



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Divorce Cause 38 of 2005

M.J.MPETITIONER

VERSUS

A.M.MRESPONDENT

R U L I N G:

On the 24th day of February 2006, this court gave judgment in favour of A.M.M the Respondent herein, in terms of the cross-petition as against M.J.M the Petitioner herein. In that judgment this court made the following orders:

- (a) That the Respondent and the Petitioner be judicially separated.
- (b) The Petitioner to pay into court a monthly sum of Kshs.10,000 as maintenance of the Respondent.
- (c) Costs of the cross-petition to the Respondent.

Being aggrieved by the decision, the Petitioner filed an application pursuant to Section 32 of the Matrimonial Causes Act and under rules 3(2), 30(2) and 31 of the Matrimonial Causes Rules whereby this court was urged to stay execution of the decision and subsequently set aside the same altogether. The application is supported by affidavit of M.J.M sworn on 8th March 2006. The application is strongly resisted by the Respondent who relied on the affidavit sworn on 20th March 2006.

It is the submission of Mr. Omwenga advocate for the Petitioner that the cross-petition prematurely proceeded for hearing yet directions were not taken so that the Deputy Registrar had not issued the necessary certificate under rule 29 of the Matrimonial Causes Rules. It is further the argument of the Petitioner's learned advocate that the cross-petition proceeded for hearing in the absence of the petitioner yet the petitioner had not been served with a hearing notice as required under rule 30 of the Matrimonial Causes Rules.

Finally, it is the submission of the petitioner that since there was a preliminary objection on record the same should have been disposed of first before hearing the cross-petition as per the requirement of rule 13(4) of the Matrimonial Causes Rules.

On his part Mr. S. P. Master advocate for the Respondent argued against the application. It is the submission of Mr. S.P. Master that under rule 3(2) (f) there is no room for setting aside the decree given to the Respondent. It is further the submission of the Respondent's advocate to file a reply to it. This submission was challenged by Mr. Omwenga on the ground that it was not a must for the petitioner to file a reply under rule 16 of the Matrimonial Cause Rules. It is also the argument of Mr. S.P. Master that the

Preliminary objection was filed without leave as required under rule 20 of the Matrimonial Causes Rules. The final submission of Mr. S.P. Master is that it was not necessary for the petitioner to be served with a hearing notice because the cross-petition proceeded for hearing as an undefended cause.

I have considered the competing arguments presented by learned advocates on both sides. I have also keenly perused the application plus the affidavits for and against it. Let me begin by stating that the cross-petition proceeded for hearing *ex parte* as a formal proof when it became apparent that the petitioner had not shown up for hearing neither did he file any reply to the cross-petition. It is conceded by the Respondent that a hearing notice for the cross-petition was not served because it was necessary in an undefended cause. The other ground which I think must go together with this ground is that in respect of directions by the Deputy Registrar. It is the contention of the Petitioner that directions were not taken before the cross-petition proceeded for hearing hence the Deputy Registrar never issued the certificate under rule 29. This argument appears not to be contested by the Respondent. After a careful consideration of the arguments and the material placed before me it is clear in my mind that whether a petition or cross-petition is defended or undefended directions must be taken and that one must obtain the Registrar's Certificate before setting down the cause for hearing under rule 29 of the Matrimonial Causes Rules. It is clear from the record that Miss Ndung'u, the Deputy Registrar of this court gave directions pursuant to rule 29(3) of the Matrimonial Causes rules on the 9th day of December 2005. On the 9th day of December 2005 the record further shows that Deputy Registrar issued the certificate required under rule 29(1) on the aforesaid date. Hence the contention that directions were not taken or that the registrar did not issue the certificate do not hold water. The fact that the certificate was not extracted and served does not mean that non-was issued.

The remaining issue is whether or not a hearing notice was issued and if not what is the effect? It is conceded that a hearing notice was not given. It is a fact that the petitioner filed a petition in the first instance in which he sought for the dissolution of their marriage. It is also common ground that the Respondent in response to that petition filed an answer to it. In the Answer to the petition the Respondent cross-petitioned for judicial separation. In response to the cross-petition the petitioner filed a notice of preliminary objection to object to the hearing of the cross-petition. I intentionally set out the background of this matter to show that it was not necessary for the petitioner to file an appearance to the cross-petition in that it was sufficient for him to file some sort of opposition. Under rule 30(1) of the Matrimonial Causes Rules it is mandatory for the party fixing the cause for hearing to serve a hearing notice. In this case the record shows that the Respondent fixed the cause for hearing *ex parte* at the registry on 15.12.2005 and it is conceded that a hearing notice was not served despite the fact that the Deputy Registrar noted on the record that a hearing notice should be issued. The consequences of such a failure is clearly spelt out in Section 17(3) of Matrimonial Causes Act, which provides as follows:-

“(3) The court may, on the application by petition of the husband or wife against whom a decree of judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof on ground that it was obtained in the absence of the person making the application, or if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.”

In the end I agree with the petitioner's advocate that the decree or judgment obtained by the respondent on 24th February 2006 should be set aside because it was obtained in the absence of the petitioner who had not been served with a hearing notice.

The other issue argued by the petitioner is that the Respondent had concealed the fact that there was a preliminary objection which should have been dealt with before the substantive hearing. It is the view of Mr. S.P. Master that the preliminary objection was filed without leave hence in contravention of rule 20 of the Matrimonial Causes Rules. The record shows that when the cross-petition came up for hearing on 8th February 2006, Mr. S.P. Master advocate informed this court that the cross-petition was undefended in that the petitioner had not filed any reply to it. In short, the learned advocate did not disclose that the petitioner had filed a preliminary objection in response to the cross-petition. When the issue is now pointed out, the learned advocate claimed that the preliminary objection was filed out of time and in contravention of rule 20. With great respect, that is an issue which should have been argued to dispose of

the Preliminary Objection before going into the substantive hearing of the cross-petition. The fact remains that the Respondent and his legal advisors concealed this material fact from the court. The respondent and her counsel were under an obligation to the court to disclose the existence of the preliminary objection as a material fact. They failed to do so hence they must suffer for it because this court being a court of law cannot allow them to obtain any advantage from the ex parte proceedings and the resultant judgment. To sum up on this issue, I agree with the submissions of Mr. Omwenga that it was necessary for the preliminary objection to be dealt with first under rule 13(4) of the Matrimonial Causes Rules before embarking on a long journey to hear the substantive matter.

In the final analysis I find that the Petitioner's application is well founded. Consequently the judgment given on 24th February 2006 and the consequential decree as set aside with costs to the Petitioner.

Dated and delivered at Mombasa this 29th day of September, 2006.

J.K. SERGON

J U D G E