



JNM v RWN (Matrimonial Cause 6 of 2018) [2024] KEHC 3867 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE 6 OF 2018
SM MOHOCHI, J
APRIL 23, 2024
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013**

BETWEEN

JNM APPLICANT

AND

RWN RESPONDENT

RULING

1. The parties before me are a married couple, both senior citizens with three adult issues therefrom and the initial motion was for a declaration that all matrimonial properties were jointly owned and had by way of a Court Annexed Mediation agreement settled on the 4th October 2019 before the hearing of the Originating Summons.
2. Part of the Court Annexed Mediation agreement settled on the 4th October 2019 included an obligation on the Applicant to pay the Respondent a ksh 27,000/- monthly maintenance with effect from October 2019.
3. Subsequently the Applicant defaulted on maintenance and has since been held to be in contempt with possibility of being arrested and committed to civil jail.
4. The proceedings before Court stems out of a Notice of Motion Application dated 23rd January, 2024 brought under section 1A, 1B, 3, 3A and 63 of the Civil Procedure Rule, Articles 45 (3) and 21(3) of the Constitution and Section 25 and 26 of the Matrimonial Causes Act. In it, JNM, the Applicant, seeks the following orders that;
 1. Spent.
 2. That this Honourable Court be pleased to issue an order of a temporary stay/suspense of the monthly alimony of Kshs.27,000/= per month to the Respondent pending the hearing and determination of this Application.



3. That this Honourable Court be pleased to Review, vary, discharge and set aside its order of 16th August 2021 where the Applicant was ordered to be paying the Respondent an upkeep monthly sum of Kshs. 27,000/= per month with effect from 31st August 2021 until this cause is heard and decided.
4. That his court be pleased to order the Respondent to meet the costs of this Application.
5. The application was supported by the affidavit of JNM who stated that the circumstances obtaining when the orders of 16th August 2021 were made have since changed since he is now retired without a salary to warrant the variation, setting aside, review and or discharge of the said orders.
6. That, at the time the orders of the monthly upkeep payment of Kshs.27,000/=per month to the Respondent were made, the circumstances were such that he was earning from all the 20 rental units a sum of between Kshs.70,000/= and Kshs.80,000/= per month hence it was not a difficult situation to compliance with the Court Orders.
7. That, the Respondent who is the beneficiary of the orders of 16th August 2021 has virtually made it impracticable for the Applicant to make any earnings from the rental units which is the only source of earning for the Applicant and from which earnings the Applicant has been paying the monthly upkeep of Kshs 27,000/= per month to the Respondent.
8. That, the Respondent has also made it a habit of interfering with the management and the letting out of the remaining 17 rental units by making it impractical for the contracted Estate Agent to lease out the rental units to potential tenants.
9. That, the Respondent has taken up three units of the Rental Houses, which he is leasing out to various Tenants and pocketing the Rents only to turn up at the end-month to receive from the Applicant the monthly upkeep of Kshs.27,000/= per month.
10. That, it has become practically impossible for the Applicant to keep up with the monthly up-keep payments to the Respondent who has literally turned off the taps of the Applicant's earnings.
11. That, it is very unfair, unconscionable and uneconomical for the Respondent to continue receiving a monthly stipend (upkeep) from the Applicant and at the same time block and interfere with the only Applicant's source of earnings.
12. That, as at the time of swearing the Affidavit five (5) rental units in Nakuru Municipality Block 25/873 are vacant and they have been so vacant since December 2021.
13. That, whenever potential tenants seek the rental units with a view of taking up tenancy, the Respondent emerges and tells such Tenants not to take up any Tenancy in the premises on the basis that there is a case pending in Court over the properties and that if they take up such premises they will be doing so at their own risks.
14. That, out of the 20 Rental Units the Applicant is left with 12 units with unreliable Tenants making a paltry sum of between Kshs.30,000/= to Kshs.40,000/= per month. Out of these earnings he has to pay Electricity Bills, Water Bills, Kenya Revenue Authority taxes and the Estate Agents' Commission and after settling the upkeep payment of Kshs.27,000/= to the Respondent and is left with a measly sum of not more than Kshs.4, 500/= per month.
15. The Applicant provided the Court with copies of the Records from Banita Commercial Agencies Ltd, Water Bills, Electricity Bills and KRA Records.



16. That, the Respondent has made it financially and economically impossible for me to regularly meet her monthly upkeep without borrowing from sympathizers and well-wishers. She has practically turned off all the taps of my earnings with a view of making the Applicant fail to meet her Court ordered upkeep so that he can end up in jail.
17. That, the Court records will bear him witness that at least on two occasions, she has caused him to be arrested and he has escaped committal to civil jail by a whisker 7 only after well-wishers have come to his rescue.
18. That, it is unconscionable and very oppressive on the part of the Respondent to create a disadvantage on him and at the same time ask for her monthly upkeep.
19. That, the circumstances now existing are totally different from those obtaining in August 2021 and the Respondent is the sole author of his financial misfortunes and this Court should step in and grant the orders sought the Notice of Motion.
20. That, the provisions of Section 1A of the *Civil Procedure Act* (The over-riding objective/oxygen principles) states there should be proportionate proceedings between the parties appearing in Court. The Respondent has however tilted the see-saw in her favour by making it impossible for him to meet her monthly upkeep or even earn a decent living.
21. That, the Applicant humbly urges this Court to borrow a leaf from paragraphs 34-37 in the Judgment of Hon. Justice R. Nyakundi (J) in Eldoret H.C. Divorce Cause No.4 of 2016 *LCS v SKS* [2023] eKLR [2023] KEHC 24922(KLR)

34. In *WV.M.M. v B.M.L.* [2012] eKLR, GBM Kariuki, J (as he then was) held that:

“In considering a claim for maintenance, regard must be heard to the provisions of Article 45(3) of the *Constitution* of Kenya which recognize that "parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage." The rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms. The equality in this Article does not create nor is it intended to create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) is in harmony with Article 21(3) of the *Constitution* which enshrines equality of men and women and specifically states that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.".

In the light of Article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or the vice versa and the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses



does not hold true anymore. Under the Constitution, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden 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. 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. It seems clear that an adjustment to sections 25 and 26 of the Matrimonial Causes Act (and to a host of other provisions) to align the same with the Constitution is called for... The quantum of maintenance must make sense. It must be such as the party paying can afford i.e. within the ability of the spouse paying it. It must not enrich the spouse to whom it is paid nor oppress the spouse paying it. Where the spouse seeking maintenance is capable of engaging in gainful employment but refuses to work, such conduct may be oppressive to the other spouse and the court is entitled to have regard to it when considering the quantum of maintenance. Equality of spouses under Article 45(3) of the Constitution connotes equal treatment under the law."

35. In W.N. v P.B. (2013) eKLR, the High Court observed as follows:-
the concept of alimony originated in England. A wife was deemed to be totally reliant on her husband and would not own property or earn money to support herself. As such upon divorce alimony would provide an economic means to enable the divorced wife to support herself and prevent her from being a public charge."
36. Section 77(1) of the Marriage Act provides;
The court may order a person to pay maintenance to a spouse or a former spouse
- (a) if the person has refused or neglected to provide for the spouse or former spouse as required by this Act;
 - (b) if the person has deserted the other spouse or former spouse, for as long as the desertion continues;
 - (c) during the course of any matrimonial proceedings;
 - (d) when granting or after granting a decree of separation or divorce; or
 - (e) if after making a decree of presumption of death, the spouse or former is found to be alive.
37. The provisions leave it to the discretion of the court on the granting of maintenance. The issues that the union was blessed with are all adults with the youngest being 26 years of age and therefore, there are no children requiring the support of the parents. I have considered the submissions of the Petitioner on alimony and find no grounds to grant the prayer for alimony or maintenance.
22. That, the Applicant humbly urges this Court to allow the Notice of Motion and in fact vacate and set aside the orders of 16th August 2021.



23. The Applicant elected not to file written submissions opting to refer to the Applicant's sworn affidavit paragraph 15. As is captured verbatim at paragraph 21 above.

Respondents case

24. The Respondent opposed the Application by filing a sworn Affidavit dated 29th January 2024 together with written submissions dated 7th February 2024.

Submissions

25. The mediation settlement agreement was adopted as an order of the Court. Thereafter, the Applicant immediately defaulted on the said agreement which prompted the Respondent to make an application for contempt, the result of which is the Order dated the 16th August 2021 that the Applicant seeks to review or vary and it is worth noting that, the Applicant has neither attached any of the orders set to be stayed or reviewed to his application. Section 77 of the Marriage Act grants this Court the discretion to issue a Maintenance Order during the cause of any matrimonial proceedings.

26. That among the parameters this Court ought to consider is:

- a. if the person has refused or neglected to provide for the spouse or former spouse as required by this Act.
- b) if the person has deserted the other spouse or former spouse, for as long as the desertion continues. The Parties however have to align to the provisions of Article 45(3) of the Constitution of Kenya which recognizes that "parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage". In the case of WMM v BML [2012] eKLR, Justice GBM Kariuki (as he then was) observed that:

“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”.

27. The Applicant now seeks this Court to review/set aside/vary the Orders issued on 16th August 2021 provides as follows: -

- a) That the Contemnor to pay the Applicant her monthly upkeep of Ksh. 27,000/- per month with effect from the end of this month (August 2021) and not later than the 5th day of (September) and the other subsequent months. He is to pay all the unpaid arrears within three (3) months thereof and not later than 5th December 2021.
- b) That in default of the payment of the monthly upkeep and payment of arrears whichever comes first, a warrant of arrest to issue to be executed by the OCS Nakuru Central Police for his committal to prison for six (6) months for contempt.
- c) That the Applicant to have costs of the application.

28. That Order 45 Rule 1(1) provides in more detail the instances under which an application for review can be made. It states: -

“Any person considering himself aggrieved -



- i) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- ii) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

29. That in the case of *Peter Waititu Njau v Biashara Sacco Society* [2018] eKLR, the court referred to the case of *National Bank of Kenya Ltd v Ndungu Njau*, where the Court had rendered itself thus:-

"A review may be granted whenever the court Considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

30. The first ground of discovery of new and important matter or evidence envisages a new matter or evidence that was in existence at the time of hearing or reaching the decision sought to be reviewed and not subsequent events as held in *O.O.A v H.O.O* [2011] | eKLR. The Applicant has not demonstrated any new circumstances that have come to his attention and which were prevailing at the time of entering into the consent agreement.

The next issue is whether there was an "error apparent on the face of the record". Maraga J (as he then was) in *O.O.A v H.O.O* (*supra*) explained this notion when he stated as follows;

"From its very nature, the phrase "an error apparent on the face of the record" has an inherent element of in definitiveness and cannot be defined precisely or exhaustively. It has to be determined by the court on the facts of each case. The criterion in each case, however, is that the error contemplated under the rule means an error on both points of law and fact which must be obvious and self-evident from the record and does not require to be searched and fished out by re-appraisal of the evidence on record, or by an elaborate argument or a process of reasoning....»

31. That, the Applicant has not demonstrated the presence of any error on the face of the record, further, he has failed to inform the Court that the orders that he is now seeking to run away from and/or stay were entered into by the consent of both parties, willingly and freely and in the Applicant's case, with two Counsels on record to advise him on the merits his entering the agreement.

32. That, the Hon. Justice Ong'ijo A. in *GDM v CMM* [2020] eKLR while quoting *L.N.K v D.K.M* I20041 eKLR stated that a consent order can be entered into at an interlocutory stage, to preserve harmony or status quo pending the finalization of the matters in dispute.

33. That a consent order is like a contract between the parties. A consent order is like a contract and any review or setting aside can only take place if there is proof of fraud, mistake and misrepresentation.



34. That the Applicant has not alluded to there being a mistake or fraud in the making of the consent. Further, noting that it is now more than 4 years since the mediation settlement agreement was entered into and approximately three years since the impugned orders were issued, the Applicant has taken considerable time to think of his next step to prejudice the Respondent. The instant application is merely a ploy to keep all the income from matrimonial properties to himself in total disregard to the rights of the Respondent as envisaged in Articles 21 (3) and 45 (3) of the *Constitution*.
35. That the failure to abide by the consent order precipitated the notice to show cause and the subsequent Ruling by the Court. The Respondent has not shown the steps he has taken to abide to the terms of the Consent Order. The mediation settlement agreement was clear that the Respondent ought to pay the petitioner sums got from the rental proceeds in the matrimonial properties. In fact, the right persons to remit the sums were the estate agents who at the time were Pata Commercial Agencies as per clause 4 of the said agreement. The money is thus supposed to be remitted directly to the Respondent by the rent collection agencies who are currently Banita Commercial Agencies Ltd, who were appointed without the notice or consent of the Respondent.
36. That the Court in Divorce Case 10 of 2016 upheld the findings in *W.M.M. v B.M.L. (supra)* which was adopted by Judge I. Lenaola in *MSV v SJV & another (2015)* eKLR where it was stated that:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the *Constitution* of Kenya which recognizes that parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage -.it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) is in harmony with Article 21(3) of the *Constitution* which enshrines equality of men and women and specifically states that “women and men have the right to equal treatment..... .he age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore ...

No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden 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. 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 .. ”

It was further held that: -

“neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner.”.

37. The Respondent in her replying affidavit dated the 29th January 2024 opposed the current application. In it, she has demonstrated that the Applicant not only earns from the rental premises which are fully occupied, but also has other means of income being 2 commercial lorries and a pick-up truck. All these commercial vehicles were acquired during coverture but are under the sole use of the Applicant and benefit the Applicant solely. He is therefore not bereft of resources as he would like the Court to think. Further, some of the expenses listed by the Applicant, to wit: - electricity and water bills, are met by



the individual tenant and at no time have they been subtracted from the rental income. The Applicant is therefore on a clear mission to mislead the Court.

38. On the question of the Respondent fending or herself, she runs a small shop adjacent to the matrimonial home from which she earns a meagre income for her household needs. The Respondent has indicated, and it is well within the knowledge of the Applicant, that she suffers from diabetes which necessitates her being constantly on medication and having frequent visits to the hospital for check-ups. Her ailment was indeed one of the reasons the Applicant deserted the matrimonial home and was also the reason he agreed to continue covering her in his NHIF cover, which he promptly stopped paying for. Notwithstanding this, the Respondent sorely depends on the monthly maintenance for her medication and hospital visits, especially now that the Applicant even denied her the use of the family car and is now forced to use alternative and costly means of transport given her fragile nature and the weakness caused by her disease.
39. The final ground for review orders is for any other sufficient cause, none of which has been demonstrated by the Applicant. The issuance of warrants of arrests against the Applicant are his own doing as he is possessed of the means to settle the maintenance for the Respondent as agreed by themselves. He is therefore the author of his own misfortune and should not be aided by this Honourable Court.
40. It is the Respondent's submissions that the application herein is unmerited and should not be allowed. The Applicant is seeking the Court's help in staying and or reviewing orders which he himself willfully entered into and thereafter flaunted with abandon. The only recourse that the Respondent has in enforcing her rights is the impugned order dated the 16th August 2023, which we are urging this Court to uphold. Further, the Respondent has clearly demonstrated that the Applicant suffers no loss or prejudice that would cause the Court to stay the settlement entered into by the parties by consent.
41. Finally, the Respondent in her replying affidavit prayed that in the alternative, since they are two separate blocks of rental houses, each party can be allocated one in the interim to collect rent therefrom and cater for their own needs pending hearing of this suit on the 27th February 2024 and a possible determination in the nearest time possible. It is on the premise of this that the Respondent prays for dismissal of the application herein with costs to the Respondent.

Analysis and Determination

42. The Court has considered the Application, the affidavits thereto and the submissions on record and the only issue for determination is whether the Application is merited to review vary or alter the Order dated 16th August 2021.
43. The law applicable was espoused in the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held *inter alia*, that –

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”



44. That in *Hirani V. Kassam* [1952] 19 EACA 131 the Court of Appeal held:

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676: -

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

45. In *Shanzu Investments Limited v. Commissioner for Lands* (Civil Appeal No. 100 of 1993) the Court of Appeal upheld its earlier decision in *Wangechi Kimata & Another v Charan Singh* (C.A. No. 80 of 1985) (unreported) where it was held: -

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

46. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held: -

“Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.”... As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”

47. My appreciation of the dispute at hand is that, the mediation settlement agreement dated 4th October 2019 sought to cement and affirm the proprietary rights of the Respondent while ringfencing agreed proceeds from rent as monthly maintenance income. The Respondent was to return to her matrimonial home. The ultimate resolution was matrimonial harmony which has not been the case in this instant with frequent use of and need for judicial execution orders including arrest.

48. This Court is of the view that a matrimonial union cannot be managed by judicial orders, and if the relationship is such that, the parties can only engage and relate through Court process, then such parties might as well consider dissolution of their union and consequent division of the matrimonial property.

49. While the validity of the mediation settlement is not impugned, the balance of convenience is in favor of reviewing and varying the terms while ensuring the parties rights subsisting prior are unaffected. The dispute resolves around rental income generated from Nakuru Municipality Block 25/873 (Teachers) and Nakuru Municipality Block 25/1039 (Teachers) of which the Respondent was guaranteed Ksh 27,000/- per month.



50. The Applicant has evidenced how rental yields have dropped owing to lack of tenants and in other instances of the Respondent's own making by taking over three shops from whence she is earning rental income and discouraging potential tenants which tilts the balance of convenience to wards allowing the Applicants' case this being sufficient reason for interference.
51. This Court is alive to the senior citizen status of the parties, and the need by them of a resolution that assures them peace of mind in their twilight years while this course has sought specific affirmation and declaration the parties concluded the same in a mediation settlement agreement and as such nothing further remains to litigate thereafter upon this ruling.
52. The upshot of the foregoing is that the Court finds merit in the Applicant's Notice of Motion dated 23rd January, 2024 sufficient reason and is hereby allowed on the following terms;
- i. The Orders of this Court dated of 16th August 2021 are hereby set-aside.
 - ii. Clause 2 of the Mediation Settlement Agreement dated 4th October 2019 is hereby varied to read;

“The Applicant shall forthwith surrender nine (9) rental units within Nakuru Municipality Block 25/873 (Teachers) and Nakuru Municipality Block 25/1039 (Teachers) yielding a monthly rental yield of kshs (27,000/-) to be managed by the Respondent who shall thereby collect her maintenance.”

53. This being a family matter I am persuaded to order parties to bear their own costs.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 23RD DAY OF APRIL 2024.

MOHOCHI S. M.

JUDGE

