

UGANDA / JUDGMENT

Newell v Newell (Civil Appeal No. 20 of 1955) [1955] EACA 298 (1 January 1955)

[1955] EACA 298

COURT

East African Court of Appeal

BEFORE

Bourke J, Nihill P, Worley VP

CASE / FILE NUMBER

Civil Appeal No. 20 of 1955

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COURT OF APPEAL FOR EASTERN AFRICA

Before Sir Barclay Nihill (President), Sir Newnham Worley (Vice-President) and PAGET BOURKE, Acting Justice of Appeal.

HERBERT WILLIAM NEWELL, Appellant (Original Petitioner) v

EVELYN NEWELL, Respondent (Original Respondent) Civil Appeal No. 20 of 1955

(Appeal from the decision of H. M. Supreme Court of Kenya, Mayers, J.)

Divorce-Nullity-Court to ensure it has jurisdiction before hearing evidence supporting allegations—Submission of "No case"—Matrimonial Causes Ordinance (Cap. 145), section 4 (a)—Matrimonial Causes Rules, rule 4 (1)—Application to Court of Appeal to allow amendment of petition—Eastern African Court of Appeal Rules, rule 74—Remission of issue for decision by Supreme Court—When Appeal Court will hear additional evidence.

A petition for dissolution of marriage, admittedly brought under the Matrimonial Causes Ordinance, did not state the domicile of the parties to the marriage at the date of the institution of the cause, nor was evidence adduced thereon. Section 4 (a) of the said Ordinance limits the jurisdiction of the Supreme Court in making decrees of dissolution of marriage or of nullity of marriage, to cases where the petitioner is domiciled in the Colony when the petition is presented and rule 4 (1) of the said Rules requires (*inter alia*) that the domicile of the parties to the marriage at the date of the institution of the cause be stated in the petition.

At the close of the petitioner's case there was a submission of "no case to answer".

Held \$(8-6-55)\$ —(1) A Judge trying a petition for dissolution of marriage or for nullity of marriage, should satisfy himself that he has jurisdiction to do so before hearing evidence in support of the allegations contained in the petition. This not having been done in the instant case, it was too late to allow an amendment of the petition and it was doubtful, whether, on a strict interpretation of the Order in Council and the Rules of the Court of Appeal, there was power to remit the issue of domicile to the Supreme Court for decision.

(2) Where counsel for the respondent to a divorce suit wishes to submit that there is no case for his client to answer, the trial Judge should request him to elect either to submit "no case" or to call his evidence in rebuttal him thereafter from calling evidence.

Appeal allowed on the ground that the order appealed from was made without jurisdiction. Decree set aside and the Supreme Court proceedings declared a nullity.

Cases referred to: Gulam Fatuma v. Gulam Mahomed (1914) 7 E. A. L. R. 30; King v. King and Smith 11 E. A. C. A. 46; Devonshire v. Devonshire (1947) 14 E. A. C. A. 25; Zimble v. Zimble (1948) 15 E. A. C. A. 10; Preddy v. Preddy (1944)

Stephen for appellant.

Wilcock for respondent.

JUDGMENT (prepared by Worley (Vice-President)).—This is an appeal from a decree of a Judge of the Supreme Court of Kenya sitting at Mombasa which dismissed with costs the appellant's petition for the dissolution of his marriage

with the respondent. The dissolution was sought on the ground of the respondent's adultery with a man who has since died and who was therefore not joined as co-respondent. The appeal was argued before us on its merits, but we do not propose to consider those because we hold that the appeal must be allowed on a ground which the appellant has not and could not put forward but which the court itself feels bound to take.

The petition did not state whether it was brought, or purported to be brought under the Matrimonial Causes Ordinance (Chapter 145 of the Laws of Kenya, 1948) or under jurisdiction conferred by the Indian and Colonial Divorce Act; in the latter case it would of course have had to be shown that the learned Judge who tried the petition had been duly appointed to exercise such jurisdiction. Before us counsel conceded that the jurisdiction sought to be invoked was that conferred by the local Ordinance. Under that Ordinance, section 4(a) limits the jurisdiction of the Supreme Court in making decrees of dissolution of marriage or of nullity of marriage to cases where the petitioner is domiciled in the Colony at the time when the petition is presented; and rule 4(1) of the Matrimonial Causes Rules, which form the schedule to the Ordinance, requires that the petition in a matrimonial cause shall state, *inter alia*, the residence and domicile of the parties to the marriage at the date of the institution of the cause. The petition, however, does not comply with this rule; it does not state the petitioner's domicile of origin, nor does it aver that he is domiciled in Kenya; nor is there in the judgment of the learned Judge any finding on the issue of domicile. There is no indication whatever that the learned Judge ever directed his mind to the

question, and indeed it appears that the advocate who drew the petition and appeared for the petitioner, and the advocate for the respondent, and the Registrar who certified under rule 29 (1) that the pleadings were in order, all overlooked the issue of domicile. In these circumstances, it is perhaps not so surprising that the learned Judge also overlooked it. Nevertheless, we must point out that, to use the words of Hamilton, C. J. in *Gulam Fatuma v. Gulam Mahomed* (1914) 7 E. A. L. R. 30 at page 33: "It is equally clear that here, as in England, the first essential for the exercise of jurisdiction must be domicile within the jurisdiction", and it is always advisable for a Judge who is trying a petition for dissolution or nullity to satisfy himself that he has jurisdiction before proceeding to hear the evidence adduced to support the allegations of the petition.

In the instant case, on the record as it stands, the whole proceedings in the Supreme Court were a nullity and the question to which we have had to give careful consideration is whether at this late stage it is possible, by amendment or otherwise, to validate them. Mr. Stephen for the appellant, conceded that the responsibility for the accuracy of the pleadings principally rested with the persons who signed them, but pointed out that part of the responsibility must rest, under the local rules, with the Registrar, who certifies that they are in order. He contended, rightly, that under rule 74 of the rules of this Court we have discretionary power to allow amendment of the petition even at this late stage, and urged that we should allow him to amend the petition by adding an averment of domicile in Kenya. Consequent on such amendment, if permitted, there would necessarily have to be a finding of fact; this, he urged, could be made by this Court either on the evidence on record or on such further evidence as the court might require. Alternatively, he suggested that we should remit the question to the Supreme Court for determination. We find ourselves unable to accept any of these suggestions. In the first place, it would be most unusual, at such a late stage, to allow a party to plead for the first time an averment which the statute requires him to plead as the foundation for jurisdiction and thereby to validate proceedings which have been **coram non iudice**. Secondly, if the amendment were allowed, obvious complications would ensue on the issue of fact which would

then have to be determined. It is true that there are on the record some indications that the appellant's domicile of origin was not Kenya and that his intention was to make a home in Kenya, but the evidence is not such as to enable us to say that, had the mind of the trial Judge been directed to the issue, he would even probably have decided it in favour of the petitioner. This court has several times emphasized that anyone seeking to override his domicile of origin takes upon himself a heavy burden of proof: see the judgment of Whitley, C. J., in *King v. King and Smith* (1939) 7 E. A. C. A. 1 at page 3, *Taylor v. Taylor* (1944) 11 E. A. C. A. 46, and the judgment of Nihill, C. J., in *Devonshire v. Devonshire* (1947) 14 E. A. C. A. 25 at page 27. Even in the case of *Zimbler v. Zimbler* (1948) 15 E. A. C. A. 10, in which this Court overruled a trial Judge on the sufficiency of the evidence of a change of domicile, Graham Paul, C. J., with whose judgment the other members of the court concurred, said that where a party was asserting that he had lost his original domicile and acquired a domicile of choice, the onus of proof that lay upon him was "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". We are certainly not prepared to hold that such evidence as there is on the record was sufficient to discharge the heavy burden of proof required

to establish a change of domicile. We have not overlooked the case of **Preddy* \$v\$. *Preddy** (1944) 11 E. A. C. A. 42 in which, although there was no finding on the issue of domicile, this Court inferred that the trial Judge was satisfied on that issue. But reference to the record of that appeal shows that domicile was pleaded in the petition and not contested in the respondent's answer and that in fact the petitioner did give full and detailed evidence of his domicile of origin, of his residence in Kenya for over 18 years, and of his acquisition of property in Kenya and his intention to make this country his permanent home. On that state of the record the inference was, if we may respectfully say so, clearly justified.

As to the proposal that we should hear additional evidence, it is very rarely that an appellate court allows an appellant to adduce additional evidence on appeal and never unless there are exceptional grounds to support the application: see *Taylor v. Taylor* (supra). Moreover, one great disadvantage which would follow from a finding of fact made by this Court would be that the party aggrieved thereby would have no right of appeal except to the Privy Council.

As to the suggestion of remitting the issue to the Supreme Court, we are not certain whether, on a strict interpretation of the Order in Council and the Rules of this Court, we have power so to do. Mr. Stephen has referred us to the order made in **Preddy v. Preddy* (supra)* but there the matter was referred back only for determination of the consequential questions of custody and maintenance. But even assuming that we have such power, it would be inadvisable to exercise it in the instant case because the position might then well be complicated by the appellant desiring to amend his appeal or by the respondent desiring to crossappeal from the learned Judge's finding. Much as we deplore the waste of time and money incurred in the abortive proceedings, we feel that it is far too late to attempt to put the matter right.

There is one other aspect of the case on which we wish to comment. At the close of the petitioner's case the learned trial Judge noted as follows:-

"Wilcock does not propose to call respondent in view of evidence given by the petitioner as to the two allegations contained in the petition as (his) contention is that there is no case to answer. The allegations of adultery are denied."

In this connexion we desire to draw attention to the following passage from *Latey on Divorce*, 14th Edition, page 509: —

"Up to 1936 it was a common practice in a divorce suit for counsel one" the conclusion of the evidence for the party seeking relief to submit that there was no case to answer, and if the Judge held that there was a case to answer, the evidence for that opposing party was called. But since the observations of the Court of Appeal in *Alexander v. Rayson* (1936) 1 K. B. 169, it has become the practice in the Divorce as in the other Divisions of the High Court to request counsel to make his election, either to submit no case or call his evidence in rebuttal. So in cases where counsel is inclined to submit no case he should bear in mind that he may be debarred thereafter from calling evidence."

And see also Yuill v. Yuill (1944) 61 T. L. R. 176 at page 177, and Ramsden v. Ramsden (1954) 2 All E. R. 623. Before us Mr. Wilcock has very fairly stated: that he was in reality making a submission of no case to answer and he had not made up his mind what course he would have taken had the learned Judge put him to his election. The disadvantages which follow from the course adopted are seen in the instant case where Mr. Wilcock has urged that if the court were disposed to differ from the trial Judge's estimate of the merits of the petitioner's case, we should send the matter back for retrial or further hearing in order to give the respondent the opportunity of which she did not avail herself earlier, to explain and answer the case made against her.

In the result therefore this appeal must be allowed on the ground that the decree appealed from was made without jurisdiction; that decree must be set aside and the proceedings before Mayers, J., declared a nullity. As to costs, the main responsibility for what has occurred must, as we have said, rest upon the advocates who prepared the petition and appeared for the petitioner at the trial. What excuse or explanation they may have for what appears to us to be at least gross carelessness we do not know, but the petitioner might be well advised to consider whether the law affords him any remedy. The respondent's advocate cannot escape some blame for failing to observe the omission of a vital pleading. The defect does not appear to have been observed until attention was drawn to it by a member of this Court during the hearing of the appeal. For these reasons we order that the respondent shall have her party and party costs of the trial before the Supreme Court and that each party shall bear his or her costs of this appeal.

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