



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 45 OF 2016

BETWEEN

N B R.....APPELLANT

AND

J O.....RESPONDENT

(Appeal from the ruling and order of the High Court

at Mombasa, (Odero, J.) dated 18th December 2014

in

HCDC No. 25 of 2014)

JUDGMENT OF THE COURT

It is plainly unacceptable that almost two and half years after the filing of a divorce cause to dissolve their marriage, the parties herein have completely abandoned the divorce cause and are busy expending their time, energy and resources in the pursuit of what is otherwise a mere interim remedy. Enough is enough. They must now abandon their concerted efforts to transform an interim relief into an end in itself, and get on with the hearing and determination of the cause lying idle at the High Court once and for all.

In this appeal, *the appellant, N B R*, is aggrieved by the ruling and order (erroneously intitled "Judgment"), of *Odero J.* dated 18th December 2014 in which the learned judge awarded *the respondent, J O Kshs. 100,000/-* per month as alimony *pendete lite*. In addition the learned judge ordered the appellant to continue paying to the respondent *Kshs. 175,000/-* per month pursuant to an earlier order issued by the Children's Court at Mombasa. The appellant contends that the learned judge failed to consider all the relevant facts before determining the monthly alimony payment, and for that reason exercised her discretion erroneously, justifying interference by this Court. The respondent on the other hand counters that the learned judge cannot be faulted in the exercise of her discretion because the respondent has no other source of income for her upkeep. If anything, she contends, she was awarded a paltry sum because she had asked for a sum of *Kshs. 1 million* per month. All the same the respondent has not filed any cross appeal seeking enhancement of the monthly payment.

The appellant and the respondent were married under the repealed *Marriage Act, cap. 150* on 7th June 2012, in Mombasa and thereafter cohabited as husband and wife at Nyali, Mombasa. They were blessed with one issue of the marriage, **S**, a girl who was born on 29th December 2012. After barely two years of the marriage, serious disagreements arose between the parties, which saw the respondent leave the matrimonial home in December 2013. On 28th February 2014 the appellant applied under *section 6* of the repealed *Matrimonial Causes Act* for leave to present a petition for divorce before expiry of three years since the date of the marriage. That application was granted by the High Court on 26th March 2014 and on 3rd April 2014, the appellant filed *Mombasa Divorce Cause No. 25 of 2014*, seeking dissolution of the marriage on grounds of cruelty, desertion and the respondent's mental instability. He also pleaded that the marriage had irretrievably broken down.

On 15th May 2014, the respondent filed her answer to petition and cross-petition for divorce. While denying the grounds upon which the appellant's petition was based, the respondent prayed for dissolution of the marriage on the grounds of the appellant's adultery, cruelty and constructive desertion. Like the appellant, she also pleaded that the marriage had irretrievably broken down.

On the same day, the respondent applied under the repealed Matrimonial Causes Act for alimony *pendete lite* of Kshs 1 million per month. She averred in her supporting affidavit sworn on 13th May 2014 that the appellant had evicted her from the matrimonial home; that she was living with and maintaining the child of the marriage; that while living with the appellant she was used to a standard of life of between Kshs. 600,000/- to Kshs. 1 million per month; that she was entitled to continue living at the same standard; that the appellant was a director of a company known as *[Particulars withheld]* which was in thriving business; and that although she was also a director, the appellant had excluded her from its management and operations.

The appellant opposed the application for alimony vide a replying affidavit sworn on 19th June 2014, the substance of which was that the respondent was not entitled to any alimony because: she was free to return to the matrimonial home but had deliberately opted to keep away; pursuant to a consent order recorded in *Mombasa Children's Court Case No. 81 of 2014*, the appellant was already paying for the maintenance of the respondent and **S**; per the same consent order **S** was in the custody of the appellant for 4 days in a week; the appellant had taken out health and personal accident insurance covers for both the respondent and **S**; he had entered into a nuptial agreement with the respondent under which he had deposited in her favour Kshs 6 million; he had also deposited another Kshs. 6 million for **S**; the company was making losses rather than profits; and he was not capable of paying more money to the respondent.

By a supplementary affidavit sworn on 18th July 2014 the respondent added that the medical cover taken out by the appellant for her and **S** had expired; that she had been coerced into signing the nuptial agreement; that the amount awarded in the Children's Court was inadequate for her needs; and that the company was making profits.

