



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 122 OF 2003

F O WPETITIONER

Versus

P M WRESPONDENT

RULING

The applicant who is the petitioner in the Divorce Cause has filed the summons under Rule 14 1(b), 3, 5(a) and 6 of the Matrimonial Causes Rules. The application is supported by the Applicants Affidavit herein on 17th October 2003 and another replying affidavit sworn on 3rd February 2004. The Applicant seeks for orders that

- a) He be granted leave to amend the divorce petition
- b) That the Annexed Amended petition be deemed to be filed and served upon the respondent and co-respondent.

The application is presented on the grounds that:

- The proposed co-respondent has been adversely mentioned in the applicant's divorce petition as the known adulterer with the respondent but was not made a co-respondent in the divorce petition.
- Secondly the applicant states that there is overwhelming direct evidence against the proposed corespondent and it is in the interest of justice that he be made a co-respondent. These grounds are continuously repeated in the affidavit of the applicant, and the only new issue added to the affidavit is paragraph (5) whereby he depones that he has witnesses who are willing to come to court and give evidence against the adulterer and the respondent.

This application was served upon the proposed co-respondent, who entered appearance under protest. He also filed an affidavit sworn on 30th January 2004 and vehemently opposed the application on the following grounds:

The application offends the provisions of Rule 14(1) (b) of the M.C.A. A petition may be amended before service

- (a) without leave, upon the filling of an affidavit by petitioner
- (b) with leave, upon filing of an affidavit of the advocate of the petitioner verifying the new facts.

In the present application, the application is supported by the affidavit of the petitioner and not his counsel. Further, the application also offends Rule 14(3). The applicant has not shown any New Facts.

Rule 14(4) emphasizes that the new facts stated must be within the deponent's personal knowledge and depose as to his belief in the truth of the other new facts alleged and as to the existence or other wise of collusion, connivance and condonation as provided for under Rule 6. The co-respondent's counsel submitted that the affidavit by the petitioner has nothing of personal knowledge. The application has further technical problems regarding rule 14(b) which clearly stipulates that it is after the order has been made by the court allowing leave for amendment that the correspondent should be served with the amended petition.

In this case the co-respondent was served before leave was granted, he was already made a co-respondent this is indicated in the application. The co-respondent is already cited as a co-respondent. For this reason, the counsel for the proposed co-respondent submits that the application is defective.

In the petition which was filed on 14th August 2003 the applicant under paragraph 7 (b) states that the respondent has committed adultery with the proposed co-respondent. There are no other new grounds and no reasons have been given as to why he was not joined when the petition was drawn. There are no allegations of fresh facts. The petitioner/applicant is merely trying to embarrass and ridicule the proposed co-respondent by filing this application, by offending the rules and attempting to serve the notice to enter appearance as though leave had been granted, and causing the same notice to be published in the weekly magazine. The proposed co-respondent prayed that the application which is incurably defective be dismissed with costs to him.

The respondent did not oppose the application.

I have considered the submissions by both counsel for the applicant, and the proposed co-respondent, the affidavits filed herein and all the material that was presented before me.

I have also considered the provisions of the law particularly Rule 14 and 6 of the Matrimonial Cases Rules.

The provisions of Rule 14(1)(b) are clear that if the petition for divorce is being amended after service whereby the leave of the court is sought, this is done upon filing of an affidavit of the advocate of the petitioner, verifying the new facts.

Since the application was brought under sub rule (3) of Rule (14) An application for leave to amend a petition after service is supposed to be supported by an affidavit by the petitioner verifying the new facts. The new facts stated must be within the deponent's personal knowledge. The affidavit in support of the application does not point out any new facts, the facts alleged were in the knowledge of the petitioner even as he filed the petition paragraph (7) (b) of the petition stipulates

(c) "The respondent has had an adulterous relationship with one Hamis Mbogo the Deputy Town Clerk Nairobi City Council who is also her work mate"

The applicant does not give any reasons why he failed to join the co-respondent when the petition was filed. In his application, he admits that the co-respondent was adversely mentioned and therefore it is in the interest of justice that he be joined as a co-respondent.

While the applicant is seeking for leave, the following steps that were prejudicial, and defamatory and irregular to the proposed co- Respondent were taken:

- (1) The proposed co-respondent was served with a notice to enter appearance and yet leave had not been obtained to make him a co-respondent
- (2) The said notice was published in the weekly magazine, even before it was duly endorsed by the Registrar and against the provisions of rule 14(b).

The sum total of the above evaluation is that the application should fail. The application has not complied with the provisions of the law. There are no new facts alleged, the affidavit in support offends the rule and especially failure of the applicant to comply with the provisions of rule 6. I find the application is also based on malice as the petitioner had already joined the co-respondent and caused a notice to be served upon him even before the court had granted the leave. Accordingly I dismiss the application dated 17th October 2003 is hereby dismissed for being misconceived and mischievous. I shall award the costs of the application to the proposed co-respondent.

It is so ordered

Ruling read and signed on 12th March 2004

MARTHA KOOME

JUDGE