



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, TUNOI & LAKHA, J.J.A.)
CIVIL APPEAL NO. 246 OF 1998
BETWEEN

H W G APPELLANT
AND
E M G RESPONDENT

(An appeal from the ruling and decision of the High Court
of Kenya at Nairobi (Hon. Mr. Justice Khamoni) dated
31st July, 1998

in
H.C.SEPARATION CAUSE NO. 68 OF 1998)

JUDGMENT OF THE COURT

The parties to this appeal are husband and wife. They were married in May, 1970 and are blessed with five teenage children, three sons and two daughters. It is now common knowledge, as perceived from the petition and the answer to it that, unfortunately, the marriage since celebration, has not been a happy one.

On 21st May, 1998, the wife petitioned for judicial separation and maintenance on the grounds of the husband's cruelty and adultery with a known woman. However, the husband has filed an answer to it and a cross-petition for an order of dismissal. It is important at this stage to observe that as there are many unresolved issues and allegations in the petition which is still pending trial by the superior court it would not be proper for us at this stage to make any firm pronouncement on any issue raised by the parties in their pleadings as we have not had the benefit of a decision on them by the superior court.

It suffices to say that on the same day of lodging the petition for judicial separation, the wife also applied for ancillary relief under sections 17, 25 and 30 of the Matrimonial Causes Act and rules 3, 38 and 39 of the Matrimonial Causes Rules. On 10th June, 1998, a consent order was recorded in favour of the wife in terms of which (i) she was no longer bound to cohabit with the husband pending the hearing and determination of the cause; (ii) the husband was restrained from harassing and/or assaulting the wife; (iii) the husband was ordered to continue paying school fees and providing other necessities for two school going children of the marriage.

Two prayers were argued before Khamoni, J. These were whether the husband should be restrained from barring or locking out the wife from the matrimonial home, or in the alternative, whether the husband should be ordered to vacate it pending the determination of the cause; payment of maintenance to the wife and release of a motor vehicle to her; and, costs.

In a brief ruling the learned Judge declined to grant the wife's prayers and dismissed her application. Being dissatisfied with the decision of the learned Judge the wife has now appealed to this Court.

The main thrust of the attack on appeal before this Court was on the basis that having ordered that the wife be no longer bound to cohabit with the husband the learned Judge should have awarded maintenance to the wife.

The husband and wife are joint proprietors of the matrimonial home comprised in land Title No. [particulars withheld]. The wife was thrown out of it in March, 1998 and she is barred from visiting the rural family home in [particulars withheld]. She is a teacher by profession and earns Shs.16,000.00 per month. Her application for ancillary relief contained a statement in general terms of the husband's income and property. However, in contravention of rule 44 of the Matrimonial Causes Rules the husband has not filed an affidavit setting out full particulars of his property and income.

The Court at this stage is not able to come to any firm conclusion on the merits of the substantive issue before it in deciding what to award the wife. Suffice it to say, it is our view that the husband had no right whatsoever to turn the wife out of the matrimonial home by brute means or otherwise. We must add that this Court condemns in no uncertain terms domestic violence against a spouse and will promptly punish the erring party.

The wife's income is insufficient to support herself and the children. The husband, having expelled her from the matrimonial home, must maintain her pending the determination of the cause. In this regard we would agree with the learned Judge that this unfortunate situation having arisen the wife should not expect to have every material enjoyment she was accustomed to prior to the institution of the cause.

An arithmetical exactitude of assessment is not possible to determine the husband's property and income. He admits earning Shs.50,000.00 per month and is offering the wife an alternative accommodation at Jamhuri Estate, Nairobi. This translates, we think, into about Shs.20,000/= monthly rental.

We would agree with Ms. Karua, counsel for the appellant that the learned Judge erred in not finding that the wife having been expelled from the matrimonial home has maintained herself in a precarious fashion and the learned Judge should have made an award of the interim maintenance in her favour.

We would allow this appeal, set aside the ruling and order of the learned Judge and substitute therefor an order awarding the wife Shs.20,000.00 per month, with effect from 1st January, 1999. We decline to order a provision for the motor vehicle as it may be the only one in possession of the husband. We make no order as to costs.

Dated and delivered at Nairobi this 12th day of March, 1999.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR