



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO.156 OF 2011**

**M N B.....PETITIONER**

***VERSUS***

**J W B.....RESPONDENT**

**RULING**

The Petitioner, M N B, petitioned this court to have her marriage to J W B dissolved on the grounds that the Respondent had committed the matrimonial offences of cruelty, willful neglect and adultery. The Petitioner prayed to be granted custody of the issues of the marriage. She further prayed that the Respondent be compelled to provide maintenance for herself and the children of the marriage. The Respondent was served with the petition for divorce. He duly entered appearance. He filed answer to the petition. He denied the allegations made against him by the Petitioner. He cross-petitioned for divorce. He accused the Petitioner of committing the matrimonial offences of adultery and cruelty. He also prayed that the marriage be dissolved. He prayed that before the issue of custody of the issues of the marriage is determined, the paternity of the said issues be first ascertained. He also asked the court, if it was minded to order maintenance, to direct that maintenance be shared between himself and the Petitioner.

Before the hearing of the petition, the Respondent filed an application pursuant to the then **Section 9(1)** of the **Matrimonial Causes Act** and **Rules 5** and **14(1)** of the **Matrimonial Causes Rules**, seeking orders from the court to be granted leave to amend his cross-petition so as to enjoin one S G T as the co-respondent in the cross-petition. The grounds in support of the application are stated on the face of the application. In essence, the Respondent states that the said proposed co-respondent was a necessary party to the proceedings because he was openly cohabiting with the Petitioner. He deponed that, in his cross-petition, he had pleaded with the matrimonial offence of adultery as against the Petitioner. He could only prove this averment if the proposed co-respondent was enjoined into the proceedings.

The application was opposed by both the proposed co-respondent and by the Petitioner. The proposed co-respondent swore a replying affidavit in which he denied the allegations made against him by the Respondent. He averred that he was a stranger to the allegations made by the Respondent. He was shocked that he was being enjoined in a matrimonial dispute whose particulars he was not aware of. He denied having ever had an affair with the Petitioner. He was of the view that his name was being dragged into these proceedings with the intention of clouding the real issues in controversy which, in fact, boiled down to the determination of the question whether the marriage between the Petitioner and the Respondent was sustainable. He urged the court to disallow the application. On her part, the Petitioner swore a replying affidavit in which she denied the allegations made against her in the application. In particular, she accused the Respondent of attempting to conceal his extra marital affairs by accusing her of adultery. She urged the court to disallow the application.

Prior to the hearing of the application, the respective counsel for the Petitioner and the Respondent filed written submission. This court has carefully considered the said submissions. It has also considered the arguments made by Mr. Achilla for the Respondent and by Mr. Wanyonyi for the intended co-respondent. The issue for determination by this court is whether the Respondent established a case for this court to enjoin the intended co-respondent as a party to these proceedings. Coupled with this, is the question whether the co-respondent, if enjoined, is a necessary party to the proceedings. As stated earlier in this Ruling, the Respondent's application is predicated on the provisions of **Section 9(1)** of the then **Matrimonial Causes Act**. It should be noted that the petition herein was filed before coming into effect of **The Marriage Act 2014** whose commencement date was 20<sup>th</sup> May 2014. This **Act** repealed the

**Matrimonial Causes Act.** However, since the petition was filed before the commencement of this Act, the provisions of the repealed Act would be applicable for the purposes of determining the present application. **Section 9(1)** of the **Matrimonial Causes Act** provided as follows:

*“On the petition for divorce presented by the husband or in the answer of a husband praying for divorce, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from doing so.”*

**Rule 5** of the **Matrimonial Causes Rules** clarifies this section of the Act. It provides thus:

*“Unless otherwise directed, where a petition for divorce or a petition for judicial separation in which damages are claimed alleges adultery, every alleged adulterer, if male, and living at the date of the filing of the petition, shall be made correspondence in the cause, and where a petition contains a claim for costs against a woman named she shall be made a respondent in the cause.”*

Having perused the proposed amendments to the cross-petition, it was clear to this court that the Respondent had not sought to be paid damages on account of the alleged adultery by the co-respondent. This court is of the view that once a Petitioner has filed a petition seeking to be divorced from the Respondent, and the Respondent has filed a cross-petition seeking to be divorced from the Petitioner, it would be a waste of judicial time to enjoin third parties to the petition where the issue in controversy really is whether the marriage ought to be sustained. This court agrees with the proposed co-respondent that to enjoin him in proceedings which is essentially a matrimonial dispute between the Petitioner and the Respondent would obfuscate the real issues for determination by the court. This court agrees with the observation made by Kubo J in **Barbra Otunga – Mohamed –Vs- Ahmed Mohamed Ali [2006] eKLR** where he agreed with the finding made by Bosire J (as he then was) in **Buya –Vs- Makorain & Another [1990] KLR 232** in which he held that it was not necessary or essential to enjoin an alleged adulterer in the proceedings because the issues in dispute was the determination of the question whether or not a divorce should in the circumstances be granted.

In the premises therefore, this court holds that the Respondent’s application seeking to enjoin the intended co-respondent as a party to these proceedings lacks merit and is hereby dismissed with costs. The enjoining of intended co-respondent will not aid the court in the determination of the real issue in controversy which is the question whether the marriage between the Petitioner and the Respondent ought to be sustained. It is so ordered.

**DATED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2014**

**L. KIMARU**

**JUDGE**