



**REPUBLIC OF KENYA**

**Court of Appeal at Nyeri**

**Civil Appeal 232 of 2008**

**BETWEEN**

**J.B.M.....APPELLANT**

**AND**

**B.N.B.....RESPONDENT**

*(An appeal from Ruling and Order of the High Court at Embu (Khaminwa, J.) dated 6th June, 2008*

**in**

**H.C. DIVORCE CASE NO.2 OF 2007)**

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**JUDGMENT OF THE COURT**

The main issue in this appeal is the amount to be awarded as alimony pendente lite to the respondent **B.N.B** who is in law still the wife of the appellant pending the determination of Divorce Cause No.2 of 2007 pending at the High Court of Kenya at Embu. It is unfortunate that such a matter should still be pursued some five years after the Divorce Petition was filed as one would have expected the Divorce Cause to have been finalized such that the issue of maintenance pending the same would have been a thing of the past.

The appellant **J.B.M** and the respondent were married under Customary Law in October, 1977. According to the respondent, the said marriage was converted to a statutory marriage pursuant to Marriage Act (Cap 150) Laws of Kenya on 2nd March, 1993 but this is denied by the appellant. All the five issues of the said marriage are now adults, although at the time the Petition and the application for maintenance were filed, the last born was below 18 years. In a Petition dated 24th December, 2007, the respondent sought dissolution of the marriage, custody of the one minor issue of the marriage, alimony and maintenance for herself and the children of marriage pending the determination of the cause, and costs of the Petition. That Petition was followed by a chamber summons dated 14th February, 2008 filed by the respondent in which she sought three Orders as follows: -

- “1. That this application be certified as urgent and be heard on a priority basis.**
- 2. That the respondent be ordered to provide such reasonable maintenance for the care and support of the applicant.**
- 3. That the respondent do pay the costs of this application.”**

The grounds in support of that application were that the appellant in this appeal who was legally married to the applicant and was legally bound to maintain her, had chased her away from matrimonial home and closed down family business in Maua Town which was her only source of income whereas the same appellant was a prominent businessman earning an average income of Kshs.900,000/= from his business and about 1.5 million a year from the proceeds of tea sales; that the appellant had refused to pay the school fees and maintenance for the issues of marriage, some of whom were studying abroad. Those grounds were supported by an affidavit and a supplementary affidavit sworn by the applicant in that application who is the respondent in this appeal. In a replying affidavit sworn by the appellant in this appeal who was the respondent in the application, the appellant denied solemnizing a marriage with the respondent, alleging that he is married to another woman under customary law with whom he had five issues all adults. He however accepted that they met and had the issues as named in the Petition who according to him were all adults. He denied any acts alleged against him by the respondent such as assaulting the respondent and chasing her away from the matrimonial home and alleged that the respondent on her volition, closed her business and joined delegates at Bomas of Kenya for Constitutional Review where she earned a lot of money as a delegate and so refused to return home to business. He alleged further that he does not have vast properties, but conceded that he had some timber structures in Maua from which he earns Kshs.70,000/= per month, commercial plot No.9 which is now under partnership and another partnership in Mombasa and a Poshomill in Maua from which he earned Kshs.12,000/= a month, that he gave the respondent a plot at Mulingene which has a Poshomill, Kiosk, and timber yard all of which gave her income. The appellant denied making Kshs.900,000/= per month and/or Kshs.1.5 million per year. He then gave a breakdown of his expenditures and concluded he had no available income to pay to the respondent for maintenance. As we have stated above, the respondent filed a supplementary affidavit in which she refuted the appellant's allegations in the replying affidavit but that was encountered by appellant's further replying affidavit which sounded like an attempt to set out an affidavit of means but in our view did not fully meet the requirements of an affidavit of means as the law envisages.

The entire application landed before Khaminwa, J. who after hearing it fully and considering the effects of Section 25 of the Matrimonial Causes Act Chapter 152 and Rule 38 of the Matrimonial Causes Rules, in a ruling dated and delivered on 6th June, 2008 ordered the appellant to pay to the respondent Kshs.250,000/= per month for care and support until further orders of the Court. In arriving at that order, the learned Judge addressed herself thus:

***“In this case the applicant wife seeks an order for a sum of Shs.300,000/= per month for her maintenance. Although the husband is said to be very wealthy there is no clear evidence of actual income which he receives. On the other hand the applicant is now lodging with her daughter pending the finalization of this divorce suit.***

***After considering the material disclosed by the respondent it is my view that he can afford to pay applicant 250,000/= per month as alimony pending suit. I therefore make the order that the respondent shall pay to applicant on the 1st of every month Shs.250,000/= commencing on 30th day of June 2008 and thereafter on each consecutive similar amount on 30th of every month until further orders.”***

That is the Order that prompted this appeal as the appellant felt aggrieved by it. At the hearing of this appeal, we were told that this court, in an application under Rule 5(2)(b) of this Court's Rules reduced the amount to Kshs.50,000/= pending the hearing of this appeal. That decision is however not of any effect now as the appeal has been heard. We mention it only to show that the appellant is not at present paying the Kshs.250,000/= ordered by the High Court. Be that as it may, five grounds of appeal were preferred most of which were to the effect that the award of Kshs.250,000/= was not justified on the

circumstances of the case; that as the validity of the marriage was in question, no award should have been granted and that the respondent did not provide material to satisfy the application of the proviso to Section 25(1) of Matrimonial Causes Act Chapter 152 of the Laws of Kenya.

