IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OKWENGU, MUSINGA, GATEMBU, JJA

CIVIL APPEAL NO. 166 OF 2015

BETWEEN

P K M.....APPELLANT

AND

R P M.....RESPONDENT

(Being an Appeal from the Judgment delivered by the High Court of Kenya at Nairobi (Kimaru, J) dated 10th March, 2015 in DIVORCE CAUSE NO. 154 OF 2008)

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JUDGMENT OF THE COURT

1. This appeal arises from the judgment of the High Court at Nairobi (Kimaru, J) delivered on 10th March 2015 in which the court ordered that the marriage solemnized between the parties hereto on 1st March 1993 be dissolved. In addition to dissolving the marriage, the court ordered the appellant to pay to the respondent, as maintenance, a lump sum amount of Kshs. 30,000,000.00 and to provide her with a house in an upmarket area of Nairobi within 90 days and in default to pay to her Kshs. 60,000,000.00. The appellant is aggrieved by the order on maintenance and the order requiring him to provide the respondent with a house. Either party does not challenge the order dissolving the marriage.

Background

2. The parties were married on 1st March 1993. They were blessed with two children born on 13th November 1993 and 31st March 1995 respectively.

3. On 24th December 2008, the respondent petitioned the High Court at Nairobi seeking orders for: dissolution of the marriage; custody and control of the issue of marriage; payment of school fees for the children in schools of their choice up to and including university education (or alternatively payment of USD 1 million into a trust account for the upkeep and maintenance of the respondent and the children); maintenance at the monthly sum of USD 6,000.00 or equivalent in Kenya Shillings; and costs of the petition. The petition was based on the grounds that the respondent “was unable to continue to live with

the [appellant] for fear of her life" on account of alleged cruelty and adultery on the part of the appellant as set out in the petition.

4. In his answer to the petition, the appellant denied that he was guilty of the alleged cruelty and adultery. He asserted that the respondent had disserted the matrimonial home and was living with another man. He counterclaimed for the dissolution of the marriage on that ground.

5. The hearing of the petition did not commence until February 2014 by which time the children of the marriage had attained the age of majority. In the intervening period, the parties were engaged in acrimonious and blistering interlocutory litigation over maintenance pending the determination of the petition.

6. On 24th May 2010, the High Court (Nambuye, J, as she then was) made interim orders directing, among other things, that the appellant pays to the respondent as maintenance a monthly sum of Kshs. 250,000.00 pending placement of the children in a local boarding facility; and that after the children are placed in a boarding facility, the amount of maintenance payable be scaled down to Kshs. 150,000.00 per month. Thereafter numerous applications and counter applications followed seeking enforcement and variation of the interim orders.

7. At the trial, and before the respondent took the stand to testify before the Judge on her petition on 13th February 2014, the parties, in a notable moment of consensus, recorded a consent order that the appellant shall educate the children and be responsible for the payment of all their university fees and other expenses.

8. In her testimony, the respondent stated that since getting married to the appellant in 1993, they lived along [Particulars Withheld] Road, Muthaiga, Nairobi; that they were blessed with two children (who as already indicated were both above 18 years old at the time of her testimony); that she worked in Sudan for 7 years but had been out of work for over 3 years; that she was then living in rented premises along [Particulars Withheld] Road, Old Muthaiga Nairobi; and that she separated from the appellant in 2008 and there was no chance of reconciliation.

9. Regarding her upkeep, she stated that she had agreed to a reduction in the monthly payments from Kshs. 250,000.00 that had been ordered by the court to Kshs. 200,000.00 per month as the children had turned 18 years; and that the amount of Kshs. 200,000.00 was not adequate to meet her needs which she proceeded to outline.

10. According to the respondent, she was used to a very high standard of living; she was accustomed to living in a beautiful house in a posh neighbourhood with many workers, "*like a village*"; that the appellant "*made a lot of money*", "*is a smart rich man*" who boasted to her that he is a millionaire; that she prefers to have the money in a trust instead of the court providing for monthly payments and that "*Kshs. 200,000.00 per month is not enough*."

