



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 256 OF 2015

BETWEEN

GMM.....APPELLANT

AND

FMM.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Musyoka, J.) dated 23rd January, 2015

in

Divorce Case No. 47 of 2013)

JUDGMENT OF THE COURT

The respondent herein, **FMM**, filed a petition at the High Court of Kenya at Nairobi against her husband (the appellant), **GMM**, where she prayed for dissolution of their marriage and that she be awarded maintenance and costs of the petition. The appellant filed an answer to the petition and in a cross-petition he asked for dissolution of the marriage.

At the hearing of this appeal we were informed (and as evidenced by a judgment attached to a Supplementary Record of Appeal) that when the petition and cross petition came up for hearing the petition was dismissed while the cross petition was allowed. The Judge at the High Court found that the respondent was guilty of desertion and that her conduct had caused untold mental suffering and anguish to the appellant. Further, that she was cruel to him and on those grounds the cross petition was allowed and costs awarded to the appellant.

Those are not the orders that are subject of this appeal.

This appeal arises from the orders granted in a Chamber Summons application that the respondent filed together with the petition. It was prayed in that summons that the appellant be ordered to pay to the respondent Kshs.340,000/= per month as alimony and/or upkeep pending the hearing and determination of the petition; that the appellant be ordered to pay to the respondent Kshs.1,000,000/= towards furniture for the respondent's residence and that the appellant be ordered to cater for medical expenses in respect of the respondent.

In grounds in support of the summons it was stated *inter alia* that the respondent had been forced to vacate their matrimonial home in Karen owing to cruelty meted upon her by the appellant; that although the matrimonial home with an estimated value of Kshs.50,000,000/= was jointly owned by the two parties the appellant lived there exclusively; that the respondent had suffered serious injuries and was unable to afford her living expenses; that the respondent was a retired teacher without any source of livelihood; that the respondent had suffered injuries in an accident for which she had been admitted in hospital for a period of 2 months; that the appellant had not contributed towards treatment and care of the respondent following those injuries suffered in the accident and that the appellant was a major shareholder and director of a company where he earned a salary Kshs.800,000/= per month; and finally that the appellant had no financial responsibilities all the children of the marriage being adults.

Those averments were repeated in a supporting affidavit of the respondent where she gave particulars of the marriage including the four children of the marriage and listed various properties which the respondent stated the couple had acquired during the subsistence of the marriage.

The appellant swore a fairly lengthy replying affidavit opposing the summons where he stated amongst other things that the respondent had

left the matrimonial home on her own volition on 23rd February, 2008 a period of over 5 years before the summons was taken in court; that the respondent had abandoned her son who was a minor; that the respondent had taken all valuables from the house when she vacated; that the respondent had before leaving the matrimonial home exhibited behaviour unexpected of a married woman; that when the respondent was involved in a road traffic accident where she sustained injuries the appellant had provided for her medical care; that the respondent had treated the appellant with cruelty and that the appellant had not neglected the respondent.

The respondent also filed an Affidavit of Means in support of the petition and the summons where she stated that she was a retired teacher who had no income of her own and she tabulated her expenditure to be:

Kshs.

| | | |
|-----------------------------|---|---------------------------|
| (i) Food | - | 30,000/=per month |
| (ii) Clothing | - | 50,000/= per annum |
| (iii) Rent | - | 150,000/= per month |
| (iv) Fuel | - | 30,000/= per month |
| (v) Medical Insurance | - | 150,000/= per annum |
| (vi) House helper/driver | - | 30,000/= per month |
| (vii) Security | - | 25,000/= per month |
| (viii) Entertainment (club) | - | 20,000/= per month |
| (ix) Furniture | - | 1,000,000/= one time cost |
| (x) Laundry | - | 5,000/= per month |

The application was heard by Musyoka, J. who in a ruling delivered on 23rd January, 2015 ordered the appellant to pay to the respondent maintenance at a monthly sum of Kshs.200,000/= to cover her expenses for food, clothing, rent, fuel, labour, security, entertainment and laundry; that the appellant do cater for the respondent's medical expenses which were capped at Kshs.150,000/= per year and that the appellant do make a one off payment of Kshs.500,000/= to the respondent to enable her acquire furniture for her residence. It was ordered that those orders would last pending the hearing and final determination of the divorce proceedings and costs of the application were to be costs in the cause. Those are the orders that provoked this appeal and as we have stated above the orders were vacated when judgment was delivered when the petition and cross-petition were heard and determined.

There are seven grounds of appeal set out in the memorandum of appeal filed on behalf of the appellant by his lawyers **M/S T.K. Kariba Mbabu and Company Advocates**. The appellant complains that the learned judge erred in law and fact in failing to appreciate and make a finding that the respondent had deserted her matrimonial home in the year 2008; that the Judge erred in law and fact in failing to give any reasons for arriving at the conclusion he reached; that the ruling was against the weight of evidence; that the Judge erred in failing to consider that the respondent had refused accommodation offered by the appellant; that the amount of maintenance awarded was excessively high and not backed up by evidence; that the award for purchase of furniture was exorbitant and highly exaggerated because the respondent had carted away furniture from the matrimonial home and that the maintenance awarded was punitive to the appellant and way above what he could afford. We are therefore asked to reverse the ruling and award the costs of the appeal to the appellant.

