



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET.
DIVORCE CAUSE NO. 3 OF 2006.

O.E.O:PETITIONER

-VERSUS-

F.T.....:RESPONDENT

RULING

I. Introduction

1. It is without doubt that the Petition filed herein by the Petitioner/applicants Advocates on 20th April, 2006 was lacking. The Registrar issued on 11th October, 2006 a certificate that, the decree cause was ready and in order for hearing. Realizing that this was not so, an application by the Petitioner, dated the 20th February, 2007 was filed.
2. The Petition had initially sought for a divorce from his wife whom he claimed he married sometime in August, 1985, 26th (amended by hand). There is no Marriage certificate to show this. The petitioners' major claim against his wife is that of adultery, cruelty and desertion. In the Petition, he failed to name the co-respondents which is a requirement under section 8(1) (a) as read with section 9(1) of the Matrimonial Causes Act that states;-

“On the Petition for divorce presented by the husband on in the answer of a husband praying for divorce the petition or respondent, as the case may be, shall make the alleged adultery a co-respondent unless he is excused by the court on special grounds from doing so.”
3. On the claim of desertion, under section 8(1) (b) of the Matrimonial cause, the petitioner is not to bring a petition to court unless a period of at least three (3) years has lapsed immediately preceding the presentation of the petition has lapsed. No dates and or particulars of desertion has been given.
4. On the claim of cruelty the issue of desertion was relied on.

5. Once a petition is filed it cannot be amended without the leave of the court. Rule 14(5) of the Matrimonial cause rules provides for amendments and supplementary petition;-

Under Rule 14(1) a petition may be amended before service without leave upon the filing of an affidavit by the petitioner. With leave upon the filing of an affidavit of the advocate of the petitioner without the new facts alleged

6. Once the petition has been served, **it may be amended only with the leave of the court.** If there is to be a supplemental petition, this may only be filed after service of the original proceedings and only with the leave of the court.
7. If the Petition has been served and an amendment is sought to be made to the petition, the applicant must support such application by an affidavit verifying the new facts alleged and served upon the other party who has entered appearance.
8. By an application of 20th February, 2007, the petitioner sought leave of this court to amend his petition. This came before the late Bauni J. and ruling reserved for 11.10.2007.

II. Application dated 20th July 2010

9. The Petitioner applicants application sought leave for amendments because there was need to join a co-defendant. The application was supported by the petitioners verifying affidavit that stated inter alia, that leave is sought to “incorporate key co-respondents as parties to the suit. That he was so informed by his advocate on record that the co-respondents must be made parties.
10. The respondent /respondent in reply rightly stated that the verifying affidavit was to state what the new facts were. Instead, no mention of any new facts was made and or verified. The arguments herein, by the respondent is

understandable. The original petition mentioned the respondent committed adultery. It went as far as including handwritten names in the petition of those who committed the said offence of adultery. This therefore showed that there was no new facts. The application was not to be permitted.

III. Opinion

11.The Petition originally filed herein was so done by an Advocate. It was poorly drafted having handwritten inclusions. This was unfortunate. Knowing that there was an error by the advocate, the amendment is sought by way of applying for leave to amend. Amendments though are only to be done upon new facts that have come to the knowledge of the Petitioner applicant.

12.The original petition contains the fact that the petition knew that his wife was committing adultery. He filed a verifying affidavit together with the petition to this effect.

13.For ease of reference, the form a petitioner should take note, described under rule 4(1) (a) and (j) (2),(3),4, & (5). It is this that the “registrar” checks to ensure that the petition is in order before a certificate is issued. Unfortunately, the petition filed here together with the proposed amended petition was signed by the advocate rule 4(5) of the Matrimonial cases that states that :-

“Every petition shall unless otherwise directed, be signed by the petitioner or in case of or infant a person of unsound mind his next of friend Advocates are precluded from signing a divorce petition.”

14.In this particular application for leave to amend the petition the argument brought up by the respondent/ respondent that the petition failed to name the co-respondent was not a new fact. He never verified that this was a new fact. The petition talks of the proposed co-respondents.

15.I am persuaded that the application has no merits. It is hereby dismissed with costs to the respondent/respondent..

16. The original petition is hereby struck out as having not been signed by the petitioner with costs to the respondent.

Dated this 29th day of September 2010 at Eldoret.

M. ANGAWA
JUDGE

Advocate

Angu Kitigin and Company Advocate Applicant

Mrs Fundi instructed by the firm of M/s R. Odede and company Advocates for the Respondent.