



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL CASE NO. 36 OF 2010 (O.S.)**

C W N.....APPLICANT

VERSUS

P N K.....RESPONDENT

**RULING**

1. There is no dispute that the applicant C W N and the respondent P N K got married on 1987 and got four children. In 2010 the applicant filed Divorce Cause No. 311 of 2010 at the Chief Magistrate's Court at Nairobi against the respondent. The couple was divorced following a judgment delivered on 6<sup>th</sup> November 2012. On 8<sup>th</sup> October 2010 the applicant filed this originating summons under **section 17** of the **Married Women Property Act 1882** to determine the extent of her interest in Plot No. NRB[Particulars withheld]; Plot No. Nairobi/Block [Particulars withheld]; vehicles [Particulars withheld]; and money in A/C No. [Particulars withheld] at Kenya Commercial Bank and A/C No. [Particulars withheld] at K-Rep Bank, which she pleaded that, although registered in the name of the respondent, had been purchased, developed and improved during the period of coverture and with her joint contribution.

2. The respondent filed a replying affidavit to state that he bought parcel No. Nairobi/Block [Particulars withheld] on which he constructed a house, and that the applicant had contributed only 10% towards the construction. There is no dispute that Plot No. NRB[Particulars withheld] comprises several plots at [Particulars withheld] Tassia. On the plots stands a school ([Particulars withheld]Academy). The respondent stated that he wholly bought the plots. He then substantially borrowed money to build the school. The applicant made a contribution which he stated was not substantial. The accounts in the originating summons were being operated by the school, and stated that the applicant had no claim to them.

3. Following various interlocutory applications, the matter came for hearing on 12<sup>th</sup> May 2016. Mr. Nyangau was acting for the applicant and Mr. Kitheka for the respondent. The applicant was testifying when her counsel realised that they had not pleaded some vehicles which had been bought after the suit was filed. He made an oral application under **Order 8 rule 8** of the **Civil Procedure Rules** to amend the originating summons to indicate the vehicles. Mr. Kitheka sought that a formal application be made as he sought instructions from his client. The court allowed the applicant to make a formal application.

4. The applicant filed an application dated 17<sup>th</sup> May 2016 under **Order 8 rule 3** and **Order 50 rule 1** of

the **Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking to be allowed to amend the summons. It was stated that part of the claim had been inadvertently left out at the time of filing the summons. The proposed amendments were renaming of the suit premises; the inclusion of new assets which had been acquired using the school money; and loss of earnings as a result of the applicant's loss of employment both as a [Particulars withheld] teacher and school manager of [Particulars withheld] Academy. There is no dispute that in the course of the applications in this suit, the parties entered into a consent on 11<sup>th</sup> November 2010 in which the applicant was brought into the school ([Particulars withheld] Academy) as a partner, director, school manager, and was made a signatory to the school accounts.

5. The respondent opposed the application by filing grounds of opposition whose grounds were that:-

- (a) the motion was belated and an afterthought;
- (b) the notice was not supported by cogent evidence apart from mere allegations;
- (c) the applicant had not demonstrated that the alleged properties she sought to be included belong to the respondent;
- (d) the motion was intended to vex and annoy the respondent;
- (e) the motion was a blanket omnibus intended to drag in properties not envisaged under the law;
- (f) the application was grounded on conjecture and lacked specificity;
- (g) the prayers were bad in law; and
- (h) the motion was purely an attempt to go on a fishing expedition and therefore should not be allowed.

The respondent did not swear any affidavit in response. The factual basis of the application was therefore not challenged.

6. It was the applicant's case that the amendment sought was necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Further, that the amendment will not prejudice the respondent and, if there was any prejudice caused, the same could be made good by an award of costs.

7. Counsel filed written submissions on the motion.

8. Under **Order 8 rule 3(1)** of the **Civil Procedure Rules**:

**“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of the rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”**

9. It is clear that the applicant was stood down during her evidence-in-chief to allow for this application. She has not completed her testimony and cross-examination will follow. In other words, hearing has just begun. It should also be borne in mind that, if the application is allowed the respondent will be entitled to the opportunity to align his defence to the amended summons. If he so desires, he will be allowed to file a further affidavit. Lastly, looking at the facts of the case, the property sought to be brought into the summons are not a surprise to the respondent. The parties were already litigating over the school, initially [Particulars withheld] Academy and later [Particulars withheld] Academy, its assets and accounts.

10. The rule that allows amendment of pleadings gives the court a wide discretion (**Kara –v- Makan**

**(1950) 17 EACA 16; Eastern Bakery –v- Castellino [1958] EA 461; Gaso Transport Services (Bus) Ltd –v- Obene [1990-1994] EA 88 (SCU).** The purpose of amendment is to enable the court to effectively and completely adjudicate all the questions involved in the dispute. The discretion is, however, a judicial one and not an arbitrary exercise of the power. Each application has to be determined on its peculiar facts, but the overriding principle is to do substantial justice and not to punish a party on technical grounds.

11. As a general rule leave to amend pleadings ought not be refused unless the court is satisfied that the party applying is acting *mala fide*, or that his blunder has caused some injury to the other side which cannot be compensated by the payment of costs or otherwise (**Kassam –v- Bank of Baroda (Kenya) Ltd [2002] KLR 294**). In **Sumvir Trustees Ltd –v- Guardian Bank Ltd Nairobi (Milimani) HCCC No. 795 of 1997**, it was held that the court has discretion to allow amendments even during trial as long as that amounts to fully and clearly putting the matter in controversy before it for a just and fair final determination.

12. In the instant case, the parties have divorced. The distribution of their matrimonial property is an important constitutional and statutory obligation on the part of the court. Substantial justice can only be served and attained if all the facts are placed on the table by either side. There has been no indication that any demonstrable delay will be occasioned, or that any injustice or prejudice will be suffered if the applicant is allowed to put her full case. She will be interrogated on that case, and in any case, parties are represented.

13. In conclusion, I allow the application. Leave of 14 days is given to the applicant to file and serve an amended originating summons. Upon service, the respondent shall have leave of 14 days to respond by any further affidavit. Parties shall have each 7 days to file and exchange any further documents. The matter shall thereafter be mentioned on 10<sup>th</sup> May 2017 to take a hearing date.

14. The applicant has been indulged. She will pay costs of the application to the respondent.

**DATED and SIGNED at NAIROBI this 22<sup>nd</sup> day of MARCH 2017.**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 29<sup>TH</sup> day of MARCH 2017.**

**R.E. OUGO**

**JUDGE**