



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**DIVORCE CAUSE NO.149 OF 2008**

**F.G.N.....PETITIONER**

**VERSUS**

**E.W.G.....RESPONDENT**

**R U L I N G**

F G the petitioner herein, filed this petition seeking to be divorced from the respondent. The petition was filed on 8<sup>th</sup> December 2008. The petitioner sought to be divorced from the respondent, inter alia, on the grounds of desertion. Since the respondent is resident in South Africa, the petitioner did on the same day that he filed the petition, make an application before this court seeking to be granted leave to serve the respondent by substituted service. In particular, the petitioner craved for an order of this court to enable him serve the respondent out of the jurisdiction of this court by DHL Courier. From the court's record, it was clear that the said application was not canvassed. On 26<sup>th</sup> June 2009, the firm of Mithega & Company Advocates filed a notice of appointment of an advocate on behalf of the respondent. On 22<sup>nd</sup> July 1999, the said firm of advocates, with the petitioner purported to record a consent to the effect that the respondent was not contesting the divorce. Although the said consent was adopted as the order of this court on 19<sup>th</sup> November 2009, this court, upon perusing the entire proceedings in this divorce cause was not satisfied that the respondent was properly served. The appointment of the firm of Mithega & Company Advocates, and the subsequent filing of the purported consent is suspect. This court can only be satisfied that the respondent was properly served if an affidavit of service is filed in court to establish the fact that service was duly effected.

A cardinal principle of the law is that no person can be condemned without being given a hearing. The court cannot proceed with the hearing of a case if it is satisfied that the opposing party was not properly served. In the present case, despite the purported notice of appointment of an advocate filed by the firm of Mithega & Company Advocates, this court was not satisfied that the respondent was served with the petition for divorce. From the manner in which this divorce cause has been prosecuted, this court cannot rule out the possibility that the filing of the said notice of appointment of an advocate was contrived. To allay the doubts in the court's mind, the petitioner will be required to supply to the court evidence that he served the respondent. Otherwise, if such evidence is not forthcoming, the petitioner will be required to serve the respondent afresh with the summons to enter appearance and a copy of the petition for divorce. If need be, the petitioner will be required to seek the leave of this court to serve the respondent out of the jurisdiction of this court.

The petitioner will be required to give such evidence of service, in form of an affidavit of service, within

fourteen (14) days of today's date in default of which all the proceedings of this court from the 19<sup>th</sup> November 2009 up to the 3<sup>rd</sup> February 2011 shall be set aside. The petitioner will be required to serve the respondent afresh as stated earlier in this ruling. The proceedings will have to start afresh from the beginning. It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2011**

**L. KIMARU**

**JUDGE**