

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

DIVORCE CAUSE NO. 5 OF 2011

R C C.....PETITIONER

-VS-

E C C.....1ST RESPONDENT

G C T.....2ND RESPONDENT

RULING

In the Summons dated 12th April 2013, **R C C** prays for leave to amend the Petition. The Summons is supported by the affidavit of NAK sworn on 17/4/2014. The Respondents opposed the Summons by filing the replying affidavit of E C C sworn 22nd August 2013.

When the application came up for interparties hearing, Mr. Mwangi, learned advocate for the Petitioner beseeched this court to grant the orders sought in the summons on the basis that it will assist the court in correcting the anomaly apparent on the face of the Petition. He also argued that the Respondents will not suffer any prejudice if the orders are given. Mr. Sigira, learned advocate for the Respondents urged this court to dismiss the application on the ground that the Respondents will suffer serious prejudice in that it will take away an objection they had raised against the Petition.

I have considered the grounds set out on the face of the summons and the facts deponed in the affidavits filed for and against the application. I have further considered the oral submissions of learned counsels. Mr. Norman Asega Khagai avers in his affidavit that upon receipt of instructions from the Petitioner he prepared the Petition for divorce and he inadvertently pleaded for division of the Matrimonial property which issue cannot be dealt with within this cause. The learned advocate further avers that he has now advised the Petitioner to seek for leave to amend the Petition for purposes of deleting the prayer thus abandoning the same. It is also argued that the summons is intended to correct certain typographical errors apparent on the Petition.

It is deponed in the replying affidavit of E C C that the application is intended to resuscitate an otherwise hopeless petition. It said that the prayer for division of Matrimonial property should not have been included in the petition for divorce because it had already been pleaded in Kericho H.C.C.C no. 20 of 2012 (O.S). If I understood Mr. Sigira well, his argument is that if the amendment is allowed it will take away a preliminary objection raised in Kericho H.C.C.C no.20 of 2012 (O.S). I have looked at the notice of preliminary objection dated 19/03/2012 and paragraph 11 of the replying affidavit of E C C sworn on 22nd March 2012 in the aforesaid petition and it is obvious that the Respondents had stated that the prayer for division of Matrimonial property was improperly pleaded because the same is **res judicata** and is **sub-judice**. The question which must be answered is whether the amendment sought will take away a right which has accrued to the Respondents? In my understanding, the Petitioner is simply saying, she no longer wants to pursue the prayer for division of matrimonial property within this petition. It is trite law that amendment of pleadings should be allowed provided no prejudice may arise as a result of the amendment. I agree with Mr. Sigira that the intended amendment will take away or render useless the objection he had raised against that particular prayer in this Petition. In my view that damage can be compensated by an award of costs. In any case the objection itself could not have rendered the entire Petition to be struck out and dismissed. I will allow the summons so that the irrelevant portion of the Petition cannot be deleted leaving the relevant portion to go for trial. In so doing, the court will be able to hear and determine the real issues in dispute.

In the end the summons dated 17/4/2013 is allowed as prayed save costs is awarded to the Respondents.

Dated, signed and delivered this 27th day of September 2013

J.K.SERGON

JUDGE

In open court in the presence of

Mr. Sigira for the 1st Respondent

N/A for the Applicant

Mr. Koech- court clerk