



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI(MALINDI LAW COURTS)
Divorce Cause 16 of 2005

MF.....PLAINTIFF

VERSUS

IWA.....DEFENDANT

R U L I N G

The Chamber Summons application is dated 17-3-09 and seeks that Petitioner be granted leave to amend the petition as per the amended petition annexed to the applicant's affidavit. Further, that the amended petition be deemed to have been duly filed and served with such leave, upon payment of court fees.

- (1) The leave is necessary at this stage for the pleadings to be amended.
- (2) The amendments sought, are meant to enable the court determine the real questions in issue between the parties herein.
- (3) The respondent will have an opportunity to file an answer and she shall not be prejudiced in any way.

The same is supported by the affidavit of the Petitioner/applicant reiterates the grounds for which the application is sought.

The application is opposed, and the respondent in her replying affidavit states that there is another matrimonial matter between herself and the applicant being Judicial Separation Cause No. [...], where she is the petitioner, and the petitioner herein is the respondent. In that suit, applicant was ordered on 19-10-06, to pay inter alia a sum of Ksh 51,000/- per month with effect from 1st November 2006 and he has never complied with the orders. She therefore urges the court to deny applicant the right of audience in this matter which she says is inextricably intertwined with the separation cause.

Further, it is the respondent's contention that the amendment sought offend the provisions of the Matrimonial Causes Act and that in any event the grounds on which petitioner's application dated 18-6-08 (seeking to strike out the petition) was based and was considered that as such the present application is Res judicata and an abuse of court process.

Respondent also contends that applicant is estopped from raising the issue concerning nullity of the marriage in this suit, as he did not raise it in the separation cause. She maintains that petitioner never disclosed that he was previously married, which is why their marriage certificate shows his marital status as single, otherwise had he made such disclosure, then his status would have been reflected as "divorced".

In arguing the application, Mr. ole Kin for the applicant submitted that the court had earlier rejected an attempt by the petitioner to withdraw the petition and directed that the same could be canvassed by way of an affidavit. He argues that generally courts will allow an application for amendment unless it is shown that the amendment sought will prejudice the interest of parties. He pointed out that although the respondent entered an appearance no reply has been filed, and that ordinarily once the petitioner is served, there would be an answer. It is his submission that under Rule 14 of the Matrimonial Causes Rules, a petition can be amended without leave if it has not been served, but once it has been served, then leave to amend is necessary, whether there is an answer or not.

In response to these issues, Mr. Mwadilo for the respondent argues that the Judicial Separation Cause can't be distinguished from this Divorce Cause, as the parties are the same, the issues likely to arise are the same and the Separation Cause was filed before the Divorce Cause and that is why they have raised issues under section 6 of the Civil Procedure Act. He submits that there was nothing to stop petitioner from canvassing these matters in the Separation Cause. He further points out that petitioner failed to comply with court orders in the separation cause, and was sent to civil jail, but as far as that goes, the enforcement of the court orders wasn't complete and the petitioner would first have to submit to the authority of this court before he can be entertained. Mr. Mwadilo refers to paragraph 6 of the intended amendment which alleges adultery, and states that it still offends the provisions of the Matrimonial Causes Act, as the adulterer is not named as a co-respondent, as provided under section 9(1) of the Matrimonial Causes Act.

He repeats the issue of estoppel due to what is referred to as misrepresentation of facts by applicant to the District Registrar and tht form December 2003, many years have passed and applicant cannot suddenly come and say he now realizes that his marriage was a nullity after living with the respondent.

The amendment sought to be introduced is to the effect that applicant's marriage to respondent is a nullity because as at the time of contracting the union, his other marriage had not yet been dissolved, although its proceedings were by then a subject matter before the Italian courts.

In response to the contents of the replying affidavit, Mr. ole Kina submitted that the existence of the Separation Cause is not a bar to applicant filing his own petition and that in all cases, be it matrimonial or other civil causes, be it matrimonial or other civil cases, a party is at liberty to file defence and counterclaim or file a different suit and the court will then consider whether to consolidate or not. He argues that the petition is not subjudice and it seeks totally different orders from the Separation Cause.

It is his further argument that any orders that were supposed to be complied with must be enforced in that cause and not be linked to this one and that in any event the orders were enforced by sending applicant to civil jail and that cannot be a ground for refusing to amend the pleadings. Mr. ole Kina submits that the application does not offend section 6 of the Civil Procedure Act as matrimonial matters are governed by the Matrimonial Causes Rules and the application of the Civil Procedure Act has no place and even if section 6 of the Civil Procedure Act were to apply, what is important is the relief sought and they are different.

