



**REPUBLIC OF KENYA**

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

**Divorce Cause 15 of 2006**

**A S . . . . . PETITIONER**

**VERSUS**

**S V K S. . . . . RESPONDENT**

**R U L I N G**

The application before me is a Chamber Summons dated 30<sup>th</sup> October, 2007. It is by the Respondent herein and seeks for orders of the court to grant the Respondent leave to amend his Answer to Petition as well as Cross-Petition in the manner shown in the related draft documents annexed to the application. The Respondent also seeks that the Draft Amended Answer to Petition and the Amended Cross-Petition be deemed as duly filed and served if the leave sought to amend, is granted.

The applicant/Respondents grounds include the following: -

- (a) That the sought amendments will set out in full the Respondent's case.
- (b) That the amendments will reveal the real issues between the parties.
- (c) That the proposed amendment will not prejudice the Petitioner while if not allowed will cause irreparable loss to Respondent.
- (d) That it will be fair and just to grant the amendment.

The record shows that the Respondent was on 26<sup>th</sup> June, 2008 at his request, given leave of court to file a further affidavit within 10 days with a co-responding leave to the Petitioner to file a supplementary affidavit if she found it necessary. The further affidavit must have been intended to strengthen the Chamber Summons now before the court. However, it is not in dispute that the said further affidavit was not filed until 10<sup>th</sup> September, 2008. This was about two months out of time prescribed by the court. Further more it was filed without extending the time prescribed by the court. It is also clear that Applicant/Respondent did not seek leave at any stage to have the further affidavit duly admitted to-date.

When the application before the court came up for a hearing on 4<sup>th</sup> December, 2008, both counsel chose to proceed by written submissions. Orders were made by this court that the parties do file and serve written skeletal submissions on or before 18<sup>th</sup> December, 2008. The application was mentioned on 19<sup>th</sup> March, 2009 to confirm whether each party had complied with the orders so that they could be given a date for a ruling.

By 19<sup>th</sup> March 2009 when the case was mentioned, the Petitioner had filed her written submissions and served it. The record confirms that Counsel for the Respondent had not complied and she tendered an apology and promised to file and serve the Respondent's written submissions as soon as possible. Relying on the Counsel's assurance, the court and the parties agreed to have a ruling of the court delivered on 14<sup>th</sup> May, 2009 which later was postponed to 4<sup>th</sup> June, 2009 due to unavoidable circumstances.

Taking the above facts into account the Petitioner's case is that the Further Affidavit filed by the Applicant/Respondent on 10<sup>th</sup> September, 2008, outside the prescribed time be expunged from the record on the ground that the Respondent did not bother to seek extension of the time before filing it. The Respondent failed to controvert this assertion by the Petitioner. The Respondent would probably have argued against expunging through his written submissions, had he chosen to and had he filed such submission. Since he chose not to file any, however, the court has no option but to conclude that he chose not to controvert the argument submitted by the Petitioner that the Further Affidavit should be expunged.

As things stand right now, the Respondent filed this application for leave to amend but made no effort or took no action to prosecute it in so far as he failed to file his written submissions. In my view, it is the written submission which would have amount to the prosecution of the application. In addition he filed a late further affidavit which has not become part of the record of the application since the Respondent has not at any relevant time urged this court to admit it.

In these strange circumstances this court has no alternative but to agree that the further affidavit of the Respondent filed on 10<sup>th</sup> September, 2008 is not part of court record and should and is hereby expunged from the court file record. Furthermore the application for amendment dated 30<sup>th</sup> October, 2007 which has not also been prosecuted by the Respondent as explained above is also hereby dismissed with costs. Orders are made accordingly.

Dated and delivered at Nairobi this 4th day of June, 2009.

**D A ONYANCHA**

**JUDGE**