11. Under cross examination, the respondent stated that she studied design but that she did not have a job; that at her age it is difficult to get a job; that the appellant used to be in the Army and was earning a pension and "has many businesses" and that all "*his companies were closed because of non-payment of taxes*"; that though she did not have evidence, he sold an oil company for USD 2.4 million; that she is a poor lady; that she had a credit card debt of Kshs. 800,000.00; that the appellant's lifestyle is "*very high*" but he does "*not have anything in his name*".

12. On his part, the appellant, having asserted that the marriage had irretrievably broken down, stated that he would take care of the children of the marriage "*in whatever form*"; that he is a retired Army officer with a pension of "*about Kshs. 10,000.00 per year*" doing farming and dealing in shares with an income of about Kshs. 250,000.00 per month from which he survives; that the house in which he resides in Muthaiga, Nairobi, does not belong to him but to his father and that he has no claim over it; that the house is registered in his father's company, [Particulars Withheld] Development Ltd, in which he is not a shareholder; that he has lived in that house for 20 years; that he undertakes farming, growing hay in

Naivasha which is not profitable and from which he earns about Kshs. 150,000.00 in a good year; that he could not afford to pay the amount of Kshs. 150,000.00 that the court ordered him to make monthly but could afford Kshs. 40,000.00 only; that he has been treated unfairly on account of his surname.

13. Under cross examination the appellant stated he has 9 workers with an average income of Kshs. 5,000.00 and who get free accommodation and food. The workers include 2 cooks, 1 driver, 3 maids, 1 car cleaner, 1 gardener and 2 security guards provided by the State. He stated that he catered for the household expenses, holiday expenses, vehicle maintenance and school fees when they lived together with the respondent and that his family caters for the children's education. He asserted further that he had offered the respondent a 2 acre property in Mombasa whose value he placed at Kshs. 140 million at the rate of Kshs. 70 million per acre "*if I do not remove the squatters*;" that he had been providing the respondent with Kshs. 150,000.00 per month in terms of the court order given by Nambuye, J. but was struggling to do so; that he was prepared to pay the respondent Kshs. 4,000,000.00 which he subsequently raised to Kshs. 8 million "*one of*" in addition to the Mombasa property.

14. The appellant contested the claim that he had exposed the respondent "*to a standard of living that is higher than Kshs. 150,000.00 per month*" or that he is a billionaire. He asserted that he could not pay USD 1 million that the respondent was seeking; that he trades in shares on line and could be making Kshs. 300,000.00 per month on average and gets Kshs. 6,000.00 per month in pension and has no other income; that he gets assistance from his family including his brothers and sisters and "*cannot pay USD 6000 per month*" sought by the respondent.

15. The appellant also denied that he lives an expensive lifestyle or that he owns a property in Watamu or that he made Kshs. 200 million from importation of vehicles. He said that he was renting offices on Riverside Drive, Nairobi, paying Kshs. 45-60,000.00 per month; that he does not own a 350 acre farm in Nduru, having sold the house in Nduru due to "*many financial problems*"; that he used to own several motor vehicles which he sold leaving him with only one which he said is used by the children "*when they are here*"; that he would be willing to provide her with a motor vehicle and that he had offered the respondent a decent home in Lavington and South C which the respondent declined; that he preferred a global settlement and was offering the respondent "*Kshs. 8 million as a global settlement including the house in Lavington on a half an acre*" saying that his "*father is willing to help me conclude this matter*". He stated that the respondent "*is not old*" and "can start to look for work" and that he could not afford to pay the maintenance she was seeking. He stated that the amount of maintenance "*should be pegged at my standard today and not when my father was the President*."

