



**HWCR v RR; World Vegetable Centre (Interested Party) (Miscellaneous Application E225 of 2021) [2022] KEHC 13790 (KLR) (Family) (7 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 13790 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E225 OF 2021  
M THANDE, J  
OCTOBER 7, 2022**

**BETWEEN**

**HWCR ..... APPLICANT**

**AND**

**RR ..... RESPONDENT**

**AND**

**WORLD VEGETABLE CENTRE ..... INTERESTED PARTY**

**RULING**

1. By an application date November 18, 2021, the applicant seeks the following orders:
  1. Spent.
  2. This honourable court do compel the respondent to approve the applicant (wife) air ticket for christmas vacation to Netherlands.
  3. This honourable court do compel the respondent to provide for the applicant maintenance as a married woman as stipulated under section 77 of the *Marriage Act*.
2. The application is supported by the applicant’s affidavit sworn on even date. The grounds as set out by the applicant are that she and the respondent are legally married and have lived together as husband and wife for 23 years. They have 2 children born in 2000 and 2002 respectively. The children are university students in the Netherlands. The parties and the children are all Dutch citizens. The respondent works with the International Agroforestry Commission and is sent to work in different countries where the applicant accompanies him as his spouse. After his transfer to Kenya recently, the respondent deserted the matrimonial home, become cruel to the applicant and has failed to provide for her. He has also



- declined to approve her air ticket and travel documents to Netherlands to visit their children for the christmas vacation in accordance with family custom. The applicant contended that the respondent's actions are illegal and infringe on her right of movement as a dependent spouse. She urged the court to allow the application.
3. The application is opposed by the respondent vide his preliminary objection dated February 17, 2022. The objection is that the application is misconceived, incompetent, bad in law and fatally defective. Prayer (ii) has been overtaken by events and further that the application has not been brought under the [Marriage Act](#). The other objection is that the application for maintenance has not been substantiated.
  4. The respondent also filed a replying affidavit sworn on February 10, 2022. He urged that the application be dismissed as the same is incurably defective. He asserted that the applicant is also a Kenyan citizen, resident in Kenya and not in the Netherlands. She lives in their jointly owned property. Further that the children are over 18 years old. Further that the applicant is in receipt of an income and has a responsibility of looking after herself and is not entitled to maintenance at all. The respondent further stated that he has filed Divorce Cause No 1276 against the applicant and that he does not live with her any more.
  5. In her affidavit in response sworn on February 28, 2022, the applicant reiterated the averments in her supporting affidavit. She also accused the respondent of filing a petition for divorce in order to scuttle the present application. The applicant contended that the magistrate's court in Kenya has no jurisdiction to dissolve her marriage. Further that given that the marriage is still subsisting, she is entitled to maintenance as a wife. As a married woman, her domicile is dependent on the respondent's residence and is in Kenya based on the respondent's work transfer. She also stated that the property in which she resides is owned by their company known as [Particulars withheld] Limited. Additionally, the applicant asserted that she has a right to visit her children who, though adults, still need motherly love and care. The respondent has no right to approve her ticket given that the interested party recognizes her as the respondent's spouse. She urged that the court has power to compel the respondent to pay maintenance as the parties are legally married.
  6. Parties filed their written submissions which I have duly considered. I will deal with the preliminary objection which touches on the issue of jurisdiction of this court.
  7. It is the respondent's case that the application is a nullity ab initio. It was contended that a suit cannot be initiated by way of a notice of motion but can only be commenced by way of plaint, petition or originating summons. Notably, the applicant made no submissions on the preliminary objection.
  8. The application before me, has been brought under the provisions of articles 28, 29 and 45 of the [Constitution](#) of Kenya, 2010 and sections 40 and 77 of the [Marriage Act](#).
  9. Article 28 guarantees the inherent dignity of every person and to have that dignity respected and protected, while article 29 guarantees the freedom and security of the person. Article 45 recognizes the family is the natural and fundamental unit of society and the necessary basis of social order, and guarantees the recognition and protection of the family by the state. Article 22 of the [Constitution](#) provides that:

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.
  10. Part II of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 makes provision for the procedure for instituting court proceedings seeking



protection of fundamental rights and freedoms or redress for denial, violation infringement or threat to a fundamental right or freedom. Rule 10(1) provides:

An application under rule 4 shall be made by way of a petition as set out in Form A in the schedule with such alterations as may be necessary.

