



REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

JUDICIAL SEPARATION 5 OF 2002.

K.J.D.S.....APPELLANT

Versus

J.D.S.....RESPONDENT

October 14, 2002 Onyancha J delivered the following judgement.

By a petition dated 31.1.2002 the applicant herein sought for a decree of Judicial Separation on various grounds therein stated, which included adultery and cruelty. She also sought for maintenance for herself and the parties two children pending the hearing of the suit. The maintenance was to include for the children and the well being of the petitioner with the petition was a notice requiring the Respondent file his appearance and an Answer to the petition as required by the Matrimonial Causes Act and Rules. The Notice also contained a requirement that in the event that the Respondent entered an appearance whether limited or general, he was to file an affidavit in pursuance to Rule 44 of the Matrimonial Causes Rules, giving full particulars of the property and income within 14 days of service. The Respondent complied with the Notice therefore also with Rule 44 aforesaid by filling a general Appearance, an answer to the petition and an affidavit declaring his property and income, which were all filed on 10.5.2002. Later the petitioner with the consent of the Respondent on 19.6.2002 filed an amended petition in response to the answer to the petition. The Respondent did not file any amendment to the Answer to the petition, as probably it was not necessary.

On 23.9.2002 the petitioner filed an application-dated 21.9.2002 under S.30 (1) of the Matrimonial Cause Act and Rules. The prayers were for orders for alimony, maintenance in relation to health care, and education for the children and others related thereto. The application was based on the contents of the amended petition and the Notice annexed thereto, referred to earlier. The application was properly served. When the said application came before me for hearing, Mr. Doshi sought for adjournment on the ground that he needed time to file a replying affidavit because, he argued he was served only on 24.9.2002 and had no time to obtain a sworn replying affidavit from his client who resided at Nakuru. He had sought for more time to this from Mr. Suchak representing the petitioner but the latter had turned him down, his request to the court. To this application Mr. Suchak first agued that such a reply was not necessary since the Respondent had been served with the Amended Petition but did not find it necessary to amend his Answer. But his main ground of opposition in that Respondent is not under the Matrimonial Cause Act and Rules entitled to file a replying affidavit too such an application for ancillary reliefs since he must have filed an affidavit declaring his properties and income. He cited Rule 48 of the Matrimonial Causes Rules and argued that under the same, it is the Judge after making investigations from the petition and answer and the plaintiff's supporting affidavit, to order if necessary, for the supplementary affidavits. On the other hand Mr. Doshi argued that the said Rule 48 if carefully perused, itself gives the Respondent jurisdiction to file a replying affidavit. Mr. Suchak also strongly argued that Matrimonial Causes Act is a special Act legislated to deal with matrimonial matters and is not subject to the ordinary rules of Civil Procedure. He therefore concluded, if I understood him, that the general provisions of the Civil Procedure

applications that a Respondent has a right of reply does not exist and that if it existed it should have been so expressly provided. To this Mr. Doshi pointed to Rule 48 aforesaid again and found implied provisions allowing such a reply.

I have carefully considered the arguments from both parties. I see two main issues to be considered and be determined: - 1) Whether a Respondent under a Matrimonial Causes Act and Rules is generally entitled to file a reply such as the one sought to be filed herein on the basis of the Civil Procedure Rules.

2) Whether the Matrimonial Causes Act and Rules in fact allow the Respondent herein to file the Replying affidavit under Rule 48 of the Matrimonial Causes Rules.

It is to these issues that I now turn.

The relevant provisions of the Matrimonial Causes Rules are Rule 44 and 48 both of which were cited by both parties. Rule 44 states:-

“ 44(1) where a husband is served with a petition in which alimony pending suit is claimed, he shall within fourteen days after entering an appearance file an affidavit setting out full particulars of his property and income.”

Subrules (2) and (3) are of similar effects as the above quoted subrule (1). There is no dispute over the fact that the Respondent complied with the above sub-rule. He filed his Answer to the Petition and filed his a affidavit declaring his properties and his income. It is under rule 48 however where the main issues arise from. It states: -

“48. On an application for ancillary relief, the registrar shall fix an appointment for the hearing of the application and notice thereof shall be given by the applicant to every other party to the application who has entered an appearance, and at the appointment so fixed the Judge shall in the presence of the parties or there advocates investigates the allegations made in support of and in answer to the application, and may order the attendance of the spouses and any other person for the purpose of being examined or c5ross examined or may take the oral evidence of witnesses and at any stage of the proceedings may order the discovery and production of any document or call for further affidavit.”

In this case the application made for ancillary reliefs is this one now under consideration. The registrar fixed an appointment before the Judge after the service of the application on the Respondent. It will be noted that the purpose of the appointment before the Judge was to give the court an opportunity to hear the parties to enable eventually to make a suitable order of the relief sought. The court therefore may ask questions from not only the parties but also other persons, and require production of any relevant documents that may be revealed during the court's examination of the parties or the other persons and witnesses who may have been examined by the court. It is my further understanding of the sub-rule that the basis of the court's examination will be not only the Petition and the Answer but also the affidavit filed by the Respondent which is annexed to the answer as well as the material that arises during the court's examination of all the persons aforementioned. As a result of the court's findings the Judge may order the parties to file further affidavits either support of the application or in opposing reply by the

Respondent. I have carefully examined this Rule aforementioned. It is finding that the only affidavit that may be filed under the rules is the one to be filed in support of the application for ancillary reliefs by the petitioner and any supplementary ones which the Judge may order a party or both parties during or at any stage of the proceedings of the pleadings, arguments, discovery and production of any documents. Mr. Doshi argued that the Rules envisage a situation where the court examines the allegations of the petitioner in the application for the ancillary reliefs probably from the affidavit supporting the application and an answer to the said affidavit, which he adds, Can only be inform of a replying affidavit. His submission therefore means that the clause: -

“.....the allegations made in support of and in answer to the application,.....”

must mean that the Respondent must have also filed or should be allowed to file a replying affidavit. That, in my view, is a very ingenious way of interpreting the phrase but it is one I do not support. The legislators intention can only come expressly from the words they use in the legislation. If they wanted to say that in such an application for ancillary relief the Respondent is allowed to file a replying affidavit, they should have expressly stated so. The Matrimonial Causes Act and Rules thereunder are in my opinion, a special legislation promulgated expressly to govern matrimonial matters. What is in it is what was intended to be therein in the manner and extend it is there. What is not therein expressly is what was intended not to be there by the legislators in my view it can be said that it is now firmly established that where any proceedings are governed by a special Act of Parliament the provisions of such an Act must be strictly construed and applied and that provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by the such an Act and that such an approach remains the same even if the special Act is simply silent about and does not exclude the Civil Procedure Act and Rules. I believe this is the correct approach that has been established by the Court of Appeal. In that regard Apaloo, J.A., in C.A.C.A No. 22 of 1987 in the case of H.Adongo and others v Savings and loan Society (Kenya) Ltd., stated: -

“If I understand Mr. Aboo’s submission right, he argues that this clear submission of the legislature will be overridden by the combined effort of the provisions of Rule 3(1) of the Rent Restriction Appeals Rules, S.3A and 80 of the Civil Procedure Act and order 44 of the Civil Procedure Rules..... I cannot subscribe to that construction of the law. It would be subversive of the clearly expressed intention of the legislator and I cannot accept that that is the proper function of any court”

I accordingly rule out the application of Civil Procedures Act and Rules to these matters, which are matrimonial except where the act itself so provides. The Respondent will therefore not take refuge under the Civil Procedure Act and Rules to file his replying affidavit as he seeks to do. He must accordingly point out any other express provisions in the matrimonial Causes Act and Rules that authorises him to file his intended replying affidavit. However, as already held, herein above, rule 48 of the rules of the same Act does not expressly authorise the Respondent to file the replying affidavit. It is otherwise merely silent in respect to the issue. In such a situation, as hereinabove again held, this court will assume that the intention of the legislature was to deny the Respondent an opportunity to file a replying affidavit and I so hold. In conclusion accordingly, the Respondent’s oral application for leave to file the intended replying affidavit is hereby refused with costs to the petitioner. It is so ordered.

Dated and delivered at Mombasa on the 14th day of October, 2002.

October 14,2002.