16. Having considered the evidence, the learned trial Judge held that he had a discretion to award maintenance; that the exercise of that discretion:

> **"…must be informed by an examination of all the circumstance (sic) of the case including: the present and future assets, income, and earning potential of the parties, taking into account their ages and professional qualification; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard of living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family: and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage."**

17. Having considered the financial needs and obligation of the parties and the evidence of expenses produced by the respondent, which he found to be "*approximately Kshs. 380,000.00 per month*", and being of the view that the appellant's lifestyle was indicative that he concealed his "*substantial income*" and "*property*" from the court, the Judge concluded thus:

> **"This court is of the view that the monthly maintenance to be paid to the Petitioner should be such that it would enable her to make adequate arrangement for her own support in the long term. The Respondent is under no obligation to maintain the Petitioner until her death.**
>
> **Taking into consideration the entire circumstances in this case, this court is of the view that**

the Respondent should pay the Petitioner the sum of Kshs.250,000/- per month for a period of ten years. Since the Respondent has indicated that he would like to pay this sum as lump sum, the Respondent is hereby ordered to pay the Petitioner the sum of Kshs.30 million."

And then went on to say:

"In addition, the Respondent conceded that he was obligated to provide a house for the Petitioner. In fact during the proceedings, in recognition of this obligation, the Respondent offered to give to the Petitioner a plot in Mombasa which in his estimation was valued at Kshs.120 million. The Petitioner could not take up this offer because the parcel of land is mired in a legal dispute. This court therefore orders the Respondent to provide the Petitioner with a house within one of the following localities: Runda, Lavington, Kileleshwa, Kilimani or Karen or any other upmarket area of Nairobi. This will accord with the standard of living that the Petitioner was used to during the subsistence of their marriage. He shall provide this house within ninety (90) days or in default thereof he shall pay the Petitioner the sum of Kshs.60 million. In view of the protracted nature of this case, the Petitioner shall have the cost of this suit."

18. As already indicated, the appellant is aggrieved by those orders and lodged the present appeal.

The appeal and submissions by counsel

19. During the hearing of the appeal, learned Senior Counsel Prof. Ojienda teaming up with Miss. Awour submitted that the learned Judge did not properly exercise his discretion in making the orders on maintenance; that the Judge did not take into account Article 45(3) of the Constitution which calls for equality of parties to a marriage; that the Judge did not take into account that the respondent had voluntarily left her employment and the appellant had no role in that; that the Judge took into account irrelevant considerations in making his decision; that there was no compelling basis for the Judge to order payment of lump sum which in any case is excessive; and that on the question of financial means, the Judge wrongly shifted the burden of proof to the appellant.

20. Citing the High Court decisions in **W.M.M vs. B.M.L [2012] eKLR; P.M.A vs. E.G.M.L [2016] eKLR** among other decisions from our jurisdiction and from South Africa, counsel urged that Section 25(2) of the repealed Matrimonial Causes Act, Cap 152 conferred a discretion on the court with regard to maintenance; that that discretion should be exercised with due regard to the circumstances of each case with a view to arriving at a just decision; that in the exercise of that discretion, regard should be had to existing or prospective means of each party, their respective financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage and any other factor which should, in the opinion of the court, ought to be taken into account.

21. According to counsel, the learned Judge failed to appreciate and properly apply Article 45(3) of the Constitution (replicated in Section 3(2) of the Marriage Act 2014) which gives both parties to a marriage equal rights before, during and after a marriage and that the respondent, a person capable of earning, should not be allowed to evade or escape her responsibility to support herself.

22. Counsel referred us to the decision of the High Court in **S.M.R vs. P.H.S [2013] eKLR**, where Musyoka, J stated that Article 45(3) of the Constitution dictates that husband and wife must be treated as equal, with neither party having a greater or lesser obligation than the other in relation to maintenance. It was submitted that the Judge was enjoined by Section 7(1) of the Sixth Schedule to the Constitution to construe the provisions of the repealed Matrimonial Causes Act, in conformity with the Constitution. In that regard, the Judge should have considered that the respondent was capable of earning to maintain herself.

