

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Divorce Cause 58 of 2011

T. W. N.....PETITIONER

VERSUS

I. K. M.....RESPONDENT

RULING

By this application, the Respondent herein seeks leave to file and serve the answer to Petition and Cross-Petition out of time. The application is brought by Chamber Summons dated 4th October, 2011 and taken out under **Rules 3 (3), 16 and 20** of the **Matrimonial Causes Rules**. The application is supported by the affidavit of Ms. Onyango-Oduor, Advocate and is based on the grounds that the failure to file the answer to Petition and Cross-Petition in time was inadvertent and due to an error on the part of the Respondent's Advocate, and that no prejudice will be suffered if the orders sought are granted.

In a replying affidavit sworn by T. W. N. on 29th November, 2011, the deponent avers that the error by the Respondent's Advocates has gone a long way in delaying this matter. He also deposes that if this application is entertained and allowed, this will add to his misery owing to the delay already caused, and his wish to have these divorce proceedings out of the way is already tormenting him.

During the hearing of the application, Mrs. Othero for the Applicant relied on the grounds set out in the supporting affidavit of Ms. Onyango-Oduor and added that at the material time, the parties were negotiating in respect of matrimonial property. The Respondent was under the mistaken belief that there was no need to file the answer to Petition and Cross Petition during the period of negotiations. She submitted that no prejudice will be suffered by the Respondent and that the answer and Cross Petition raise triable issues. She relied on **FMD v NH [2010] eKLR** and urged the court to exercise its discretion cautiously. She also referred to **COMMERCIAL BANK LTD v. PARADISE COURT LTD Nbi HCCC No. 1735 of 2000 (UR)** and requested the court to grant the orders as prayed.

Opposing the application, Mr. Kimathi for the Respondent argued that the reasons advanced by the Applicant were not sufficient as the negotiations were on division of properties which would not have caused delay in filing a reply. Secondly, the particulars of adultery are not pleaded and therefore the pleadings do not raise a triable issue. He prayed for the application to be dismissed so as to pave the way for the hearing of the Petition.

After considering the pleadings and the submissions of counsel, I find that the primary issue to determine is whether leave to file the answer to Petition and Cross Petition should be granted. In order to answer that question and on the basis of the authorities cited, it is prudent to consider whether the document sought to be filed out of time is of any value to the whole case, and whether the delay was inordinate. On perusing the proposed answer to Petition and Cross Petition, I find that it is not frivolous as it raises some pertinent issues worthy consideration by the court. It will also assist the court in apportioning the blame, if any, for the breakdown of the marriage, which in turn will determine who should be condemned with costs. It is a document valuable to this cause.

Whether delay is inordinate or not depends on the facts of each particular case. In this one, the parties were negotiating a possible settlement of the matrimonial property. In the process the Applicant overlooked the issue of filing the answer to Petition and Cross Petition. The Applicant's memory was

jolted back by the Respondent's application for the Registrar's certificate to the effect that pleadings were in order for the matter to proceed to hearing. That was when they came back to action and filed this application. As none of the parties has stated when the negotiations broke down and what led to the collapse, I am inclined to give the benefit of doubt to the Applicants. As this is a matter which calls for exercise of discretion, I accordingly exercise my discretion and allow the application as prayed. I further make the following orders-

- (a) Leave is hereby granted to the Respondent to file and serve the answer to Petition and Cross Petition out of time.**
- (b) The Respondent do file and serve the answer to Petition and Cross Petition within 14 days.**
- (c) The Respondent/Applicant will pay the costs of this application in any event.**

DATED and DELIVERED at NAIROBI this 27th day of July, 2012.

L. NJAGI

JUDGE