

UGANDA / JUDGMENT

Johnson v Johnson (Divorce Cause No. 55 of 1949) [1950] EACA 627 (1 January 1950)

[1950] EACA 627

COURT

East African Court of Appeal

BEFORE

Nihill, C.J

CASE / FILE NUMBER

Divorce Cause No. 55 of 1949

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DIVORCE JURISDICTION

Before SIR BARCLAY NIHILL, C. J.

ETHEL MAY DOBBS-JOHNSON, Petitioner

v.

THOMAS ALAN DOBBS-JOHNSON, Respondent

Divorce Cause No. 55 of 1949

Suit for Nullity of Marriage

Matrimonial Causes Ordinance, section 13 (1)—Discretion of Court—Impotence: of respondent—Section 4 (a), jurisdiction—Petitioner's domicile in Colony—Section 3, law as applied in England—Petitioner's domicile of choice not affected by voidable marriage—Residence of petitioner within Kenya sufficient to confer jurisdiction.

Petitioner, then a widow, was married to respondent before the Registrar of Marriages, Mombasa, on 30th April, 1948. Neither of the parties had a domicile or origin in Kenya, but petitioner had been resident in the Colony for 20 years, and holds real property in Nairobi, and had made Kenya her domicile of choice. Respondent not having appeared, there was no evidence of his domicile of choice. The impotence of respondent was held to be proved.

Held (5-4-50).—That since the marriage was voidable, the domicile of the petitioner was not affected by the domicile of the respondent, and so long as the petitioner "bona fide" resided in Kenya, the Court had jurisdiction.

Cases referred to: Hutter v. Hutter (1944) 2 A. E. R. 368 followed. Easterbrook v. Easterbrook, 113 L. J. P. 17; Inverclyde v. Inverclyde, 47 L. T. R. 140.

(Ed. Note: The following very recent cases were not referred to: de Reneville y. de Reneville (1948) p. 100; Casey v. Casey (1949) p. 430; Chapelle v. Chapelle (1950) 1 A. E. R. 236. It is respectfully submitted that had the attention of the Bench been called to these cases, the decision might very well have been different.)

Parry for Petitioner.

No appearance of Respondent.

JUDGMENT.—This is an application for a decree of nullity of the marriage which took place between the parties before the Registrar of Marriages at Mombasa on 30th April, 1948. On the evidence I am fully satisfied that at the time of the marriage the respondent was incapable of consummating the marriage. In addition to the evidence of the petitioner, which I accept in its entirety there is corroboration in the fact that the respondent, who has entered no appearance to these proceedings, has refused to submit himself to a medical examination, and there is also evidence of Mr. Robson a chemist practising in Nairobi, which also tends to corroborate the petitioner's story. Under these circumstances this Court has a discretion to make a decree of nullity under section 13 (1) of the Matrimonial Causes Ordinance before considering the exercise of such a discretion. However, I must first be satisfied that this Court has jurisdiction to hear this petition. Under section 4 (c) of the Ordinance no decree of nullity of marriage $\frac{1}{2}$ can be pronounced by this Court in proceedings brought under the Matrimonial Causes Ordinance unless the petitioner is domiciled in Kenya.

The petitioner was born in England but after hearing her evidence I am satisfied that she has proved her intention to make Kenya her permanent home. She has been in Kenya for 20 years and has only left the Colony on occasional. holidays. She has acquired and still holds real property in Nairobi and for a time she has filled the office of a Municipal Councillor. No evidence has been laid before me as to the domicile of her former husband but as a widow she was free to abandon her deceased's husband's domicile and to substitute a domicile of choice, and I am prepared to hold that this is what she has done. Only one question remains to be answered therefore; did she by her marriage to the respondent acquire a new domicile which was not a Kenya domicile?

The respondent has not been called to give evidence as to his domicile. He does not possess a Kenya domicile of origin; there are indications that he too. may have acquired a Kenya domicile of choice, but without hearing him I am not prepared to find that he has in fact abandoned his domicile of origin. If then the petitioner's marriage to the respondent is not voidable she acquired the respondents domicile at the time of the marriage and there is no evidence to establish that this was a Kenya domicile. Fortunately for the Petitioner, however, section 3 of the Matrimonial Causes Ordinance provides that, subject to the provisions of the Ordinance, the jurisdiction of this Court shall be exercised in accordance with the law applied in Matrimonial

proceedings in the High Court of Justice in England. Now in England it has been established after some hesitation and confusion that in nullity proceedings the Court has jurisdiction even although the parties are not domiciled in England provided the petitioner is bona fide resident in England when the suit is commenced. *Hutter v. Hutter*, 1944, 2 A. E. R. 368, which followed **Eastbrook v. Eastbrook**, 113, L. J. P.17, and refused to follow a contrary decision in **Inverclyde v. Inverclyde**, 47, L. T. R.140.

In *Hutter v. Hutter* the learned Judge refused to draw a distinction between marriages void *ab initio* and those merely voidable. In either case if the Court issues a decree of nullity the decree proclaims in terms the marriage to have been and to be absolutely null and void to all intents and purposes in law whatsoever. According to *Latey on Divorce* 13 Edition at page 57 the true principle now in regard to jurisdiction in nullity cases, whatever the ground and wherever the ceremony of marriage has taken place, seems to be that the facts on which the petitioner relies, provided that he or she is bona fide resident in England when the suit is commenced, must be heard by the Court in order that it may be established whether or not there was a marriage.

In the light of the English decision therefore I hold that provided this is a proper case for the issue of a decree the petitioner had a Kenya domicile of choice on 30th April, 1948, and did not lose it by her marriage to the respondent.

There only remains the question whether on my finding that the respondent was impotent at the time of his marriage to the petitioner, a decree of nullity should issue.

Although the respondent is much older than the petitioner and was at the time of the marriage approaching a time of life when the fires of virility might be expected to show some abatement, I am more than satisfied, after listening to the petitioner who gave her evidence with great frankness and sensibility, that she would not have contracted the marriage had she known what she came to know very quickly after the ceremony, that the respondent had been impotent for a number of years. At least she would not have contracted the marriage with the intention of sharing a common bed. She frankly stated in her evidence that she might have consented to a marriage of companionship and convenience although she does not think she would have done so. As it was, because the respondent, perhaps because he hoped for the best, made no disclosure of his condition to the petitioner before marriage, both parties suffered an experience, which must have had a deleterious effect upon the mental health of each of them. The petitioner has said little about her own nervous reactions which must have been considerable but she had made it clear that the respondent's nervous condition became so acute that she found it impossible to live with him. Under all these circumstances therefore I am fully satisfied that a decree nisi of nullity should issue in this case and I order accordingly. The effect of this decree which can be made absolute in six weeks from today's date is to declare void *ab initio* to all intents and purposes whatsoever the marriage subsisting between the parties.

The respondent is ordered to pay the costs of the suit.

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