



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

DIVORCE CAUSE NO. 1 OF 2011

U N C PETITIONER

VERSUS

R CRESPONDENT

RULING

1. Before this Court for determination are two applications. The parties hereto are a married couple but divorce proceedings between them are pending before this Court. Pending before this Court also is an Originating Summons No. 2 of 2011 relating to property acquired during the marriage of the parties which the Court directed on 20.3.14 that the same be heard together with the cause herein.

2. The first Application dated 23.6.15 is filed by R C, the Respondent in the divorce proceedings herein (“R”) and seeks leave to institute contempt proceedings against U N C, the Petitioner (“U”) for failing to pay to R the sum of Kshs. 720,000/= being arrears of maintenance as ordered by the Court in a Ruling of 8.3.13.

3. According to the Ruling, the payment of the monthly maintenance sum of Kshs. 60,000/= *pendent lite* by U to R was with effect from the date of the Application being 3.4.12. The basis upon which R seeks leave to institute contempt proceedings is that U has not paid the amount due from the date of the Application to the date of the Ruling amounting to Kshs. 720,000/=. That for the period between the dates of the Application and of the Ruling, U was in arrears of Kshs. 720,000/=. That he continued to pay the monthly amount with a lot of delay thereby causing R untold suffering. U has opposed the Application on several grounds key of which is that leave of Court is no longer required to institute contempt proceedings.

4. The parties filed written submissions and cited several authorities in support of their respective cases. Several arguments were advanced by each of the parties in support of or in opposition to the Application. In my view, the issue for determination is whether leave of this Court is required to institute contempt of court proceedings. This Application will turn on this point alone and I therefore need not comment on other submissions.

5. The law relating to contempt of Court is Section 5 of the Judicature Act which provides:

“5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts”.

6. Applications and proceedings in relation to contempt of court in England are provided for in Part 81 of the Civil Procedure (Amendment No. 2) Rules, 2012. Rule 81.4 thereof provides for enforcement by

committal of a “judgment, order or undertaking to do or abstain from doing an act.” The Court of Appeal when faced with a similar application in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR pronounced itself thus:

“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court’s order. The application is for that reason, incompetent and is struck out with costs”.

7. In view of the fact that leave to file contempt proceedings is no longer required, this Application cannot be allowed and is therefore dismissed but without prejudice to the Applicant’s right to file an application for contempt of court. There shall be no order as to costs.

8. The second Application dated 21.7.15 is filed by U seeking the setting aside the order of this Court of 8.3.13. The Application also seeks that R be compelled to execute a transfer of Flat No. 44 in Hout Bay, Cape Town, South Africa and in default, the Deputy Registrar of the Court be ordered to do so. U further seeks that the proceeds of sale of the said Flat 44 be utilised towards the education and upkeep of the three children of the parties herein.

9. The Application is premised on the grounds that R in spite being a qualified hairstylist/beautician has chosen not to engage in any gainful employment and instead relies on U for her “frolics and indolent lifestyle. That R has neglected her joint responsibility towards the children and continues to conduct herself in a very contumelious, intransigent, obstructive and obtrusive manner. U claims that due to his health condition, his earning capacity has reduced to 50% and he is unable to continue to meet his obligation to pay the monthly sum of Kshs. 60,000/= to R and at the same time maintain the children. It was further submitted for U that the conduct of R makes her undeserving of the support ordered by the Court and citing authorities, he argued that no spouse has an inherent right to be maintained at the detriment of the other.

10. U annexed copies of correspondence from South African Attorneys relating to Cape Town Flats which he says speaks “for itself”. That mediation for a financial settlement has failed. He also attached copies of documents showing the children’s educational expenses, his income and his medical notes regarding the diagnosis of synovitis. He prayed that the Application be granted.

11. The Application is opposed by R who claims in her Replying Affidavit that the Application offends the mandatory provisions of Order 51 Rules 4 and 13(2) of the Civil Procedure Rules 2010 and should be struck out. R claims that the property in Hout Bay, Cape Town, South Africa is matrimonial property and that should the same be sold the proceeds therefrom should be applied towards the children’s education. That U has acted belligerently towards her and will not agree to the funds being deposited in a joint interest earning account. R further claims that U sold a property in Dubai without disclosing to her how the proceeds were applied and prayed that U be compelled to provide an account in respect thereof. She denied that U is suffering from synovitis in his right wrist as he still plays tennis at Mombasa Sports Club. That his clinics in both Nairobi and Mombasa are still fully operational. R further claims that U has an apartment in Lavington, Nairobi and two in Nyali Mombasa from which he collects rents, as well as bank accounts in several banks.

12. I have considered the application, the affidavits and the submissions herein. R asserts in her Replying Affidavit that the Application offends the provisions of Order 51 Rules 4 and 13(2) of the Civil Procedure Rules 2010 and should be struck out. Rule 4 of Oder 51 provides:

“4 Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

The Application herein does indeed state in general terms the grounds of the application which grounds R has in fact responded to.

