



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 29 OF 2017

(CONSOLIDATED WITH CIVIL SUIT NO. 12 OF 2018)

MH.....DEFENDANT/APPLICANT

VERSUS

AAH.....PLAINTIFF /RESPONDENT

RULING

1. Before this court for determination is an application filed by way of Notice of Motion dated 3rd June, 2019. In it MH, the Applicant, is asking the court to grant orders that pending the hearing and determination of this suit, the Respondent AAH be ordered to pay him Kshs. Five Million (Kshs. 5,000,000/=) being at least the quarter of the rent received from Plot No. xxx, xxx, xxx and xx [Particulars Withheld] River Bank from 1st January 2012 to date and that the costs of the suit be provided for.
2. The application is supported by an affidavit sworn by the Applicant on 3rd June, 2019 in which he deposes that he is unable to sustain himself, his adopted child who requires urgent surgery to remove bullets lodged in his body and his second wife. He attributes this to the fact that the Plaintiff chased him out of his residential home, Plot No. xxx [Particulars Withheld] River Bank Nairobi and continues to collect rent from the same and from Plots No. xxx, xxx and xxx [Particulars Withheld] River Bank Nairobi.
3. The Applicant averred that sometime in the year 2007, he married one YNM as his second wife through Islamic law and together they have one issue namely MM born in the year 2008. A copy of the marriage certificate and the issue's birth certificate are on record. They have an adopted son, one MAH who as per the copy of the Identity Card on the record was born in 1998.
4. According to the Applicant, his first wife AAH, the Respondent herein, chased him from their matrimonial home on 1st January, 2012 forcing him to look for alternative shelter. He now lives in a rental flat in Eastleigh where he pays the sum of Kshs. 23,500/= monthly. His second wife Y lives in a rental house in their rural home in Mito Andei for which he pays the sum of Kshs. 10, 250/= monthly. Receipts of the payments are on record.
5. The Applicant stated that he also pays school fees of Kshs. 9,000/= per term in addition to Kshs. 6,000/= for transport and Kshs. 4,500/= for tea and lunch with respect to his son MM who was in class 3 at the time of filing the application. Payment receipts are on record.
6. It is the Applicant's averment that his adopted son MAH who suffered gunshot wounds within his pelvis requires urgent surgery to remove bullets that were left lodged within the left iliac bone at a cost of Kshs. 950,000/=/. An additional Kshs. 150,000/= is needed for post-surgery care.
7. In addition to the expenses enumerated above, the Applicant states that he has incurred a sum of over Kshs. 3,000,000/= in advocate's fees to prosecute and defend his court cases and in particular cases between him and the Respondent. That he also requires money to sustain himself and his second family which amounts to approximately Kshs. 150,000/= per month.
8. The Applicant deposed that he is no longer in employment and his family's property is therefore at risk of being auctioned for nonpayment of rent arrears and other debts. He contended that he was entirely dependent on rent from the suit plots which rent money the Respondent now pockets entirely.
9. In opposition to the application, the Respondent filed a replying affidavit sworn by herself on 27th June, 2019 in which she asked the court to dismiss the application with costs in the interest of justice.
10. The Respondent deposed that she and the Applicant cohabited as husband and wife from November 1987 after having formalized their union before a Sheikh in Nakuru in a ceremony known as *nikkah*. They however separated in September 2011 when, according to the Respondent, the Applicant deserted their matrimonial home leaving her to single-handedly shoulder the burden of the liabilities of their

family. The marriage was dissolved by the Kadhi's Court at Nairobi on 16th July, 2018 and a Certificate of Divorce of serial number [xxxx] duly issued.

11. The Respondent opposed the Applicant's statements with regard to the sums of money he pays towards monthly rent of the Eastleigh flat and the Mito Andei Flat and the total sum of school fees and related expenses in relation to his son MM. She accused the Applicant of misleading the court stating that the Applicant had failed to attach factual evidence. I note that whereas the payment receipts are not attached to the present application, they are on the record having been attached to the application dated 10th May, 2019 and marked as referenced in the current application.

