

UGANDA / JUDGMENT

Gurner v Hall (Divorce Cause No. 37 of 1955) [1955] EACA 223 (1 January 1955)

[1955] EACA 223

COURT

East African Court of Appeal

BEFORE

CRAM, Ag. J

CASE / FILE NUMBER

Divorce Cause No. 37 of 1955

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DIVORCE JURISDICTION

Before CRAM, Ag. J.

DEREK FRANK THOMAS GURNER, Petitioner

v.

JUNE MARY GURNER AND ROY HALL, Respondents

Divorce Cause No. 37 of 1955

Divorce—Matrimonial Causes Ordinance, Cap. 145, sections 3, 14 (1) (3) and 32—. Abridgement of period before decree *nisi* can be made absolute—Application for special order—Matrimonial Causes (Decree Absolute) General Order. 1951—How Court may be approached—Whether respondent can apply— Directions—English practice.

The respondent, **enceinte** by the co-respondent, wished to marry him before her confinement which was anticipated within the six weeks delay laid down by the Matrimonial Causes (Decree Absolute) General Order, 1951. Her advocate, holding a watching-brief, approached the petitioner's advocate who moved the Court, after decree *nisi*, for a special order to shorten the period in terms of the Matrimonial Causes Ordinance, Cap. 145, section 14 (1). The Court considered the procedure to be adopted and gave directions.

Held (5-11-55).—(1) The Matrimonial Causes Ordinance, Cap. 145, at section 3 legislates that the divorce jurisdiction of the Supreme Court "shall ... be exercised in accordance with the law applied in matrimonial proceed With the law applied in maximum procedure was part of that law and applied in Kenya,
"subject to the provisions of" the Ordinance and the Schedule thereto,

the Matrimonial Causes Rules. Since none of the Kenya Rules provided to shorten the period before which a decree nisi could be made absolute, English procedure and practice ought to be followed, which, too, was not the subject of any rule but of directions of the Divorce Division.

- (2) The respondent had neither right nor standing to apply to the Court for a special order, as comprehended by section 14 (1) of the Ordinance, but had invoked the aid of the petitioner by whom alone the Court could be approached.
- (3) The petitioner's advocate had laid certain facts before the Court and the Court had expressed an opinion, as it could do in a proper case, that the decree nisi was "fit for expedition", but it was not in accord with practice, unless in the most exceptional circumstances, for the Court then and there to make an order abridging the six weeks period. In any event the proposal to shorten the period must be intimated to the Queen's Proctor.
- (4) The mere expression of the Court's opinion could neither influence the discretion to be exercised by the Queen's Proctor nor fetter that of the Court in any future application.

Directions: The appropriate mode of approach (after the Queen's Proctor had made enquiries and informed the petitioner's advocates that he was ready and had no objection to expedition) was for the petitioner to make an application to shorten the prescribed period by summons in this instance supported by medical evidence upon which the Kenya Rules required an appearance in Chamber of reasons in exhibiting the Queen's Proctor's letter.

Semble: The Queen's Proctor could recover costs against the petitioner with remedy over against the co-respondent.

Cases cited: *Hays v. Hays*, (1943) P. 55; *Morrice v. Morrice and Leland*, (1942). 20 (1) K. L. R. 23. \$20\$

Referred to: *Latey, Divorce*, 14th edn., (1952) p. 361, para. 756, and p. 876, para. 1390.

Compared in *pari materia*: Matrimonial Causes Act, 1860, section 7; Matrimonial Causes Act, 1925, section 183 (1); Matrimonial Causes Act, 1937, section 9; Matrimonial Causes Act, 1950, section 12.

Wilcock for petitioner.

RULING.—After decree **nisi** in this divorce cause the petitioner's advocate broached the topic of how an approach might properly be made to the Court to shorten the period within which an application might be made to have the decree made absolute and doubtless he was influenced to do so at the instance of the learned advocate for the respondent and co-respondent, holding a watching-brief. The grounds were that the respondent was **enceinte** by the co-respondent whom she wished to marry before her confinement. It was represented that neither in England nor in Kenya did the rules provide specifically for any application of the sort adumbrated and that although in England there was a recognized practice, that in Kenya was inchoate.

The Matrimonial Causes Ordinance, Cap. 145, at section 3, legislates that the divorce jurisdiction of this Court "shall... be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England". The adjectival law of procedure is part of the law applied in matrimonial proceedings by the Divorce Division of the High Court and ought therefore to apply to Kenya "subject to the provisions of" the Ordinance, including the Schedule, i.e. the Matrimonial Causes Rules. As, on this topic, none of the Kenya Rules modifies the English procedure that procedure ought to apply in this instance. Although even the English Matrimonial Causes Rules do not provide for such application the procedure has been not only judicially defined but also the subject of several recent directions of the Divorce Division.

In England, every decree for divorce is, in the first instance, a decree *nisi* not to be made absolute until after the expiration of six months from the pronouncement unless the Court, by general or special order, from time to time, fixes a shorter time—section 12 (1) of the Matrimonial Causes Act of 1950, replacing section 183 (1) of the Act of 1925 and identical with section 14 (1) of the Matrimonial Causes Ordinance, Cap. 145. A general order was made in England in 1946 reducing the period to six weeks which was still effective when the Act of 1950 came into force and which remained in force by virtue of section 34 (2) of the Act. In Kenya, the Matrimonial Causes (Decree Absolute) General Order, 1951, contains an identical general order.

The general order is irrelevant to the purpose of parties who seek a special order. How is the Court to be approached? The object of section 7 of the Matrimonial Causes Act, 1860, which provided, for the first time, that decrees for divorce should in the first instance be decrees *nisi* with a delay of three months before such decrees could be made absolute was to enable the Queen's Proctor to intervene in a proper case. The interval, increased to six months and now whittled down to six weeks is retained for the same purpose up to the present day. It would only be logical that a procedure in which the discretion of the Court to shorten the period is invoked should provide for due notice to the Queen's Proctor as well as for any costs which he may incur. Lord Merriman, P., in *Hays v. Hays*, (1943) P. 55, observed (before the period was shortened) that the procedure was a practice not governed by any rule. He said: -

"As is well known, it is impossible for the King's Proctor to make enquiry in every case in which a decree *nisi* is pronounced. There must be a certain element of guess-work—it may possibly be informed guess-work in the selection of cases for enquiry, but in any case in which special application is made for the shortening of time, it is the invariable practice of the King's Proctor, and, in my opinion, it is his duty to make special enquiries. When

an application to expedite the making of a decree absolute comes before a judge it is the practice to allow the King's Proctor's costs of the enquiries as against the petitioner. As a rule no costs are asked for or allowed in poor persons' cases, but, in this respect, the principle is the same in all cases and the King's Proctor is entitled to apply for the special costs of the enquiries. From this it follows that the King's Proctor may be put in a very grave difficulty if any encouragement is given to an undue number of applications to expedite the making of decrees absolute. In this Division the judge is often asked to say at the trial that such an application should be encouraged, and if, and only if, it is thought that the case merits special consideration is such encouragement given.

But the decision is never made then and there. The most that is said is that the case seems to the judge to be 'fit for expedition', and the party is advised to get into communication with the King's Proctor at once with a view to expediting the enquiries, the matter being ultimately dealt with by summons. . . As is the invariable practice, the King's Proctor will inform the petitioner's solicitors immediately he is ready so that the application to expedite can be brought before a judge in the ordinary course. \$\\ldots\$

These general observations and directions by high authority whether or not regarded as binding upon this Court, taken with the absence in Kenya of any like directions or rules, ought to be accepted and followed.

The procedure to be followed in Kenya was indirectly considered in **Morrice* v. Morrice and Leland*. (1942) 20 (1) K. L. R. 23, a case more concerned with the merits and in which undefined English procedure was followed. This case was, however, decided a year before the directions in *Hays v. Hays* (supra), to settle a varying practice not subject to any rule. Further, *Morrice v. Morrice* was decided some 15 years ago and before any of the recent directions issued in the Divorce Division and, in any event, did not attempt to lay down any practice.

That the practice crystallized in *Hays* \$v\$. *Hays* is valid in England up to the present time is clear from the learned commentators on divorce practice. I refer to *Latey on Divorce*, 14th edn. (1952), who at page 361, paragraph 756, outlines an earlier practice where the judge at the hearing, in suitable cases, might order the decree to be made absolute in the next week's list or even before and he reiterates this practice at page 876 in paragraph 1390 where he qualifies it by stating that in such a case the Registry is forthwith to notify the King's Proctor. The learned President in *Hays v. Hays*, however, stated overwhelming objections to such a procedure, viz.: \$-\$

"Great difficulties, too, are necessarily created for the King's Proctor if an order is made for a definite shortening to some prescribed period by the judge of assize. The King's Proctor, at that time, has not been heard and he does not know whether or not it is a case in which it will be necessary for him to intervene or take steps to bring any matters to the notice of the Court. Moreover, the circumstances in these cases vary enormously. In some cases the enquiries may be easy and short but in other cases they may necessarily be more prolonged. Another aspect is that the King's Proctor is not provided with an unlimited staff, and, if an order for a reduction of the period by a definite time were made habitually, it would necessarily operate so as to give an unfair advantage to the cases in which the order was made."

These words apply with equal force to divorce procedure in Kenya and unless in the most exceptional cases which can be conceived even only with difficulty, apart from expressing a view the proper course is to prefer an approach by summons. The advantages of such procedure are manifest.

Latey, at paragraph 1390, reports the directions of the Divorce Division, \$viz.\$:-

"Where a judge at the hearing expresses the opinion that a cause is 'fit for expedition' the applicant should immediately communicate with the King's Proctor so that the necessary enquiries may be started. If, when such enquiries are complete, the King's Proctor raises no objection to the expedition and notifies the solicitors to this effect, the latter should apply by summons to a judge. The King's Proctor will on such application apply for an order for his costs against the petitioner. In appropriate cases the order may be made that the petitioner recover such costs from the co-respondent the order drawn in such cases being:

'It is ordered that the petitioner do pay the King's Proctor's costs with remedy over against the co-respondent.'

"When the King's Proctor has intimated in writing that he does not desire to oppose an application for the expedition of a decree absolute and either \$(1)\$ that he does not ask for costs or \$(2)\$ that he proposes to apply for an order for the payment of his costs and the applicant's solicitor endorses the summons with a consent to an order for payment of the King's Proctor's costs, the parties or their representative will not be required to attend upon the summons for expedition."

On this point, Kenya procedure, by reason of local rules, requires attendance in chambers by the parties.

In the present case, it is the respondent and co-respondent who desire to have the period abbreviated. Is it competent for either or both to approach the Court by summons? In my view neither can do so. In England, up to the passing of the Matrimonial Causes Act, 1937, the party against whom the decree **nisi** was made had no right to apply to have the decree made absolute. Section 9 of that Act provided that such a party could apply for the decree nisi to be made absolute after the expiration of three months from the earliest date on which the holder of the decree could have applied. This provision is now enacted into section 12 of the Matrimonial Causes Act, 1950. A like provision is contained in section 14 (3) of the Kenya Ordinance. No provision is made either in England or in Kenya for the party against whom a decree **nisi** has been pronounced to apply to the Court to abridge the delay. If therefore, the respondent in the instant cause, is about to be confined and desires to remarry so that her child, which would otherwise be born illegitimate, be born in wedlock, the only manner in which the Court may be approached is through the petitioner, and she must, as she has done lay the facts before the petitioner and invoke his aid to make an application, if the petitioner thinks fit.

If an application is made to shorten the already abbreviated period of six weeks, the applicant must show cause, supported by medical evidence, that the apprehended confinement is expected to take place within the six weeks delay or so shortly after the end of it that the respondent's health might be adversely affected or that at this time a marriage ceremony would be dangerous and impracticable due to the risk of imminent birth, were the order not made. A medical certificate could competently be exhibited by the applicant's affidavit or otherwise an affidavit by the medical practitioner attending upon the respondent exhibited. Any reply by the Queen's

Proctor should be in writing exhibited by the applicant's affidavit.

Should the applicant intend to move for an order that the costs of the application be paid by the co-respondent then proper notice of the application must be given to him so that he may attend and be heard on that matter.

It is hardly necessary to add that, although on the facts submitted at the Bar, the Court has recorded that the decree is one suitable for expedition that expression of opinion in no way whatsoever can affect the discretion to be exercised by the Judge in chambers on any application to shorten the delay. Equally so it cannot affect in any way, the discretion to be exercised by the Queen's Proctor, which is, as a matter of public policy, completely unfettered. Notice of the application cannot be allowed to go forward unless and until the Queen's Proctor has stated in writing that he has no cause to show against an order.

It seems incumbent on the Court to make a further order, under the provisions of section 32 of the Ordinance, that the Registrar do forward all necessary papers forthwith to the Queen's Proctor.

Finally, in a wholly exceptional case there may be such clamant circumstances at the close of the hearing in which the trial judge has discretion then and there to make an order that there shall be decree absolute on a day certain with brief delay, to enable a reference to be made to the Queen's Proctor.

The costs of this debate are reserved upon an application in Chambers.

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