



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 103 OF 2007

PETER SUTHERLAND HUTCHENCE.....APPELLANT

VERSUS

RENATE WALTER HUTCHENCE.....RESPONDENT

RULING

By a Memorandum of Appeal dated 19th July, 2007 the appellant herein **PETER SUTHERLAND HUTCHENCE** has appealed against the ruling and all consequential orders of the learned magistrate in Maintenance Cause No. 4 of 2006 delivered on 27th June, 2007. The Memorandum of Appeal lists the following grounds

- “1. **THAT** the learned magistrate erred in fact in holding that the evidence on the termination of income from the sale of boats in January, 2007, appellants personal accounts audited on 15th March, 2007 and returns for Kese Investments Limited filed on 2nd March, 2007 all predated the maintenance order of 19th July, 2006, when indeed the said evidence is evidently post the order of 19th July, 2006 and therefore fresh evidence under section 6 Cap 153.
2. **THAT** the learned magistrate erred in law in failing to appreciate that the evidence of exhaustion of income in January, 2007 from the sale of boats is fresh evidence under section 6 of Cap 153, as against the maintenance order made on 19th July, 2006.
3. **THAT** the learned magistrate erred in law in failing to appreciate that Kese Investments Limited is a distinct and separate legal entity from the appellant and that income if any of Kese Investments Limited is not the income of the appellant.
4. **THAT** the learned magistrate erred in law in refusing to consider the fresh evidence adduced by the appellant as punishment to the appellant for not availing the said evidence during the main suit.
5. **THAT** the learned magistrate erred in law in confusing the appellant’s personal business which was non-operational with the Kese Investments Limited which filed its returns in March, 2007 posting a loss of Kshs. 115,129/=.
6. **THAT** the learned magistrate erred in law and fact by failing to exercise his discretion judiciously as more particularly set out in grounds 1-5 herein above, and in taking into consideration irrelevant facts and misapprehending the law.

7. **THAT the learned magistrate erred in law by finding merit in the appellant's application dated 27th March, 2007 then dismissing it."**

Based on the above grounds the appellant proceeded to pray that this appeal court do

"(a) Set aside the entire/whole ruling dated 27th June, 2007 and substitute therefore an order for maintenance of Kshs. 7,000/= per month.

(b) Allow the appeal with costs to the appellant."

The application was disposed of by way of written submissions. Both parties did duly file their written submissions before the court. The background of this matter is that on 19th July, 2006 HON. OCHENJA Senior Resident Magistrate sitting at the Kwale Law Courts delivered a judgment in **Civil Suit No. 41 of 2006 RENATE WALTER HUTCHENCE VS. PETER SUTHERLAND HUTCHENCE** in which he ordered that the appellant do pay to the respondent a sum of Kshs. 50,000/= per month as maintenance under section 3(1) (c) of the Subordinate Court's (Separation and Maintenance) Act Cap 153, Laws of Kenya. On 27th March, 2007 the appellant filed an application seeking that the Hon. trial magistrate vary his orders and reduce the maintenance payable to a sum of Kshs. 7,000/= per month. The basis for this application was that the appellant's income had diminished and he was no longer earning the amount which he was receiving at the time when the judgment was delivered. In his ruling of 27th June, 2007 the learned trial magistrate dismissed this application to vary the maintenance orders with costs to the respondent. The Hon. magistrate in his ruling found that no basis had been laid for variation of the maintenance order as the evidence adduced in support thereof was not '*new evidence*' in terms of section 6(1) of Cap 153, but rather was evidence which was available to the appellant at the time when the initial judgment was delivered.

I have carefully considered the written submissions filed by both parties as well as the authorities annexed thereto. In coming to his initial decision to award maintenance in the amount of Kshs. 50,000/= per month the trial court considered the income being received at that time by the appellant as follows

- i. Incomes from his shares of Kese Investments of Kshs. 30,000/= per month.
- ii. Income of Kshs. 60,000/= per month as monthly installments from the sale of a boat at Kshs. 800,000/= in November, 2005.
- iii. Income of Kshs. 40,000/= received by the appellant for managing beach cottages belonging to a friend.

I will now proceed to consider each of the grounds of appeal raised individually.

1. The appellant submitted that Kese Investments, a company in which he held shares made an operating loss of Kshs. 115,129.00 in the year ending December, 2006. He relied upon the company's annual returns as proof of this loss. The annual returns of the company filed for the period upto December, 2006 do not show whether this sum of Kshs. 115,129/= was a loss or a profit. No Profit and Loss Account for Kese Investments Limited was exhibited by the appellant. He did not discharge his burden of proving that the company was actually making a loss as alleged.

2. The appellant submitted that his fishing business was not making any income. He stated that the installment payments which he had earned for the sale of assets i.e. the sale of boats for a sum of Kshs. 800,000/= had come to an end as payment for the boats had been received in full. Although the Trading Account included profit on sale of assets, there is no indication that these assets were infact boats. Assets for a deep sea fishing business could very well include other items like fishing gear, oxygen tanks, etc. Further the Trading Account annexed shows that the appellant's boat business made a nett profit of Kshs. 588,601/= up from Kshs. 8,775/= made in the preceding year 2005. The Trading Account is very clear that these monies are '*profits*' and not just income from sale of assets. The term '*profit*' in its ordinary meaning refers to the difference between the amount spent in purchasing an asset and the amount for

which the said asset was subsequently sold. The Profit and Loss Account of the business which ordinarily should have clarified what the nett profit of the business was only contains expenses and does not indicate what the nett profit was. The appellant has therefore failed to demonstrate (prove) that his boat business was performing worse at the time he sought a review of the order than when the initial order of maintenance was made.

3. The appellant submitted that the income which he had been earning from managing cottages owned by a Mr. Richard Bonham ceased in May, 2006 when the owner of the cottages took up the management himself. The appellant relied on a letter dated 28th February, 2006 written by the said Mr. Richard Bonham. However a clear reading of this letter shows that the appellant was merely being asked to vacate a cottage which he had been occupying. Nowhere does the letter indicate that the role of the appellant as estate manager has been terminated and/or dispensed with. All the owner says is that “*I require the Beach Cottage for personal use from the end of May, 2006.*” Nowhere in the letter does the owner direct the appellant to cease from his role in **managing** the beach cottages. Further this letter is dated 28th February, 2006 almost five months before the trial court delivered its judgment. It cannot therefore be said to amount to ‘*new evidence*’ requiring a review of the maintenance order.

4. Finally the appellant submits that he relies only on a stipend of Kshs. 20,000/= from his mother. Given that he has declared his monthly expenses to amount to Kshs. 30,000/= and given that he proposes to pay to the respondent a monthly sum of Kshs. 7,000/=, the appellant has not explained how and from where he will access the extra Kshs. 17,000/= to meet these monthly costs. I am not persuaded by the arguments put forward in this appeal. If anything the appellant has come across as a man who is ready to do anything including abusing the court process in an attempt to evade his duty to pay the court ordered maintenance. I therefore find no merit in this appeal. The same is hereby dismissed with costs to the respondent.

Dated and delivered in Mombasa this 5th day of September, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Ndegwa h/b Mr. Sitonik for Appellant

Court Clerk Mutisya