



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Divorce Cause 44 of 2012

D. N.K.....PETITIONER

VERSUS

J. H. K.....RESPONDENT

RULING

This application is brought by a Chamber Summons dated 8th August, 2012 and taken out under Rules 3(3) and 25(1) (i), (ii) & (iii) of the Matrimonial Causes Rules. The Applicant thereby prays for orders that the Petitioner’s evidence in support of the Petition herein be adduced by way of affidavit evidence and that costs be in the cause.

The application is supported by the annexed affidavit of the Petitioner, DNK, and is based of the grounds that the Petitioner herein intends to travel to the USA and shall not be present in court on the date appointed for hearing of the Petition and that the Petition has been certified to proceed as an undefended cause. She further attests that she was going to the USA on 15th September, 2012 to visit her sister residing therein and to attend her daughter’s graduation ceremony scheduled for 18th September, 2012. She will not have travelled back into the country by 27th September, 2012 when the Petition is scheduled to be heard.

On the basis of the above depositions, learned counsel for the Petitioner requested the court to proceed to hearing by way of affidavit evidence. Rule 3(3) of the Matrimonial Causes Rules on which counsel lied states that-

“Except where these rules otherwise provide, every application shall be made to, and any leave or direction shall be obtained from, a judge by summons in chambers.”

Learned counsel also relied on rule 25(1) (i), (ii) & (iii) of the Matrimonial Causes Rules which states-

“Subject to the provisions of the Act and of this rule, the witnesses at the trial or hearing of any Matrimonial Cause shall be examined by viva voce and in open court:

Provided that a judge may on application made to him-

- (i) Subject to the provisions of paragraph 2 of this rule, order that any particular facts to be specified in the order may be proved by affidavit:
(ii) Order that the affidavit of any witness may be read at the trial or hearing on such conditions as the judge may think reasonable:

(iii) Order that evidence of any particular facts to be specified in the order shall be given at the trial or hearing by statement on oath of information and belief or by production of documents or entries or otherwise as a judge may direct...”

From this Rule, it is patently clear that the general rule is that witnesses at the trial of any Matrimonial Cause should be examined by *viva voce* evidence. Reference to affidavit evidence applies to particular facts which a judge may deem appropriate for proof by affidavit evidence. Reference to affidavit evidence is not a practice of general application but rather an exception to the general rule. Its blanket application would therefore contradict the general rule laid down in **Rule 25(1)**.

The Applicant does not state that she was travelling to reside in America and she vividly stated that she would not be back in the country by 27th September, 2012 when the Petition was scheduled to be heard. Although she does not specify when she expects to be back, the wording of the affidavit suggested that she was going to be back on a date subsequent to 27th September, 2012. It is imperative that *viva voce* evidence be adduced and therefore the Petitioner should ready herself to give oral evidence. I accordingly decline to grant the order sought and hereby dismiss the application.

A fresh date for the hearing of this Petition be taken at the registry.

Orders accordingly

DATED and DELIVERED at NAIROBI this 25th day of October, 2012.

L. NJAGI
JUDGE