12. The Respondent stated that she receives approximately Kshs. 80,000/= in rental income from semi-permanent homes built on Plot No. xxx, xxx and xxx at [Particulars Withheld] Estate River Bank but which income is not stable since the tenants are low-class citizens. That the rental income is therefore insufficient to feed, clothe and educate all the children in addition to paying utility bills owing to the increasing family needs. She urged that she has directed the rental income towards paying school fees for the four (4) children she was raising with the Applicant.

13. According to the Respondent, she and the Applicant both worked towards acquiring wealth and providing for their children during the subsistence of their marriage. She asserted that her contributions have not only been financial but also include non-financial contributions which cannot be quantified. Further that she has over several years provided the Applicant with companionship, taken care of their children, carried out domestic work and managed the matrimonial home and various businesses.

14. The Respondent contended that according to Islamic law, the husband ought to be financially stable if he wishes to marry another wife. In addition, he has to demonstrate the ability to provide and cater for the wives together with their issues. That the Respondent can therefore not claim that he is unable to sustain himself and his second family.

15. The Respondent asserted that prior to their separation in 2011, the Respondent had refused and neglected to pay school fees for their children. To her dismay, the Applicant adopted another child even as he failed to provide his own biological children with food, clothing, medical needs and subsistence. That as such, the savings she accumulated from the rental income from the semi-permanent houses has gone towards catering for the needs of the children. From the Respondent's annexures, the court gathers that the issues of the marriage have all since attained the age of majority, having been born in 1989, 1993 and 1997.

16. Learned Counsel Mr. Ndichu filed written submissions dated 5th July, 2019 on behalf of the Applicant in which he asked the court to exercise its discretion in favor of the Applicant and allow the application as prayed. Counsel submitted that the properties in [Particulars Withheld] Estate in Buruburu being plots no. xxx, xxx, xxx, xxx and xxx in River Bank were acquired solely by the Applicant. Copies of allotment letters are on record. Counsel contended that at all material times, the Applicant was responsible for the family's wellbeing and paid all the school fees for his children who were at the time in primary and secondary schools.

17. Counsel asserted that the Respondent gave contradictory statements of the rental income received from the properties. That from the figures listed by the Respondent in her replying affidavit, the rental income has reduced from Kshs. 132,000/= in 2012 to 80,000/= in 2019. Counsel asserted that the figures are suspect since rental income in Nairobi has surged upwards in the last 10 years. Further that contrary to the Respondent's claims that she has used the rental income to cater for the children, all her children have completed their studies.

18. Mr. Ndichu submitted that the grant of temporary reliefs as provided under the **Civil Procedure Act and Rules** is a matter of judicial discretion. Counsel asserted that in exercising this discretion, the court ought to appreciate the facts of this case as outlined in the pleadings and submissions and apply those facts to the principles of law. Counsel contended that the Applicant has demonstrated that he has a *prima facie* case with a probability of success.

19. Mr. Ndichu averred that the Respondent has in various suits claimed that the [Particulars Withheld] River Bank properties are matrimonial property and that she made both monetary and non-monetary contributions towards their acquisition, and is therefore entitled to fifty percent of the properties. Counsel asserted that in spite of this, the Respondent has refused to give the Applicant his fifty percent share of the properties. That in any event, the properties were purchased and developed solely by the Applicant.

20. Mr. Ndichu asserted that even if the Court were to find that damages that can be ordered in the final determination are adequate, which he stated should not be the case in the instant suit, that in itself should not disentitle the Applicant to the interim reliefs sought in the nature of a quarter of the share of the rental income collected in the last eight years. To buttress his point, Counsel referred to the case of **Waithaka vs. Industrial & Commercial Development Corporation [2001] KLR** and **Joseph Siro Mosioma vs. HFCK & 3 others Nairobi HCCC No. 265 of 2007 (UR)**.