13. Rule 13(4) of Order 51 provides:

“13(2) Every application shall bear at the foot the words—

“If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient.”

14. It is a fact that the requisite words have been omitted in the Application. Does this omission warrant the striking out of the Application? Rule 10(2) of the same Order 51 provides:

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

The omission of the words required by Order 51 Rule 13(4) is in my view a technicality and a want of form that does not affect the substance of the Application. In view of the above, I find that the claim that the Application is a nullity and should be struck out, is without basis. In so finding, I am also guided by the provisions of Article 159(2)(d) of the Constitution to administer justice without undue regard to procedural technicalities.

15. For U, it was submitted that he has made every effort within his earning capacity to pay to the Applicant the monthly sum of Kshs. 60,000/= as directed by the Court. He argued that R in spite of being a qualified hairstylist/beautician has chosen not to engage in gainful employment. That she has no regard for the interest of their children and uses them to get money to fund her extravagant lifestyle. It was further submitted that U's health condition has reduced his earning capacity by fifty per cent and he is therefore no longer able to fund R's extravagant lifestyle. U has submitted extensively on the conduct of R which he strongly disapproves of. The submissions filed by R did not address U's application nor indeed the allegations relating to her conduct.

16. It is quite apparent from the record that R has not worked and continues to depend on U for maintenance. U has painted a picture of a woman who has no regard for her children or indeed her home as a wife or mother. A woman who lives lavishly and spends her time visiting friends or watching television. A woman who waits for her husband to provide for all the needs in the home without making any contribution whatsoever. U on the other hand has had to solely bear the responsibility of the education of the three children of the marriage, their upkeep and other needs. On top of all this he has to pay a monthly maintenance of Kshs. 60,000/= *pendente lite* to R who has shown no interest whatsoever in engaging in gainful employment.

17. U faults R for waiting on him to support her without lifting a finger. He cites Article 45(3) of the Constitution which provides that parties to a marriage are entitled to equal rights at the time of, during and at the dissolution of marriage. He also cites the case of W. E. L v. J. M. H. (2014) eKLR where Odero, J stated that *“the purpose of a maintenance order is not to punish or unfairly condemn a party to penury...”* The learned Judge went further to state that *“no spouse has an inherent right to be maintained to the detriment of the other.”*

18. In R G N v J R K N [2015] eKLR, Musyoka J rendered himself thus:

“The principle emerging from both decisions is that upon marital breakdown both parties ought to rise up, pick up the pieces and move on. Both underline the fact that the paradigm with respect to spousal maintenance has shifted. The age when men were viewed as sole bread winners is gone. Husband and wife are equal partners in marriage. They have equal responsibilities during marriage. Both are entitled to equal treatment. This extends to the period after break up. None bears the burden of caring for or providing for the other spouse after break up. Each of them is expected to be on their own after brake up. None of them should be a parasite to the other; neither should any of them be turned into a slave for the other”.

19. The obtaining circumstances between the parties herein cannot prevail forever. The old order where the wives stayed at home and waited for their husbands to bring home the bacon is long gone. Section 25 of the now repealed Matrimonial Causes Act allowed a wife to make an application for alimony *pendent lite* whereupon the Court would make such order as it deemed just. Section 77 of the Marriage Act 2014 on the other hand provides that the Court may order “a person to pay maintenance to a spouse or a former spouse” during the course of any matrimonial proceedings. This is a clear shift from the old order as the Court may now order a wife to pay maintenance to a husband! This provision evidently enforces the equality of spouses in a marriage as envisioned in Article 45(3) of the Constitution.

20. Section 80(2) of the Marriage Act provides:

“The court may vary the terms of an agreement as to maintenance between spouses wherever made if satisfied that there has been a material change of circumstances since the agreement was made despite any provision to the contrary contained therein”.

21. From the Ruling of 8.3.13, the Court found that U had conceded that the monthly sum of Kshs. 60,000/= had been agreed upon by the parties. By virtue of Section 80(2), the Court has the discretion to vary the terms of this agreement. U claims that his circumstances have changed in that he has been diagnosed with Synovitis in his right wrist which has reduced his earning capacity as a dentist by 50% as per the medical reports he produced. R expressed surprise at this and claimed that U still plays tennis. I am inclined to go by the medical reports produced by U and I find that circumstances have changed to warrant a review of the maintenance order. However, given that Raakhee has not worked for years, I will not set aside the Orders of 8.3.13. Instead I will grant her an opportunity to re-organise her life during the pendency of the proceedings herein and wean herself off her financial dependence on U.

22. On the prayer that R be compelled to sign the transfer for Flat No. 44 in Hout Bay, Cape Town, South Africa, the same is deferred to the hearing of HCCC No. 2 of 2011(OS) the cause in which the application ought to have been filed in the first place.

23. In the result and for the reasons stated I dismiss the Application dated 21.7.15 but with no order as to costs. Parties are directed to fix this suit and HCCC No. 2 of 2011 for hearing on a priority basis for the expeditious disposal of the same.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of July, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicants**

..... **for the Respondents**

..... **Court Assistant**