



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

Divorce Cause 92 of 2007

MARIA KANE CUUNINGHAM.....PETITIONER

VERUS

GERARD MICHAEL CUNNINGHAM.....RESPONDENT

RULING

By chamber summons dated 21.09.07 stated to be brought under rules 3 (3), 16 and 20 of the Matrimonial Causes Rules, the respondent sought certification of his application as urgent and also sought the following orders:-

- a) That the Honourable Judge do grant leave for the respondent's Answer to the Petition dated 30.08.07 to be filed out of time.
- b) That the respondent's Answer to the Petition dated 30.08.07 filed on 13.09.07 and served upon petitioner's advocates be considered properly filed and served for purposes of this suit.
- c) That costs of this application be in the cause.

The application is grounded on the affidavit of petitioner's counsel, Jonathan Bowen Havelock sworn on 21.09.07. The purport of that affidavit may be stated briefly as follows:-

- a) That the deponent was authorized by the respondent to swear the affidavit.
- b) That the petition dated 16.07.07 was filed on 18.07.07 but not served on the respondent until 02.08.07, i.e. 14 days later, at the respondent's residence despite the fact that the parties have been working in the same organization, namely, the United Nations Environment Programme (UNEP).
- c) That the petitioner was aware that the respondent had to take leave with the children of the marriage between her and the respondent from 19.08.07 to 11.09.07.
- d) That the advocate (Mr J.B. Havelock) who had the conduct of this matter was away on leave in England from 27.07.07 to 22.08.07.
- e) That on 05.09.07 chamber summons dated 03.09.07 by petitioner's advocate seeking Registrar's certificate for this matter to be listed for hearing as an undefended cause was served on respondent's advocate's firm.

f) That the executed Answer to Petition was received in respondent's firm on 06.09.07 but was not filed until 13.09.07, i.e. about a week later.

g) That the Answer to Petition is not a mere denial but contains substantive replies to the issues raised in the petition.

At the hearing on 25.10.07 of the chamber summons application dated 21.09.07, the petitioner was represented in these proceedings by learned counsel, Mrs J. Thongori while the respondent was represented by learned counsel, Mr. J.B. Havelock.

On 05.10.07 petitioner's counsel filed a replying affidavit to the respondent's aforesaid chamber summons and respondent's counsel's supporting affidavit. The purport of the replying affidavit may be stated broadly as under:-

a) That it is true that the petition filed on 18.07.07 was served on 02.08.07 (14 days later).

b) That court documents are not acted upon at the parties' convenience but that time limits set are mandatory irrespective of parties' engagements.

c) That in any event the respondent had 8 days from the date of service (02.08.07) which was more than sufficient time to instruct counsel to prepare necessary response.

d) That it is curious that the advocate (Mr J.B. Havelock) who swore the affidavit in support of respondent's application states that he was in charge of this fresh matter while the same was served (on 02.08.07) when (by his own admission) he was out of the country.

e) That if it was going to be difficult to file Answer to Petition in time, respondent's advocates should have sought petitioner's advocate's confirmation that the latter would not take a step in default, but respondent's advocates did not seek such confirmation.

f) That despite the fact that the deponent of the affidavit in support of the respondent's application returned to Kenya on 22.08.07, he never took trouble to explain to petitioner's advocates if he had any challenges.

g) That it was unforgivable that respondent's advocates received on 06.09.07 the Answer to Petition executed by the respondent but never filed the same until 13.09.07, i.e. about 7 days later.

h) That it was not until respondent's advocates were served with application for directions that the Answer to Petition was filed.

i) That since respondent's advocates were aware that a step in default had been taken before the Answer to Petition was filed, they should not have filed it without leave of the court; that their so filing the Answer to Petition was in bad faith and that the Answer to Petition amounts to an illegality.

j) That in any case the Answer to Petition is incompetent as it is not accompanied by a verifying affidavit despite it not consisting of mere denials.

k) That the respondent has no genuine reason for not filing the Answer to Petition within the prescribed time and that the Answer to Petition irregularly filed should be struck out.

The parties advocates addressed this court in support of their respective clients' cases.

The essence of respondent's counsel's case was that the delay ascribed to his client and himself or his firm is short; that the court has unfettered discretion to allow the filing of the respondent's Answer to Petition out of time; and that the court should allow late filing of the said Answer to Petition. He relied on the following authorities:-

a) Osmond -vs- Daima Bank Ltd & Another [2001] LLR 3439 (CAK) to make the basic point that the mistake of counsel in insisting on seeking certified copy of proceedings and signed copy of proceedings and signed copy of judgment, which the Kenya Court of Appeal (Shah, J A – as he then was) considered unnecessary for purposes of mounting an appeal, should not be visited on the innocent appellant. The court also noted that the application seeking extension to file a notice of appeal was filed within a few days of the striking out of the notice of appeal in question and allowed the application

b) Al -Iswlamiya Estates Ltd -vs- Khamis Omar Salim, High Court (Nakuru) Civil Case No.7 of 2005 in which the defendant explained that he had instructed his advocate then on record to file defence to the suit filed by the plaintiff but that his advocate failed to do so. The High Court (Kimaru, J) found there were substantial triable issues and exercised the court's discretion, set aside the ex-parte judgment and granted the defendant leave to file and serve defence within a specified period.

On the other hand, petitioner's counsel in the present case opposed the respondent's application for leave to file Answer to Petition out of time. In petitioner's counsel's view, the respondent did not deserve to have the court's discretion exercised in his favour. In Petitioner's counsel's view, respondent's counsel should not have filed the Answer to Petition without first seeking leave and that having so filed the Answer to Petition, the respondent took himself out of the ambit of rule 20 of the Matrimonial Causes Rules. The rule provides:

'20. No pleading shall be filed out of time without leave after a step in default has been taken.'

It was also petitioner's counsel's contention that respondent's delay has not been sufficiently explained. Petitioner's counsel also drew attention to rule 17 of the Matrimonial Causes Rules which is to the effect that every answer which contains matter other than a simple denial of the fact stated in the petition should be accompanied by an affidavit by the person filing the answer to verify such other matter and that since the respondent's Answer to Petition is not accompanied by a verifying affidavit, it constitutes no answer to the petition. With regard to the two authorities cited by respondent's counsel, petitioner's counsel sought to distinguish them on the basis that in those cases the mistakes were those of counsel. Finally, petitioner's counsel urged that if the court finds it necessary to exercise the discretion sought, the court should award the petitioner costs to compensate her for the inconvenience of amending or withdrawing and filing fresh Registrar's Certificate.

In reply, respondent's counsel described finger-pointing about delay as unnecessary and pointed out that the petition itself came out on 18.07.07 but it was not served until 02.08.07, i.e. 14 days later.

I have given due consideration to the rival pleadings, affidavits and submissions of the parties.

Respondent's counsel made an issue of the fact that although the petition was filed on 18.07.07, it was not served until 02.08.07, i.e. 14 days later, on the respondent at his residence in Nairobi despite the fact that both parties work with the same organization, i.e. United Nations Environment Programme (UNEP), Nairobi. It is not clear to this court why the respondent considers that point important since time did not begin to run against him until service was effected upon him. The point seems minor and I ignore it.

The point was also made that the respondent was due to take leave with the children from 10.08.07 until 11.09.07. While that may be so, the fact of the matter is that the respondent had 8 days to brief counsel either to prepare an answer to the petition or to negotiate for extension of time. No such step seems to have been taken by the respondent and/or his advocates.

It was deponed vide paragraph 6 of respondent's counsel's affidavit sworn on 21.09.07 that the advocate having conduct of this matter was away in England between 27.07.07 and 22.08.07. The same affidavit acknowledges that the petition was served on the respondent on 02.08.07. The service was effected on the respondent while his aforesaid advocate was away on leave out of the country. How could the said advocate be said to have had the conduct of the freshly filed petition? This does not add up!

The deponent of the affidavit sworn on 21.09.07 in support of the chamber summons application of

the same date for leave to file answer to Petition out of time acknowledges vide paragraph 14 of the supporting affidavit that the Answer to Petition contains substantive replies to the issues raised in the petition. And indeed it does. In this connection, rule 17 of the Matrimonial Causes Rules provides, *inter alia*, as follows:

'17. (1) There shall be filed with every answer which contains matter other than a simple denial of the fact stated in the petition an affidavit by the person filing the answer verifying such other matter so far as he has personal cognizance thereof and deposing to his belief in the truth of the rest of such other matter and, where that person is husband or wife of the petitioner, deposing in so far as such other matter is concerned to the existence or otherwise of collusion, connivance and condonation in the manner required by rule 6 of these Rules in the case of petition.'

As there is no accompanying affidavit verifying the Answer to Petition, the purported Answer to Petition violates rule 17 and is by virtue of such violation incompetent. The dilemma facing the court is that the purported Answer to Petition seems to raise substantial triable issues vis-à-vis the petition.

Paragraph 7 of the affidavit sworn on 21.09.07 in support of the chamber summons application of the same date deposes that the respondent instructed his advocates in this matter on 03.08.07, i.e. a day after he was served with the petition, and the advocates entered appearance on 10.08.07. It appears the respondent acted promptly initially and left the matter in the hands of his advocates to do the needful while he apparently proceeded on holiday abroad. It was the responsibility of his advocates to advise him on the requisite time schedules for actions to be taken in this matter and the need for him to make himself available for necessary consultations in view of the aforesaid time schedules. There is no evidence before this court whether the respondent was so advised. Be that as it may, no answer to petition was filed within time. As there is no evidence furnished to the court that the respondent was duly advised to make himself easily accessible, the court takes it that the respondent's advocates did not duly advise the respondent and that the said advocates should take the bigger part of the blame. The respondent and his advocates would do well to remember that the court diary does not necessarily run at the convenience of parties.

Having regard to the peculiar circumstances of this case and in the wider interests of justice, I make the following orders:-

1. The Answer to Petition dated 30.08.07 and filed on 03.09.07 without a verifying affidavit is declared incompetent and struck out.
2. The respondent is granted leave to file and serve a valid Answer to Petition out of time and that such Answer to Petition be filed and served within 10 (ten) days, with corresponding leave to the petitioner to file and serve necessary response within 14 (fourteen) days of service.
3. The respondent shall meet the petitioner's costs of and incidental to the present application.

Orders accordingly.

Delivered at Nairobi this 26th day of November, 2007.

B.P. KUBO

JUDGE