When the appeal came up for hearing **Mr. Kariba Mbabu advocate** appeared for the appellant while **Mr. Wilfred Nyamu advocate** appeared for the respondent. Mr. Kariba Mbabu had filed written submissions on 18th November, 2016 and he relied fully on the same without finding it necessary to make any highlight. Counsel for the respondent had similarly filed submissions on 29th May, 2017 and relied on the same without making a highlight.

We have perused both sets of submissions and lists of authorities filed, have considered the same, the record of appeal and relevant law.

The core of the argument in the submissions by the appellant is that the appellant and the respondent had stated different circumstances leading to departure of the respondent from the matrimonial home and that the Judge could not make definitive findings based on affidavit evidence. It is also stated that the properties set out in the respondent's affidavit were not income generating and were idle lands and that the same could not be used as a basis for assessing maintenance. The appellant also submits that there was no basis upon which the Judge could make the awards that he did based on the material produced by the parties. Further, that ordering the appellant to pay a sum of Kshs.200,000/= monthly for maintenance and the other sums of Kshs.150,000/= per annum and Kshs.500,000/= one-off payment even flew against the provisions of the Matrimonial Causes Act which placed alimony pending suit at one fifth of the husband's income.

In opposing the appeal in the said written submissions the respondent submits that the appellant had not filed an affidavit of means to contradict the respondent's submissions on financial capacity and in those circumstances the Judge was entitled to make the orders that he made. The respondent submits that the amounts awarded were reasonable and prays that we dismiss the appeal.

We have considered the record and the submissions made and take the following view of this appeal.

As we have stated the appeal concerns only the application that was presented by the respondent through a Chamber Summons. In the event the submissions by the appellant on findings of the Judge or failure to make findings that the learned Judge reached on issues on why and how the respondent had vacated the matrimonial home have no basis as no evidence had been led or placed before the learned Judge on which final findings could be made on those issues. Those grounds of appeal therefore have no merit and are dismissed. The appellant further complains that the awards made in respect of maintenance and other awards were high and excessive and should be set aside.

Section 25 of the **Matrimonial Causes Act** on the issue of alimony provides that:

“1. In any suit under this Act, the wife may apply to the court for alimony pending the suit, and the court thereupon make such order as it may deem just:

Provided that alimony pending the suit shall in no case exceed one fifth of the husband’s average net income for the three years next preceding the date of the order, and shall continue in the case of a decree nisi of dissolution of marriage or of nullity of marriage until the decree is made absolute.”

In the case before the learned Judge the respondent filed an Affidavit of Means which we have reproduced in this judgment where she set out various items of expenditure from which she prayed for maintenance by her husband the appellant. The appellant did not specifically respond to that affidavit or file an Affidavit of Means. **Rule 44** of the **Matrimonial Causes Rules** is to the following effect:

“1. Where a husband is served with a petition in which alimony pending suit is claimed, he shall within fourteen days after entering an appearance file an affidavit setting out full particulars of his property and income.”

In the case of **K v K [2008] 1 KLR 75** the High Court had awarded the respondent’s wife a sum of Kshs.2000/= per month as alimony pending suit against the appellant husband and a similar sum for each of the three children of their marriage. The appellant's application to the same court to reduce those sums was refused and he appealed. It was held by this Court that **rule 44** of the **Matrimonial Causes Rules** obliged the husband within 14 days of an application for alimony pending suit to set out the full particulars of his property and income. It was further held that the rule envisaged an honest and true disclosure by the husband of his earnings so that the court could be guided by it in fixing the quantum award. Since the appellant in that appeal had not filed such an affidavit and having failed so to discharge the obligation cast on him by the said rule he could not be heard to say that the High Court's award of alimony exceeded one fifth of his income for the three years preceding the date of the award. The court took the view that a court could only fix a quantum on such evidence as was available ensuring that the sum fixed was in all the circumstances fair and reasonable and that the figure did not suppress the husband below the subsistence level.

In the case before the trial Judge the respondent stated in the affidavit in support of the application that the appellant earned a salary of Kshs.800,000/= per month. This deposition was not controverted by the appellant. In the face of that evidence that was placed before the Judge through affidavit evidence he was entitled to make the orders that he made in respect of maintenance of the respondent. The said awards were not exorbitant and the appellant is not entitled to challenge the same he having not filed an affidavit of means as he was required to do in law. In the circumstances we find no merit in this appeal which we dismiss with costs. As we have stated the orders subject of the appeal were vacated in the judgment of the High Court delivered on 15th June, 2016 and these findings may not have any practical effect.

Dated and delivered at Nairobi this 21st day of June, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR