



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 167 OF 2002

J.M PETITIONER

VERSUS

J.M..... RESPONDENT

R U L I N G

In this divorce cause Miss Njeri appears for the Petitioner **J.M** while Mr. Mung'ala is the advocate for the Respondent **J.M**

During the hearing of the Petitioner's summons dated 23rd September 2002 Mr. Mung'ala, who had not filed his client's replying affidavit to the summons, although he had filed his client's reply to petition, kept quiet until after Miss Njeri had come to the end of her submissions when, faced with the possibility of not being allowed to address the court because of having filed no replying affidavit, decided to raise a preliminary objection stating that the pleadings relating to the summons were not properly before the court as they were a non-starter because the petitioner's or Applicants affidavit served upon the Respondent was not commissioned and further that the Notice To Appear served upon the Respondent was not signed by the Registrar.

While Miss Njeri conceded that a copy of the affidavit served upon the Respondent did not show it had been commissioned and that the Notice had not been signed, she pointed out that that was an oversight and explained that her copy which was commissioned was the one supposed to have been served so that the copy served upon the Respondent should have been her office copy. The court, however, had a commissioned copy of the affidavit. As concerns the Notice, Miss Njeri said it was an over sight that it went out unsigned.

This is a matter where the affidavit filed in court is commissioned although the Notice issued by the Deputy Registrar was not signed. The Respondent was served with all the documents and has even filed a reply to the petition suggesting no prejudice on his part has been occasioned.

In any case Mr. Mung'ala should have raised that objection before hearing of the summons started. He kept quiet and since the Applicant's affidavit I was using had been commissioned, I did not know and the Advocate for the Applicant did not also know that the Advocate for the Respondent had a defective affidavit until he surprised us at the time he was expected to answer the submissions made by the Applicant's advocate.

In the circumstances therefore since Mr. Mung'ala raised the objection too late and since no prejudice was caused to the Respondent who must have fully understood the claims being made by the Applicant, I do hereby reject that objection, although this is not to encourage carelessness on the part of Applicants who must be diligent.

I have heard the unchallenged submissions made by the Applicant's advocate. I note the evidence she has filed in support of her prayers in the summons has been left unchallenged. But does that mean that she necessarily gets the orders prayed for?

The Applicant and the Respondent are lawfully married and are still husband and wife. The most drastic prayer the Applicant, as a petitioner, has put in her petition is a prayer for Judicial Separation. Other prayers are custody of the children of the marriage and financial support to pay the children's school fees as well as reasonable alimony to the petitioner.

Evidence will have to be adduced, tested and canvassed before the court will be persuaded to grant all those prayers or any of them.

That evidence has not been adduced, tested and canvassed before me during the hearing of this summons, and I am not saying it should have been, yet the Applicant is praying for the eviction of the Respondent from the matrimonial home. She is also asking for interim custody of the two children said to be 10 and 7 years. She also asks for interim maintenance for the children's school fees and a temporary injunction restraining the Respondent from assaulting or interfering with the Applicant.

To my mind the prayers in the summons sound more drastic than the prayers in the petition. If the prayers in the petition wait until relevant evidence is adduced, tested and canvassed before they are granted, why grant the prayers in this summons on affidavit evidence?

Otherwise I get the impression that the petition in this cause is filed merely for the purpose of the Petitioner easily obtaining the interim orders asked for in the summons so that she goes back to sleep leaving the petition pending in this court indefinitely yet ready for her to come back whenever and as it suits her, to update the interim orders.

I am reluctant to allow the possibility of such a development. And as I cannot and should not say today that the Applicant has adduced sufficient evidence to prove the three grounds relied upon in this summons at (a), (b) and c), those grounds being the very grounds to be proved during the hearing of the petition, and it being inappropriate for me to pronounce a definite decision on any of those grounds today, the Applicant's summons dated 23rd September 2002 must fail.

Accordingly the said summons be and is hereby dismissed in its entirety.

Each party to bear its own costs of this summons because they are still lawfully married and the Respondent filed no replying affidavit to this summons.

Dated at Nairobi this 24th Day of October 2002.

J.M. KHAMONI

JUDGE