After hearing the application, the learned judge awarded the respondent, in addition to the monthly sum of Kshs 175,000 ordered by the Children's Court, Kshs 100,000/- per month to cater for her personal expenses such as car, maintenance, petrol and utilities. This is the order, which has aggrieved the respondent, leading to this appeal. It is apt to point out that the appellant subsequently applied to this Court for stay of execution of the High Court's order and by a ruling dated 26th February 2016 the Court directed him to be paying Kshs 50,000 per month in lieu of Kshs 100,000 pending the hearing and determination of the appeal.

The appellant's memorandum of appeal contains 6 grounds of appeal, but in our estimation, all boil down to a challenge of the exercise of discretion by the learned judge. Indeed, the appellant's learned counsel, **Ms. Rajab**, argued the grounds of appeal globally. It was her submission that while the learned judge correctly appreciated the constitutional principle, which emphasizes equality of rights and obligations in a marriage; she failed to apply the principle in the case before her and ended up condemning the appellant to pay to the respondent amount of money that he could not afford.

It was the appellant's further submission that the exercise of discretion by the learned judge was vitiated by failure to take into account relevant factors, namely that in addition to depositing the sum of Kshs 6 million for the benefit of S, the appellant had also paid to the respondent another sum of Kshs 6 million under the nuptial agreement made by the parties on 11th December 2013. The appellant submitted that the learned judge erroneously treated the payment made by the appellant to be only Kshs 6 million instead of Kshs.12 million.

In the circumstances, the appellant concluded, the award to the respondent of alimony *pendete lite* of Kshs 100,000 per month was not deserved because the appellant had adequately provided for her and she was otherwise not destitute. The appellant lastly complained that when the hearing concluded and the parties filed their written submissions, the learned judge directed on 17th October 2014 that the ruling would be delivered on notice. However, the ruling was delivered on 18th December 2014 without notice to the parties, and when the appellant learnt of the ruling almost one year later in October 2015, he had accumulated huge arrears which he could not manage to pay at once.

The respondent opposed the appeal, submitting that under **section 25(1)** of the Matrimonial Causes Act, the High Court had discretion to order a husband to pay to a wife alimony *pendete lite* so long as the awarded amount did not exceed one-fifths of the husband's net income. Her learned counsel, **Ms. Wanjeri** argued that the award of Kshs 100,000 per month was justified because the respondent was unemployed and did not have any skills to earn a living. She also contended that the Kshs 6 million that the appellant had deposited for the benefit of S was not available for use by the respondent and therefore could not be taken into account. Counsel however conceded that the trial court did not appreciate the fact that there were two separate payments for Kshs 6 million each and the fact that the parties were never notified of the date for delivery of the ruling. She however submitted that the payment of Kshs 6 million to the respondent did not preclude her from applying for alimony *pendete lite* and the fact that the appellant could afford to pay Kshs 6 million was sufficient indication that he was not a poor man. She accordingly urged us to dismiss the appeal as unmeritorious.

We have anxiously considered the record of appeal, the ruling of the High Court, the grounds of appeal and the submissions by learned counsel. We agree with the appellant that in making the order for alimony *pendete lite*, and in determining the quantum thereof, the learned judge was exercising discretion. In **Rose Detho v. Ratilal Automobiles & Others CA. No. 304 of 2006**, Otieno-Onyango, JA stated that such discretion:

"...must be exercised judicially and not capriciously. It must be exercised upon reason and not on the whims of the court or on sympathy or sentimental aspects..."

(See also **Sharp v. Wakefield [1891] AC.173** and **Jaribu Holdings v. Kenya Commercial Bank Ltd, CA. No. 314 of 2007**).

Because the discretion belongs to the trial rather than to the appellate court, the latter is obliged to interfere with exercise of discretion by the former with great circumspection. The appellate court will not interfere with exercise of discretion by the trial court unless it is satisfied that in arriving at its decision, the trial court misdirected itself or that it considered matters that it should not have considered, or failed to consider matters it should have considered, and thereby came to a wrong decision. (See **United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898**).