21. Mr. Ndichu urged the court to find in favor of the Applicant stating that to disallow the application will amount to conferring more benefit to the Respondent at the expense of the Applicant and his family who are already deprived of their just and fair entitlement. Counsel urged the court to find that the balance of convenience tilts in favor of the Applicant and to deem it fit to grant the remedies sought in terms of prayers 2 and 3 of the application.

22. The Applicant submitted extensively on the guiding principles of the grant of injunctive reliefs. However, from the face of the application dated 3rd June, 2019 it is clear that the interim orders sought therein are not of an injunctive nature.

23. In opposition to the application, learned Counsel Ms. Maina filed written submissions dated 15th July, 2019 on behalf of the Respondent in which she asked the court to dismiss the application with costs. Counsel submitted that the main issue for determination herein is whether the Applicant is entitled to payment of the sum of Kenya Shillings Five Million as sought in his application.

24. Ms. Maina submitted that **Article 45(3)** of the **Constitution** and **section 3(2)** of the **Marriage Act No. 4 of 2014** give parties to a marriage equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. That whereas **section 77(1)** of the **Marriage Act** states that the court may order a person to pay maintenance to a former spouse, the Applicant has not satisfied any of the grounds under the section to warrant the grant of the orders sought.
25. It is Ms. Maina's submission that the Applicant is a man of means who can support himself as he worked as a truck driver before and during the subsistence of his marriage to the Respondent. Counsel asserted that the Applicant went ahead to marry a second wife an act which is permissible under Islamic law only if one is financially stable. Further that the Applicant currently rents his wife a flat in Mito Andei and has for the last ten (10) years maintained his second family.
26. Counsel contended that a person who voluntarily incapacitates himself or herself from earning is not entitled to saddle the other spouse claiming maintenance from that spouse. That in any event, the Respondent is not in possession of the sum of money claimed since the little money received from rental income over the years has gone towards maintaining the family.
27. Ms. Maina asserted that the Respondent is currently paying school fees for her twin sons who are pursuing their masters' degrees and undergraduate fees for her last born son. That it is therefore unfair for the Applicant to ask for such a large sum of money from the Respondent. To buttress her assertion, Counsel referred to the decision of Ougo J in **P.M.A vs. G.M.L [2016] eKLR** and the Court of Appeal case of **P.K.M. vs. R.P.M. [2017] eKLR**.
28. Counsel urged that the Applicant has failed to furnish the court with an affidavit of means and has only shown expenses that are obligatory in the exercise of his parental responsibilities. That as such, neither the rent the Applicant pays for his wife, nor the school fees he pays for his children, should be burdened upon the Respondent.
29. The present application is straightforward. What the Applicant is seeking is payment of a sum of Kshs. Five million from the Respondent which he claims is at least quarter of the rental income received from the suit properties from 1st January, 2012 to date.
30. The interim reliefs sought herein are anchored on the main suit which is for division of matrimonial property. In advancing his case, all the Applicant has done is state that there are a total of 44 rental rooms on the suit properties for which tenants pay Kshs. 3,200/= monthly to realize a total monthly rental income of Kshs. 176,000/=. That in the last seven and a half years, the Respondent has therefore collected approximately Kshs. 25,000,000/= in rental income. The Applicant did not however tender any documentary proof in support of his claims thereof. A court of law cannot act on bare allegations not supported by credible evidence. It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. This the Applicant has failed to do.
31. The only documentary evidence of the rental income realized from the Plots is found in the payment receipts and statements annexed to the Respondent's replying affidavit, which indicate that the rent collected from the plots ranges between a total Kshs. 50,000/= to Kshs. 60,000/= each month. This is for the period starting July, 2018 to September 2018. From the statements, the court gathers that there are 41 rental units, 19 of which are vacant. For the occupied units, the monthly rent chargeable is Kshs. 3,200/= but some of the tenants do not pay the sum in full when due.
32. The Applicant contended that during the last three years, the Respondent has used the rental income for her own benefit since all her children have finished school and are now working for gain. From the pleadings, it is clear that all issues of the marriage have since attained the age of majority. The twins MM and MM were born on 27th November, 1993 while the youngest child GM was born on 14th June, 1997. The twin daughters have since completed their undergraduate degrees, while the youngest child is currently pursuing his undergraduate degree, having completed his secondary school studies in 2015.
33. The evidence on record and in particular the Divorce Petition annexed to the Respondent's replying affidavit indicates that at the time of petitioning for divorce, the Applicant was a businessman whereas the Respondent was a house wife. It is therefore safe to conclude that the Respondent used the rental income to provide for herself and the children of the marriage, and in particular the couple's youngest child GM who was born in 1997 and was therefore aged 15 years as at 2012. GM completed his secondary school education in 2015 and attained the age of majority in the same year. As such, I am convinced that from 2012 to 2015, the rental income realized from the plots went towards educating the youngest child.
34. The Applicant further pointed out that for the last three (3) years the Respondent has enjoyed the rental income for her sole benefit. He did not however adduce evidence as to what amount was realized during this three year period. Further, I note that both parties hereto profess the Islamic faith and under Islam, a wife is entitled to be maintained in the same standard she enjoyed during the subsistence of the marriage. Where the husband has two wives as in the instant case, the first wife is entitled to the same standard that she had before the husband's marriage to the second wife.
35. The Respondent herein was a housewife and therefore relied solely on the Applicant for financial support during the marriage. Noting that the Applicant is not maintaining the Respondent following the decree of divorce, I am convinced that the rental income realized over the years has been used by the Respondent to provide for herself and the children of the marriage even though they have attained the age of majority.
36. The parties hereto also led evidence on their contributions towards the acquisition of the suit properties. I will not however delve into the question of the contribution of the parties towards the acquisition of the properties at this point. This is a question that can only be determined at the conclusion of a full trial where all relevant material is properly placed before the court. Further at the trial, the parties will have an opportunity to adduce adequate and concrete evidence upon which the court can confidently make a determination.
37. The Respondent alluded to a ruling by Justice Odunga dated 4th May, 2012 in HCCC No. 538 of 2011. She averred that at page 12 of the ruling, the Honorable Judge maintained the status quo of the suit properties as the non-parties (the children) would be the ones adversely

