

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

DIVORCE CAUSE NO.10 OF 2006

E A OPETITIONER

VERSUS

H O NRESPONDENT

R U L I N G

The petitioner and the respondent got married in April 1977 under Luo customary law. On 11/8/81 the marriage was registered under the provisions of the Marriage Act (Cap.150). They were blessed with two children. On 12/12/06 the petitioner sought divorce on account of cruelty, adultery and constructive desertion. The respondent filed answer to the petition denying that he had been cruel, adulterous or had been guilty of desertion. Instead, he cross petitioned for divorce on the same grounds. On 23/3/09 judgment was delivered allowing the petition with costs.

On 14/1/10 the petitioner filed an application dated 17/7/09 under sections 25, 26, 27 and 28 of the Matrimonial Causes Act (Cap.152) and rules 3 and 4 of the Matrimonial Causes Rules seeking maintenance, lump sum or periodic maintenance and settlement of the matrimonial property. The respondent filed an affidavit to oppose the application. On 14/10/10 the court gave an interim order of maintenance in the following terms:

- a. that the respondent to put vehicle registration number [particulars withheld] Mitsubishi Gallant into a roadworthy condition and release it to the petitioner; and
- b. the respondent to pay to the petitioner Kshs.6000/= monthly from 31/10/10 pending the hearing and determination of the application by way of oral evidence.

By application dated 8/3/13 the respondent sought the review of the order of payment of Kshs.6000/= per month and instead order the payment of Kshs.2000/= per month. By the time of the application the respondent stated that he was in arrears to the tune of Kshs.42,000/= and execution had been ordered to recover the amount. His case was that he was a retired person whose only income was Kshs.6000/= per month from five rental rooms he owned at Pandipieri. He stated that he had spent Kshs.40,000/= to repair the vehicle which had made it impossible to service the installments.

The petitioner filed a replying affidavit to say that the respondent was not being truthful about his means. She stated that she jointly owned a flat [particulars withheld] in Westlands in Nairobi whose rent was Kshs.21,000/- per month in 2006 but which had increased to about Kshs.60,000/=. She showed copy of the lease in their joint names. She also produced document to show that the respondent had rental houses at [particulars withheld] Estate in Kisumu from which he was collecting Kshs.20,000/= per month. Further, that he had a catering business called [particulars withheld] in Nairobi. Lastly, that the parties were directors in [particulars withheld] Holdings Limited which the respondent was operating alone.

The respondent had stated that he had a son studying in Uganda for whom he was paying fees. The petitioner denied that that was true. She denied that the arrears outstanding from the order of Kshs.6000/= per month was Kshs.42,000/=. She stated that what was owing was Kshs.216,000/= as of 1/11/13.

The respondent did not swear any further or supplementary affidavit to challenge the averments regarding the property and income that he has and in respect of which the petitioner exhibited documentary evidence. It follows that he failed to fully disclose his income. In **TOURING CARS (K)**

LTD .V. MUNKANJI [2000] 1 EA 261 it was held that party who fails to disclose material facts does not deserve the order of review.

The application was made under sections 1A, 1B, 3A , 63(e) and 80 of the Civil Procedure Act and Order 45 rules 1 of the Civil Procedure Rules. In **YANI HARYANTO .V. ED & F. MAN (SUGAR) LTD, Civil Appeal No.122 of 1992** the Court of Appeal stated that the facility of review is available to the person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from discovery of new and important matter or evidence or error on the face of the record or for any other sufficient reason desires to obtain a review, The new and important matter or evidence should be such that after due diligence was not within the knowledge of the applicant or he could not produce it at the time. It is also critical that the application for review should be made without unreasonable delay (**ORIGO & ANOTHER .V. MUNGALA [2005]2 KLR 307**).

Regarding the issue of delay, there is no dispute that the respondent made no attempt to explain why it took him between 14/10/10 and 8/3/13, a period of about two yeas and four months, to bring the application. In **JOHN AGINA .V. ABDULSWAMAD SHARIF ALWI [1992] LLR 5734** it was held that the unexplained delay of two years in making an application for review following a consent order would not earn the sympathy of the court.

The respondent has not obeyed the order to pay Kshs.6000/= per month. He is in arrears to the tune of over Kshs.200,000/=. This application entails the exercise of discretion. Such discretion can only be exercised in favour of a deserving person. If the respondent says that he can afford only Kshs.2,000/= per month, he should have deposited the amount covering all the months in question as a demonstration of good faith. He did not.

In short, the respondent was aware of his financial position at the time of the order and did not declare it. There is no new evidence or matter that he has since come by. There is no demonstrable error on the face of the record, and there is no good or sufficient reason to interfere with the order made on 14/10/10. I dismiss the application with costs.

Dated, signed and delivered this 10th March, 2014

A. O. MUCHELULE

J U D G E