



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI**  
**DIVORCE CAUSE 45 OF 2004**

**M.C.B.....PETITIONER**

**Versus**

**1. A.I.B**

**2. F.M.....RESPONDENTS**

**RULING**

The petitioner filed the petition dated 23rd March 2004 whereby she has made various allegations against the husband. There are allegations of adultery and there is a co-respondent who is named as the adulterer.

The respondent has duly filed an answer to the petition thus denying all allegations and sought for dismissal of the petition but should the divorce be granted he sought for an order of joint custody of the two children of the marriage.

Additionally, the respondent filed the application by way of Chamber Summons on 19th October 2004. the application is brought under the provisions of Section 9(2), 10 of the Matrimonial Causes Act, Rule 3(3) of the Matrimonial Causes Rules.

The respondent sought for orders that the petition filed on 23rd April 2003 be struck off for reasons that under Section 9(2) of the Matrimonial Causes Act, the Courts leave should be sought before the co-respondent is joined especially when the petitioner is a woman. In the present case no such leave was sought before Florence Muindi was joined as a co-respondent.

Similarly counsel for the respondent argued that there are allegations of adultery and according to the petitioner she condoned the acts of adultery which the petitioner alleges took place between 1995 and 1996 and yet the petitioner admits that she stopped having sexual intercourse with the respondent two years ago. Hence the respondent argued that this was tantamount to condonation which is against the principles and the spirit of the provisions of Section 10 of the Matrimonial Causes Act.

The other issue raised by the respondent has to do with the complains of dissertation raised in paragraph 9 of the petition and the particulars set out therein which according to the respondent are frivolous as the period of 3 years which is the statutory period recognized by the Law to warrant the grant of the order of divorce have not lapsed at least at the time of filing the petition. Lastly the respondent's counsel also asked the court to consider that the allegations of cruelty were not brought to court without unreasonable delay.

This application was opposed by the petitioner who relied on her replying affidavit which raised several issues as follows:

Firstly, the petitioner argued that the present application was meant to delay the effectual conclusion of the divorce matter as directions were given and the cause was ready to proceed for hearing.

Secondly the respondent has duly filed an answer, which is an indication that the allegations were clear and he did not need further particulars as none were sought. Counsel submitted that the provisions of Section 9(2) of the Matrimonial Cause Act are not obligatory and the use of the words “may” are an indication that the court is not obliged to give leave especially where the co-respondent is known to the petitioner.

Thirdly counsel argued that under the provisions of Section 10 of the Matrimonial Causes Act the court is empowered to inquire into the fact so that the court can determine whether there is condonation of the offences after hearing evidence.

I have given careful thought to all the submissions and the pleadings before me. I have also given due consideration to the provisions of Section 9(2) of the Matrimonial Causes which provides

**“On a petition for divorce presented by the wife the court may if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent”**

I have also considered the allegations of adultery and especially the particulars stipulated thereto and in particular the response/answer by the respondent. There are other allegations of adultery with other women and in my view striking the petition is not necessary as it is a matter of evidence of how the petitioner intends to prove the allegation of adultery.

The name of the co-respondent can be struck out since the leave of the court was not sought but that does not warrant the striking of the entire petition.

As regards the allegation of condonation of the offences of adultery by the petitioner, I am of the humble view that this aspect should be left to be determined after the evidence is adduced as to the circumstances under which the parties continued to have sexual intercourse after the adulterous relationship if at all they did.

The issues of cruelty and desertion should similarly be left out to be dealt with after evidence is adduced and the circumstances of each allegation is inquired into.

In the circumstance the respondent’ application should fail except in as far as it relates to the co-respondent whose name is hereby struck off and the particulars of adultery stipulated in paragraphs 7 (i) (ii) and (iii) are similarly struck off.

Costs of this application shall be in the cause.

It is so ordered.

Ruling read and signed on 10th June 2005.

**MARTHA KOOME**

**JUDGE**