



REPUBLIC OF KENYA



**KENYA LAW**  
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**MRM aka RLM v SMRM (Civil Appeal E124 of 2022)  
[2025] KEHC 735 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 735 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E124 OF 2022  
RE ABURILI, J  
JANUARY 30, 2025**

**BETWEEN**

**MRM AKA RLM ..... APPELLANT**

**AND**

**SMRM ..... RESPONDENT**

*(An appeal from the ruling & order of the Hon. Beryl M.A. Omollo  
Senior Resident Magistrate delivered on the 7.12.2022 in Kisumu CMCC  
Divorce Cause No. E037 of 2022 at the Kisumu Chief Magistrate's Court)*

**JUDGMENT**

**Introduction**

1. The parties herein are an estranged couple of husband and wife respectively who through a petition dated 26<sup>th</sup> May 2022 filed by the respondent are currently engaged in divorce proceedings.
2. The respondent herein moved the trial court vide an application dated 17<sup>th</sup> June 2022 in which she sought a number of orders touching upon the couple's matrimonial property and further that the appellant be made to pay her Kshs. 210,000 to enable her meet her expenses pending the hearing and determination of the suit so as not to leave her destitute.
3. The appellant opposed the aforementioned application vide a replying affidavit dated 18<sup>th</sup> July 2022. In addition to opposing the respondent's claim, the appellant offered to pay the respondent's rent to the tune of Kshs. 20,000 if at all she moved out of the matrimonial home and further pay to her a stipend of Kshs. 20,000 pending the hearing and determination of the suit.
4. The appellant further termed the respondent's prayer for Kshs. 210,000 for her expenses as unjustified and based on exaggerated figures and alternatively offered to pay Kshs. 50,000 per month for the respondent's extraneous expenses such as legal fees.



5. In her ruling, the trial magistrate held that the evidence on record was that the respondent was helping the appellant in running their joint business and further that the matrimonial property which was owned jointly was enough to enable her grant the respondent Kshs. 150,000 per month from the appellant backdated from the month of January 2022.
6. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 13<sup>th</sup> December 2022 raising the following grounds of appeal:
  1. The learned trial magistrate erred in law and fact in evaluation of the evidence presented before court, thereby wrongly awarding the respondent a sum of Kshs. 150,000 as monthly maintenance/alimony and backdating the same.
  2. The learned trial magistrate erred in law by awarding the respondent a global sum as monthly maintenance/alimony without any basis or justification of the same.
  3. The learned trial magistrate erred in law and fact by failing to appreciate and apply the well-known principles of law to be considered with regard to payment of alimony/maintenance and arrived at a manifestly wrong decision in her consideration of the same.
  4. The learned trial magistrate erred in law in failing to discern all the issues raised and failed to make determination on the same.
  5. The learned trial magistrate erred in law in departing from the general rule that “Alimony or maintenance should not be granted unless it is established by evidence that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings therefore deserves the support of the other partner” which principal in this instance was not demonstrated/established.
  6. The learned trial magistrate erred in law by awarding alimony/maintenance for a period before when the maintenance request was made in court and without any justification for the same.
  7. The learned trial magistrate erred in law by allowing prayers granting third parties access to and stay in the matrimonial property which orders directly infringe on the proprietary rights of the appellant as guaranteed under Article 40 of *the Constitution* of Kenya 2010.
  8. The learned trial magistrate’s judgement fails to meet provisions of Order 21 Rule 4 of the Civil Procedure Rules and thus is void ab initio.
7. The appeal was heard by way of written submissions.

### **The Appellant’s Submissions**

8. On behalf of the appellant, it was submitted that the ruling and order of the trial magistrate was flawed owing to the determinations on matrimonial property having been made which were outside the trial court’s jurisdiction.
9. The appellant further submitted that the trial magistrate failed to take cognisance of the principles of granting alimony. Reliance was placed on the case of NBR v JO [2014] eKLR that breaks down the purpose of alimony pendente lite.
10. It was further submitted that the respondent is capable of earning as she was not incapacitated physically or mentally and thus has a responsibility towards herself to give herself the basic amenities sought.



11. The appellant further impugned the trial magistrate's ruling on the grounds that she failed to provide reasons for granting the alimony of Kshs. 150,000 per month and in further proceeding to backdate the same to January 2022 way before the respondent filed the divorce proceedings.
12. It was submitted that the respondent had failed to provide proof that the appellant was not providing for her prior to her filing of the divorce petition on the 26<sup>th</sup> May 2022 and that further, that the trial court failed to provide reasons for backdating the payment of the alimony to January 2022. Reliance was placed on the case of ZYSA v YSA [2012] eKLR where it was held inter alia that  

“alimony pendente lite, which is a provision for the maintenance of the wife pending determination of matrimonial proceedings, must accrue from the entire period of pendency of the cause so that it should be paid from the date of application to the date of determination of the cause.”
13. It was further submitted that this action by the trial magistrate of determining division of matrimonial property deprived the appellant of his right to fair hearing as provided under *the Constitution* of Kenya 2010.
14. The appellant further faulted the trial magistrate's judgment as it granted 3<sup>rd</sup> parties rights to the matrimonial property without the authorization of both the parties herein.

### **The Respondent's Submissions**

15. It was submitted by counsel for the respondent that the trial magistrate was spot on in her dealing with the issue as the property was in the joint names of the parties and there was no evidence that it was the appellant's exclusive property as he appeared to imply and thus she correctly interpreted Article 45 (3) of *the Constitution* that grants parties to a marriage equality during and at the dissolution of the marriage.
16. The respondent further urged the court to uphold the trial court's grant of alimony in the sum of Kshs. 150,000 as the properties had been jointly acquired, that she had contributed to the said acquisition and further, that the appellant failed to provide any evidence that he paid for all the utility bills, servants, car maintenance or the respondent's own personal bills like legal, medical, internet or beauty parlour bills.
17. The respondent further impugned the appellant's assertion that the respondent should pay for her own bills as the appellant blocked her from having any access to any accounts of the jointly operated business and that he further refused to share any details of the said accounts with the court.
18. The respondent further submitted that the backdating of the alimony payments to January 2022 was an exercise of discretion by the trial court which this court ought not to interfere with. It was submitted that the appellant is capable of meeting the alimony payments ordered.

### **Analysis and Determination**

19. I have considered the grounds of appeal and the opposition thereto as argued via written submissions filed by both parties' counsel. The subject matter of the proceedings in the lower court was the respondent's maintenance pending the determination of the divorce suit.
20. Pendente lite is a Latin term meaning "awaiting the litigation" or "pending the litigation" which applies to court orders which are in effect while a matter (such as a sale of goods or a divorce) is pending.
21. The Appellant's key plank in support of the instant appeal is that the award for alimony was made without regard to the established principles for grant of alimony.



22. I have re-evaluated the affidavit evidence which was tendered before the trial court and also perused the pleadings which were before the learned trial magistrate. The main issue for determination is whether the appeal herein has merit.
23. The Marriage Act allows for alimony, also known as spousal maintenance, to be paid to a spouse or former spouse. The court may order alimony in certain circumstances, including if a spouse has deserted the other, or if they have neglected to provide for them
24. From the trial court record, it is not clear how the trial magistrate arrived at the award of kshs 150,000 alimony. No affidavits of means were filed or directed to be filed by both parties in view of the varying versions of the means of each of the parties.
25. The Court of Appeal in MEK v GLM. Court of Appeal at Eldoret Civil Appeal No 66 of 2015 E M Githinji, H Okwengu, J Mohammed, JJA May 31, 2018 dealt with the issue of alimony and the necessity for an affidavit of means and stated as follows:

“The provision to section 25(1) of the Matrimonial Causes Act (repealed) placed a fetter on the Court’s discretion by directing that no more than one fifth of the husband (read in ‘or wife’s’) average income for the last three years preceding the order, would be awarded as alimony pendent lite. To be able to make a decision that conformed to that requirement, it was imperative that information be available to the Court concerning the assets and income of each party as well as their financial needs and obligations.

