



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO.136 OF 2008

V.K. K.....APPLICANT

VERSUS

J.J.R.....RESPONDENT

R U L I N G

On 31st October 2008, the applicant filed an application under **Rule 2** of the **Matrimonial Causes Act** seeking the leave of the court to file a petition for divorce in regard to the marriage that he had solemnized with the respondent on 1st August 2008 notwithstanding that three (3) years had not expired from the date that the said marriage was celebrated. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the applicant. The application is opposed. The respondent filed a replying affidavit in opposition to the application. On 19th February 2009, Onyancha J dismissed the application with costs for want of prosecution. Counsel for the applicant failed to attend court to prosecute the application hence its dismissal.

On 18th May 2009, the applicant moved this court by notice of motion seeking the setting aside of the said order of dismissal. The applicant craved for orders from the court for the reinstatement of the said application to hearing. The grounds in support of the application are stated on the face of the application. In essence, the applicant blames his former advocate on record for the failure to prosecute the application. The applicant further states that his former advocate failed to communicate to him with regard to the progress of the case. He reiterated that he was still desirous of prosecuting the application and should therefore be given an opportunity by the court to ventilate the application on its merits. The respondent opposed the application. She filed a replying affidavit in opposition to the application. She deponed that the applicant had not placed any grounds before the court that would persuade the court to grant the application for the reinstatement of the dismissed application.

At the hearing of the application, counsel for the parties herein agreed by consent that the court delivers its ruling on the basis of the written submissions that had already been filed in court. This court has carefully considered the said submissions. It has also considered the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the applicant made a case from the reinstatement of the originating summons which was dismissed by this court on 19th February 2009 for want of prosecution. It is not disputed that the originating summons was dismissed on the first instance that it had been fixed for hearing. The applicant's counsel failed to attend court. According to the applicant, his erstwhile advocate failed to attend court for reasons that are unknown to him. He has been unable to communicate to the said applicant due to the fact that she had relocated her offices. It is for the above reasons that the applicant instructed counsel who are presently in court. In summary, the applicant pleads with the court not to punish him for the mistakes of his former counsel on record. The respondent is of contrary view. She maintains that even if the originating summons was reinstated to hearing, the applicant would still not satisfy the requirements for the grant of leave to petition this court for divorce before the expiry of the statutory period of three (3) years.

It was clear to the court that the applicant made a case for the setting aside of the said order of dismissal of the originating summons. As stated earlier in this ruling, the application was dismissed on the first day that it was scheduled to be heard. Since the dismissal of the case, the applicant has made every effort to have the present application seeking the reinstatement of the application for hearing. I am persuaded that the applicant should not be punished for his former counsel's failure to attend court on one instance. It is

a general principle of the law that in so far as possible the court should lean towards deciding matters on merit and not on technicalities. This is one instance where a litigant should be given an opportunity to ventilate his case on merits.

In the premises therefore, I will allow the application seeking the setting aside of the order of dismissal of the originating summons for want of prosecution and reinstatement of the same to hearing. The order of this court made on 19th February 2009 is hereby set aside. The originating summons dated 10th October 2008 is hereby reinstated to hearing. The applicant shall however pay the respondent's costs of the application which I assess at Kshs.7,500/-. The same shall be paid within fourteen (14) days of today's date or in default thereof the respondent shall be at liberty to prosecute. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2010

L. KIMARU
JUDGE