



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO: 125 OF 2001

S M.....PETITIONER

VERSUS

M M.....RESPONDENT

RULING

1. The application for determination is dated 21st November 2011. In it the applicant seeks that the orders made on 7th May 2004 be varied or discharged or suspended in such manner as the court may deem fair and fit in the circumstances. His case is that the said orders were meant for maintenance of the respondent and the two children of the marriage, yet the said children are now adults and the respondent is now a wealthy person who is able to take care of herself without any input from the applicant.
2. In her reply, the respondent counters that the children though adults are still dependent on her. She denies being wealthy and puts her average monthly income at Kshs.35,000.00. She would not like the court to vary the maintenance orders. She asserts that the applicant earns Kshs.400,000.00 per month from his efforts as a lecturer. He is said to live in a luxuriant apartment and to drive a classy car.
3. The application was argued before me on 26th September 2013 by counsel for both parties.
4. The orders sought to be modified were made on 7th May 2004 by Martha Koome J. Under the said orders the applicant was to pay a monthly sum of Kshs.21,000.00, broken down to Kshs.15,000.00 for maintenance and Kshs.6,000.00 for rent. The said orders were made on the understanding that the respondent then needed the money to settle utility bills and to feed the children.
5. The application is premised on **Section 25 (3)** of the Matrimonial Causes Act, Cap 152 of the Laws of Kenya, and Rules 3(3), 43 and 47 of the Matrimonial Causes Rules. **Section 25** of the Matrimonial Causes Act provides for alimony and maintenance. **Section 25(2)** of the Act provides for post – judgment orders on maintenance. There is a proviso to **Section 25(3)**, which empowers the court to discharge or modify the maintenance orders or temporarily suspend them, or if need be increase the amount payable. Rule 3(3) of the Matrimonial Causes Rules provides for the filing of summons in chambers for the purpose of interlocutory applications. Rule 43 provides for applications for modification of maintenance orders. Rule 47 sets out the particulars that ought to be given for the purpose of a modification order.
6. Whereas the Matrimonial Causes Rules talks of modification of a maintenance order, the said Rules do not indicate the nature of such modification. The provision that gives guidelines on the nature of modification is **Section 25(3)** of the Matrimonial Causes Act, specifically the proviso thereto. **Section 25(3)(i)** of the Act enables the court to modify maintenance orders where the husband has become unable to make maintenance payments, to the extent of discharging or modifying the order temporarily

suspending. **Section 25(3) (ii)** of the Act empowers the court to modify a maintenance order where the means of the husband have increased by increasing the amount payable under the order.

7. The application before me seeks orders that the maintenance orders made on 7th May 2004 be modified on several grounds. The principal ground appears to be that the respondent former wife's circumstances have improved, as she is said to have acquired a property from which she is drawing substantial income to the extent of exceeding the applicant former husband's income. She is said to be no longer living in rented premises, but rather in her own premises. She is described as a wealthy businesswoman who does not now require maintenance from her husband. It is further argued that the children of the dissolved marriage have attained majority age and no longer require maintenance from their applicant father. The applicant father argues that he is not able to continue making the payments without compromising his wellbeing.

8. I have carefully gone these grounds and weighed them against the provisions of **Section 25 (3)** of the Act and Rules 3(3), 43 and 47 of the Matrimonial Cases Rules. The fact that the respondent has become wealthy and no longer in need of support from the applicant would appear to me not to be one of the factors envisaged in **Section 25(3)** of the Act for modifying a maintenance order.

9. I note that the applicant alleges that he is unable to continue making the payments without compromising his

wellbeing. This would be a factor which falls within the ambit of **Section 25(3) (ii)** of the Act. Unfortunately, the applicant husband has not placed any material before me to demonstrate that he is unable to continue making the payments ordered on 7th May 2004 without compromising his wellbeing. His supporting affidavit dwells only on the fact that the respondent is wealthy and does not merit further maintenance; he does not provide any material upon which I can determine that his income as at present is inadequate to support continued payment of the maintenance ordered by the court. I cannot therefore exercise discretion to modify the maintenance orders on the basis of this ground.

10. The question then that I have to ask is whether I have Jurisdiction to modify the maintenance orders on grounds other than those set out in **Section 25(3)** of the Act. **Section 32** of the Act grants the court power to vary or modify the order for the provided payment either by altering the terms of payment or by increasing or diminishing the amount or temporarily suspending the order as to the whole or part of the money ordered by the court as the court thinks fit. I find that under this provision I do have discretion to vary the order by either increasing or diminishing the amount or suspending it.

11. The applicant advances two main grounds for allowing the order. He says that the respondent is no longer needy. She has acquired property where she now resides and from where she draws an income. The respondent counters that she is not wealthy, but concedes that she does own three properties, that she lives in one of them and that she does derive income from the said assets. Quite clearly she does not reside in rented premises and she does have an income from which she can meet her monthly utilities.

12. The other argument by the applicant is that the said maintenance order catered for the children of the marriage, yet these children are now adults who he is not now obliged to maintain. He puts their ages at 27 and 29 years respectively. The respondent's counterargument is that the said children are still dependent since they are unemployed and one is still in university undertaking a master's degree programme. I note that at making the order of 7th May 2004 the court took into account the fact that the respondent needed money to feed the children. These children are now adults. At the time of filing the divorce petition on 11th July 2001 the said children were said to be 16 and 18 years of age respectively. Thirteen years have lapsed since then, meaning the children are now 29 and 31 years of age or thereabout today. They cannot therefore be children for the purposes of **Section 25** of the Matrimonial Causes Act. Given their ages, the applicant has no obligation to provide for them. The fact of their unemployment cannot possibly be a ground for continuing to burden their father with their maintenance. The fact that one of the children is undertaking a master's degree programme in university is also not sufficient for the father to continue providing for the said children. Parental responsibility can only be extended beyond the age of 18 years for the purpose of basic education; post-graduate university education cannot possibly

be described as basic education.

13. Maintenance orders in favour of a wife or children should be made on need basis. In this case the children are adults and there is no basis for making a maintenance order in their favour. Whether they are needy or not is not relevant. With regard to the wife, there is material evidencing that she does own property, she resides in her own residence and she draws income from such property adequate to meet her daily needs. She is therefore not needy.

14. In view of the above, I hold that the application dated the 21st November 2011 is merited. The orders made on 7th May, 2004 are hereby suspended temporarily until further orders of the court. The parties are at liberty to apply. This being a family matter, I will order that each party do bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF March, 2014.

W. M. MUSYOKA

JUDGE