Even though section 25(1) of the Matrimonial Causes Act (repealed) addressed only the need for information on the income of the party against whom the order of alimony was sought, a fair decision could not be arrived at without knowing the assets and income if any, and the needs of the party seeking alimony. Section 25(2) provided a more balanced view by requiring the Court to take into account the conduct of the parties in addition to the financial position of both parties. Therefore, without the Court having the benefit of the affidavit of means from each of the parties giving their particulars of property, income and expenditure, the Court could not exercise its discretion judicially, but would be groping in the dark, and the resultant amount awarded, nothing more than guess work. None of the parties filed an affidavit of means as required under rule 44 of the Matrimonial Causes Rules (repealed). The Respondent did file an application that was stated to be under Matrimonial causes Act (repealed) rule 31, 40(1) 44(3) and 43 in which he sought alimony pending suit, permanent alimony, maintenance and a secured provision. The Court appreciated that the Respondent did not have the benefit of counsel and assumed that the rules, which he referred to in his application, were the Matrimonial Causes Rules (repealed). Those were the Rules that were applicable in such an application. Maintenance was neither a right nor an entitlement. It was a discretionary order the availability of which was dependent on the circumstances of the case. It was imperative for the Trial Court to have appropriate information upon which it could judicially exercise its discretion. In that regard, the Appellant having failed to file any affidavit of means had only herself to blame. Although the Respondent had maintained that the deceased was married to another woman, there was no evidence in support of that.

There was no evidence in support of the conclusion that the Respondent was impecunious, and not a man of means. Besides, the fact that one was not in salaried employment did not necessarily make one impecunious or destitute. Furthermore, there was no evidence at all to show what efforts he had made to alleviate that burden from the Appellant. For a man who was under no disability, it looked like he did not do much to improve his standard



of living. Further, there was no evidence tendered to prove that after the parties stopped living together in 1996, the Appellant continued to maintain the Respondent or provided an exclusive financial basis for the Respondent to rely on.”

26. The Appeal was allowed by the Court of Appeal, the order of the High Court granting the Respondent maintenance against the Appellant was set aside.
27. Part XII of the *Marriage Act*, 2014 provides for orders of spousal maintenance pending divorce or after divorce. Section 77 of the Act gives the Court the power to order payment of maintenance to a spouse or former spouse in situations of desertion, neglect to provide for the spouse or during matrimonial proceedings, with the court considering factors like the standard of living during the marriage and each party's income when determining the amount and duration of maintenance; essentially allowing either spouse to seek financial support from the other upon divorce depending on the circumstances of the marriage.
28. In view of the above provision, for the court to determine the amount and duration of maintenance, an affidavit of means was necessary in this matter because whereas the respondent alleged that the appellant was rich and could raise that money which fact the trial magistrate took to be the gospel truth, the appellant also alleged that the respondent was also a person of means. For that reason, therefore, the respondent should also have availed evidence of means to disapprove the assertions by the appellant. This would have enabled the trial court to reach an informed conclusion on the matter, in as much as the award was expected only to last till the determination of the divorce cause.
29. I reiterate that the evidence of clear income would only have been forthcoming if an affidavit of means was filed. In my view, the trial court did not have sufficient information upon which it could make an informed decision regarding the financial ability of the Appellant and the requirements of the Respondent.
30. This need for affidavit of means was well captured in the now repealed proviso to Section 25(1) of the Matrimonial Causes Act. That law was repealed but the principle espoused therein is still applicable as far as determination of what a spouse would be entitled to in maintenance pending divorce proceedings is concerned. The section which is similar to section 77 of the *Marriage Act*, the latter taking into account the constitutional provisions of Article 45 of *the Constitution* on equality of spouses during and after marriage, removing the 1/5<sup>th</sup> income of the husband requirement and now with husbands also enjoying rights to claim for alimony unlike before, provided as follows:

“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.”
31. An "affidavit of means" in the context of spousal support would simply be a sworn statement submitted to the court by a party involved in a divorce case, detailing their financial situation including income, assets, liabilities, and expenses, which is used by the court to determine an appropriate amount of spousal support to be awarded to the other party and attaching evidence of such means or lack of it for example, the party may appear to have means which may be over committed.



32. More recently, in *EMO v JMN* [2021] eKLR, Ndung'u J had this to say in a child maintenance case, concerning affidavit of means:

“ 16. It is prudent for parties contesting maintenance to file an affidavit of means stating the financial contributions they would be willing to make towards the upkeep of the children. The court in *A M K v S D M HIGH COURT CIVIL APPEAL 45 OF 2017* [2018] eKLR set out the contents of a comprehensive affidavit of means thus:

“... ideally the affidavit of means should include income earning capacity and other financial resources by each party/parent; the financial needs, obligations and responsibilities by each party / parent and propose contribution which each party has made or intend to make for the welfare of family/child (ren) including looking after the children through day to day care and support.”

17. Comprehensive affidavits of means assist courts to make an informed decision on the contribution each party is to make towards the upkeep of the minor. The parties in this case did not file affidavits of means or indicate in the evidence what they earned or the financial contributions they were willing to make.”

33. Although the above persuasive case concerned maintenance of a child and not alimony, the principle espoused therein is the same and applicable to alimony pendente lite causes.

34. In the application that was before the trial Court subject of this appeal, the learned trial magistrate doing what she could with the evidence before her felt that Kshs. 150,000 per month was a proper award. This court's concern, and I am in agreement with the appellant on this, is that the trial magistrate did not assign any reason for that award. She simply stated that the amount sought by the respondent was a bit high but she did not consider the appellant's depositions in his replying affidavit dated 18<sup>th</sup> July 2022 and his pleadings in general that the respondent was staying in the matrimonial house and was being paid a salary in their business.

35. Thus, in the absence of a proper affidavit of means to assist the Court in calculating the appellant's income, I find that the learned trial magistrate could not have been right in arbitrarily awarding a figure which she thought the appellant could pay simply because it was said that he was very wealthy. That cannot be the legal 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.

36. Thus, in assessing the award, even on temporary basis, the wife's alleged income cannot be ignored. In this case, the learned trial magistrate never 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.

37. There is also no reason as to why the trial magistrate backdated the award of the alimony to the month of January 2022 whereas the divorce petition was filed in May, the same being dated 26<sup>th</sup> May 2022. Alimony pendente lite must accrue from the entire period of pendency of the cause thus being paid from the date of application to the date of determination of the cause. See the case of *Z.Y.S.A v Y.S.A.* (supra).



38. Having found as such, it is my view that this is a proper case where I must allow the appeal and remit the case back to the trial court to apply the law in determining the application for alimony. I am aware that the trial magistrate is no longer in the court station. I therefore remit the file back to the Chief Magistrate's Court at Kisumu for reallocation to another magistrate to rehear the application for alimony pendente lite and in doing so, the court must obtain evidence of means of both parties and should the court find that the respondent is entitled to the alimony as prayed, a proper award in the circumstances of this case can only be calculated from the date the respondent filed the divorce suit pending the hearing and determination of the said divorce suit.
39. As there was no order made for 3<sup>rd</sup> parties to continue staying in the matrimonial property, I shall not consider the said issues.
40. Accordingly, this appeal is allowed to the extent that the ruling of the trial magistrate dated 7.12.2022 is set aside and the matter remitted back to the trial court for a rehearing of the application for alimony pendente lite.
41. In the circumstances of this case, each party will meet its own costs.
42. The trial court file and copy of this judgment be returned to the trial court. Judgment be uploaded and published.
43. This file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NAIROBI  
THIS 30<sup>TH</sup> DAY OF JANUARY, 2025**

**R.E. ABURILI**

**JUDGE**