affected by denying them a source of livelihood and education. A copy of the ruling is however not annexed to the replying affidavit. What is annexed is a copy of an order made by Lady Justice Mugo on 11th June, 2012 in Civil Suit No. 36 of 2012. An examination of the order reveals that it was with regard to Plot No.xxx [Particulars Withheld] River Bank on which the parties have their matrimonial home. The order was pending the hearing and determination of the substantive motion.

38. Under **section 77** of the **Marriage Act**, the court may order a person to pay maintenance to a spouse or former spouse or a former spouse during the course of matrimonial proceedings or after the granting of a decree of divorce. In making an order for maintenance, the court is under an obligation to interrogate the financial affairs of the parties.

39. From the evidence on record, the Court gathers that at the time of petitioning for divorce, the Applicant was a businessman while the Respondent was a house wife. The Applicant has not tendered any evidence to demonstrate change of circumstances or decline in his financial earnings or capability.

40. Having determined that it was the Respondent who catered for the children of the marriage following the separation of the parties hereto, and by virtue of being a house wife during the pendency of the marriage, I am inclined to find that the Respondent used the rental income towards providing for the upkeep and educational needs of the issues of the marriage.

41. Further, the Respondent has failed to marshal evidence to support his claim of the amounts realized in rental income from the properties. As such, the court cannot grant the orders as sought because to do so would be tantamount to granting orders which cannot be enforced. This is bearing in mind that courts of equity do not grant orders in vain.

42. Consequently, I find that there is nothing in the application dated 3rd June, 2019 that would enjoin me to grant the orders sought. The Applicant has failed to demonstrate and adduce evidence to support his prayers to the satisfaction of this court. I therefore find that the application dated 3rd June, 2019 fails and is accordingly dismissed. The costs shall be in the cause. Due to the nature of the issues raised in this application, I direct that the main suit be fixed for hearing as a matter of priority. It is so ordered.

SIGNED DATED and DELIVERED in open court this 17th day of September, 2019.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondent.