

UGANDA / JUDGMENT

Leon Zimbler v Gladys Zimbler (Civil Appeal No. 1 of 1948) [1948] EACA 4 (1 January 1948) [1948] EACA 4

COURT

East African Court of Appeal

BEFORE

Coffey AgJ, Edwards CJ, Graham Paul CJ

CASE / FILE NUMBER

Civil Appeal No. 1 of 1948

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR G. GRAHAM PAUL, C. J. (Tanganyika), EDWARDS, C. J. (Uganda), and COFFEY, Ag. J. (Kenya)

LEON ZIMBLER; Appellant (Original Petitioner)**GLADYS ZIMBLER, Respondent (Original Respondent) Civil Appeal No. 1 of 1948**

(Appeal from decision of H. M. Supreme Court of Kenya)

Divorce—Domicil—Burden of proof.

The petitioner for a decree of nullity, whose domicil of origin was the United Kingdom, sought to establish that he had acquired a domicil of choice in Kenya. The only evidence was that of the petitioner in regard to his past residence and his intention to reside. The learned Judge in the Supreme Court stated that he did not believe this evidence as regards intention and dismissed the petition.

Held (11-2-48).—That the Supreme Court was wrong in rejecting the evidence of the petitioner in regard to his intention. It should not be rejected because it was not based on a definite and certain prospect of a secure livelihood. An intention to reside could be based on hope and not on knowledge.

Harrison for the Appellant.

Respondent. absent, unrepresented.

SIR G. GRAHAM PAUL, C. J.—This appeal is from the decision of the Supreme-Court dismissing the suit brought by the appellant as petitioner for a decree of nullity in regard to his marriage with the respondent. The suit was brought under the Matrimonial Causes Ordinance, 1939, and the jurisdiction of this Court to entertain the suit depended upon it being established as a fact that the appellant, whose domicile of origin was the United Kingdom, at the time the petition was brought had acquired a domicile of choice in Kenya. The learned Judge in the Court below held that it was not established as a fact to the satisfaction of the Court that the petitioner was domiciled in Kenya when the petition was presented and accordingly dismissed the suit.

The only evidence proffered in the Court below was that of the petitioner himself who gave sworn testimony as to his intention and as to the facts in regard to his residence in Kenya. The learned Judge in regard to his testimony in his judgment said: "That testimony does not ring true and I do not credit it".

It is quite true—except in certain special cases which do not here concern us—that a fact may be proved by the evidence of one witness, provided the evidence of that witness is believed. Here the evidence of the one witness was not believed by the learned Judge and the only question in this appeal is, whether this Court on appeal can and should hold that the learned Judge was wrong in disbelieving the evidence of the petitioner.

It is, of course, well-settled law as well as plain common sense that an appeal court which did not see or hear the witness give evidence will not lightly interfere with the decision as to credibility of a witness given by the tribunal which did see and hear the witness give evidence. Whether a witness is to be believed or not does not depend only on the actual words of his evidence which are recorded and are available to the Court of Appeal in the record. That question generally depends for its answer on much more subtle considerations than mere words. The demeanour of the witness, the tone of his voice, the expression on his face, his hesitations, etc., are all important factors in the decision as to his credibility, and of course none of these things can be reflected in the mere record of the words he spoke which is all that a Court of Appeal has to go on. All that, of course, is elementary.

It appears to me, however, that in this case these subtle unrecorded factors are not of much importance because the learned Judge has given in his judgment very fully and clearly his reasons for not accepting the sworn testimony of the petitioner and these reasons do not include any of the unrecordable subtle factors which I have indicated. This Court is therefore in a position to examine the cogency and sufficiency of the reasons given by the learned Judge.

The first of these reasons as it appears to me was that the learned Judge regarded the standard or proof required on this question of domicile as a very high one. He refers to "the very high burden of proof cast upon the petitioner" To prove that a man has lost his original domicile and acquired a domicile of choice is of course a very serious matter. In the reported cases where there has been an attempt by A to set up that B (B being either dead or alive at the time) has lost his original domicile and acquired a domicile of choice learned Judges have referred to the very heavy onus of proof upon A. That is quite right and proper, for in such cases there is an attempt perhaps

to take away part of the birthright of another person. To my mind the case is different from this point of view where, as here, it is B himself who is setting up his own domicil of choice. It is of course a difference only of degree. There is still upon B an onus of proof, but it is no lighter and no heavier than the onus of proof that lies upon the petitioner in divorce proceedings to prove any fact material to the petition. From the wording of his judgment I do not think that the learned Judge appreciated that difference of degree in this case where the petitioner was setting up his own domicil of choice. In the result I think the learned Judge set up too high a standard of proof.

