

IN THE HIGH COURT OF MALAWI, BLANTYRE
CIVIL CAUSE NO. 465 OF 1985

BETWEEN:

ROSE MTSUKO PETITIONER

- and -

DAVID MTSUKO RESPONDENT

Coram: UNYOLO, J.

Ng'ombe, Counsel for the Petitioner
Respondent, absent, unrepresented
Kalimbuka, Court Clerk

O R D E R

This is an application on the part of the petitioner for an order that the respondent pay her alimony pending suit.

The history of the matter is as follows : by her petition filed with the court on the 30th July, 1985, the petitioner pleads that she was married to the respondent on the 29th March, 1984, at the offices of the Registrar General in the City of Blantyre. She pleads further that after the said marriage, she lived and cohabited with the respondent at Area 3 in Lilongwe and that there is issue of the marriage namely Tong'asi Mtsuko, a girl, born on 8th June, 1985. She further pleads that since the celebration of the marriage the respondent has treated her with cruelty. The particulars of the alleged cruelty are stated. She says that she has since been forced to leave the matrimonial home and she is presently living on her own in Blantyre. She prays for a decree that she be judicially separated from the respondent, that she may have custody of the child and that the respondent pay her such sums of money by way of alimony pending suit as may to the court seem just. The present application is a follow-up of the said prayer. She avers in her affidavit in support of the application that since she left the matrimonial home the respondent has not made any provision for her maintenance and that of the child. Apart from her own maintenance, she has specified the items she needs and will continue to need for the upbringing of the child - things like napkins, baby toiletries

and milk. Finally she avers that the respondent is a man of means earning some K1,500 per month as Operations Manager in the employ of Hardware & General Dealers.

In his affidavit in answer to the alimony claim the respondent has set out particulars of his income and commitments. He avers that his gross salary per month is K1,534 and that his commitments are as follows:

(a)	Tax	K577
(b)	Arrears of Tax	50
(c)	Debt with Press Furniture & Joinery to be fully paid in 22 months	100
(d)	Mortgage repayment to New Building Society for the next 204 months	412
(e)	Debt with Hardware & General Dealers for the next 8 months	125
(f)	Electricity	100
(g)	Wages for Servant	50
		<u>K1,414</u>

It is the respondent's case that in the end he is left with K120 only out of which he has to buy his food and also pay legal costs in the total sum of K2,351 owing to Mr. Kaliwo and Messrs Wilson & Morgan. He concludes by saying that in these circumstances he is not able to pay the alimony sought or at all.

Pausing there I must now say something about the law. The starting point is section 25 of the Divorce Act which provides as follows:

"In any suit under this Act the wife, whether or not she has obtained a protection order, 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 or nullity of marriage until the decree is made absolute."

This means that the question whether or not alimony should be awarded is at large before the court. It is a discretionary matter, in other words. However in Welton v. Welton (1927) p.162 it was said that if a wife is a competent suitor without independent means she is usually entitled to an order. Such is the position the petitioner says she is in. She has no independent means. Indeed she avers that she intends to look for work soon, this with a view, obviously, to try and earn an income on which to subsist. Here, it is to be observed that the respondent has not in his affidavit sought to challenge or refute the averments made by the petitioner in her affidavit.

The matter does not however end there. In Coombs v. Coombs 1866 LR 1 P & D 218, it was stated that where it appears that the husband has no means or very small means, the court may refuse to award alimony pending suit. As indicated in this judgment, the respondent says he would not be able to pay any money to the petitioner because after paying out for his divers commitments what he has is only some K120 and that even that, he must share between his food and other debts.

Referring to the monthly commitments itemised by the respondent under paragraph 3 of his affidavit, Mr. Ng'ombe has submitted that only the item in (a) namely tax, can properly be taken into account in an allotment of alimony pending suit. Counsel contends that the only deductions which can properly be taken into account in the allotment of alimony pending suit are those which are ancillary to the salary itself; those of a compulsory nature. He cited Ryden on Divorce, 9th Edition at page 451 for authority. And Latey puts it thus:

"The Court must have regard to the husband's free income after paying the expenses of earning it, including tax liability."

See Latey on Divorce, page 272, para. 520. With respect, I accept this principle.

Referring to items (c) and (e) Latey at page 232, para.437 and citing Patterson v. Patterson, Curtis and Dore (1863) 33 LJP.36 states that where a defendant had contracted to pay off a debt by instalments, such instalments were allowed for in establishing his income. This suggests that the two items here can be taken into consideration. I would only observe that I find it difficult to appreciate why a husband should be allowed to pay a debt and leave his wife and child to starve. The same is true with stronger force of the items in (f) and (g). I cannot agree that the respondent should, with impugntiy, be allowed to pay K100 for electricity and K50 for wages for a servant every month and yet pay nothing for the up-keep of his

own wife and child. Indeed taking the items here into account would, in my judgment, run counter to the principle cited above in Latey. In short I would take into account only the commitments itemised as (a) and (b) which in my view are ancillary to the respondent's salary and which are, in practice, deducted directly by the employer from salary.

Finally, I wish to say also that actually I am unable to believe that the respondent does live, as he would want the court to believe, on only K120 (in fact less if the payments which he alleges he makes to Mr. Kaliwo and Wilson & Morgan are taken into consideration) considering his station in life. That is pure fabrication, intended to mislead the court. Indeed even if I were, for argument's sake, to believe this, it would still mean that the respondent has some money on which he is able to buy some food for himself. No reason has been advanced as to why he should not share such money with the petitioner.

All in all, I am satisfied that the petitioner is entitled to the order sought. It appears from what the petitioner has averred in her affidavit that for the child's milk and toiletries alone she needs a minimum of K54. There is then the question of nappies for the child and provision of the petitioner herself. Having given the matter the best of my consideration and regard being had to section 25 hereinbefore mentioned, I think that the sum of K100 per month would be reasonable. Accordingly, it is ordered that the respondent pay alimony to the petitioner at the rate of K100 per month from the month of October, 1985, until final decree; the first instalment to be paid on or before the 31st day of October, 1985, and thereafter on or before the last day of each succeeding month. The respondent is condemned in costs of the application.

MADE in Chambers this 30th day of October, 1985,
at Blantyre.

L.E. Unyolo
JUDGE