23. It is not enough, counsel posited, for a spouse who seeks maintenance to simply state, without more, that they were accustomed to a particular lifestyle which they are unable to maintain in order to be

entitled to maintenance; and that maintenance is not a right but discretionary. According to counsel, the purpose of maintenance is to provide assistance to a spouse who is incapable of supporting himself or herself.

24. It was submitted that the respondent willingly left employment and the court should not aid a person who is unwilling to work so as to "*exploit*" and live on the back of a former spouse. Counsel argued that a person who voluntarily incapacitates himself or herself from earning is not entitled to saddle the other spouse by claiming maintenance from that spouse. Support for that argument was found in a decision of the High Court of Delhi in **Dr. Pradeep Kurmar Sharma vs. Ratna Sharma CM (M) 50/2007 and CM 15892/2008**. Counsel also faulted the Judge for awarding the respondent alimony on the basis "*loss of her earning capacity*" on grounds that at age 54 it would not be easy for her to obtain employment.

25. It was also the appellant's case that in violation of the appellant's rights under Articles 27(4) and 27(5) of the Constitution, the learned Judge discriminated against the appellant on account of his surname and status as the son of a former president of the Republic of Kenya and also on account of his sex with the result that he made an astronomical award against the appellant. Furthermore, and on the strength of a decision of Supreme Court of Alaska in **Sharpe vs. Sharpe, 366 P.3d 66(Alaska 2016)** it was argued that lump sum awards should only be made in exceptional or special circumstances. Such circumstances include difficulties in enforcing periodic payments, availability of sufficient assets from which a lump sum could be paid, paying spouse imminent departure from jurisdiction, provision of immediate needs of dependent spouse. According to counsel, none of those circumstances were shown to exist. The indication by the appellant that he was willing to make a lump sum payment of Kshs. 8,000,000.00 to the respondent was, in counsel's view, not made willingly, as it was made with a view to surmounting a distressful divorce.

26. Counsel concluded by asserting that the respondent had the burden, under Section 107 of the Evidence Act, to prove that the appellant had the ability to pay and that the respondent did not discharge that burden.

27. Opposing the appeal, learned counsel for the respondent, Mrs. Judy Thongori, submitted that the appeal is wholly without merit and is intended to frustrate the respondent from reaping the fruits of her judgment; that the appeal should be considered against the backdrop that the appellant conceded that the respondent was entitled to maintenance; that in the course of his testimony before the trial court, the appellant admitted that he was maintaining the respondent from the onset of the marriage; that on one occasion in the course of trial he offered the respondent a lump sum payment of Kshs. 4 million in addition to a property in Mombasa and subsequently revised the offer to a lump sum payment of Kshs. 8 million and a house in Lavington, Nairobi; that indeed before the hearing commenced a consent order was recorded that the appellant would pay for the education of the children as well as their expenses. In those circumstances, counsel submitted, all the court was left to do was to either record a consent if the appellant's offers were accepted or otherwise determine how much the appellant would be liable to pay, which is what the trial court did.

28. It was submitted that there is no basis for the appellant's complaint that his rights under Articles 27(4), 27(5) and 45(3) were violated. It is manifestly clear from the judgment, counsel stated, that the learned Judge did consider the matter extensively and correctly concluded that a party to a marriage is not relieved of obligations to maintain the other spouse because the parties have equal rights. Counsel went on to say that the appellant's contention that he was discriminated upon on account of being the son of a former President of the Republic of Kenya is baseless, saying that the learned Judge cautioned himself against doing so.

29. Counsel went on to say that the decision of the learned Judge is consistent with the legal principles applicable for determining how much maintenance is payable. In that regard, counsel referred to the decision of this Court in **S.N.K vs. M.S.K & 5 others [2015] eKLR**, and pointed out that the respondent was aged 54 years at the time of the judgment and " *too old to find a job*" and the Judge therefore arrived at the correct decision.

30. It was submitted that the Judge did consider the earning capacity of the parties and their standard of living; that despite efforts by the appellant to conceal his financial capacity, the Judge correctly found that he has very substantial means as demonstrated, for instance, by his ability to shoulder the heavy financial burden of educating the children in [particulars Withheld] Universities abroad compared to the respondent who is out of a job with no means of earning.

31. As regards the complaint that the circumstances under which lump sum payment should be ordered did not exist, counsel argued that it was the appellant who offered to pay a lump sum settlement; that there was evidence that the appellant had gone to great lengths to avoid making payments including filing bankruptcy proceedings; that the lump sum payment was based on a monthly amount of Kshs. 250,000.00 which is a figure that was ordered by Nambuye, J. in the year 2010 as an interim payment and which was below what the respondent required; that having himself made the express request to pay a lump sum settlement, he is estopped and cannot now complain about the order for lump sum payment.

32. As to the argument that the respondent was under a duty under Section 107 of the Evidence Act to demonstrate the financial ability of the appellant, counsel submitted that the appellant had the burden to demonstrate his financial ability; that under Rule 44(2) of the Matrimonial Causes Rules the appellant was required to file an affidavit setting out his property and income once he was served with the application for maintenance. The burden of proof was not, as submitted by the appellant, on the respondent to prove the appellant's financial ability. In that regard, counsel found support in the decision of the Supreme Court of England in the case of **Prest vs. Petrodel Resources Limited and others [2013] UKSC 34**.

Determination

33. Having considered the appeal and submissions by counsel, the question for determination is whether circumstances warrant this Court to interfere with the exercise of discretion by the trial court in making the orders of maintenance that it did.

34. The grant of relief and the determination of the quantum of maintenance under Section 25(2) of the repealed Matrimonial Causes Act involve the exercise of discretion by the court. (See **W.M.M vs. B.M.L** (above)). That Section provided that:

> **"(2) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable**." [Emphasis]

35. It is a discretion that must however be exercised judiciously and this Court can, as an appellate court, interfere with the exercise of such discretion in certain limited circumstances. In **Mbogo and Another vs. Shah [1968] EA 93** this Court stated:

> **"…That this Court will not interfere with the exercise of…discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

36. Given those parameters, has the appellant made out a case for us to interfere with the decision of the lower court?

37.In our view, the learned Judge correctly summarized the legal principles that should inform the exercise of discretion by the court under Section 25(2) of the repealed Matrimonial Causes Act when he stated in his judgment that:

"…The common law rules that govern post-divorce maintenance derived from Kenyan as well as comparative case law indicate that the exercise by this Court of its discretionary power to award maintenance must be informed by an examination of all the circumstance (sic) of the case including: the present and future assets, income, and earning potential of the parties, taking into account their ages and professional qualification; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard of living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family: and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage."

38. Ougo, J. expressed similar views in another High Court decision in **P.M.A.V vs. G.M.L [2016] eKLR** where she stated that in seeking to ascertain maintenance, the court should have regard to existing and potential means of the parties, their respective earning capacities, financial needs and obligations, the duration of the marriage, the conduct of the parties prior to divorce, their conduct that led to the breakdown of the marriage remembering that both parties have equal rights under Article 45(3) of the Constitution.

39. In order to properly and judiciously exercise its discretion when considering an application for maintenance, the court must delve into the financial affairs of the spouses before deciding whether to make an order for maintenance, and if so, the quantum. G. B. M Kariuki, J. (as he then was) in **W.M.M vs. B.M.L** (above) succinctly put it that "**the financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much**."

