



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 35 OF 2011**

**D K.....PETITIONER**

**VERSUS**

**A W N .....RESPONDENT**

**RULING**

The Petitioner and the Respondent were married on 8<sup>th</sup> October 1993. Their marriage was celebrated under the **Marriage Act**. The marriage was blessed with two (2) issues. One issue is deceased. On 14<sup>th</sup> March 2011, the Petitioner petitioned this court seeking to be divorced from the Respondent, *inter alia*, on the grounds of cruelty. The Respondent filed answer to the petition denying the allegations made by the Petitioner in the petition for divorce. The petition for divorce is yet to be heard and determined.

On 20<sup>th</sup> February 2014, the Respondent filed an application predicated on **Section 25** of the **Matrimonial Causes Act** (now repealed) seeking orders from this court to compel the Respondent to provide her with reasonable maintenance together with that of their surviving child. The Respondent averred that the Petitioner should be ordered to pay her monthly maintenance to the sum of Kshs.112,000/-. The Respondent stated that the Petitioner was a man of means who was in a position to take care of her and the child of the marriage. She further stated that she is unemployed having lost her job in 1993 on account of her ill health. She urged the court to grant the prayers sought in her application as an interim measure pending the hearing and determination of the divorce case. The application was supported by the annexed affidavit of the Respondent. She swore an affidavit in further support of the application.

The application is opposed. The Petitioner swore a replying affidavit in opposition to the application. As a first shot, he stated that this court had no jurisdiction to grant the orders sought in the application. Essentially the Petitioner was saying that the issue regarding the maintenance of the child ought first to be canvassed before the Children's Court. He further deponed that he had always supported the child by paying his school fees. He was of the view that the Respondent was using the provision of the child's education as a means to extort money from him. He was willing to pay the school fees of the child directly to the school. He had also taken a medical cover for the child which the Respondent was not willing to acknowledge. He did not agree with the assertion by the Respondent that she was destitute. He explained that the Respondent was a businesslady who is able to comfortably provide for her on food, housing and entertainment since the two were separated in 2004. He denied that he earns a lot in business that he was currently engaged in. He stated that he was struggling to make ends meet. He urged the court to dismiss the application with costs.

At the hearing of the application, this court heard oral rival submission made by Mr. Webale for the

Respondent and by Mr. Ilako for the Petitioner. Mr. Webale submitted that the Petitioner was a person of means and was currently working at Equity Bank. He stated that since the Petitioner and the Respondent separated more than ten (10) years ago, the Petitioner had neglected to take care of the needs of the Respondent and the child. He submitted that although the Petitioner claimed that he had taken medical cover for the child, he had never availed the same to the Respondent. The Respondent only learnt of it when the Petitioner responded to the application. Learned counsel reiterated that the Petitioner was a man of means who was able to take care of the Respondent and the child of the marriage.

In response to the application, Mr. Ilako submitted that the issue regarding the welfare of the child should be addressed by the Children's Court. It is that court that has jurisdiction in the first instance to hear and determine any dispute relating to custody and maintenance of a child. He submitted that the Respondent was not employed by Equity Bank but was rather engaged in private business as an accountant. He was willing to pay for the school fees of the child. He had also taken a medical cover for the child. He conceded that he had not availed the medical card to the Respondent. Learned counsel submitted that the amount sought by the Respondent cannot be paid by the Petitioner because he lacks capacity to do so. It was the Petitioner's case that if the order sought was granted, it would bankrupt him.

This court has carefully considered the submission made by counsel for the parties to this application. There are two aspects of the application. In the first limb, the Respondent seeks an order of this court to compel the Petitioner to pay her maintenance. Her application was predicated upon **Section 25 of Matrimonial Causes Act** (now repealed) which granted this court jurisdiction to grant maintenance pending the hearing and determination of the divorce case. That **Section** is now contained in **Section 77 of the Marriage Act 2014**. That **Section** grants this court jurisdiction to issue an order of maintenance during matrimonial proceedings. The second limb of the application was the prayer by the Respondent in respect to the maintenance of the child of the marriage. In that regard, this court agrees with the Petitioner that it is only the Children's Court which has jurisdiction, in the first instance, to issue an order of maintenance for a child. It is so specifically provided under **Section 73 of the Children Act**. So that there is no doubt as to which court has jurisdiction to deal with disputes on maintenance of a child, **Section 85 of the Marriage Act 2014** provides thus:

***“Custody and maintenance of children shall be dealt with in accordance with the Children Act and any other written law relating to children.”***

In the present application, this court will not therefore deal with the aspect of the Respondent's application that deals with the maintenance of the child of the marriage. The Respondent is advised to file an appropriate case before the Children's Court.

As regards the first aspect of the application, the Respondent pleaded that this court ought to compel the Petitioner to provide her maintenance. She stated that she was unemployed, having lost her job due to ill health. From her affidavit, it was evident that the Respondent lost her job in 1993. She separated from the Respondent in 2004. It was not clear from her pleadings how she has been able to maintain herself in the period of more than ten (10) years since she separated from the Petitioner. The Petitioner was of the view that the Respondent has been able to maintain herself in the intervening period and that was the reason why she did not move the court to make an order of maintenance. On the other hand, the Respondent stated that the Petitioner was a man of means who is able to provide her maintenance pending the hearing and determination of the divorce case. She denied that she has a source of income. She insisted that her medical condition had not improved hence the need for constant medical attention. Interestingly, the Respondent did not annex any medical document in support of her application to the effect that she was a person of ill health.

Having carefully evaluated the facts of this application, it was clear to this court that the Respondent did not make a case for this court to compel the Petitioner to pay her maintenance pending the hearing and determination of the divorce case. There are gaps in the Respondent's story: she did not give a cogent explanation how she was able to support herself in the ten (10) year period that she has been separated from the Petitioner. Her claim that she was a person of ill health was not supported by documentary evidence. In this court's assessment, it is apparent that the Respondent has concealed her source of

livelihood which has enabled her to support herself in the past ten years that she has been separated from the Petitioner. This court can only issue an order of maintenance when it is established, to the satisfaction of the court, that indeed the person seeking to be maintained has been previously supported by the other spouse, and if the support is withdrawn, it would render the person destitute. This court is mindful of **Article 45(3)** of the **Constitution** which provides that:

***“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

In the present application, the Respondent was required to show how she has been able to maintain herself and difficulty she has experienced in maintaining herself before this court can consider whether or not to compel the Petitioner to provide her with maintenance.

In the premises therefore, as regard the first limb of the application, the Respondent is hereby ordered to file an appropriate application before the Children’s Court for the maintenance and education of the child. As regard the second limb of the application, this court finds no merit with the same. That aspect of the application is dismissed but with no orders as to cost.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER 2014.**

**L. KIMARU**

**JUDGE**