



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

DIVORCE CAUSE 76 OF 2006

GABRIEL FERNANDEZ. PETITIONER

VERSUS

NGINA FERNANDEZ. RESPONDENT

R U L I N G

The application before the court is by a Chamber Summons dated the 27.4.2007. It seeks that: -

- a) Registrar's certificate issued on 9.11.2006 be set aside.
- b) Respondent be granted leave to amend the Answer to Petition and grant her leave to file a Cross-Petition a draft of which is annexed.

It is understood that if the court grants the leave sought above, it will then admit the amended Answer to Petition with the Cross-Petition which already filed by the applicant.

The applicant's affidavit in support deponed that the Respondent had instructed her advocate that the Cross-Petition be filed and thought it had been so filed only to realize too late that it had not. That she had herself intended to file for the dissolution of marriage on available grounds created by the petitioner but only to learn too late that her advocate had failed her, hence this application. She further argued that she still has in her favour grounds for seeking the dissolution of their marriage and it would be unjust not to canvass them and sought for orders to allow her to canvass them in a cross-petition.

Furthermore the applicant through Mrs. Ndungu argued that she wishes to amend the answer in order to include prayers for additional reliefs available to her including the wider maintenance for herself and the two children of the marriage in her custody, which also requires to be regularized.

The respondent/petitioner through M/s Quadros did oppose the application. She argued that the application was filed a little too late apart from the fact that it is misconceived in so far as it seeks a setting aside or variation of the Registrar's certificate. Quadros further argued that an Answer or Cross-Petition cannot be amended, as only the Petition can be amended. She also believed and asserted the reliefs of custody and maintenance of wife and children is a jurisdiction of the Children's court, not this court.

I have carefully considered the argument recorded by both parties. Neither cited any legal authorities in

support of the positions each asserted despite the fact that the court gave them time to do so.

It is the court's view that a party should be given ample opportunity to present his best case, unless there are good grounds for denying him such a right. In this case the Registrar has filed his certificate stating that the case is ready for a hearing. On the other hand the Respondent/Applicant is saying that her case is not properly pleaded as it stands. That as pleaded the Answer is not complete in so far as she wanted it to include a Cross-Petition and reliefs for custody of the children of the marriage who are already in her physical custody, as well as the orders for her and the Children's maintenance. That is why, she argued, she should be granted leave to amend her pleadings to include all the issues which ought to be canvassed and be decided upon by the court.

In this court's view, the full case of party should be presented all at once so that a party does not have to go to another court to seek what should have been decided by the first court.

This court does not agree that it has no jurisdiction to hear and determine the issues of custody of the marriage or the maintenance of a spouse and the children. Nor did Quadros cite any law that takes away the unlimited jurisdiction of this court to hear and determine cases before it fairly and justly.

The court also in my view, has discretion to allow a party to amend his/her pleadings at any stage of the proceedings in order to place before the court all the issues that need to be heard and finally decided all at once within the basic principles of the res judicata rule. Again the respondent did not state what prejudice he would suffer if the amendment sought is allowed, and can be compensated in costs.

For the above reasons this court will allow the application as prayed. Since the amendments sought are contained in the draft Amended Answer which contains the cross-petition, all that this court needs to do is to admit the same in the following orders: -

ORDERS

1. The respondent's Amended Answer and Cross-Petition is admitted and the same should be formally served upon the Petitioner within 7 days.
2. The Petitioner shall file the relevant responses within 21 days from the date of such service.
3. The matter thereafter to be mentioned before the Registrar for her directions, if any, as the law may require and thereafter all the parties to seek a hearing date.

Dated and delivered at Nairobi this 13th day of December 2007.

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D A ONYANCHA

JUDGE