40. The provisions in Rule 44 of the Matrimonial Causes Rules requiring spouses to file affidavits setting out full particulars of property and income (generally referred to as affidavit of means) where alimony or maintenance is sought must be seen in this light. They are to assist the court to make an informed decision. Indeed under Rule 48 of those rules for example, the court is empowered to undertake "investigation" and has power to order discovery and production of any document or call for further affidavits.

41. Proceedings of this nature therefore "**have a substantial inquisitorial element"1 and the court is not "to engage in pure speculation**" 2 where financial relief in matrimonial proceedings is sought. Lord Sumption in **Prest vs. Petrodel Resources Limited and others** (above) stated that**, "the proper exercise of these powers calls for a considerable measure of candour by the parties in disclosing their financial affairs, and extensive procedural powers are available to the court to compel disclosure if necessary**."

42. The editors of **Bromley's Family Law**, 9th edition (Butterworths) at page 783 state that underlying the whole basis of the exercise of the court's discretion in financial proceedings of this nature is the duty, of both spouses, to make "*full, frank and up-to date disclosure*" and to provide the court with information about all the circumstances of the case and that in doing so, the

[1]Lord Sumption in **Prest vs. Petrodel Resources Limited and others [2013] UKSC 34**

[2]ibid

court is exercising not merely a "*paternal*" but also, in appropriate instances, an "**inquisitorial**" jurisdiction.

43. How then did the trial Judge reach the decision that the appellant should pay to the respondent maintenance of Kshs. 30 million and provide her with a house in the localities indicated or pay Kshs. 60 million in lieu?

44. Neither party filed an affidavit of means. There was no compliance with the provisions in Rule 44 of the Matrimonial Causes Rules, which provision in our view, should be construed as requiring both

spouses to furnish the requisite information to the court. The court itself did not demand of the parties to be supplied with information that would have enabled it to make an informed decision regarding the financial circumstances of the parties. It is noteworthy that when dealing with the application for interim maintenance between the same parties, Nambuye, J lamented the absence of information on the financial standing of the parties. That Judge noted:

> *"It is common ground that both petitioner/applicant and Respondent have expressed financial inability to meet financial expenses for herself and the children unassisted by the Respondent, alleging that the Respondent is in a position to cushion them financially whereas the Respondent alleges that he has financial constraints and that the petitioner/applicant has not candidly disclosed her true financial status.*
>
> *It is common ground that neither party has filed bank statements to demonstrate their financial standing."*

45. On his part, the trial Judge noted that the respondent had filed a schedule of documents outlining monthly expenses of approximately Kshs. 380,000.00 per month, a figure, the Judge observed, as being "*far more than the sum of Kshs.150, 000.00 that the respondent currently pays her as maintenance per month*." No doubt the Judge took into account the testimony of the respondent pertaining to her expenses. The respondent had, in her testimony, outlined her financial needs as follows:

1. Rent Kshs. 178,000.00 per month.

2. Security guard Kshs. 29,950.00 per month.

3. Security alarm Kshs. 3,000.00 per month.

4. Electricity Kshs. 18,000.00 to Kshs. 20,000.00 per month.

5. Water Kshs. 7,000.00 to Kshs. 12,000.00 per month.

6. 2 household assistants (at the rate of Kshs. 13,000.00 each) Kshs. 26,000.00 per month.

7. Gardner-amount not indicated.

8. Cook- amount not indicated.

9. Pet (dog) upkeep-Kshs. 6,000.00 per month.

10. Food shopping, Kshs.30, 000.00 per month. (Rising to

Kshs. 50,000.00 per week "when the children are around".)

11. DSTV -Kshs. 8,000.00 per month.

12. Internet -Kshs. 7,500.00 per month.

46. In addition, the respondent stated that she has medical cover of USD 1785 and would like full insurance cover; that she would like to travel to Italy to visit with her mother and would require USD 2000 for the travel and USD 1,000 for expenses; that she would also like to travel to UK to visit with her children from time to time for which she would require UK Pounds 10,000.00 per year; that she would also require to be provided with a car as she is reliant on taxis; and that in addition she requires clothing.

