER 2020

HON ANNE ADWERA ONG'INJO

JUDGE

In the presence:

Mr Kinoti Court Assistant

Mr Mutuma advocate for petitioner – No Appearance

Mr Thuku Advocate for Respondent – No appearance.

HON ANNE ADWERA ONG'INJO

JUDGE