Mr. Kariuki and Mr. Mageto the learned counsel for the appellant and respondent respectively, addressed us at length on the appropriateness or otherwise of the award and we have carefully and anxiously considered their rival stands as well as the pleadings together with the affidavits, the record and the law.

We entertain no doubt in our minds that the learned Judge would have been in a better position to decide on the issue of alimony pendente lite had she ordered for and received an affidavit of means for the appellant, and as the appellant also alleged that the respondent was also having some income from various businesses, the respondent should have also availed the entire income. This would have enabled the trial court to reach an informed conclusion on the matter much as the award was expected only to last till the determination of the divorce cause dated 24th December, 2007. It does appear to us that the learned Judge appreciated that aspect hence her comment that **“although the husband is said to be very wealthy there is no clear evidence of actual income which he receives”** The evidence of clear income would only have been forthcoming if an affidavit of means was filed. It is only then when the proviso to **Section 25(1) of the Matrimonial Causes Act** (Supra) would have applied. That Section provides: -

**“In any suit under this Act, the wife may apply to the Court for alimony pending the suit and the Court may therefore make such Order as it may deem just.**

**Provided that the 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.”**

However, in the application that was before the Court and which in our mind, was brought pursuant to Rule 38 of the Matrimonial Causes Rules, the learned Judge doing what she could with the evidence before her felt that Kshs.250,000/= per month was a proper award. Our concern is that she did not assign any reason for that award. She said the appellant, could in her view afford to pay that amount, but she did not consider the appellant's assertion in his affidavit to the effect that he was married to another wife with whom he had five children and who was married before the respondent, and that he was indebted to the bank on account of fees for his children abroad who according to the names, included the respondent's children namely Dorine, Denis and Kevin. Further, the learned Judge never considered the appellant's allegations that the respondent had a plot which had Poshomill, Kiosks and timber yard together with a shamba with miraa in her name and other incomes from her participation in Constitutional Review Meetings in Nairobi where she was a delegate. Thus much as we agree that the provisions of Section 25(1) of the Matrimonial Causes Act could not apply as there was no proper affidavit of means to assist the Court in calculating  $\frac{1}{5}$  of the appellant's income, we nonetheless feel the learned Judge could not have been right in arbitrarily awarding of a figure which she thought the appellant could pay simply because it was said he was “very wealthy.” That cannot be the yardstick for the award of alimony pendente lite and has never been one. People or even a party may claim that another is very wealthy yet because of other responsibilities such as fees and mortgages, that apparent wealth may in effect amount to nothing. 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. This sentiment is supported by an observation in the book “Matrimonial Offences” by Lionel Rosen where the author deals with “The Duty to Maintain.” He quotes the words of Lord Merrivale in the case of **Church vs Church (1933), 97 J.P. 91** at page 95:

**“They (the justices) must see what evidence there is of the husband's actual earnings and his capacity to earn a livelihood under existing conditions in that neighbourhood, also of the earning capacity of the wife, and they must take care, if they make an order which is capable of being enforced by imprisonment, that it is clearly within the faculties of the husband.”**

Thus in assessing the award, even on temporary basis the wife's alleged income cannot be ignored. In this case, the learned Judge never even directed her mind to the respondent's alleged earnings nor did she consider the appellant's other responsibilities and what was actually declared by the appellant.

In our view, and for the above reasons, we find this an appropriate case for our intervention as we think, as we have stated, that the learned Judge failed to consider matters she needed to consider and considered matters that should not have been considered and as a result she came to a decision which we think was arbitrary.

We have considered the record, and the income conceded by the appellant, together with the alleged earnings of the respondent. In our considered view, Kshs.100,000/= per month would be a proper award in the circumstances of this case. We thus, allow the appeal, set aside the award of Kshs.250,000/= per month and in its place we award to the respondent Kshs.100,000/= to be paid to her monthly by the appellant till the Matrimonial Cause No. 2 pending hearing and determination in the High Court is heard and determined. In the circumstances of this case, each party will meet its own costs.

**Dated and delivered at Nyeri this 6th day of February, 2013.**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**