Before we consider the merits of the appeal, it is apt to point out that although the respondent based her response on provisions of the Matrimonial Causes Act, that Act was repealed by section 97 of the Marriage Act, No. 4 of 2014 which came into operation on 20th May 2014. By dint of section 98(2) of the Marriage Act, any proceedings commenced under the repealed Act were to be continued, as far as practicable, under the new Act. When the impugned ruling was delivered on 18th December 2014, the Marriage Act was in force for seven months and the dispute should have been determined, as far as practicable, under the new Act. One of the fundamental differences between the old and the new Acts is that under **Part VI** of the Matrimonial Causes Act, the right to maintenance was a right of the wife, not of

the husband. However, under **section 77** of the Marriage Act, 2014, the right to maintenance is conferred on a “**spouse**”, which term is defined by **section 2** of the Act to mean a **husband** or a **wife**. In this appeal, nothing much turns on the respondent’s reliance on the Matrimonial Causes Act because the learned judge instead based her determination on the Marriage Act and Article 45 (3) of the Constitution, which emphasizes equality of the parties to the marriage.

In determining an application for maintenance under section 77 of the Marriage 2014, due regard must be had to Article 45(3) of the Constitution which provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage, as well as Article 53 (1)(e) which guarantees every child parental care and protection that entails equal responsibility of the mother and the father to provide for the child, whether they are married or not. In **JBM v. BNB, CA No. 232 of 2008**, this Court, while considering an appeal against an order for alimony *pendete lite* stated thus:

“Again, we think, upon reading Article 53(1) (e) of the current Constitution, 2010, which came into effect after the suit and the application were filed but which we find is of profound bearing in such matters, that a wife is also obligated to provide care and protection to a child of the marriage and cannot heap it all on the husband.”

GBM Kariuki, J. (as he then was) took a similar view in **WMM v BML, HCDC No. 179 of 2009**, when he stated:

In the light of Article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or the vice versa and the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore. Under the Constitution, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden...

Back to this appeal, it is common ground that before the learned judge made the award of alimony *pendete lite*, the Children’s Court had made an order directing the appellant to pay to the respondent Kshs 175,000 per month, from which 65,000 was expressly reserved for payment of rent. In addition the appellant was staying with S for 4 days in a week, and was paying for her school fees. He had also taken out a medical cover, for both the respondent and S which the learned judge found he was ready and willing to keep under renewal. He had further deposited Kshs 6 million for S and paid a further 6 million to the respondent, barely 5 months before she applied for alimony. It is readily conceded by the respondent that the learned judge conflated the two payments of Kshs 6 million each and considered only the deposit of S, which she found was not available to the respondent. Lastly although the learned judge found that it was not reasonable to expect all the Kshs 175,000 awarded to the respondent to be spent on S who was only one and half years old at the time, nevertheless she awarded the respondent an additional Kshs. 100,000/- per month.

In our view, the learned judge did not consider, or sufficiently consider all the relevant factors in this dispute and in particular the lump sum payment that the appellant had made to the respondent a few months before the application for alimony. The learned judge also did not consider the fact that after the separation of the parties, there were two separate households to be maintained, meaning that none of the parties could demand a standard of living that they were used to as one household. Those are sufficient grounds to justify our interference with the award of alimony made by the court.

We would also agree with the appellant that the trial court properly appreciated the principle of equality of spouses in a marriage in terms of rights and obligations, which underpins the relevant provisions of the

Marriage Act and the Constitution. The learned judge expressed herself thus:

“This constitutional provision (Art 45 (3)) emphasizes the equality between spouses. No one spouse has a right to be maintained by the other simply by virtue of his/her gender. The question that immediately comes to mind is what efforts if any is the respondent making to provide for her own upkeep. She is an able bodied woman and is perfectly capable of seeking some form of sustenance for herself. The purpose of maintenance is not to financially punish or cripple one party at the expense of the other. Nor is its purpose to make one spouse a human ATM machine. No spouse who is capable of earning a living ought to be allowed to shirk his/her responsibility to do exactly that.”

However the problem was in the application of the principle in this appeal. It was not enough for the respondent to claim that she was unskilled and unemployed, without evidence of any effort on her part to secure some employment or to contribute to her welfare and that of S. As the court in ***WMM v. BML***, (*supra*) observed, in light of the equality provisions of the Constitution, a spouse cannot sit idly and expect to be maintained by the other without making efforts to be gainfully employed.

We have come to the conclusion that this appeal has considerable merit. We allow the same and set aside the order for payment of alimony *pendete lite* of Kshs 100,000/- per month. The appellant shall continue to pay to the respondent Kshs 175,000 per month as ordered by the Children’s court. We direct the appellant, who filed the divorce cause, to list the same for hearing and determination without further delay and in any case within 60 days of this judgment. Each party shall bear their own costs.

Dated and delivered at Mombasa this 10th day of March, 2017

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR