



**REPUBLIC OF KENYA**

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

**DIVORCE CAUSE NO.146 OF 2012**

**S O O..... PETITIONER**

**VERSUS**

**E M A.....RESPONDENT**

**R U L I N G**

The Petitioner (Respondent) and the Respondent (Applicant) were married on 18<sup>th</sup> March, 2009 at the Registrar's Office in Nairobi. The marriage was celebrated under the **Marriage Act**. The marriage has been blessed with One (1) child namely R O O. The application before court is dated 15th April, 2013 and was filed by the Respondent pursuant to the provisions of **Sections 25 and 26** of the **Matrimonial Causes Act** and **Article 45** of the **Constitution**. The Respondent is seeking alimony from the Petitioner amounting to Kshs.150,000/- for herself and the issue of the marriage pending the hearing and determination of the divorce cause. The Respondent has further sought for an order of the court directing that the said amount be deducted from the Respondent's salary and be deposited in a family account to be run by her. On 10th August, 2012 the Petitioner filed the present petition seeking to be divorced from the Respondent on the grounds of cruelty and desertion. It is this petition that provoked the Respondent to file the application.

The application is supported by the annexed affidavit of the Respondent. In response, the Petitioner filed his replying affidavit on 30<sup>th</sup> September 2013. Parties agreed to file written submissions in respect of the application. The submissions were duly filed. From the pleadings filed, the Petitioner lodged a petition seeking for divorce from the Respondent alleging the matrimonial offences of cruelty and desertion on the part of the Respondent. The Petitioner and the Respondent are no longer living together. It was stated that the Respondent is still living in the matrimonial home. The Respondent herein in answer to the Petition has also filed a cross-petition accusing the Petitioner of cruelty. She sought an order of judicial separation from the Petitioner together with an order of maintenance and upkeep for herself and the issue of the marriage.

In her application the Respondent stated that she is still a student at the university and that she has the physical custody of the issue of the marriage. The child is four (4) years old. She alleged that she does not have a permanent job and that it is the Petitioner who had been maintaining them during the subsistence of the marriage. The Respondent accused the Petitioner of deserting the matrimonial home from 1st March, 2012. He had failed to maintain them since. She further accused the Petitioner of selling her car thus causing her to suffer. She has been forced to commute using public transport. The Respondent was also aggrieved that the Petitioner had withdrawn his credit card from her. She therefore urged the court to grant her alimony from the Petitioner to the sum of Kshs.150,000/- to cater for rent, food, house help, fuel and transport and entertainment expenses. She further wants the court to order the Petitioner to provide her with a car. The Respondent contended that the Petitioner was employed with Kenya Airways as a captain earning a monthly salary of Kshs.700,000.

In his response, the Petitioner averred that Respondent and the issue of the marriage were still living at their matrimonial home where he still maintains them. He alleged that he still pays rent for the house and has access to the issue of the marriage. The Petitioner however denied earning a salary of Kshs.700,000 as alleged by the Respondent. He further denied selling the Respondent's car and stated that the Respondent now has her own new car. The Petitioner argued that the application was therefore an abuse of the court process and an attempt by the Respondent to fleece him more so since the Respondent has

filed a children's case at the magistrate's court.

During hearing of the application this court heard rival submissions of counsel for both parties. Counsels reiterated the contents of their pleadings. Mr. Wachira learned counsel for the Respondent submitted that it is the Petitioner who had been maintaining his family prior to the separation since the Respondent was still a student. He submitted that the children's court had only made interim orders relating to payment of the minor's school fees by the Petitioner. Mr. Wachira therefore urged this court to determine the issue of maintenance for both the Respondent and the issue of the marriage. On his part, Mr. Ombwayo for the Petitioner reiterated that the Petitioner has continued to maintain both the Respondent and the issue of the marriage even after their separation. He maintained that the Respondent is not destitute and is therefore not entitled to be maintained by the Petitioner. According to Mr. Obwayo, under **Article 45** of the **Constitution**, all parties to a marriage have equal responsibilities thus it was incumbent for the Respondent to fend for herself. He submitted that the issue of maintenance is contested and should therefore be ventilated during the full trial. To support his submission, counsel for the petitioner relied on the following authorities:

*Nairobi High Court Divorce Cause No. 5 of 2012, SMR vs. PHS, Embu High Court, Divorce Cause No. 2 of 2008, LGNG vs. JGK and Nairobi High Court, Divorce Cause No. 167 of 2012 JSM vs. DIS* and urged the court to dismiss the application.

The court has read the pleadings filed by the parties herein in support of their case. It has also considered the submissions made by counsel. Under the **Matrimonial Causes Act**, the right to maintenance accrues during marriage and even when the marriage has ended. **Section 25** and **26** of the **Matrimonial Causes Act** gives the court power to order maintenance when proceedings are pending for appropriate matrimonial reliefs. From the reading of **Section 17** of the Act, it is clear that a husband is bound to maintain his wife and children. The Act recognizes the right of the wife to alimony pending the determination of the divorce cause and final alimony. The maximum amount that can be decreed by the court as alimony during the time of the pendency of the divorce cause in court is one fifth of the husband's net income.

In this case, the Petitioner's net income has been disputed. The Respondent has not provided proof of the Petitioner's net income to support her claim. There is therefore no justification for the Respondent to claim Kshs.150,000/- from the Petitioner given that the affidavit of means of the parties herein had not also been filed. The financial capacity of each party has to be assessed before an order for alimony can be granted. The Petitioner has averred that he is still maintaining his family by paying rent for Kshs.37,500/- the Respondent and the child's school fees as ordered by the Children's Court.

In the circumstances therefore, this court shall exercise its discretion and order the Petitioner to pay the Respondent Kshs.75,000/- as monthly alimony pending the hearing and determination of the divorce cause or until the said order is varied by this court. As regards the issue of maintenance of the child, the same shall continue to be canvassed at the Children's Court. It is that court which has jurisdiction in the first instance to consider such disputes. There shall be no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 8<sup>th</sup> DAY OF NOVEMBER 2013**

**L. KIMARU**

**JUDGE**