



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Matrimonial Case 11 of 2007

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

E. N. K..... APPLICANT

VERSUS

J. N. K..... RESPONDENT

RULING

Before me is a notice of motion brought by the Respondent under the provisions of **Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking orders from this court to allow the Respondent to file and rely on a further affidavit during the hearing of the suit. The grounds in support of the application are stated on the face of the application. The Respondent contends that the information he intends to put in the further affidavit were not readily available to him at the time he filed the previous affidavit within the period stipulated by the court. The Respondent stated that it would be in the interest of justice for the information contained in the further affidavit to be placed on record. He further contends that the Applicant will not be prejudiced because she would have an opportunity to respond to the contents of the further affidavit.

The application is opposed. Anne Mbugua, the advocate for the Applicant swore a replying affidavit in opposition to the application. She avers that the applicant is a resident of the United Kingdom and the many occasions that the case had been listed for hearing and had not proceeded to hearing had caused her considerable expense. She swears that the parties herein had agreed that the hearing of the case would proceed by way of submission after the court had considered all the pleadings and affidavits on record. In compliance with this agreement, the Applicant had filed written submissions. It was the Applicant's contention that the application by the Respondent to be allowed to adduce additional evidence was belated and would prejudice the Applicant who had complied with all the time lines required of her pursuant to the agreement for the hearing to proceed by way of submission. The Applicant was of the view that if the court allowed the Respondent to adduce further evidence, it would cause her considerable expense that is not justified in the circumstances of this case.

At the hearing of the application, this court heard oral rival submissions made by Dr. Kuria for the Respondent and Mrs. Mbugua for the Applicant. This court has carefully considered the said submission. The issue for determination by this court is whether the Respondent made a case for this court to grant his application to adduce further evidence in the case after the close of pleadings. It is true as stated by Mrs. Mbugua that the parties had by consent agreed on a time table by which the parties herein were required to file their pleadings and submissions. The Applicant complied with the agreed time lines. On his part, the Respondent wishes to be allowed to adduce further evidence in form of a further affidavit. The main reason advanced by the Respondent for the delay in filing the required evidence is that the information that is intended to be adduced in evidence was not available to him at the time he swore his replying affidavit. This court is aware that **Article 159(2)(d)** of the **Constitution** requires this court to administer justice without undue regard to procedural technicalities. In this case, it is clear that whereas the Applicant would be prejudiced in terms of being required to file further evidence, in this case the interest of justice dictates that this court allows the application. It is only fair that the Respondent be allowed to put on record all the evidence that he deems necessary to advance his case. Any prejudice that the applicant may suffer, will be compensated by an award of costs. The Applicant will also be given an opportunity to respond to the further evidence that will be filed by the Respondent.

In the premises therefore, the Respondent's application is allowed. The Respondent is granted leave to rely on the further affidavit at the hearing of the suit. The supporting affidavit in support of the application is deemed to be the Respondent's further affidavit. The Applicant shall be at liberty to file a response to the said affidavit. The Respondent shall pay the Applicant's cost of the application which this court assesses at Kshs.5,000/-. It is so ordered.

**DATED AT NAIROBI THIS 26<sup>th</sup> DAY OF APRIL, 2013**

**L. KIMARU**  
**JUDGE**