

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
DIVORCE CAUSE NO. 30 OF 1975

M W PETITIONER

VERSUS

J K..... RESPONDENT

JUDGMENT

This is an application by the petitioner for striking out the appearance and answer filed by the respondent on the ground that these pleadings were filed out of time without leave of the court. Although the hearing date of this application was fixed by consent of parties, there was no appearance of the respondent at the hearing and Mr Hayanga for the petitioner proceeded to put forward his arguments *ex parte*.

According to the affidavit of the petitioner, the respondent was served with the petition on 7th May 1975 but did not enter an appearance until 12th November 1975; he filed an answer on 4th December 1975. Mr Hayanga referred me to rule 20 of the Matrimonial Causes Rules which provides: "No pleading shall be filed out of time without leave after a step in default has been taken."

If I understand Mr Hayanga correctly, his submission is that by the time the respondent entered appearance, he (ie the respondent) had taken a step in default and by the time he filed his answer he had taken another step in default. With respect to Mr Hayanga, in my view, this is a complete misconception of the phrase "step in default" in this context. I interpret it to mean a step which the petitioner must take after the petition has been served upon the respondent. The petition was served upon the respondent on 7th May 1975, and the respondent was given ten days in which to enter an appearance. The respondent did not do so. The petitioner then became entitled to apply for the registrar's certificate under rule 29(2) of the Matrimonial Causes Rules, but, from the record, I observe that he had taken no action at all when the respondent filed his appearance and answer respectively. Therefore, since the petitioner had not taken: "a step in default" as he was entitled to, the respondent became entitled to enter an appearance and file an answer without leave of the court.

I have been unable to find any local decision on this point in respect of matrimonial causes but the English practice is similar. Thus it is stated in *Rayden on Divorce* (12th Edn) volume 1, page 458:

The time for filing an answer is twenty-one days from the expiration of the time for giving notice of intention to defend, ie eight days for service, or such longer time as is appropriate if service is effected abroad. But until directions for trial have been given, notwithstanding that such time has expired or the fact that no notice of intention to defend has been given, an answer may be filed without leave at any time. After directions for trial have been given leave is required.

Again, in *Humphreys' Matrimonial Causes* (10th Edn) at page 61 it is stated:

An answer may not be filed without leave after directions for trial have been given. Application for leave is to a registrar where the cause is proceeding.

To sum up, in my view, the step in default is a step which must be taken by the petitioner and that the entering of appearance or the filing of answer out of time by the respondent does not constitute a step in default. Therefore, I dismiss the petitioner's application for striking out the appearance and answer.

However, since the respondent has not appeared at the hearing of this application, I make no order as to costs.

To registrar is directed to treat the appearance and answer as having been properly filed and, when applied for, to proceed to issue his certificate under rule 29(1) of the Matrimonial Causes Rules.

Application dismissed. No order as to costs.

Dated at Nairobi this 24th day of September 1976.

S. K. SACHDEVA

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JUDGE