An important basis of the learned Judge's decision is the following passage from his judgment:-

"The petitioner has testified that he formed the intention to settle and reside permanently in Kenya before he ever arrived in the Colony. His wife had been in the Colony before and apparently wished to return. No doubt accordingly Mr. Zimbler had some knowledge of the country before he set out to arrive in Kenya in February, 1940, from war-stricken England. But I find it asking too much of my credulity to accept that a man dependent for his living upon playing as a concert pianist would have formed the fixed intention to make Kenya his permanent home before he had ever set foot in that country and before he had had the opportunity of discovering whether he could make his livelihood there as a solo pianist. He would know, I have no doubt, that Kenya had a comparatively large, though scattered, European population and that some sophistication and appreciation of his art would be likely to be found there. But in the nature of things, unless he is exceedingly foolish or irresponsible, and Mr. Zimbler gives me the impression that he is neither, a man will not make up his mind to reside permanently in a new land unless he has reason to think that he can make his living there and has seen the country and experienced living conditions therein. To a man of the petitioner's profession, viewing the prospects from England, the chances of making a secure livelihood in an African Colony, even Kenya, through the exercise of his profession as a concert musician and in the absence of fixed employment, must surely seem precarious in the extreme. There is no suggestion that the petitioner was coming to take up paid employment arranged beforehand, or that he was a man of means who could afford to settle as he pleased; on the contrary, it is made apparent from his evidence that he has to earn his living and that he depends upon his piano-playing as a soloist."

With great respect to the learned Judge I find myself unable to accept the reasoning indicated in that passage. If emigrants only emigrated when they had good grounds of their own knowledge for certainty that in the country of their choice they would have a secure livelihood I am afraid the history of British colonization would never have been written. Hope and courage rather than a definite and certain prospect of a secure livelihood are in my opinion the main incentives which through history have induced people of the United Kingdom to make up their minds to abandon their domicil of origin and choose the adventure of a new domicile in a new country. Often it has happened that the hope was not realized and the emigrant has returned to his original domicil. But where, as in this case, we have a definite intention, even if based only on hope and not on accurate knowledge, and the hope is realized to such an extent that the petitioner was able to afford to go to England for six months' special eye treatment and to return

to Kenya, I do not see why the intention to settle in Kenya should be scouted, as the learned Judge has scouted it, just for the reason that the intention was based originally on hope and not on knowledge.

Moreover, it appears from the evidence of the petitioner that he had something more than mere hope to go on. His wife had lived in Kenya and no doubt had told the petitioner enough about Kenya to justify an expectation that he would make good in Kenya, as in fact he appears to have done.

The learned Judge has made a point of the exact words of the petitioner who said in evidence: "My intention is to remain permanently here", observing that that statement "does not amount to evidence of the requisite intention in proof of domicile at the time when the petition is presented". With great respect to the learned Judge I regard that view as hypercritical. The date of the presentation of the petition was 18th March, 1947. The date on which the petitioner gave evidence was 28th November, 1947. For about a year before presenting the petition the petitioner was continuously resident in Kenya and was still resident in Kenya when he gave his evidence. He formed the intention to choose Kenya as his new domicile before he arrived and there is nothing in his evidence to suggest that such intention had ever been changed. In his petition he averred that he and his wife were domiciled in Kenya, and on his evidence it is clear to my mind that both the intention to make Kenya his domicile and the fact of actual residence in Kenya were present at the date when the petition was presented.

In my opinion the judgment of the learned Judge shows that his decision to disbelieve the evidence of the petitioner was expressly based on faulty reasoning and therefore on appeal this Court is entitled to reject his conclusion. With all respect to the learned Judge I find that I must reject his conclusion and I would allow the appeal, find that the uncontradicted evidence before the Court below was adequate to discharge the onus of proof upon the petitioner as to his having acquired a domicile of choice in Kenya at the date on which the petition was presented; and remit the suit to the Court below for further procedure.

EDWARDS, C. J.-I agree that the appeal should be allowed and the case remitted on the lines proposed by My Lord. I have had doubts on two matters: whether this Court is entitled to interfere with the learned trial Judge's estimation of the evidence of the appellant. The words used by the trial Judge are, "I can attach little or no importance to the value of the petitioner's testimony when he says further. 'My intention is to remain permanently here'. He is there, of course, only deposing to a present intention and, apart from the question whether the intention is real, it does not amount to evidence of the requisite intention in proof of domicile at the time when the petition is presented". What I myself infer from those remarks is that the learned trial Judge was sceptical as to the appellant's assurance that he had made up his mind to reside permanently in Kenya. On this aspect of the case I respectfully agree with the judgment just delivered.

The other matter which has given rise to doubts in my mind is this, namely, even if the trial Judge had been satisfied with the appellant's declaration that he intended to remain permanently in Kenya, was the other evidence, namely, the evidence of residence in Kenya for about eight years, sufficient to discharge the onus of proving that he had acquired a domicile of choice in Kenya? On this point also I agree with the judgment just delivered.

As I have said, I agree with the result reached by the learned Acting. President, the Chief Justice of Tanganyika.

COFFEY, Ag. J.—I agree and have nothing to add.

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