



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

DIVORCE CAUSE 13 OF 2008

F DAUGHTER OF SPETITIONER

VERSUS

H.T.....RESPONDENT

RULING

In the Chamber Summons application dated 4-5-09, the applicant has moved this court under the provisions of Order VI Rule 8 and 16 Civil Procedure Rules; and section 3(3), 21(1), (2) and 23(4) of the Matrimonial Causes Rules (Cap 152) that:

1) The Respondent do deliver to the Petitioner within seven (7) days of the orders made pursuant to this application, particulars set out in the petitioner's

(a) request for particulars dated 2-3-09 in relation to the respondent's answer dated 15-1-09.

(b) request for particulars dated 17th March 2009 in relation to the respondent's affidavit sworn on 15-1-09 and containing 38 paragraphs

(c) request for particulars dated 17th March 2009 in relation to the respondent's affidavit sworn on 15-1-09 and containing 2 paragraphs.

Each of the said requests were served on the respondent's advocates.

2) In default, then the respondent be precluded from giving evidence in support of the matters alleged in the answer and the two affidavits.

The application is premised on grounds that despite respondent's advocate having been served with the requests, he has failed to comply with them, with a view to delaying the hearing of the petition and other applications lodged.

The affidavit in support of the application is sworn by the petitioner who has filed further prayers for restitution of conjugal rights, custody of the issue to the marriage and a return to the matrimonial flat No. 3 in a building known as F complex, Malindi.

The applicant depones that respondent and his mother forced her out of the said flat and prevented her from taking her five (5) year old son with her. She was driven to Mombasa and left at the flat belonging to SA in Mombasa. She eventually instructed counsel to file the petition and chamber summons application.

The respondent answered the petition and filed two affidavits but the petitioner and her counsel require particulars contending that respondent has not filed an affidavit of means in compliance with Rule 44 of the Matrimonial Causes Rules and without those particulars that applicant is unable to have information which would enable her to instruct her advocate and the Registrar's Certificate and directions for trial cannot issue.

The application is opposed on grounds that it is without merit and ought to be dismissed. Further that it is bad in law and made in bad faith and is an abuse of the court process. Also that the application offends the provisions of Order VI Rule 8 of the Civil Procedure Rules.

At the hearing of the application Mr. Jiwaji for the applicant submitted that he has made requests for particulars including particulars stated in affidavits, but the same are not forthcoming, and as a result, he has been unable to take instructions from his client. Mr. Jiwaji's complaint is that some of the answers in the affidavit are not detailed and that he was only served with the grounds of opposition a day before the hearing of this application and so the same should not be entertained as it offends orders L rule 16. Mr. Jiwaji contends that not a single

letter has been sent to him in response to the requests made and has referred to the text by O'Hare and Browne "Civil Litigation 25th Anniversary Edition Chapter 32 page 470" under the heading when to ask and How to ask. Incidentally, Mr. Jiwaji says he had even e-mailed the request for particulars before he filed the matter.

Mr. Abdallah for the respondent submits that Order VI Rule 8 under which counsel for applicant has approached this court, deals with pleadings generally and states that parties can only plead facts not evidence. Further that a party can only request for particulars in pleadings where a party is seeking clarification from the opponents and that there is no provision for request for particulars in affidavits.

Mr. Abdallah also laments that applicant has bombarded him with requests for particulars on affidavits – requesting for each paragraph and some instances raising five questions for each paragraph, which he submits is an abuse of the court process and respondents do not have an obligation to reply.

He concedes that the grounds of opposition were filed and served late, but explains that this is because the matter has not been allowed to take the direction it ought to take due to the weekly applications and that the delay in service was due to the multiple applications which have almost become an obstacle.

As for the reference to the text by O'Hare, Mr. Abdallah points out that the same relates to request made on pleadings and not affidavits and so they responded to what they considered legal and not what offends the legal provisions and the applicant is not entitled to what is sought. It is denied that respondent is out to deliberately delay the matter and Mr. Abdallah submits that the respondent's mind is very clear, he wants the matter to proceed and it's the applicant who is causing delay by the many applications. He also takes exception with the ultimatums being made by the applicant's counsel.

Order VI Rule 8 provides that ***"every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded, including...(a) particulars of any misrepresentation, fraud, in breach of trust, willful deceit or undue influence on which the party pleading relies, and***

(b) where a party pleads a condition of the mind,...particulars of the facts on which the party relies"

This provision specifically refers to request for particulars in pleadings not affidavit and refers to the phrase ***"a party pleads"*** as opposed to the phrase ***"a party depones"*** if the reference was to include the contents of an affidavit.

A party pleads facts, but depones evidence – what is contained in an affidavit is evidence. Do the rules in the Civil Procedure Rules and Matrimonial Causes Rules anticipate a situation entitling a party to request for particulars contained in an affidavit? At least from the provisions of Order VI Rule 8, I would say no. What about the Matrimonial Causes Rules?

Rule 3 of the Matrimonial Causes Rules addresses how proceedings commence under The Matrimonial Causes Act – its by petition and rule 4 provides the contents of a petition.

Sub-rule 3 then states that –

"Except where these Rules otherwise provide, every application shall be made to, and any leave or direction shall be by way of submissions in chambers"

I suppose its under that provision that applicant has sought to move this court for directions in her quest for particulars of affidavits sworn by the Respondent – but do the rules make such a provision?

Rule 21(1) provides as follows:

"Any party may by letter require any other party to furnish particulars of any allegation or other matter pleaded, and if such other party fails to furnish such particulars within a reasonable time, the party requiring the particulars may apply for an order that particulars be given."

It is these particulars which are then to be filed accompanied by an affidavit in support. My reading of that provision is that the operative word is found in rule 21 (1) ***"matter pleaded"*** – which denotes pleadings not affidavit. Mr. Jiwaji seems to mix up this request for particulars with discovery – I say this because in the application, he has referred to Rule 23 (4) of the Matrimonial Causes Rules, which states that:

"A party to a matrimonial cause may apply for an order for discovery of documents by an opposite party, and such opposite party may be ordered to make such general or limited discovery on date s the judge shall think fit"

It is clear that a process very distinct from request for particulars and to my mind if this is what Mr. Jiwaji's client is seeking then he should abide by the provisions of Rule 23 of the Matrimonial Causes Rules and not attempt to extrapolate the provisions of Order VI Rule 8 in this situation.

My conclusion is that to allow the application in its present form, would be a total abuse of the court process – applicant knows what she requires and the Matrimonial Causes Rules, Rule 23 provides the process by which she can obtain the same by way of discovery but not in the manner currently applied. The application is therefore dismissed. Applicant bears the costs of the application.

Delivered and dated 17th day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Jiwaji for petitioner

Mr. Abdallah for respondent