IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 2 OF 2014

BETWEEN

C M A W M …….....… APPELLANT

AND

P A W M ……..……..……..…RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Malindi (Meoli, J.) dated the 20th May, 2013

in

H.C. Divorce Cause No. 1 of 2013)

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JUDGMENT OF THE COURT

The appellant and the respondent were married on 31st May, 1997 in the London Borough of Richmond upon Thames, England. Each was going through a second marriage after their first marriages ended up on the rocks. Thereafter they lived and cohabited at various addresses in England until in or about the year 2007 when they relocated to Kenya and settled camp **at Plot No. [Particulars withheld of Group V Kilifi**. All was well until March, 2009 when the appellant left Kenya for England ostensibly to attend a wedding. That spelt doom to the marriage. The appellant never returned home and to date he has not done so. As if that was not enough the appellant also reneged on the payment of monies to the respondent for her maintenance, welfare and upkeep. Whereas the appellant is a Kenyan by birth, the respondent is a housewife and a British Citizen domiciled in Kenya and has been a resident since January, 2007. When the appellant deserted the respondent as aforesaid, the respondent was compelled to lodge a petition for the dissolution of the marriage on 26th February, 2009. Besides seeking dissolution of their marriage, the respondent also sought alimony pending suit in the sum of Kshs.250,000/= per month, variation of marriage settlement, and costs.

The appellant with the leave of court filed his answer to the petition and cross- petition out of time. The appellant denied the allegations made against him in the petition. In turn he accused the respondent of all manner of ills, hence the cross-petition.

On 6th May 2010, the respondent took out a Chamber Summons application seeking in the main: "*That alimony pending suit in the sum of Kshs.250,000/- per month or such other sum as the court may deem reasonable and just may be awarded to the petitioner…*" The application was expressed to be brought under **sections 25** and **26** of the repealed Matrimonial Causes Act and **Rules 3(3), 38, 48** and **70** made thereunder. The grounds in support thereof were that the appellant had deserted the respondent in March 2009 by leaving the matrimonial home in Kilifi for England where he began and or continued an adulterous relationship with the woman named. That the desertion the appellant had not paid her a single cent by way of alimony and/or maintenance although he was a rich man. That the matrimonial home was large and grounds expansive requiring personnel to tend them. That the respondent had continued to support members of staff who originally worked for the appellant's parents now deceased. That the said members of staff had been taken over by the appellant who had since refused to pay them their salaries forcing the respondent to pay them from her meagre resources of Kshs.38,860/= per month that she receives as income from her house in England. That she had no other source of income as she was a mere housewife, that it was contended that, the appellant was an extremely wealthy man who lived a high life and the respondent was convinced that payment of Kshs.250,000/= per month towards her maintenance would not exceed 20% of his income. The respondent's supporting, supplementary and further affidavits merely elucidated and elaborated on the above grounds.

The appellant opposed the application, relying on the replying affidavit as well as affidavit of means. In a nutshell, the appellant claimed that the application was incompetent; that the petition and the application served on him were not certified; that the respondent had denied him access to the matrimonial home and could not therefore file affidavit of means; that the respondent had more than adequate assets of her own by which she could meet her own expenses. For example, he alleged that the respondent had a boat and trailer, Toyota Rav 4, and a very beautiful house in a desirable location in England; that the respondent lives alone and has no dependant and also receives part of the naval pension due to her 1st husband; that the respondent had five (5) employees whilst he did not have any and simplys took care of himself. In the premises, it would be most oppressive to require him to live within his own means while at the same time paying for five (5) employees looking after an able bodied mature woman. That instead of looking for a job in England, the respondent had opted to come out here in Kenya on a permanent holiday and expected the appellant to maintain her luxurious lifestyle; that he derived his only income from a trust set up by his grandfather in England in the 1940s long before he was born. Under the terms establishing the trust, he could not touch the capital. His monthly income was £3,000 out of which he spent £2,350 on his upkeep, which exceeds the £2000 the respondent was demanding. Finally, the appellant deposed that an order for interim alimony is discretionary; and that the respondent had not stated the basis upon which she demanded Kshs.250,000/= monthly as maintenance as presently, she was not paying rent. Besides her food, water, electricity and LPG, her bills would be much less than the amount demanded. Thus it would not be equitable for the appellant to be asked to pay money to a person whose assets were almost of the same value as his without being told what he was paying for.

The application came up for interpartes hearing on 20th October, 2012 before ***Meoli, J.*** In a reserved ruling delivered on 20th May, 2013, Meoli, J. allowed the application holding thus:-

> ***"Considering all the foregoing and doing the best in a situation clouded by reluctant disclosure on both sides, I have come to the conclusion that the petitioner is entitled to prayer 1 allowing interim alimony, in the sum of Kshs.127,000/= per month being the current equivalent of £1000 which is half of the sum she was receiving until March, 2010. This sum is payable from 1st April, 2010 until the suit is heard and determined."***

This order provoked the instant appeal on 18 grounds, principally that the court erred, in dismissing the application for maintenance by the respondent on account of being an abuse of the court process, by anchoring its decision on technicalities which violated the Constitution; by awarding the respondent Kshs.127,000/= as monthly maintenance and by favouring the respondent over the appellant on grounds of sex, when she had refused to disclose and tabulate her needs even though she had her own independent and sufficient means. That, the court erred further by, relying on evidence improperly obtained by the respondent in violation of the appellant's privacy and against a prior order by the court

that the appellant would have the opportunity to object to the use of such evidence; by making an award that violated the provisions of **section 25** of the Matrimonial Causes Act, by following English authorities to wit, **Donaldson v Donaldson [1958] 2 ALL E.R 660** and **Rayden on Divorce 12th Edition**, whilst disregarding the provisions of the Constitution of Kenya. That in awarding the maintenance, the court required the appellant to maintain the respondent at a higher standard than he could maintain himself and implied that the respondent may save all her independent income and be maintained fully by the appellant, and, was further in error in awarding costs of the two applications to the respondent; that the court reached a false and inaccurate conclusion concerning the appellant's means and the alleged non-disclosure of means on the basis of speculation and without carrying out preliminary investigations under the provisions of **Rule 48** of the Matrimonial Causes Rules, and, finally that, the Judge wholly misapprehended the duties of a court in determining the application for alimony pending suit and based her award on her own unfounded allegation that the appellant had more means than the respondent and thereby unlawfully and unprocedurally purported to redistribute the wealth between one spouse and another.

In supporting the appeal, **Mr. Kinyua**, learned counsel for the appellant reiterated what the appellant had deposed to in his various affidavits. Suffice to add that, the appellant had established his monthly means of income to be £3000 and had also proved how he spends the same. Though awarded alimony the respondent had never tabulated her monthly needs or expenses. The award was in breach of **Section 25** of the Matrimonial Causes Act which stipulates that maintenance payable should not exceed 1/5 of the net income of the respondent. Counsel further submitted that, in 2012 the appellant filed an application in which he stated that his net worth had declined to £2000 following economic meltdown in Europe. Therefore 1/5 thereof would have translated to £400. To the appellant, the court exhibited outright bias against him throughout the proceedings and in the ruling. That spouses had a duty to maintain themselves. In the event that the respondent was unable to be gainfully employed in Kenya, she should pack her bags and head for England. That **Rule 48** of the Matrimonial Causes Rules requires the court in an application of this nature to call for evidence and cannot merely draw inferences as suggested in **Rayden on Divorce**, the book the court relied on heavily in finding for the respondent. As a parting shot, counsel submitted that the respondent was not entitled to a single cent from the appellant as she had her own income.

In response **Mr. Osmond**, learned counsel for the respondent submitted that the appeal had been overtaken by events as the Matrimonial Causes Act Cap 152 had been repealed by the Marriage Act, 2014 which gave protection to spouses. That a spouse cannot be evicted from a matrimonial home without a court order. The appellant had made no such application. Counsel further submitted that the appellant had even deserted the respondent for another woman since 2009 and had not paid a single cent towards alimony. The appellant had in the face of several court orders willfully and spitefully refused to pay any maintenance to the respondent. The respondent had been unable to enforce the orders as the only property the appellant has in Kenya is the matrimonial home. Besides, the court had declined to enforce the order until this appeal was heard and determined. Counsel went on to submit that the appellant was born and brought up in Kenya. He had brought the respondent to Kenya as his spouse. She has no work permit and therefore cannot engage in any gainful employment. The appellant had disclosed his net income which is well beyond the 1/5 requirement. Accordingly, the court was right in arriving at the figure awarded. This Court should therefore not interfere with the findings of the court; that English authorities were referred to and correctly so since by dint of **Section 3** of the Matrimonial Causes Act, the jurisdiction of the High Court in matrimonial proceedings is to be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England.

Among the grounds of appeal raised are the court's refusal to grant the appellant's application dated 28th August, 2012, in which he had sought that the respondent be ordered to pay him a sum of £1,000 as monthly maintenance pending the determination of the cause. In other words, the appellant had also sought from the respondent alimony *pendente lite*. On being heard the application was struck out. That striking out forms grounds 1, 2, 3 and 4 of this appeal. There is also the issue of the court stalling the hearing of the cross petition pending the hearing of the main petition. This is the complaint in ground 15 of the appeal. However, during the hearing of the appeal, the appellant did not advert to those grounds in his submissions nor did the respondent. Accordingly, we deem that the appellant had abandoned them

which explains their absence in our narrative.

Having so said, we need at this very early stage to deal with the appellant's submissions that the court should not have relied on English authorities in resolving the application. It is contended that the court erred in law by following the authorities of **Donaldson vs Donaldson [1958]** (supra) and "**Rayden on Divorce**" (supra) whilst disregarding the provisions of the Constitution of Kenya. Those authorities suggest that parties to a matrimonial cause and in particular those involved in an application of this nature, must make full and frank disclosure of the resources at their disposal and that failure to do so may result in the court drawing inferences against the party in default. The appellant thought that, that cannot be the law and that in this country, courts are not allowed to draw inferences. For this proposition, he relied heavily on **Rule 48** of the Matrimonial Causes Rules. That rule is in these terms:

> ***"…On an application for ancillary relief, the registrar shall fix an appointment for the hearing of the application, and notice thereof 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 and in answer to the application, and may order the attendance of the spouses and any other person for the purpose 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…".***

It is easily discernable from a careful reading of this provision that nowhere does it outlaw the drawing of inferences by the court. Further, it is an established rule of evidence that where a party does not come clean in his evidence or is guilty of material non-disclosure, or on the whole his conduct is not above board, then adverse inference could be drawn against him. We are not aware of any exception to this general rule and it matters not therefore that this was a matrimonial cause. Further, whether or not to grant alimony, the court exercises discretion. The evidence of such discretion depends on the conduct of the parties in the proceedings. If any of the parties is not open or candid with the court then there would be consequences. Certainly lack of candour will be held against such a party with fatal consequences. In any event even assuming that this rule forbade the drawing of inferences, it cannot override the provisions of the main Act. **Section 3** of the Matrimonial Causes Act provides *inter alia*….

> ***"…Subject to the provisions, of the African Christian Marriage and Divorce Act, jurisdiction under this Act shall only be exercised by the High Court (hereinafter called "the court") and such jurisdiction shall, subject to the provisions of this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England…"***

From the authorities that the appellant has sought to impugn, the law in England is that adverse inferences can be drawn against a party who has been less than candid with the court. That should be the law here as well.

Does **Rule 48** also provide in mandatory terms that the court must investigate the allegations made in support of and in answer to the application by calling evidence as submitted before us by the appellant? Our careful reading of the rule does not give such an assurance or comfort. The rule is permissive and not mandatory, in that, in the cause of the investigations, the court may call spouses or any other person to be cross-examined, may take oral evidence of witnesses, order discovery or even call for further affidavits. As can be readily seen, there is no particular preferred mode of preliminary investigations by the court. It has a wide latitude and leeway on how to go about it. In this cause, there were several affidavits by the respective parties filed such that the court felt sufficiently and adequately armed to dispose of the application. Thus the appellant cannot therefore claim that the court never investigated allegations in the application. Indeed the court did make comments with regard to lack of candour on the part of the parties. How would it have come by this conclusion without such investigations? Then there were comments regarding the financial muscle of each party. Surely can the appellant's condemnation of the court in this regard hold?

At pages 715 to 716 **Rayden on Divorce** (supra) the principles upon which a court faced with an application of this nature should act are laid down. In summary these are:

- The financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future.
- The standard of living enjoyed by the parties before the breakdown of the marriage.
- The age of each party to the marriage and duration of the marriage.
- Both husband and wife must disclose all their resources to the court and the obligation is to be full, frank and clear in that disclosure and any shortcomings in this standard can and normally will be visited by the court drawing inferences against the party in default.
- The conduct of the parties.

We have no doubt at all that when deliberating on the application, the court had the foregoing at the back of its mind. This is how it delivered itself:

> ***"…The financial capacity of the spouses has to be considered before the court makes a finding as to whether a spouse ought to pay maintenance and the extent thereof. Secondly, the deserving spouse should be supported at the standard of life he or she was used to at the time of separation.*** *(see W.M.M. vs B.M. L. [2012] eKLR)* ***Other considerations are the age of the parties. With regard to the first consideration regarding financial capacity each party is obliged to make full and frank disclosure of their resources, else the court is entitled to make adverse inferences as was the case in*** *Payne v Payne [1968] 1ALL E.R* ***(sic)…"***

We did not hear the appellant fault these considerations, save for the drawing of the inference which we have already addressed elsewhere in this judgment.

The court had serious misgivings and rightly so in our view with regard to lack of candour by the parties as to their means of income. According to the court, the depositions of the parties were characterized by understatement of their respective incomes while exaggerating the adverse party's, that the respondent in her initial affidavit cut a forlorn figure financially until the appellant filed a replying affidavit showing that she had her own assets in England. For the appellant it was on record that in an email in which he was passing on the chauffer business management to a Mr. Smith in England was this disturbing line regarding the respondent: ***"****I don't want Pam to know too much at present****."*** Other allegations against the appellant concerning similar incredible dispositions during divorce proceedings with his first wife as captured in various affidavits of the respondent also cast aspersions on the appellant's capacity for frank disclosure. At the end of the day, it came down to who between the appellant and respondent was more believable regarding their means, their respective lack of candour notwithstanding. The court believed the respondent. From the evidence on record, it does appear that the appellant lives large and is opulent. He can afford ocean cruises and valentine trips out of the country, has three trusts in his favour out of which he draws substantial amounts of money, sold a '*matrimonial house'* in England for a tidy sum out of which £500,000 is still being held by his solicitors. There was also evidence of large sums of money being credited into his Drummonds Account. Granted that some of this information was gleaned from documents which he had kept away from the respondent, hence his complaint that the court had relied upon evidence improperly obtained by the respondent in violation of his privacy, nonetheless, they provided good *prima facie* evidence for a court to act.

Regarding the complaint, our simple response is that to date the appellant and respondent are still man and wife. They will remain so until the marriage is formally dissolved. As correctly submitted by the respondent in the High Court, the constitutional provisions with regard to privacy did not apply retrospectively. But even if they did pursuant to **Article 31** the right to privacy as regards family and private affairs is not absolute but limited to certain aspects only. In this case, it was necessary for the appellant's affairs to be revealed as he had been grossly economical with the truth and had not also filed an affidavit of means then on the pretext that he could not do so until he had received a valuation report from his own valuer of the matrimonial home. The court was aware that the valuation had in fact been carried out and yet it had not been availed to the court. In the circumstances of this appeal, the court did

not error by relying on the information that was availed by the respondent regarding the appellant's means.

Tied to this complaint is the fact the appellant had been led to believe that in future he could be accorded an opportunity to raise objection against the use of such evidence. This issue was extensively addressed by **Omondi, J.** in her detailed ruling dated 23rd March, 2012. She concluded thus:

> ***"…who knows what communications take place between a man and a woman during the seasons of closeness, spanning from the times of Samson and Delilah, all the way to Cleopatra and Mark Anthony unto the House on the hill in the seat of the World's Super Power U.S.A. I think some of the aspects being raised and objected to, make a mockery of natural and ordinary association and communication between a once married couple and are in my view unreasonable."***

Having made such a fundamental finding, what objection was left to be raised at a future date. In our view, the statement by Omondi, J. in the same ruling to the effect that:

> ***"…I concur with Mr. Osmond that the appellant is simply out to block evidence which he fears may be prejudicial to his case. In any event, the applicant seems to be putting the cart before the horse because in my opinion, he ought to wait for the matter pending to be heard and raise objections when appropriate…"***

was gratuitously made. The Judge having made firm findings on the admissibility of such information, we doubt whether Meoli, J. would have taken a different path.

It is common ground that the respondent is a British citizen resident in Kenya; that the couple married in England; that after the marriage and at the request and insistence of the appellant, the couple relocated to Kenya; that the appellant is Kenyan; that the respondent though resident in Kenya, does not have a work permit and cannot therefore engage in gainful employment and finally, that whilst the couple were cohabiting in Kilifi, the appellant used to pay the respondent £750 per month to meet household and housekeeping expenses (see para 37 (V11) of the appellant's affidavit dated 14th May, 2010.) If the appellant was making this payment, though the respondent still had her own income, on what basis then should he turn around and demand that he should be excused from maintaining such responsibility? The fact that the appellant abandoned the respondent, a foreigner, is the more reason that the appellant should be called upon to maintain her at the same level as when they were cohabiting and before the desertion. The appellant cannot be heard to say that if the respondent was marooned here she should make her way back to her motherland. We think that such submission is outrageous, offensive and heartless. The appellant brought her here and must therefore play ball.

In awarding the sum of £1000 as monthly maintenance, the court considered relevant factors set out elsewhere in this judgment. Indeed all those factors were relevant for the just determination of the application. We do not therefore see any error in law or in fact on the award. As we have already stated whether or not to grant interim maintenance is discretionary. As long as the discretion is exercised judicially, the appellate court will not interfere. We do not discern any capricious or whimsical exercise of such discretion by the court. The mere fact that the court awarded the respondent the maintenance despite vehement opposition by the appellant cannot by any stretch of imagination amount to bias against the appellant on grounds of sex as claimed by the appellant. There were various affidavits of means on record and admissions which the court took into account before arriving at the award. Much as the respondent may not have filed an affidavit intituled "*Affidavit of means*," there was enough material from the respondent's various affidavits on record from which the court could vouch for her needs and expenses. Indeed, it is from these very affidavits that the appellant gleaned information regarding the respondent's earthly possessions and worthiness that he used against her. There is no legal requirement that an affidavit of means must be intituled as such before it can be used in evidence.

What is required is sufficient information or material regarding a spouse's income and expenditure to enable the court to determine the issue one way or another. In this case, we are satisfied just as the trial

court that on the material on record, the court was not at all disadvantaged in assessing the maintenance payable. Accordingly, the grounds of appeal in which the appellant claims that the court erred by awarding the respondent maintenance inspite of the respondent's refusal to disclose and tabulate her needs as well as awarding the respondent maintenance inspite of the respondent's own independent and sufficient means and or that the appellant was required to maintain the respondent at a higher standard than he can maintain himself must fail for want of merit.

We agree that under **Section 25** of the repealed Matrimonial Causes Act.:

> ***"...the wife may apply to the court for alimony pending the suit, and the court may 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…"***

Contrary to the submissions by the appellant that the 1/5 rule applies to the appellant's monthly net income, the requirement is that it must be pegged on the appellant's average net income for the last three (3) years preceding the date of order. So on the basis of the foregoing the court was right in awarding the impugned maintenance. The appellant by his own admission had monthly income in excess £3000. He now claims that such income is no longer available to him on account of economic meltdown in Europe. Other than the bold statement, there was no evidence tendered by the appellant to demonstrate that he was indeed a victim of such meltdown.

At the end of the day, we have come to the inevitable conclusion that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and Delivered at Malindi this 29th day of May, 2015.

ASIKE-MAKHANDIA

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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