



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
DIVORCE CAUSE 13 OF 2006
LMJB.....PETITIONER
VERSUS
LKB.....RESPONDENT
RULING

By an application, by way of Chamber Summons, dated 13th March 2007, the applicant seeks orders:

- a) **That this matter be certified as urgent and service be dispensed with in the first instance.**
- b) **That leave be granted to the Original Respondent (Intended Petitioner by Cross Petition) to amend the Answer to the Petition and to introduce a Cross Petition in the manner shown in the draft Answer to Petition and amended Cross Petition for Judicial Separation.**
- c) **That there be a stay of the hearing herein until the Certificate issued herein by the Deputy Registrar on the 27th day of October 2006 is renewed.**
- d) **That the costs of this application be provided for.**

The application is based on the grounds:

- (i) **That the Original Respondent (Intended Petitioner by Cross Petition) is now desirous and intend to introduce pertinent issues herein to be jointly determined having arisen due to the Original Petitioner's conduct in a bid to save the limited judicial time and avoid duplicity of suits.**
- (ii) **That no party will be prejudiced by the grant of the orders herein.**

The application is predicated upon the annexed affidavit of **LKB** sworn on the 13th day of March 2007.

For the applicant, it was argued that a number of issues have arisen, since the filing of petition, which need to be determined jointly with the pending Divorce Cause. On that account, she has been advised by her advocate that the only way to introduce them is by way of a cross-petition. A draft of the cross-petition is marked as exhibit as "**LKB-1**". That the only way to introduce the cross-petition is by leave of court hence this application.

The respondent filed and relied on grounds of opposition to the application. For the respondent, it was

argued that the court lacks the requisite jurisdiction to hear and determine this cause.

That in any event, there is already a certificate issued by this court under Rule 29 of the Matrimonial Causes Rules. In effect the pleadings are closed thereby precluding a party from introducing new pleadings.

I have carefully appreciated the two issues raised in this application.

Jurisdiction is every thing without which a court has no power to take one step in the matter and a court of law downs tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction. (see **ROY SHIPPING S.A. AGENCIES AND ALL INTERESTED IN THE SHIP "MAMA OTAN" – VS – DODOMA FISHING COMPANY LTD (CA) NO 238 OF 1997; (1997) LLR 260 [CAK] per OMOLO J A** on 3rd April 1998. In my view it is an issue to be raised at the time of the hearing of the suit. At this juncture, the applicant is only seeking to introduce a cross-petition and nothing else.

The problem is compounded by the fact that pleadings are already closed by the issuance of a certificate by the Deputy Registrar under Rule 29 of the Matrimonial Causes Rules.

I am alive to the law that an amendment to pleading can be done at any time if the same is necessary for determining the real questions in controversy between the parties or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that no injustice would be occasioned to the other side (see **CENTRAL KENYA LTD VS TRUST BANK LTD AND OTHERS (C.A.) CIVIL APPEAL NO. 22 OF 1998 KLR 814 (CAK) (2000) 2 EA 365.**) The other principle is whether the amendment is made in good faith. The test of good faith in an application for amendment is whether the amendment are sought at an early opportune moment having regard to the progress of the case and where appropriate, whether they seek to set up a substantial cause of action. (see **JULIA AKELO KUNGURU V SETH LUGONZO AND OTHERS NAIROBI (MILIMANI) HIGH COURT CIVIL CASE NO. 197/2001; (2001) LLR 1102 (CCK) Ringera J.** on 23rd July 2001.

In respect of this case, the petition was filed on the June 2006, Appearance Entered on 12th July 2006, application for transfer of the petition from Mombasa to Malindi filed on 4th August 2006 and orders in respect thereof issued on 18th August 2006, and application under Rule 29 of the Matrimonial Causes Rules issued on 27th October, 2006.

It would appear, on the evidence, that at the time of filing answer to the petition certain matters were not within the applicant's knowledge. These matters so far as is discernible from the draft answer to petition and amended cross-petition for judicial separation seems to be *adultery* and *desertion*. It is her case, that unless this court grants her orders of amendment she may be compelled to institute other proceedings and thereby constitute multiplicity of suits.

I have carefully enquired into the propriety of allowing the applicant to introduce new matters and is of the view that the intended amendment is merited. Accordingly I allow the application in terms of prayer (b) and (c).

Under Rule 14(5) of the Matrimonial Causes Rules the proceedings herein be and is hereby *stayed until* a certificate by the Registrar under Rule 29 *be re-newed*. Costs shall be in the cause.

Dated and delivered at Malindi this 20th Day of June 2007.

N.R.O. OMBIJA

JUDGE

Mr.Mrima } for applicant

Mr.Kibara } for respondent.