



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION NO. 100 OF 2013**

**P W K.....APPLICANT**

**VERSUS**

**L K K.....RESPONDENT**

**RULING**

1. The applicant and the respondent were wife and husband, respectively, until 2<sup>nd</sup> August 2013 when they were divorced by the Chief Magistrate's Court in Nairobi in **Divorce Cause No. 285 of 2005**. The petition was filed by the respondent and opposed by the applicant. On 16<sup>th</sup> October 2013 the applicant filed a motion under **section 79G** of the **Civil Procedure Act** and **Order 51 rules 1 to 5** of the **Civil Procedure Rules** to be allowed to appeal out of time. Her case was that she lives and works in the U.S.A; that she had problems with her then advocates on record to the extent that she was not made aware that the case was coming for hearing; and neither was she informed of the judgment date. When she came to know that her matter had been decided, the statutory appeal time had passed, she deponed.
2. On 13<sup>th</sup> March 2014 the respondent filed grounds of opposition to say that:-
  - a. the application was fatally and incurably defective and misconceived;
  - b. the applicant was not entitled to the orders sought;
  - c. the applicant was guilty of inordinate delay;
  - d. the application was a gross abuse of the process of the law;
  - e. the application was frivolous and vexatious;
  - f. the appeal does not lie;
  - g. the applicant's advocates were not properly on record; and
  - h. there was a decree absolute in the matter and therefore application was null and void.

On the same day the application came up for hearing counsel for the respondent successfully applied for adjournment, saying that he had not taken instructions from his client who had got a stroke. He was given leave of 21 days to file and serve response. The applicant got corresponding leave. The matter came up for hearing on 5<sup>th</sup> June 2014, but was adjourned at the instance of the respondent. Parties were directed to file and serve written submissions on the application. Each side was given 14 days. It was ordered that the matter be mentioned on 8<sup>th</sup> July 2014. When the case came up the respondent had not filed written submissions, but the applicant

had. He was given 30 days to file and serve. The respondent filed his submissions on 10<sup>th</sup> July 2014. On the same day he filed a replying affidavit to the application. This was done without leave.

3. The substance of the replying affidavit was that, following the divorce the decree *nisi* had been made absolute on 6<sup>th</sup> March 2014 and subsequent to it the respondent had contracted another marriage. Therefore, the application had been overtaken by events and the intended appeal would be rendered nugatory.
4. The applicant filed the present application and a further affidavit on 24<sup>th</sup> July 2014 in response to the replying affidavit. The applicant complained that both the decree *nisi* and decree absolute were obtained after the application had been served, and therefore the subsequent marriage by the respondent was done with full knowledge of the pending application whose intention was to appeal the judgment that had given rise to the divorce. There was clear intention to defeat the application and the intended appeal, it was averred.
5. On 29<sup>th</sup> October 2014 the applicant filed the instant application in which she sought under **Order 2 rule 15** of the **Civil Procedure Rules** to have an affidavit filed on 23<sup>rd</sup> September 2014 by the respondent struck out and expunged from the record with costs. This was on the grounds that the affidavit was scandalous, frivolous and vexatious; was an abuse of the process of the court; was filed after parties had closed their cases and filed written submissions; and had been filed without leave. This affidavit (it is titled "Further Replying Affidavit") was sworn by Njoroge Wachira who represents the respondent. It was a factual narration of the history of the case as known by counsel; the fact that following several adjournments at the instance of the applicant the matter was eventually heard on 12<sup>th</sup> March 2013 in the absence of the applicant but that her counsel was allowed to cross-examine; the matter was adjourned to allow for the applicant to attend but she did not; there was unsuccessful application in the High Court to stop the proceedings; the case was decided and divorce granted, following which the respondent got married to one Grace Muthoni Ngugi with the respondent's advocate being the best man.
6. I agree with the applicant that the affidavit was filed without leave, and after submissions had been filed by either side on the application dated 16<sup>th</sup> October 2013. The hearing of the application was closed on 24<sup>th</sup> July 2014 when the applicant's counsel filed submissions in reply to the respondent's counsel's submissions dated 10<sup>th</sup> July 2014. Further, the respondent's counsel swore to contentious matters. The respondent was available to depone to these matters of fact (**Small Enterprises Finance Co. Ltd –vs- George Gikubu Mbuthia, [1994] LLR 7693**). For these reasons, the further replying affidavit sworn by Mr. Njoroge Wachira on 23<sup>rd</sup> September 2014 and filed on the same date is found inadmissible and is hereby expunged from the record. Costs shall be borne by the respondent.

**DATED at NAIROBI this 21<sup>ST</sup> JANUARY 2016.**

**A.O. MUCHELULE**

**JUDGE**

**DELIVERED at NAIROBI this 21<sup>ST</sup> JANUARY 2016.**

**R.E. OUGO**

**JUDGE**