11. In the present case, the applicant has moved to this court claiming that her fundamental right of movement has been violated by the respondent. Under article 22, she has the right to do so. However, she is obligated to comply with the rules that govern the procedure for instituting court proceedings. Her application ought to have been anchored in a petition, in compliance with the rules.
12. The Application is also brought under sections 40 and 77 of the *Marriage Act*. Section 40 recognizes foreign marriages as civil marriages in Kenya, while section 77 provides for grounds for an order of maintenance of a spouse. Part X of the *Marriage Act* stipulates that matrimonial disputes and matrimonial proceedings shall be commenced by way of a petition. Rule 7 of *The Marriage (Matrimonial Proceedings) Rules, 2020* provide that an application for maintenance is to be made within a petition as follows:
  - (1) An application by any of the parties for ancillary relief under Part XII of the Act may be made by notice of motion at any stage in the proceedings.
  - (2) A petitioner who has not included in their petition a prayer for maintenance may make an application for maintenance at any time after filing the petition.
  - (3) A respondent may make an application for maintenance at any time after entering appearance.
13. The foregoing provisions make it clear that an application such as the present one for redress of violation of a fundamental right under the *Constitution* or for maintenance under the *Marriage Act* must be made by way of a petition, as provided by law.
14. In the case of *Proto Energy Limited v Hashi Energy Limited* [2019] eKLR, Odero, J. found the suit before her which was instituted by way of notice of motion to be defective. The learned Judge stated:

The applicants contention is that a suit may be initiated by way of a notice of motion – it will all depend on the governing statute of the particular proceeding. They rely on the decision of Justice Gikonyo in *Abdi Abdullahi Somo -vs- Ben Chikamai & 2 others* [2016] eKLR where the court held that:-

“In my life as a judge I have in the past heard similar arguments being advanced that a notice of motion cannot commence substantive proceedings. But, it should be understood that as a matter of general principal, a notice of motion is a competent way of initiating substantive proceedings in court. It will all depend on the particular statute governing the particular proceeding in question. Therefore where the law provides for the manner of commencing a suit or proceedings in court then that procedure applies...” [own emphasis]

*Order 3 Rule (i) (ii)* provides that every suit shall be instituted by way of a plaint. As a general rule a suit can only be instituted by way of a plaint, petition or an originating summons. A notice of motion is not legally recognized as an originating process. A notice of motion can only be filed within a properly instituted suit. The applicants failed to file any originating



process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective.

15. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* and The *Marriage (Matrimonial Proceedings) Rules, 2020* are clear that a party moving to court thereunder, must do so by way of petition.

16. Further an application must be anchored on a suit, where the law expressly so stipulates. In *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR, the Court of Appeal stated:

Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or statute, that procedure should be strictly followed (See Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on article 159 of the *Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that article 159 of the *Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Ors [2010] eKLR; Dishon Ochieng v SDA Church, Kodiaga (2012) eKLR; Hunter Trading Company Ltd v Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010).

17. It is trite that where the law has prescribed a specific procedure for the redress of any particular grievance, that procedure must be strictly followed. The court cannot use its inherent discretion to override a constitutional or statutory provision.

18. Similarly, the Court of Appeal in the case of *Scope Telematics International Sales Limited (supra)* went on to state:

The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.

19. Duly guided, I find that the application herein is fatally defective for not being anchored in a petition as specifically required by the enabling rules.

20. In the result and in view of the foregoing, I find uphold preliminary objection dated February 17, 2022 with the result that the application dated November 18, 2021 being incompetent, is hereby struck out. The circumstances herein do not call for an award of costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2022**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**



..... **for the Respondent**

..... **Court Assistant**

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