As for the application being Res Judicata, orders of 18-6-08, Mr. ole Kina submits that the application referred to, sought to strike out the petition because life could still be injected into it by way of amendment. The issue of amendment was never canvassed in that application and so Res Judicata does not apply. Mr. ole Kina argues that Estoppel does not arise here in view of the provision of Rule 14(3), which means, a party is at liberty any time, to challenge the validity of marriage.

As for failing to include a co-respondent it is Mr. Ole Kina's contention tht the same only applies where damages or costs are sought and that the submission is premature and should be made after the leave to amend has been obtained. He states that the answer to the question of misrepresentation and estoppel is governed by Rule 14(2) of the Matrimonial Causes Rules.

Rule 14 of the Matrimonial Causes Rules address the issue of amended and supplemental petitions.

14(3) An application for leave to amend a petition after service or to file a supplemental petition shall, unless otherwise directed, be supported by an affidavit by the petitioner verifying that new facts alleged..."

It was on the basis of this provision that this court declined to have the petition withdrawn and instead directed that the petitioner do make his amendment by way of affidavit.

14(2) reads:-

"A supplemental petition for leave to amend may be filed only after service of the original proceedings and only with leave"

It is therefore within the provisions of the law that the petitioner/applicant should seek leave to amend the petition. Was the matter then Res Judicata by vote of the court's earlier decision on 18-6-08. Section 7 of the Civil Procedure Act address the issue regarding Res Judicata that:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by the court"

The prayer then had sought an amendment on similar grounds, the merit of the amendment was not determined, the court dealt with the issue of procedure and struck out the application as it did not comply with the legal provisions. What the court considered was not the substance of the amendment, but the procedure adopted in seeking to effect the amendment – so the issue of whether the amendment was merited was not addressed by the court and to that extent, Res Judicata does not apply.

There was also the existence of Judicial Separation Case No. [...] which was filed before this Divorce Cause was filed and Respondent contends that the issues likely to arise are the same and there was nothing to stop the Petitioner from cautioning those matters in the Separation Cause citing section 6 of the Civil Procedure Act which states:-

“No court shall proceed with the trial of any proceeding in which the matter in issue is also directing and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

What are the reliefs sought in the Separation Cause? A copy of the cause No. [...] has not been annexed, but it is apparent that one of the prayers sought is maintenance – I don't know whether separation is also sought – although ordinarily that would be the normal course.

In the present matter, the prayer sought is for dissolution of the union – certainly the issues may be related but the prayers sought are different – what's more, section 7 of the Matrimonial Causes Act provides that:

“A person shall NOT be prevented from presenting a petition for divorce, by reason that the petitioner has been granted a judicial separation under the Matrimonial Causes Act or under the Subordinate Courts (Separation and Maintenance Act,) upon the same or substantially the same facts as those prove in support of the petition for divorce”

I think this provision clearly takes care of the respondent's protestation regarding the existence of another suit dealing with marital relations between the two since the other is a separation cause.

There is no bar to the petition filing for divorce separately.

Is the applicant estopped from making any amendments to the petition by virtue of the contents of his marriage certificate which indicated he was “single” and not “divorced”. Mr. Mwandilo argues that this was a misrepresentation by the applicant and he cannot suddenly waken to the fact that at the time of contracting the present union, he was not aware of the existence of the other union or its then prevailing status. With all due respect to counsel, that would not be a reason to refuse an amendment, it is up to the applicant to prove what he is claiming to the court, simply including it in his pleadings, does not in any way transform it into an unchallenged truth, and that aspect of the submission would do well on cross-examination and submissions by the respondent at an interpartes hearing.

Respondent is really bent on betting historical, pegging every argument to the Separation Cause – saying application has never complied with the orders given in that cause. It is however confirmed that as a result of non compliance with the court orders, the applicant served a jail term in civil jail. If for any reason the applicant has not complied with the orders in the Separation Cause, then the most natural question is – what steps has the respondent taken to enforce those orders? The Civil Procedure Act section 42(2) recognizes that a judgment debtor released from detention under the section shall not merely by reason of his release be discharged from his debt – it is really up to the respondent to show that after serving in civil jail, she has then used other avenues of enforcing the order and applicant has failed to heed – she has not done so and cannot therefore insist that applicant lacks right of audience.

Yes section 9(1) of the Matrimonial Causes Act requires that on the petition for divorce presented by the husband or in the answer of a husband praying for divorce, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless the court excused this requirement. That has not been done – yet that cannot be a reason to refuse an amendment, it would probably serve well to raise it as a preliminary objection at the hearing, that the pleadings are defective for want of complying with section 9(1), but it is not a ground to warrant a party not being allowed to amend the petition.

The upshot then is that there is merit in the application and leave is granted to the applicant to amend the petition as prayed in the chamber summons dated 17-3-09.

Costs of this application shall be borne by the applicant.

Delivered and dated this 6th day of July 2009 at Malindi.

H. A. OMONDI

JUDGE