47. As regards the appellant's financial circumstances, the appellant stated that he earns a pension as a retired Army officer. He mentioned a figure of Kshs. 6,000.00 per month and a figure of Kshs. 10,000.00 per annum as his pension. He also stated that he has an income from farming and dealing in shares. He

mentioned a figure of Kshs. 250,000.00 per month on one occasion and Kshs. 300,000.00 per month on another occasion as his income. He further stated that his companies collapsed and that he was getting financial assistance from members of his family.

48. The Judge correctly observed that, "*the* [appellant] *has not produced any evidence of his monthly income and expenditure*". The Judge concluded that from the evidence before him, it was clear that the appellant concealed his income from the court. The Judge went further to state that, "*the court got the impression that when the* [respondent] *lodged the present petition, the* [appellant] *made every effort to conceal all his properties through limited liability companies which he incorporated for the purpose or by transferring some of the properties to his nominees and or close relatives*." In his view:

> **"The only conclusion that this court reached from assessment of the [appellant's] evidence in regard to the properties that he owns is that the [appellant] is a person of substantial means and of substantial income who has over time perfected the art of concealing what he actually owns."**

49. Given the litigation history over enforcement of the orders of the court on the interim orders of maintenance, the Judge was perfectly entitled to draw an adverse inference against the appellant as he had failed in his duty of candour to furnish the court with information as to his means and assets. (See the judgment of Lord Sumption in **Prest vs. Petrodel Resources Limited and others** (above) at paragraph 45).

50. However, the conclusion by the Judge that, "*when the [respondent] lodged the present petition, the [appellant] made every effort to conceal all his properties through limited liability companies which he incorporated for the purpose or by transferring some of the properties to his nominees and or close relative*" is not, with respect, based on evidence. The respondent herself testified that the appellant used to be in the Army and was earning a pension; and that the appellant "*has many businesses*" and that "*his companies were closed because of non-payment of taxes*." She stated that although she did not have evidence, she was aware that the appellant had sold an oil company for USD 2.4 million.

51. Whereas there was justifiable basis for drawing the adverse inference against the appellant in that he was not forthcoming with information about his financial circumstances, we are unable to find any evidence to support the conclusion by the learned Judge that the appellant embarked on an elaborate scheme of transferring his assets when the respondent commenced divorce proceedings with a view to keeping them out of reach.

52. The other matter that has weighed on our minds is this: The respondent stated in her evidence that she studied design. She was in gainful employment as a consultant until the year 2010. She was earning a monthly income of USD 3500. The circumstances under which she left employment were not indicated. She did not, however, have a job at the time of trial. She stated that it is difficult for her to get a job at her age. She did not demonstrate what efforts she had made to either secure employment or consultancy work or indeed efforts made to establish a design practice. The Judge stated that "being unemployed and having no assets, the [respondent] has no other source of income and occasionally receives some financial assistance from her mother and friends." This was in spite of the learned Judge's earlier statement in his judgment that, **"the spouse who is seeking to be maintained should not seek the court's intervention to be granted maintenance without providing evidence that he or she has made an effort or is making an effort to secure a livelihood for herself or himself."** (Emphasis)

53. As we have already stated, we can find no evidence tendered by the respondent to demonstrate the efforts, if any, she had made to secure employment or a livelihood for herself.

