



**ICT v RPT (Civil Appeal E003 of 2024)  
[2026] KEHC 2439 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2439 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CIVIL APPEAL E003 OF 2024  
HM NYAGA, J  
FEBRUARY 26, 2026**

**BETWEEN**

**ICT ..... APPELLANT**

**AND**

**RPT ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein (formerly Petitioner) is dissatisfied with the Ruling of the Senior Principal’s Magistrates court dated 21/6/2024.
2. In the petition of appeal dated 27/6/2024 the appellant is aggrieved by the decision of the court setting aside the award of alimony, the grounds of appeal are as follows; -
  1. That the Learned Magistrate erred by granting a relief that had not been expressly sought in the application in breach of rules on pleadings;
  2. That the Magistrate erred by ordering the review and setting aside of the alimony in failing to find that he was bereft of jurisdiction;
  3. That the court erred by invoking the provisions of section 80 of the Marriage Act by sitting on appeal against the decision of a concurrent jurisdiction.
3. The appellant prays that the lower court decision be set aside in so far as it reviewed and set aside the alimony award.
4. This being a first appeal, this court has the duty to re-evaluate and analyze all the evidence tendered in the trial court and come up with its own findings and conclusions. This court is guided by this principle which was espoused in the case of *Selle & Another -vrs- Associated Motors Boat Company & others* (1968) EA 123.



5. A brief background of this matter is that, the appellant filed for divorce in 2017 and on 17/11/2017 the court determined the cause by dissolving the marriage and also made an order for payment of alimony by the Respondent in the sum of Kshs.10,000/= per month.
6. The appellant filed the application dated 18/8/2023 in which she sought orders that the decree nisi made on 8/10/2019 be made absolute on the grounds in support of the application. The appellant indicated that the order nisi of 18/10/2019 included an order for payment of alimony and that the order nisi be amended to include the award of alimony.
7. The Respondent filed grounds of opposition to the applicant indicating inter alia that the court in Eldoret Children's matter 141/2019 between the same parties had pronounced itself on the issue of maintenance and ordered the Respondent to pay maintenance of Kshs.10,000/= per month.
8. The court considered the application and relying on section 80 (1) and (2) of the *Marriage Act*, arrived at a finding that under the above section, it had jurisdiction to review its earlier orders if there were new and important matters which may not have existed when the court made the initial order. The court went ahead to state that there was no reason to include the award of alimony in the decree absolute. In effect the court set aside the order for payment of alimony made on 17/11/2017. It is against this order that the appellant feels aggrieved.
9. The appellant's Counsel filed submissions dated 9/10/2025 in which it was urged that the trial magistrate acted ultra vires his powers by awarding the order because it was not pleaded in the application, contrary to the law; that parties are bound by their pleadings and the court cannot grant an order which is not specifically pleaded. Counsel relied on the case of Daniel Otieno Migore -Vrs- South Nyanza Company Limited (2018) where J. A.C. Mrima dealt with a similar issue.
10. Counsel further submitted that an award of alimony and child maintenance are two different awards; that alimony is awarded to a spouse or ex-spouse, whereas child maintenance is issued for maintenance of the children of the union and both are issued under Section 77 of the *Marriage Act*. Counsel urged that the court had dealt with the issue and dismissed it and the same court could not sit on appeal of its own orders based on section 80 of the *Marriage Act*.
11. In response, the Respondent filed submissions dated 14/10/2025 in which it was submitted that when the trial court made the orders for alimony, it observed that it was for upkeep of the children. Counsel went into detail on what transpired in the Children's case in Eldoret Child E.141/2019 where the court ultimately made an award of Kshs.10,000/= as child maintenance. The Counsel also brought in the issue of the two spouses' means and which children actually belonged to the marriage. I believe the paternity of the children and their means is not the issue in this application. Relying on the case of Mbogo & Another -Vrs- Shah (1968) EA 98., Counsel urged that the order of the court was an exercise of the courts discretion which this court should not interfere with;
12. In BAN -V- BWN (2024) KEHC 7977 (KLR) the court held that once the Respondent was able to maintain herself, the petitioner was absolved from payment of further alimony.
13. Counsel also relied on W.M.M. -V- B.M.L (2012) eKLR where the court observed that in making an order of maintenance, due regard has to be made to Article 45(3) of *the Constitution* which provides for equal rights of parties to a marriage at the time of marriage, during marriage and at the time of dissolution of the marriage.
14. I have considered the grounds of appeal, the rival submissions and the proceedings before the trial court.



15. It is clear from the application dated 14/8/2023 that the order sought was one of making the order of decree nisi made on 8<sup>th</sup> October, 2019 absolute. By a ruling of the trial court dated 12/9/2019, the court had allowed the petitioners application dated 25/4/2019 in which the appellant sought the decree nisi dated 17/11/2017 to be amended to include all the terms of the Judgment which included an award of Kshs.10,000/= alimony. In the same ruling the court declined to grant the Respondent's application dated 2/5/2019 in which the Respondent sought an order that the court review the order of alimony made on 17/11/2017.
16. The question then is whether the trial court had the jurisdiction to revisit the issue of review of the order of alimony. The trial court in reviewing the order of alimony relied on section 80 of the Marriage Act which provides as follows: -
17. Section 80. Revocation and variation of an order for maintenance
  - (1) The court may revoke or vary a subsisting order for maintenance of any kind, whether secured or unsecured, if it is satisfied that the order was based or obtained as the result of any misrepresentation or mistake of fact or that there has been a material change of circumstances since the order was made.
  - (2) The court may vary the terms of an agreement as to maintenance between spouses wherever made if satisfied that there has been a material change of circumstances since the agreement was made despite any provision to the contrary contained therein.
18. Section 80 is clear, that the court may vary an order of maintenance between spouses (alimony) if inter alia, there has been change of circumstances since the order was made. In this case, the court considered the orders that had been made in the Eldoret case between the parties. Although the court had the discretion to act as it did, the court was required to act based on clear facts. If the Respondent had wanted the discharge of the said order of alimony, the Respondent should have properly sought the court's exercise of discretion by filing an application to seek the said orders.
19. The court has already alluded to the application of 2/5/2019 where the Respondent sought the review of the said order of alimony but the court declined to grant it in its ruling of 12/9/2019. If circumstances had changed since 2019, nothing prevented the Respondent from approaching the court for review of the said order or by way of appeal.
20. As correctly submitted by the appellant every party is bound by its pleadings and one cannot depart from them and ambush the other party in a replying affidavit to seek contrary orders as was the case here. In Daniel Otieno Migore case, the Judge said
21. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection.....” The issues on change of circumstances should have been brought before the court in an application and the appellant given a chance to respond before the court could make a determination on alimony. They had not been in this application.
22. Having said the above, I do agree with the appellant that the court acted outside its powers in this case and it did not exercise its jurisdiction judiciously as expected of it because none of the parties had sought review the order of alimony in the application dated 14/8/2023 which was the subject of consideration.
23. In the end, I allow the appeal and set aside the order of the trial court setting aside the order of payment of alimony by the Respondent to the appellant. The appeal succeeds with costs to the appellant.

**DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**



**HON. R. WENDOH – JUDGE.**

Judgment read in the presence of

Appellant- Mr. Mugambi

Respondent-Maritim

Juma/Hellen-Court Assistants

