IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN FAMILY DIVISION
CLAIM NO. F.D. 0006 OF 2004

BETWEEN ERROL BOOTHE PETITIONER/RESPONENT

AND CHEKETA BOOTHE RESPONDENT/APPLICANT

Mr. Debayo Adedipe for Respondent/Applicant

Miss Jeromha Crossbourne instructed by Scott, Bhoorasingh & Bonnick for Petitioner/Respondent

Divorce – Application to set aside Decree Absolute for irregularity – Notice of application for Decree Absolute not served on Respondent – Grant of Decree Absolute affecting Respondent's rights to apply under the Married Women's Property Act – Whether Decree Absolute void for irregularity – Rule 49 of the Matrimonial Causes Rules 1989

30th October and 27th November, 2008

BROOKS, J.

Mr. Errol Boothe was, on 10th December 2004, granted a Decree Absolute dissolving his marriage to Mrs. Cheketa Boothe. On 29th May 2005 he and a second lady went through a ceremony of marriage. I refer hereafter, to Mrs. Cheketa Boothe as "Mrs. Boothe". Mrs. Boothe now wishes for the Decree Absolute to be set aside on the basis that it is a nullity. If she is correct, Mr. Boothe's second marriage would also be a nullity.

Mr. Boothe admits that there was a procedural irregularity when he secured the Decree Absolute but contends that the irregularity does not entitle Mrs. Boothe, as of right, to have it set aside. He states that the court

has the discretion to waive the irregularity and that in these circumstances it ought so to do.

The question for the court is whether the failure to give notice of an application for a Decree *Nisi* to be made Absolute, gives Mrs. Boothe the right to have the Decree Absolute, set aside. If she is so entitled then the Decree Absolute must be set aside. If she is not, then what are principles which guide the court in deciding whether or not to set it aside.

The basis of Mrs. Boothe's application is that she was not informed of Mr. Boothe's application to have the Decree *Nisi* made absolute. Her Counsel, Mr. Adedipe submitted that because she had filed an appearance to the Divorce Petition, she was entitled to be served with notice of the application for the Decree Absolute. That entitlement, counsel submitted, is given by rule 49 of the Matrimonial Causes Rules, 1989 (MCR) which was the applicable law at the time. The rule states:

> "49. Service of summonses, notices and applications generally
>
> Unless a Judge shall otherwise direct every summons and notice of every motion or application (other than *ex parte summonses* or motions) shall be served on all parties who may be affected by the proposed order at least five (5) clear days prior to the hearing thereof. Proof of service may be given in the manner prescribed by Rule 19 hereof."

It addition to the rule, there was an older practice direction (dated 29th June 1977), which also required that:

> "Where a general appearance has been entered by a respondent spouse in a suit, a copy of any application for a decree absolute shall hereafter be served...on the respondent spouse by or on behalf of the petitioner."

Counsel submitted that the breach of the rule gave Mrs. Boothe the right to have the Decree Absolute set aside, but accepted that, despite that fact, an order of the court was required to set it aside. In support of the submission, Mr. Adedipe cited two cases from this jurisdiction. The first is *Wiltshire v Wiltshire* C.L. W079/1998 (delivered 29/6/04). In that case Jones, J. ruled that a Decree Absolute secured after the failure of the applicant to serve the respondent with notice of the application, rendered the Decree Absolute "void and of no legal effect".

The second case is *Stephenson v Stephenson* F-1994 / S. 152 (delivered 9/1/97). There, K. Harrison J. (as he then was) ruled that this Court had an inherent jurisdiction to set aside decrees which had been obtained without notice of the petition being given to the respondent. The learned judge found that in such circumstances the procedure (the grant without notice) would be a nullity and that the respondent would be entitled, as of right, to have both resulting decrees set aside.

Both learned judges emphasized, that underlying the principle for the voiding of the decree, is the fact of the failure to give the other side an opportunity to be heard; the *audi alteram partem* rule. Harrison J. cited, among others, the case of *Everitt v Everitt* [1948] 2 All E.R. 545, in support of his decision. In *Everitt* Lord Merriman, P. stated at pages 546-7:

> "It is well settled that **a judgment obtained against a party in his absence owing to his not having been served with the process is not merely voidable for irregularity but is void as a nullity**...Manifestly, this general principle applies with full force to a judgment affecting the status of the party: *Marsh v Marsh* [[1945] A.C. 271]." (Emphasis supplied)

Mr. Adedipe has pointed out that Mrs. Boothe's status has been adversely affected by the lack of notice. This, he says, has prevented her from securing the benefit of the summary jurisdiction of this court, under the then applicable provisions of the Married Women's Property Act.

Miss Crossbourne on behalf of Mr. Boothe submitted that the procedural irregularity only rendered the Decree Absolute voidable. Counsel submitted that the court had the discretion in the circumstances as to whether or not it would set aside the decree. According to Miss Crossbourne, when all is considered, Mrs. Boothe has not shown that the court should exercise its discretion in her favour.

Miss Crossbourne cited the case of *Wiseman v Wiseman* [1953] 1 All E.R. 601 in support of her submission. *Wiseman* was considered by both locally decided cases, mentioned above. Jones, J. distinguished it on the basis that service, albeit substituted service, was effected in *Wiseman.* I respectfully adopt that position and find that it is different from the instant case where there has been a breach of the rule requiring service.

Despite the above, I did, however, consider the situation that rule 49 does not apply where a respondent does not enter an appearance. There is

no need to give notice of the application for the Decree Absolute in that instance. The foundation for that practice may perhaps be identified in rule 36 of the MRC. Rule 36 gives the respondent who enters an appearance a right to be heard despite the fact that that respondent does not file an answer. It states:

> "36. Right of respondent to be heard on questions of custody and access etc.
>
> After entering an appearance a respondent/spouse may, without filing an answer be heard in respect of any question as to custody or access to any relevant children of the marriage, or any question of ancillary relief."

If it is that notice is not required in some circumstances, why should the failure to give notice, where notice is required, render the resultant decree a nullity? It could be argued, that the difference is merely a consequence of the circumstances and, therefore, it should be open to the defaulting party to show that no prejudice was caused by the default.

In my view, the difference lies in the very principle of allowing the other side to be heard. A respondent, by entering an appearance, as Mrs. Boothe did in this case, is saying, "I want to be informed of all developments". It is not for the petitioner to choose what he will or will not inform the respondent about. If the respondent is not served in accordance with the rules then there is a breach of natural justice. In *Marsh v Marsh* [1945] A.C. 271, the Privy Council, in an appeal from this jurisdiction stated that one test of determining when the result of an irregular procedure is void

is where the irregularity causes a failure of natural justice. Their Lordships said at page 284:

> "But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable....No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that **one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice**....*McPherson v McPherson* [[1936] A.C. 177] is an illustration of the rule that where there has been a defect in procedure which has not caused a failure of natural justice the resulting order is only voidable." (Emphasis supplied)

In the circumstances I agree with Mr. Adedipe that Mrs. Boothe is entitled, as of right, to have the Decree Absolute set aside, because of the breach of rule 49 of the MCR. The breach has deprived her of her right to be heard in that application, or to take such other step as she deemed necessary. The Decree Absolute must be set aside. The result is that Mr. Boothe's subsequent marriage is therefore void.

It is therefore ordered that:

1. The decree absolute granted herein on the 10th day of December, 2004 be and is hereby set aside;

2. Costs to the applicant to be taxed if not agreed.