

**IN THE SUPREME COURT OF BELIZE A. D., 2015
(DIVORCE)**

ACTION NO. 18 OF 2015

BETWEEN:

	(FRANK KRAHN	PETITIONER
	(
AND	(
	(
	(SULMA KRAHN	RESPONDENT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

**Mrs. Robertha Magnus-Usher for the Petitioner
Mr. Kevin Arthurs for the Respondent**

Hearing Dates:

7th June, 2016

19th January, 2017

D E C I S I O N

1. On 23rd January, 2014 Frank Krahn the Petitioner filed a divorce petition against his wife Sulma Krahn. The Petition has not been heard as there are two preliminary applications before the court which have to be determined prior to the substantive hearing. The Petitioner has filed an Application for leave to amend his Petition

and/or in the alternative leave to file a Reply. The Respondent has filed an application to have the Petition struck out, and is asking that the Divorce proceed on the basis of the Respondent's Answer as the Petitioner has failed to file a Reply. The Court deals with both applications simultaneously in this hearing as they overlap significantly.

Legal Submissions on behalf of the Petitioner in support of Application for Leave to Amend Petition and/or Leave to File a Reply

2. Mrs. Usher on behalf of the Petitioner is asking for leave to amend this Petition to include amendments to the grounds of divorce which she claims would set out with more clarity the ground of cruelty and adultery already alluded to in the Prayer. Mrs. Usher recently took over as Counsel for the Petitioner in this case from Mr. Mark Williams who represented the Petitioner in earlier stages of the proceedings in this matter. Mrs. Usher argues that an amendment to a Petition is possible with leave of the Court at any time, even after a trial and after a decree nisi is granted. She refers to Order XXI Section 1 of the Supreme Court of Judicature Subsidiary Rules:

"The Court may, at any stage of the proceedings, allow either party to amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made necessary for the purpose of determining the real questions in controversy between the parties."

The additional statutory provisions relating to amendments in Order XXXI are:

- i. *"6. In all cases not provided for by the preceding Rules of this Order, application for leave to amend may be made by either party to the Court or to the Court at the trial of the action, and such amendments may be allowed upon such terms as to costs or otherwise as may be just."*

ii. 12. *The Court may at any time on such terms as to costs or otherwise as the court may think just, amend any defect or error in any proceedings and all necessary amendments shall be made for the purpose of determining the real issue raised by or depending on the proceedings.*”

Mrs. Usher points out that no steps in default were taken by the Respondent, and the Petitioner applied to amend his Petition prior to date when the Application to strike out the Petition was filed by the Respondent. She submits that even if a step in default had been taken, the Court is still empowered by statute to grant leave to amend. After hearing such an application, the Court has full discretion on whether to grant leave to amend. She cites ***Nelson v. Nelson*** [1958] 1 WLR 894 as the leading authority on leave to amend pleadings:

“There is now no practice in the Divorce Division, which would prevent the Court from applying the ordinary rules as to amendment of pleadings contained in R.S.C. Ord. 28 rr1 and 12... and in the exercise of its discretion allowing amendment in a case where after service of a petition praying for dissolution of marriage on the ground of desertion, the petitioner seeks leave to add charges of cruelty and notwithstanding that the ground for the charges was known to the petitioner at the time when the original petition was served.”

Mrs. Usher also cites Romer LJ at p. 896 of his judgment taken respectively from (a) ***Tildesley v Harper*** (Bramwell LJ) and (b) ***Clarapede &Co. v Commercial Union Association*** (Sir Bratt MR)

“a) My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise;

b) However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

The Respondent has not alleged any injury to herself that the amendment would have caused. The Petitioner has not acted *mala fides*. The Respondent's Counsel claims that a concession was made by previous Counsel for the Petitioner that based on case law the case must go on as uncontested. The Respondent's attorney filed no order reflecting such a concession. Mrs. Usher argues that even if this is true, that was a preliminary discussion as the Respondent's attorney was instructed by the Court to make this formal application for the matter to proceed uncontested which is now before the Court. The Petitioner has since changed attorneys and has acted on his right to put his case fully before the Court and to seek leave to make necessary amendments of his Petition. There is nothing *mala fides* about the Petitioner's actions. Amendments are allowed in the interest of justice, so long as they cause no injustice to the Respondent which could not be compensated for with cost. Therefore, amendments have been allowed in the following cases:

- i. ***Parkinson v Parkinson*** (1869) LR 2 P & D 27 Petitioner allowed to plead cruelty, after failing to prove a ground of her Petition at trial; amendment allowed after verdict
- ii. ***Duplany v Duplany*** (1892) P. 53 Amendment is necessary for determining the real issue between the parties
- iii. ***Parson v Parson*** [1907] P. 53 Amendment may be allowed at any time before decree absolute. Amendment allowed after

conclusion of trial, at which time the Petitioner was offered judicial separation instead of Divorce. She accepted and changed her prayer from Dissolution of Marriage to Judicial Separation.

