



IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CIVIL APPEAL 273 OF 1996

C J M.....APPELLANT

AND

P M O.....RESPONDENT

**(Appeal from an order and ruling of the High Court of Kenya at Mombasa (Lady Justice Ang'awa)
dated 27th June, 1996**

IN

H. C. DIVORCE CAUSE NO. 2 OF 1994)

JUDGMENT OF THE COURT:

Although the appeal before us is based on 15 grounds, the substance of the same lies in the complaint by the appellant that the learned judge of the superior court (Ang'awa, J.) did not consider the appellant's application before her on the principles set out in Rule 48 of the Matrimonial Causes Rules Whilst considering the said application. The appellant had sought by Chamber Summons orders for:-

- (1) Leave to take the child of the marriage in question (M) with her to the United Kingdom where she was returning to after her employment with the British Council had come to an end;
- (2) maintenance for M;
- (3) permanent alimony, maintenance and secured provision for the benefit of the appellant.
- (4) costs.

The issue of taking M out of the jurisdiction of the Court has been decided and both the appellant and M are no more in Kenya. They are now resident in the United Kingdom.

On 23rd November, 1994 the superior court (Mbogholi-Msagha, J.) ruled that the court was unable to make any order as to maintenance of the appellant and M when the two eventually leave for United Kingdom as there were no sufficient facts to enable the court to do so and the appellant was advised to apply when necessary. She so applied and the application came up for hearing before Ang'awa, J.

Rules 48 of the Matrimonial Causes Rules reads:

“48. On an application for ancillary relief, the registrar shall fix an appointment for hearing of the application, and notice hereof shall be given by the applicant to every other party to the application who has entered an appearance, and at the appointment so fixed the judge shall in the presence of the parties or their advocates investigate the allegations made in support of an affidavit in answers to the application, and may order the attendance of the spouses and any other person for the purposes of being examined or cross-examined, or may take the oral evidence of witnesses, and at any stage of the proceedings may order the discovery and production of any document or call for further affidavits.”

This rule requires a judge to make full investigation into the matters in issue for such ancillary relief as is sought and the duty to make such investigation becomes more pronounced when the interests of an infant are involved.

The appellant was leaving Kenya. She wanted sufficient maintenance to maintain herself and M. We note at this stage that she already had, in her favour, an order for the maintenance of herself in the sum of Shs. 6,000/- per month given by Mbogholi-Msagha, J. who had also ordered the respondent to pay maintenance for M at the rate of Shs. 4,500/- per month. The respondent was paying M's school fees, in addition, in the sum of K. shs. 18,000/- per term.

When the application for ancillary relief came up for hearing before Ang'awa, J. the respondent had not filed his affidavit of means. The appellant however, submitted that the respondent was in receipt of gross salary exceeding K. Shs 80,000/- per month. Despite such evidence the learned judge proceeded to assess the maintenance for the appellant at Shs. 2,000/- per month thereby reducing the amount awarded to her by Mbogholi-Msagha, J. by Shs. 4,000/- per month when in fact there was no application at all by the respondent for review of orders made by Mbogholi-Msagha, J. In doing so the Learned judge clearly erred and in our view surprisingly so. Instead of revising the figure of Shs. 6,000/- upwards she reduced the figure to Shs, 2,000/- It must be borne in mind that at the time the sum of Shs. 6,000/- per month was arrived at by Mbogholi- Msagha, J. the appellant was gainfully employed whereas at the time Ang'awa, J. was asked to look into the issue afresh the appellant was not gainfully employed. The order of maintenance at Kshs. 2,000/- per month was clearly made in error and is set aside.

The learned judge in awarding a sum of Shs. 8000/- per month for maintenance of M advised herself that the British Government would provide school for M. There was no such evidence before the learned judge. We do not know if the British Government would provide free education to a Kenyan citizen, which doubtlessly M is. The learned judge erred in considering the factor of British Government providing free schooling for M. We would want to point out that judges should not base their findings on what they think may be the position. We set aside that order also.

Having set aside both orders we have to consider what we ought to do in the circumstances. The appellant has left this country. To order reinvestigation into the issue of ancillary relief would not serve any purpose as the respondent seems not at all bothered to tell the court what his earnings are. We however have more reliable evidence by way of the respondent's salary slip that he earns a gross salary inclusive of allowances, of Shs. 94,645.00/- per month. The figures as shown in the respondent's salary slip before us are as follows:

Basic salary	Shs. 81,00.00
Living Out allowance	-
Boarding allowance	Shs. 1,300.00
Total allowance	Shs.82,300.00
Housing at 15%	<u>Shs.12,345.00</u>

Total Salary	Shs. 94,645.00
Chargeable pay	K£ 4,732.25
Tax charged	Shs. 28,575.75
Less personal relief	<u>Shs. 546.00</u>
	Shs. 28,575.75
N. S. S. F.	Shs. 80.00
N. H. I. F.	Shs. 320.00
R. C. C. S-C	<u>Shs. 200.00</u>
	600.00
Total deductions	Shs. 28,629.75
Net Salary	Shs. 66,016.25

Unfortunately the figure printed in the salary slip (in the record) for net salary is not clear but arithmetically it works out at Shs 66,016.25.

To order maintenance for the wife at Shs. 2000/- per month when the husband earns Shs. 66,000/- per month is, to say the least, parsimonious. The learned judge, in our view, abdicated her duties when she made such an order.

Mr. Suchak for the appellant argued that the wife is entitled to at least one-third of the husband's earnings for her maintenance and that this court ought to consider that as a starting figure. He relied on the case of Wachtel v. Watchel, [1973] All E.R. 829,835 in basing his argument on the one-third rule. The Watchel case refers to the celebrated case of Ackerman v. Ackerman, (1972) 2 ALL E. R 420 wherein the English Court of Appeal proceeded on the basis that the so-called rule was still applicable to cases arising under an Act of English Parliament passed in 1970. Broadly speaking the one-third rule is convenient, but circumstances have to be looked at in their entire context when considering the issue of ancillary relief.

Reverting to the appeal before us, it is to be noted that the appellant and M are now living in England and the respondent is employed in Kenya. But we cannot of course consider awarding maintenance at the level that may be required in England. We have to go by what the respondent earns in Kenya.

Taking all these matters into consideration we think that the ends of justice will be met by ordering the respondent to pay a monthly sum of Shs. 36,000/- for the maintenance of both the appellant and M, the child of the marriage. Out of this sum of money shs. 24,000/- per month shall be for the appellant's maintenance and Shs. 12,000/- per month for M. In awarding Shs. 24,000/- per month to the appellant we keep in mind the fact that as a mother the appellant would spend some of her own monies for the upbringing and education of M.

This appeal is therefore allowed and the figure of Shs. 2,000/- for maintenance of the appellant is increased to Shs. 24,000/- per month to be paid by the respondent until Maria attains the age of 18 years or until further orders and that the figures of Shs. 8000/- per month for the maintenance of M is increased to Shs. 12,000/- per month to be paid by the respondent so long as the appellant shall remain unmarried or until further orders. These payments shall be with effect from the 1st day of august , 1996. The appellant will have costs of this appeal.

Dated and delivered at Mombasa this 31st day of January, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL