IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(MATRIMONIAL)

DOMHMT2017/0053

BETWEEN:-

ULANDO CUFFY

Petitioner

And

AUGUSTINA CUFFY (nee) VIGILANT

Respondent

Appearances

Mrs. Dawn Yearwood Stewart for the Petitioner

Mrs. Gina Dyer Munro for the Respondent

2019, February 22

ORALWRITTEN SUBMSISSIONS

[1] STEPHENSON J.: This is an application brought by the **respondent ("The respondent")** to file for leave to amend her answer and cross prayer. his application was opposed by the petitioner**("The petitioner")**.

[2] Both parties filed affidavits and submissions in support of their respective cases which have been taken into consideration by the court. It is to be noted that these proceedings have become rather acrimonious with a number of applications and affidavits being filed matters related to these parties and their marriage. The court in an attempt to manage the matter, at one of the many hearings established with the agreement of parties and their counsel a chronology of the matters filed and also a list of issues to be considered by the court.

[3] The issue to be resolved by the court can be stated as follows:

"*Whether or not the Respondent should be allowed to amend her answer and cross prayer to plead a party cited and to have the divorce petition heard on the grounds listed by the Respondent named adultery. It is to be borne in mind that that is in the Respondent***'s view the sole cause and** *reason for the* ***breakup of the marriage."***

The law in support of the Respondent's application - Consideration to be made regarding whether or not to allow amendment:

[4] Learned Counsel Mrs. Dyer Munro on behalf of the respondent urged the court to apply the Rules of the Supreme Court 1965 ('the 1965 rules") on the grounds that these rules are applicable by virtue of section 3(2) of the Matrimonial Causes Rules 1977 which state:

> ***"For the purposes of paragraph (l) an****y provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were in the case of proceedings pending in a divorce county court, a provision of the county court rule 1963 and in the case of proceedings pending in the High Court* ***a provision of the rules of the supreme court 1965"***

[5] It was submitted on behalf of the respondent that in the circumstances of the case at bar that the court should consider the principles of law governing amendments as is provided for in Order 20 rule 5 of the 1965 rules which states that

> *"subject to Order 15, rules 6.7 ad 9 the following provision of the rule, the Court, may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."*

[6] Learned Counsel further relied on the learning as stated in the White Book (it is noted that the court was not informed as to which white book counsel was relying on and wishes to remind counsel that this is not an acceptable practice). Be that as it may the submissions which counsel sought to make is that the amendment ought to be allowed for the purpose of determining the real question in controversy between the parties.

[7] Learned Counsel submitted that the applicable law in the case at bar is that all amendments ought to be made may be necessary for the purpose of determining the real controversy between the parties. Further that the judge's discretion should be exercised according to the justice of the case.

[8] It was urged on this court that the objective is to obtain a correct issue between the parties,

[9] Reference was made to statements of Jenkins LJ in the case of GL Baker Ltd –v- Medway Building Supplies Ltd[1], Bowen LJ in Cropper –v- Smith[2] , Tildesley –v- Harper [3]per Brawell LJ all of which are authorities establishing the principles to be applied and in support of Counsel's application.

[10] In support of her client's case Counsel Dyer Munro submitted that the respondent in the evidence adduced in her affidavit stated that she wanted the court to know the full situation as to why her marriage broke down. Counsel urged the court not to punish the respondent for the mistakes in the previous pleading as this case fell within the principle of law that what is important is for the rights of the parties to be determined.

[11] Learned Counsel submitted that the proposed amendment to include adultery is not being made in bad faith as is suggested by the petitioner, further, that the Respondent is seeking to utilise a ground of divorce that is available to her in the law and that she has the right to advance her divorce on terms deemed fit. Learned Counsel further submitted that it would not be fair and just for the respondent to be requested to shield the party cited as the law is that where adultery is pleaded the parties cited must be pleaded.

[12] Counsel on behalf of the respondent urged the court to allow the amendment as to do so would afford the court with an opportunity to grant the divorce either on the petitioner's petition or the respondent's answer which advances the administration of justice. That to refuse the amendment will deny the respondent the opportunity.

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[1] 1958 1 WLR 1216 at1231
[2] (1884) 26 CH D at pages 710 to 711
[3] 10 CH D 396 at page 397

[13] Learned Counsel Yearwood Stewart firstly objected to the manner of the proposed amendment on the grounds that the amendments do not comply with the rules regarding amendments of pleadings and should be struck out with costs. Reference was made to learning as recorded in Raydon and Jackson on divorce, land and family matters[4] which addresses the "Mode of Application" and which stated as follows:

> *"The copy of the amended pleading should show the amendments in red in such a way that it should be apparent from the document what amendments have been effected in the original matter deleted should be typed in black and ruled through in red and the new matter should be typed in red in appropriate places. …"*

[14] Learned Counsel Yearwood Stewart submitted that the respondent's amendments did not follow this rule in that the respondent completely removed the words previously stated in her answer instead of crossing said words out and then she replaced the words crossed out by adding her new (amended grounds). Counsel listed each and every proposed amendment made by the respondent which this court does not propose to repeat. That the amendments as presented by the respondent should be rejected and struck on these grounds[5].

[15] This court understands Learned Counsel's further submissions to be that to allow the amendments would visit injustice on the petitioner and that the proposed amendments smacks of *mala fides.*

[16] The particulars of the *mala fides* of respondent was stated as follows by the petitioner:

a. That the amendments are delaying tactics on the part of the petitioner by filing documents on the eve of when they became due
b. Name and shame on the part of the respondent and an effort by the respondent to wash dirty linen in public
c. That the petitioner is stretching the court's discretion in that there is a total disregard of the time lines set and amending in a timely manner

[4] 6th Edition Butterworth's London 1991 Volume 1 at paragraph 15:13
[5] See Paragraphs 4 to 18 of the Petitioner's submissions in opposition to the application for leave to amend filed on the 14th January 2019

d. That the amendment smack of bad faith making the proceedings before the court acrimonious and costly. That there will now be a delay in the hearing in that the party cited will now have to be served and time allowed for her to possibly respond and for possible replies by the petitioner and respondent. That the petition was due to be heard on the 6th November 2018 and this application and the amendment and involvement of the party cited will now delay the hearing of the petition which is highly prejudicial to the petitioner.

[17] Learned Counsel cited in support of her submission section 49 (1) of the Matrimonial Causes Act 1973 which states

> *"Where in a petition for divorce or judicial separation, or in any other pleading praying for either form of relief, one party to a marriage alleges that the other has committed adultery, he or she shall make the person alleged to have committed adultery with the other party to the marriage a party to the proceedings unless excused by the court on special grounds from doing so".*

[18] Counsel Yearwood Stewart in her submissions made reference to the Kenyan case MNB –v- JWB[6] and cited the statement of Mr. Justice L Kimaru who said ***"it would be a waste of judicial time*** *to enjoin third parties to the petition where the issue in controversy really is whether the marriage* ***ought to be sustained." Learned Counsel submit****ted that to enjoin a third party into the case at bar would be to obfuscate the real issues to be determined by the court. It was further submitted that it would be unnecessary to enjoin the alleged adulterer because the issues in dispute is the determination as to whether or not the divorce should in the circumstances be granted. Counsel placed reliance on the MNB –v- JWB and Buya –v- Makorain[7] which case was mention in the MNB decision.*

[19] *Learned Counsel Mrs. Yearwood Stewart urged the court to follow the decision of the court in MNB that enjoining the intended party named will not aid the court in determining the real issue between the parties. She quoted the dicta of Mr. Justice Kimaru in support of her position.*

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[6]

[7] (1990) KLR 232

> *"…**Respondent's application seeking to enjoin the intended co**-respondent as a party to these proceedings lacks merit and is hereby dismissed with costs. The enjoining of the intended co-Respondent will not aid the court in the determination of the real issue in controversy which is the question whether the marriage between the petitioner and **respondent ought to be sustained."***

Decision

[20] Having read the submissions and considered the oral arguments on behalf of the Petitioner and the Respondent, I agree with the submissions filed on behalf of the respondent that the law is very clear that leave to amend can be granted at any time.

[21] I am satisfied that there is an abundance of authorities clearly showing that pursuant to the relevant rules of the supreme court leave to amend can be granted at any time. It is necessary to repeat the guiding principle regarding whether or not amendment **should be allowed that is** "all amendments ought to made 'as may be necessary for the purpose of determining the real controversy between the parties': Re: *GL Baker Ltd v Medway Building & Supplies **Ltd"***[8]

[22] I am also satisfied that no injustice will be visited on the Petitioner if the Respondent is granted leave to file her answer in the proposed terms that is to include adultery and a person named which cannot be compensated in costs

[23] I am satisfied that the explanation proffered by the respondent as to why there is the need to **amend her answer and cross petition. This is coupled with the court's own recollection as to what** transpired when this matter first came before the court for hearing of the divorce petition.

[24] The application to amend in this case is admittedly been drawn out and is not in compliance with the requirements of CPR 2000 and the practice directions that goes with it. It is noted also the CPR is not applicable, but it would be remiss of this court not to state that the rules of practice as provided for by CPR 2000 regarding amendment is not in any way new or novel, they are in fact

[8] [1958] 3 All ER 540 at 546, **[1958] 1 WLR 1216** at 1231

rules governing amendments that have been present for a very long time. The failure of the respondent to comply with the rules of practice regarding amendments in the case at bar would not be fatal to the application.

[25] Counsel for the petitioner's submission on section 9(1) of the Matrimonial Causes Act 1973 does not find favour with this court as the wording of the section clearly envisages an application being made to the court for an excuse to be granted on special ground. There has been no such application for consideration before the court in the case at bar.

[26] I find that Counsel for the petitioner has made mention of but has failed to prove *mala fides* on the part of the respondent in this case. The court heard from counsel for the respondent at the first hearing of this case and accepts that subsequent to that hearing the respondent took further advice and instructions and based on that sought to amend her answer and cross petition.

[27] In the absence of proof of *mala fides* on the part of the respondent, this court is obligated to grant her leave to amend in the interest of justice. I therefore order that the respondent's leave to amend her answer and cross petition including the party named is granted;

[28] Taking all things and factors into consideration this court also finds that it is appropriate that the petitioner be compensated in terms of costs in the sum of $2,000.00

M E Birnie Stephenson
High Court Judge

[SEAL] By the Court

Registrar