In this case there is not a change in the case or a completely new ground being added. The Petitioner has already alleged cruelty and adultery, so that the case that the Respondent has to meet remains substantially the same; but even if completely new grounds were added, this is permitted.

Legal Submissions on behalf of the Respondent against Application for Leave to Amend

3. Mr. Kevin Arthurs on behalf of the Respondent objects strenuously to the Application by the Petitioner to seek leave to amend the petition and/or file a Reply. He submits in oral arguments that the authorities placed before the Court on behalf of the Petitioner in particular *Nelson v Nelson* refer to another test in that the Amendment ought not to be made in circumstances where the party applying was not acting *mala fides*, or that by his blunder he had done some injury to his opponent which he could not be compensated for. He argues that the petition was filed on 23rd January, 2015. That is 473 days ago. There is no allegation in respect of Adultery in the Petition. The *mala fide* arises in this application when the Petitioner attempts through Counsel to say that adultery was referred to and this is absolutely untrue. According to the Petition, the Respondent told the Petitioner that she wanted to have an open relationship and she would start to go out as she was in love with a next man. That is not a confession and it is not adultery. The Respondent categorically denies that allegation in her Answer to the Petition.

Mr. Arthurs goes on to submit that in the particular circumstances of this case, where an oral application was made by him to strike out the Petition in November 2015 on the basis that no Reply to the Respondent's Answer had been filed by the Petitioner, and that on that hearing Counsel for the Respondent Mr. Williams conceded that the matter should be allowed to proceed uncontested. Injury was caused to the Respondent by allowing the Petitioner to amend the Petition some 413 days after submissions have been made and after concessions were made. He further submits that the Petitioner is prevented from having this matter re-litigated on the doctrine of collateral estoppel also referred to as issue estoppel. Collateral estoppel prevents identical parties from re-litigating identical issues that have been determined prior to litigation.

He relies on the case of *Joaquin Riverol v Maria Riverol* (Supreme Court of Belize Action No. 23 of 2011) where this court held that the Petitioner's failure to contest the Respondent's Answer by filing a Reply within the time frame stipulated by the Matrimonial Causes Rules resulted in his Petition being set aside and the Divorce proceeding on the basis of the uncontested Answer filed by the Respondent. Mr. Arthurs argues that not only has there been a failure to amend but also the timeframe for that failure started to run at least from the day that the Petitioner received the Answer on 23rd February, 2015 to the 23rd February, 2016 amounting to 365 days and an additional 108 days until the application was filed. He also argues strenuously that there was a concession by this court and by previous counsel following submissions made by him and previous counsel for the Petitioner in

chambers on a previous occasion that this court was bound to follow its decision in **Riverol**. He argues further that it is now *mala fides* for the Petitioner, having changed Counsel since that date, to now seek to re-litigate the matter and seek leave to amend his Petition after such a long time has passed.

4. Mrs. Usher in Reply submits that while she concedes that this application for leave to amend is being done at a late stage, the courts are saying that even at this late stage persons are able to apply for leave to amend. The distinction in **Riverol** was that there was no application ever made by the Petitioner to amend nor was there any application for extension of time. This case is not yet concluded so estoppel does not apply; nothing is being re-litigated here. Adultery was intimated in the Petition, and the Petitioner is now seeking leave to set out the particulars. Nothing in the law prevents one from adding grounds.

Decision

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

Rules 25 and 26 of the Matrimonial Causes Rules clearly allow for amendment of pleadings once leave is obtained:

Rule 25: "A pleading may be amended by leave to be obtained upon summons subject to any directions which may then be given as to re-service of the amended pleading and any consequential amendments of pleadings already filed."

Rule 26: “No pleading shall be amended out of time without leave nor shall any pleading be filed out of time after a step in default has been taken, without leave, such leave to be obtained upon summons.”

I find that Counsel for the Respondent has failed to prove *mala fides* in this case. There is no re-litigation of any issue. The court heard submissions from Mr. Williams (as previous counsel) for the Petitioner and Mr. Arthurs for the Respondent in chambers on a previous date on the issue of how the matter should proceed. While the court may have made some passing remarks in relation to its previous decision in the **Riverol case** cited by Mr. Arthurs, there was no order made in that regard. What the court did order the Respondent to do was to make a formal application to have the Petition struck out. There is an abundance of authorities clearly showing that leave to amend can be granted at any time. The distinction in **Riverol** and the present case (as helpfully and correctly pointed out by Mrs. Usher as the Petitioner’s new counsel) is that there was never any application made by the Petitioner in **Riverol** to amend at any stage, nor did he seek an extension of time. The application to amend in this case is made admittedly very late, but it has been made, and in the absence of proof of *mala fides* on the part of the Petitioner, this court is obligated to grant him leave to amend in the interest of justice. I therefore order that the Petitioner’s leave to amend the Petition is granted; the Respondent’s application to strike out/set aside the Petition is refused. Each party to bear its own costs.

Dated this 19th day of January, 2017

Michelle Arana
Supreme Court Judge