



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Matrimonial Case 150 of 2009**

**F.M.D.....PETITIONER**

**VERSUS**

**N.H.....RESPONDENT**

**RULING**

The proceedings herein were kicked off by the petitioner moving to this court to present her petition for divorce dated 9<sup>th</sup> October 2009 and filed on the 12<sup>th</sup> day of October 2009.

Notice to appear dated 22<sup>nd</sup> day of October was taken out and served on to the Respondent. Apparently he failed to respond within the stipulated time, where upon the petitioner filed an application dated 15<sup>th</sup> day of December 2009 and filed the same day seeking orders to the effect that the proceedings herein are in order and that the cause be certified to proceed as an undefended cause. But before that application was argued, the Respondent presented an application dated 18<sup>th</sup> January 2010 and filed on 19<sup>th</sup> January 2010 subject of this ruling. It is brought under rule 3(3) and 20 of the matrimonial causes rules and all other enabling provisions of the law. Three reliefs are sought namely:-

- (1) *That the Respondent be granted leave to file his answer to the petition out of time.*
- (2) *That the draft answer annexed to the supporting affidavit be deemed to be properly filed and served.*
- (3) *That the costs of and incidental to this application be costs in the cause.*

The application is grounded on the grounds in the body of the application and the supporting affidavits, as well as oral representations in court. The sum total of the same is to the effect that:-

- Indeed the Respondent was served with the petition herein.
- That him Respondent is resident in Canada.
- That upon service of the petition the Respondent duly engaged counsel who entered appearance.
- That the delay in filing the answer to petition was occasioned by the fact that the Respondent is resident in India and it took time to obtain certified copies and then obtain instructions on the one hand, on the other hand the counsel for the respondent closed offices on 22/12/2009 and reopened on 13/1/2010.
- That they promptly presented this application because they could not file the Answer to petition without leave as the petitioner had already presented an application seeking the issuance of the Registrars certificate.
- That the answer to petition raises triable issues and for this reason the same should be heard on merit.
- That there has not been inordinate delay on the one hand and on the other hand the delay if any is excusable.

- That they have made out a case to warrant the court granting them leave to file their answer to petition out of time.

In response, counsel for the petitioner opposed the application on the basis of a replying affidavit deponed by counsel for the petitioner on 24<sup>th</sup> February 2010 and filed on the 26<sup>th</sup> day of February 2010. The sum total of the same is as follows:-

- Concede that the petition was filed on 12/10/09 and appearance by the Respondent was entered on 25<sup>th</sup> November 2009.
- That no good reason has been given for the delay in presenting the answer to petition because the fact that the Respondent resides in Canada is no good reason for failing to present the answer to petition in time as the same could have been presented by way of e-mail.
- That the matrimonial causes rules are very clear as regards the time for filing of answer to petition.
- That the Respondents counsel were aware of the presentation of the application for the Registrars certificate and yet they did not present their application for leave to file Answer to petition out of time.
- Concede having convased with the counsel for the Respondent and the deponent spoke concerning the application for leave but then she received firm instruction from the client not to concede to the same hence the opposition.
- Maintain no good cause has been shown for the granting of the reliefs sought and on that basis urged the court to dismiss the application.

Due consideration has been made by this court of the above rival arguments for and against the application for leave to file answer to petition out of time, and the question for determination is first of all a determination as to whether both the application and replying affidavit are competent considering the fact that the supporting and replying affidavits have been deponed by counsel as opposed to parties themselves.

This court, has judicial notice of the fact that it is now trite that counsel appearing for a party in any proceedings is precluded from deponing to contentious matters in any proceedings, where he/she is appearing either as prosecuting or defending counsel. This means that before going to the merits of the application, this court, has to determine whether these affidavits are competent or not. Due consideration has been made by this court of the same and the court, is of the opinion that both relate to routine office matters within the knowledge of the counsels. As such these matters were properly deponed to by the counsels seized of the matter. The affidavits are therefore properly deponed and are allowed to stand.

Turning to the merits of the application, it is clear that the only issue in controversy is whether the Respondent should be allowed to present the answer to petition out of time or not. Due consideration has been made by this court, of the said issue and the court finds that the reason for the delay is that the Respondent is based in Canada, and it took long to obtain the papers necessary for the preparation of the Answer to petition. Secondly that the petition raises triable issues and for this reason room should be opened for the Respondent to defend the petition.

No case was cited to court, but that notwithstanding this court has judicial notice of an abundance or wealth of case law on the subject emanating from the court of appeal and as dutifully followed by the superior court, which case law provides guidelines on circumstances under which a party may be turned or driven away from the seat of justice without being heard. These are:

- (i) The court has jurisdiction or discretion to turn away a litigant from the seat of justice but which jurisdiction and discretion has to be exercised judiciously and with reason.

- (ii) It should be exercised cautiously and in exceptional circumstances where the litigant's cause is so hopeless that it cannot be salvaged or that it will be a waste of judicial time to entertain the same.
- (iii) Where a party's pleading raises triable issue even if only one issue has been raised irrespective of whether it will succeed or not, the party raising it should be heard on its merits.
- (iv) The court, also has jurisdiction to consider payment of costs as compensation to the party inconvenienced.

These principles have been applied to the Rival argument herein and the court is of the opinion that the Respondent to the application have not asserted that the Answer to petition does not raise triable issues, nor that payment of costs will not be adequate compensation for the inconvenience suffered by them.

Further to this, it is evident that from 25/11/2009 to 19/1/2010 when the application for leave was filed is a period of less than 2 months. Although this should not be excused in normal circumstances, but bearing in mind the fact that the Respondent is outside the jurisdiction of the court, and the counsel closed office for December vacation is sufficient ground for granting the applicant indulgence to present the Answer to petition out of time and be heard on merit. The inconvenience caused can be compensated for by way of costs.

For the reasons given the assessment the court is inclined to allow the applicants' application dated 18/1/2010 and filed on 19/1/2010 on the following terms.

- (1) The Respondent applicant has leave of court to file Answer to petition out of time.
- (2) The said answer to be filed and served within 15 days from the date of the reading of this ruling.
- (3) The petitioner Respondent to the application will have costs of the application.

Dated, Read and delivered at Nairobi this 12<sup>th</sup> day of March 2010.

**R.N.NAMBUYE**

**JUDGE**