54. The learned Judge was also alive to the fact that the respondent's capacity to earn an income was a relevant consideration in assessing whether to grant relief by way of maintenance and if so the quantum. It is not clear on what basis the Judge concluded that at the age of 54 years, the respondent, a designer, had lost her earning capacity. In our view, that was a misdirection that impacted adversely on the exercise of the Judge's discretion. We are in agreement with Kariuki, J. when he stated in W.M.M vs. B.M.L

(above) that:

> **"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 to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce."**

55. Whether a spouse is deserving of spousal support is a matter dependent on the circumstances of each case based on the evidence presented to the court. The court must carefully and proactively examine the financial circumstances of both parties when considering whether to grant relief by way of maintenance and the quantum thereof. In this case, the court failed to do so. It is also not manifest that the Judge took into account that on 13th February 2014, the parties recorded a consent order before the court that the appellant would educate the children and be responsible for the payment of all their university fees and other expenses. That is a matter that would have impacted on his decision. We do not think in the circumstances the learned Judge properly exercised his discretion in making the orders that he did.

56. It is also not clear to us the basis upon which the court ordered, the appellant to purchase a house or pay the respondent an amount of Kshs. 60 million, having ordered payment of Kshs. 30 million as maintenance. The order for payment of Kshs. 30 million presumably had taken into account the respondent's rent for her accommodation. We are not persuaded that the appellant intended to provide rent in addition to a house, when he offered to make a lumpsum payment and purchase a house for the respondent. There is in effect a duplication of relief. The order for the purchase of a house or the payment of Kshs. 60 million in lieu cannot stand and must be set aside.

57. As regards the order for payment of maintenance by a lump sum, the Judge cannot be faulted. The appellant made that proposal, and the learned Judge took into account the special prevailing circumstances relating to the difficulties that had been experienced by the respondent in getting the interim monthly maintenance that had been ordered by the court.

58. The complaint that the Judge did not consider Article 45 of the Constitution is not merited. The learned Judge was alive to the fact that Section 25(2) of the repealed Matrimonial Causes Act had to be construed in the context of the Constitution. He said so in these words:

> **"It is important to draw attention to the fact that while the above provision seems to be discriminatory to men in that it only provides for the payment by men of maintenance to women, any adverse effect to men is eliminated by Section 7(1) of the Sixth Schedule of the Constitution which provides:**
>
> **"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualification and exceptions necessary to bring in into conformity with this Constitution."**
>
> **A conjunctive reading of the above provisions would require the words "husband" and "wife" to be adapted to the principle of equality in the Constitution and thus replaced with the word "spouse" so as not to discriminate any of the sexes, either directly or indirectly."**

59. The upshot of the foregoing is that, we must interfere with the decision of the trial judge.

60. We venture to suggest that whenever a court is faced with an application for maintenance, whether seeking interim relief or upon dissolution of the marriage, it must direct the parties to furnish the court with comprehensive information by way of affidavit relating to their respective financial circumstances. The affidavits should detail the assets, income, expenditure and liabilities of each party over the relevant

period and should be supported by necessary evidence. If there is contest over such information, an inquiry or investigation must then be scheduled where the parties are subjected to cross-examination on their affidavits in order for the court to make an informed decision. On making orders for maintenance, the parties must be accorded the liberty to subsequently apply for variation of such orders should the circumstances of the parties materially change to warrant such variation.

61. In conclusion, we allow the appeal and set aside the orders made for the payment of maintenance by the appellant to the respondent of Kshs. 30 million and for the purchase of a house or payment Kshs. 60 million in lieu. We remit the matter back to the High Court before a judge other than Kimaru, J. with directions that the parties do, within 30 days from the date of delivery of this Judgment, file in the High Court comprehensive affidavits setting out their means, assets, income, expenditure and liabilities of each party supported by necessary evidence. Thereafter the High Court shall accord the parties a hearing before pronouncing itself on maintenance.

62. Meanwhile and pending determination by the High Court, the interim orders of maintenance under which the appellant is to pay to the respondent Kshs. 150,000.00 per month shall continue in force.

63. Each party shall bear its costs of the appeal. The costs of the proceedings in the High Court shall be determined by the High Court upon pronouncing itself finally on the question of maintenance.

Dated and delivered at Nairobi this 30th day of June, 2017.

H. M. OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

……..

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR