



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2009: No. 119

BETWEEN:

A.A.

Petitioner

-And-

A.S.

Respondent

Dates of Hearing: 25-26 October 2010
Date of Judgment: 26 November 2010

Lomas & Co., for the Petitioner
Respondent in person

JUDGMENT

History of the Marriage

1. In this application the Petitioner, wife, seeks periodical payments and lump sum provision for herself and the child of the family pursuant to a notice of intention to proceed dated 26th July 2009.
2. Affidavits were sworn by both parties for the purpose of this hearing. At the onset of these proceedings both parties were represented by Counsel; however, during the hearing the wife was represented by Counsel while the husband acted in person because he said, of the expense of retaining Counsel whom currently he owes \$20,000 for legal fees and he is having difficulties settling this obligation.
3. The wife is Ethiopian and is 25 years of age. The husband is Bermudian and is 34 years of age. He has been diagnosed with 'systematic lupus'. There is no

medical evidence as to how this will affect his long term ability to be gainfully employed. There is one child of the family who is 5 years of age. He lives with the Petitioner who has custody care and control. The Respondent has reasonable access.

4. In 2004, the parties met in Ethiopia and after a short courtship, about three months, the Petitioner became pregnant. Thereafter, the husband left Ethiopia and returned ten days before the child was born. The Petitioner said that she married the Respondent, husband, because of the shame the pregnancy brought to her family and relatives. They were married in Ethiopia on the 28th day of August 2005 three days before the child was born. They came to Bermuda when the child was about three months old. The wife felt isolated and cut-off from her family and she and the husband and child returned to Ethiopia in September 2006. The husband stayed two weeks and returned to Bermuda. In 2006 the husband funded a one year course which allowed the wife to obtain a vocational certificate-Master of Fine Arts in Ethiopia.
5. The husband visited Ethiopia about ten months later, June 2007, and stayed for two months. In March 2008 he returned again and stayed for six months. According to the wife although he was in Ethiopia for this expanded period he did not seek employment telling her that he wanted to spend time “with his friends”. The family returned together to Bermuda in September 2008 and upon his return the wife said he failed to take up employment for the next six months.
6. They separated in May 2009 when the wife quit the matrimonial home and resided at the physical abuse center because of the husband’s alleged violence and threats of violence. Decree Nisi was granted on 30th September 2009 and was made absolute on 30th November 2009. The marriage therefore lasted some 4 years.
7. The wife is living at the good grace of a family who has allowed her and the child to live rent free in a bedroom and share the kitchen and other facilities. She says

that she wishes to have her own accommodation and to be able to purchase basic necessities, for example, her own toiletries.

8. After the parties separated the husband wanted the wife to return to Ethiopia. She prefers to stay in Bermuda as it is easier to find work and care for her child. She says that she has never seen her husband go out to work. He believes he does not have to work.

Assets

9. The assets which are the subject of the hearing are (a) a house in Ethiopia which was purchased by the husband initially in his name for \$28,215. The husband transferred it into the wife's name because of the legal difficulties of holding it in his name. The wife is prepared to treat this property as having a value of \$30,000. There is conflict in the evidence of the parties as to whether the property in Ethiopia consists of one or two plots of land. I accept the evidence of the wife that it is one plot. There has been no valuation and the value of this property is agreed as \$30,000; (b) a multiple dwelling house in Bermuda comprising six apartments which was inherited in a derelict state by the husband and his siblings from their father. In 2000, he purchased his siblings' interest in the property. In order to do so, he secured a mortgage as well as sufficient funds to renovate the property.
10. The husband receives an income of \$8,400 per month from the rental of the dwelling units. The mortgage payment is \$4,857 monthly. Additionally, he has the following annual expenses associated with the property.

House Insurance	\$5,000
Land Tax	\$6,000
House maintenance	\$24,500
Medical expenses approximately	\$12, 000

Standard of Living

11. In Ethiopia, the standard of living was simple. In Bermuda the parties lived in a cramped one bedroom unit on the lower level of the husband's inherited property. The husband discussed moving into a larger two bedroom unit and have his mother reside with them but the marriage failed before that materialized.

Earning Capacities

12. The wife worked in Bermuda for three months but thereafter she could not seek additional work as the husband complained to the immigration department. She is now unemployed and is unable to seek employment until she receives an Extension of her Spouses Employment Rights Certificate (ESERC). The husband refused to complete an application to have their son registered as a Bermudian. If that had been done upon pronouncement of the Decree Absolute the wife, as the child's caregiver would have been entitled automatically to this certificate which would have provided her with equal opportunity in the workplace. In effect the husband's conduct has deprived the wife of income from working since May 2009. After considerable effort by the wife's Counsel it is expected that she should be securing a certificate in a few weeks. In her affidavit sworn on 13th May 2010 she indicates that her potential income is \$2,169 monthly.
13. There is a conflict in the evidence of the parties as to whether the husband was gainfully employed during the marriage. I accept the evidence of the wife that the husband rarely worked if at all during the times that they were together. In areas of dispute I prefer the evidence of the wife who is open and cooperative. On the other hand the husband is not forthcoming indeed at times he is evasive.
14. Presently the husband who is a qualified electrician is not gainfully employed. The evidence shows that the husband does not keep a job for any length of time. Whenever the husband needs money to support his life-style he borrows against the property. However, when he works he can earn at least \$900 weekly. Counsel for the wife submits that he prefers to sit at home, watch television and smoke marijuana.

15. There is an existing order that the husband should pay the wife \$150 per week as maintenance for the child. The payments are not always made in a suitable manner. At the time of the hearing he had accumulated six weeks arrears. Before the hearing commenced he paid \$600 leaving a balance of \$200. He offers to continue with the payment of \$150 per week for the child. Additionally, he has offered to pay the wife \$1300 per month – the income from the one bedroom apartment. She has \$2,000 in a savings account. The wife argues that she would like to be placed in a position where she and the child can be in her own settled accommodation albeit rented. The wife produced evidence of rental under \$3,000 which will provide adequate accommodation for her and the child of the family.

16. I do not propose to conduct any further detailed analysis of the parties' budget. This is a needs driven case.

17. In summary the parties married in Ethiopia in 2005 and separated in 2009. They have one child who is now aged 5. The wife has no resources. The husband resource is a multiple dwelling unit which he inherited. It is valued at \$1,275 million with an outstanding mortgage and further charge of \$535,000. The wife seeks an award of \$148,000. She urges that the husband can obtain this sum as a further charge secured by the property.

18. It is the husband's case that this is inherited property, the wife has made no contribution to it and she ought not to gain any benefit from it. He stressed that he has always been gainfully employed in some shape or form – that is, working at his trade as an electrician, hustles or maintaining the property which is extensive. The husband argues that she should be allowed to keep the property in Ethiopia. There is a debt of \$3,000 due on this property which will take about \$17,000 to develop.

Court

19. The first issue which needs to be determined is how the equity in the assets should be shared between the parties. This is a short marriage one where the parties lived a very unsettled and at times turbulent life together. Their standard of living was measly. There is one five year old child of the family whose welfare must be paramount. A clean break is inappropriate. I conclude that it is appropriate to place the mother in a position where she can provide adequately for the child and herself. Having regard to the Matrimonial Causes Act, statutory provision, and precedent I conclude that the wife should retain the property in Ethiopia with an agreed value of \$30,000. She should retain the \$2,000 cash savings. The husband shall pay her a lump sum of \$55,000 which will enable her to pay off the \$3,000 debt due on the property in Ethiopia. With frugality she should be able to modestly furnish an apartment here in Bermuda where she and the child can reside. Instead therefore of the 1/5 of the \$740,000 equity in the Bermuda property or \$148,000 split sought by the wife, the order made by the Court splits the total equity of a little over 1/10 to the Petitioner, wife. In arriving at this decision, the Court has had regard to the husband's earning potential which is likely to be between \$900 and \$1,237.75 net weekly and, the wife's earning potential of \$2,169 per month.
20. I consider this to be a fair division of the assets in light of the following – (i) the property was inherited (ii) the wife made no contribution to the enhancement of the property. That said, I recognize that contributions to a marriage is not limited to financial contribution. (iii) the wife will keep the property in Ethiopia which was purchased with funds secured against the Bermuda property. (iv) the funds which the husband will use to pay the wife's lump sum award will likely be taken as a charge against this property as the husband has no independent means which could be used to satisfy the payment of the wife's award.

Charge against the property

21. Historically whenever the husband needs funds he simply takes a further charge against the property. The majority of the husband's income from the property is fully committed. The wife has sought and the Court accepts that in order to protect the wife and child's periodical payments there ought to be an order prohibiting the husband from further borrowing on the property. Given the husband's volatile behaviour in borrowing against the Bermuda asset, except for borrowing the property to pay \$55,000 lump sum award the husband is prohibited from further borrowing against the Bermuda property until the child attains the age of 18 or otherwise ordered by the Court. There is liberty to apply by letter in respect of this restriction.

Periodical Payments

22. The husband shall pay periodical payments of \$2,300 per month for the wife and child. This periodical payments order should be reviewed in ten (10) months time that is, on the 29th September 2011 at 10:30 am at which time it is envisaged that the wife will be gainfully employed.

Costs

23. The wife is a recipient of legal aid and has put forward that the award of \$148,000 being sought includes \$35,000 which would enable her to repay the legal aid fund. In this case I make no orders as to cost. The asset being considered is very small and the wife's legal aid cost is disproportionate. The husband was represented by Counsel but had to forgo such representation because of lack of funds to pay. He still owes some \$20,000. As I have indicated this is a needs driven case and the Court is mindful of the effect on the husband's ability to repay any further charges secured by the property as well as diminishing the long term security of the child.

Care for the child's welfare

24. An insight into the husband's make up was provided by the wife's evidence about what she contended was the husband's training of the child. I consider that his guidance of the child is potentially very harmful. The court is required to have regard to all the circumstances of the case. The evidence before the court is that the father would beat the mother in front of the child. The child listens to his father and he is now behaving disrespectfully to his mother and to his teachers. The husband's overall attitude to the wife's living condition lacks sensitivity. The wife in her oral evidence made allegation of the husband's brutality and threats of violence to her in the presence of the child during the marriage. She speaks of the five year old's rudeness and unspeakable behaviour towards her which is brought about by the father tutoring him to be disrespectful to her. Now the child is misbehaving in the school environment. Given these factors I hereby order that the Child and Family Services Department conduct an inquiry and report to the court whether it is desirable to curtail the husband's access and if yes, in what manner.
25. Counsel for the wife is to prepare an order for the Court's signature.

Dated the 26th of November 2010

The Hon. Justice Norma Wade-Miller
Puisne Judge

Addendum:

Under Paragraph 21: The amount of \$55,000 is to be paid on or before the 26th January 2011

Under Paragraph 22: The payment of \$2,300 per month is to commence on 17th December 2010.