



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 12 OF 2010

G.M.K PETITIONER

VERSUS

C.K.K.....RESPONDENT

RULING

The Applicant/Respondent has brought this present application by way of a Notice of Motion filed in court on 12th October 2010, seeking the following orders –

- “1. THAT the Petitioners’ suit is an abuse of the court process.**

- 2. THAT the Petitioners’ suit be dismissed and/or struck off for being ‘Res Judicata’**

- 3. THAT costs be borne by the Plaintiff.”**

The application was opposed. **MS. JUMA** Advocate appeared for the Applicant whilst **MR. HAMZA** appeared for the Respondent.

Briefly the undisputed history of this matter is that the Petitioner **G.M.K** and the Applicant **C.K.K** met and married under statutory law at the Mombasa District Registry on 8th May 1976. The couple lived as man and wife in Mombasa for a period of 18 years during which time their union was blessed with four (4) children. In 1994, the Petitioner filed before the High Court a Petition for Divorce dated 20th July 1994, seeking the dissolution of her marriage to the Applicant. This Petition was heard by Hon. Justice S.O. Oguk (Rtd) who dismissed the Petition for Divorce on 30th August 1995. Ten (10) years later on 11th March 2010 the Petitioner again filed before the Mombasa High Court a second petition seeking the dissolution of her marriage to the Applicant. The Applicant through his lawyer submits that this second

petition dated 22nd February 2010 is ‘Res Judicata’ as the issues raised therein had already been heard and determined in the first petition which was dismissed on 30th August 1995.

The term Res Judicata is a latin term which taken literally refers to a matter ‘**already adjudicated**’. It refers in law to an issue that has already been heard and settled by way of a Judicial Decision. The general rule in law is that matters which have already been so determined cannot be brought before the courts by the same party again. Ms. Juma argues that by dismissal of the Petitioner’s first petition she is ‘**estopped**’ from filing another petition. The only avenue open to her is to appeal the dismissal by the court of this first petition.

I have carefully considered this application as well as the submissions made by both counsel. I do agree with Mr. Hamza for the Petitioner that unlike other matters or issues raised in law marriage is not static. A marriage is a living and continual relationship which is either renewed or dies daily as the case may be. The fact that a certain position prevailed in a marriage in 1995 does not mean that the same position will prevail ten (10) years later in 2010. Like all other human relationships marriages evolve daily. There are shifts and changes that cannot be denied or overlooked. If the Petitioner’s petition was dismissed in 1995 and the cruelty either continues or escalates after such dismissal does that mean she has no other legal remedy – I think not. As pointed out by Mr. Hamza any events which the Petitioner claims occurred between 1995 – 2010 obviously could not have been considered and determined in the petition decided in 1994. These are therefore new or fresh issues and can be properly ventilated before a court of law. The doctrine of Res Judicata is not applicable in the present circumstances.

Ms. Juma also asked that the Replying Affidavit dated 25th October 2010 and sworn by Mr. Hamza, be expunged on the basis that as an advocate he ought not swear an affidavit on contentious issues. I have perused the said replying affidavit. I find that it only deals points of law which cannot be said to be contentious nor to be issues between the parties to the marriage. I therefore find that this affidavit was properly sworn by learned counsel and it is therefore properly before the court

Finally I find that the petition filed in court on 11th March 2010 is neither Res Judicata nor an abuse of the court process. It raises new issues which the Petitioner is fully at liberty to ventilate before a court of law. I therefore dismiss this application in its entirety. No orders are made as to costs.

Dated and Delivered in Mombasa this 8th day of December 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-
Mr. Hamza for Petitioner
Ms. Charo holding brief for Respondent

M. ODERO

JUDGE

8/12/2010