



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

**Divorce Cause 102 of 2007**

**FMS ..... PETITIONER**

**versus**

**MGC ..... RESPONDENT**

**RULING**

The petition in this cause was filed on 15/8/2007 and though served a week later, the respondent did not file his answer to the petition. **FMS** thereafter obtained a certificate from the Senior Deputy Registrar of this Division that her matter ready to proceed as an undefended cause.

The petitioner appeared before me on 15/5/2008 on a day when the respondent’s counsel, who had entered appearance earlier that morning, was also present in Court and she proceeded to adduce evidence in support of her cause in which she sought an order for the dissolution of her marriage to **MGC** on grounds of cruelty. She also prayed for the custody of their five years old son as well as costs of the suit.

I had initially pointed out to the parties herein that not having filed a reply to the petition all that the respondent was legally entitled to do was to cross-examine the petitioner on issues pertaining to the custody of their son and costs only. This indeed is the position which is laid down in Rule 31 of the Matrimonial Causes Rules of the Matrimonial Causes Act Cap 152 of the Laws of Kenya which stipulates that:

*“After entering an appearance, a respondent or co-respondent may, without filing an answer, be heard in respect of any question as to costs or damages, and a respondent spouse may, without filing an answer, be heard as to any question of custody of or access to any children the marriage of whose parents is the subject of the proceedings:*

*Provided that –*

- (i) .....
- (ii) .....

Despite having pointed out the above limitations, the respondent’s counsel did not raise any objections to the matter proceeding and it was not after the petitioner had given her evidence in chief, that he intimated that he would not be ready to cross-examine her because he intended to make a formal application to file a reply and cross petition to the cause out of time, which application was opposed. I declined to grant him the order which he sought as in my view it was but an attempt to delay the finalization of the cause. He

then proceeded to cross-examine the petitioner, who thereafter closed her case. Both counsel were then ordered to submit their written submissions within 21 days thereof; with a rider that the matter be mentioned on 5/6/2008 for purposes of confirming compliance.

However, before the appointed date, the respondent moved this court by way of an application, filed under a Certificate of Urgency in which he seeks leave to file his answer to the petition out of time.

He bases his application on several grounds, but mainly that though the matter had proceeded on the basis of the fact that he would not oppose it, he would however like to give evidence on matters pertaining to custody, which steps he cannot take, and rightly so, without filing the said answer to a cross petition.

It was the submission of his learned counsel Mr. Mureithi that the application was made in time, and also that the respondent stands to suffer injustice if he is not allowed to reply to the petition. In his view no prejudice would be occasioned on the petitioner.

Mrs. Okulo was however of a different view, and it was her submission that the respondent has no basis for his request for it is clear from the proposed answer to the petition, that he seeks an order for the dissolution of their marriage, which order if granted would in effect amount to the same result which her client seeks. She urged the court to find that having closed her case, the petitioner stands to be prejudiced and it would amount to an injustice.

I have considered the application as well as the submissions of both counsel and more so the citation in **Family Law by Bromley & Lowe 8<sup>th</sup> Edition page 235 – 236 (Butterworths 1992)**, which Mr. Mureithi relied on in support of this application wherein it appears that even after a decree nisi has issued by a Judge the said decree can nevertheless be set aside to allow the respondent to file his reply out of time should the court deem it fit. Mr. Mureithi also relied on **Mitchell v. Mitchell [1983] 3 All ER page 621**, wherein the above contention is supported.

Unfortunately, it is my humble opinion, that the same position would not apply locally as the Matrimonial Causes Rules 1977 England are not applicable within our jurisdiction, and in the circumstances, both authorities would not aid his cause for the simple reason that the reasoning behind them is pegged to regulations which came into place in England as aforesaid and by virtue of which, the court is empowered to exercise the 'special procedure' whereby the Registrar of the court can issue a certificate in favour of a petitioner in an undefended cause, upon the latter being satisfied that the petitioner has satisfied his/her case and where instead of giving evidence the petitioner is required to depose and to verify the contents of the petition and the statement of arrangements for the children and giving certain other information and also by any corroborative evidence on which the petitioner intends to rely, after which the matter is placed before the Judge for the issuance of decree nisi, without further ado. That procedure does not apply locally. Indeed the position in our courts is very different in that all that the Registrar is empowered to do in a cause such as this petition, is to certify it as ready to proceed as an undefended cause after which the petitioner is expected to adduce evidence before a Judge in support of his/her case after which should the case be proven to the expected standards, a decree nisi can issue.

It is important to note that the petitioner had actually testified and was cross-examined by the respondent's counsel after which she closed her case. I find that this is but a belated attempt to delay this cause, and needless to say having already closed her case, the petitioner stands to be highly prejudiced. I do dismiss the application with costs.

Dated and delivered in Nairobi this 26<sup>th</sup> day of June 2008.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of: