Divorce — Decree Nisi — Irregularity — Motion to set aside — Petition erroneously heard as undefended cause — Power of Court to set aside decree — Costs — petitioners attorney liable to pay for: Decree Nisi set aside. Costs to be paid by petitioners attorney-at-law

Cases referred to (See p 7 Cards)

Civil Procedure (Transfer of Cases)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN DIVORCE

SUIT NO. D 1988/S043

BETWEEN	AUDREY LILIETH SCOTT	PETITIONER
A N D	BURNHAM JON SCOTT	RESPONDENT

Civil Procedure (Procedure & Costs)

Motion to Set Aside Decree Nisi

Mrs. Margaret McCaulay instructed by Miss Patience B. Whyte for the Respondent/Applicant.

Gordon Steer instructed by Myers, Fletcher and Gordon Manton and Hart for the Petitioner/Respondent.

Hearing on July 13, 1989 ; delivered on July,27, 1989.

Reasons for Judgment

Bingham J:

On 13th July, I heard this Motion brought by the Respondent to the above cause and at the end of the hearing of the submissions I granted the application and set aside the order of a Decree Nisi entered by Orr J (acting) on 26th April, 1989.

The hearing before Orr J. had proceeded on the basis that the suit for dissolution of the marriage of the parties brought by the petitioner on the ground of cruelty was an undefended cause.

In so far as the Judge's Bundle prepared by the petitioner's Attorneys-at-Law sought to include therein copies of documents which from the history they related of the proceedings grounding the Petition presented before the Learned Judge represented the matter as being an "undefended cause", there is no suggestion nor can there be any argument or complainant advanced that given these circumstances he was quite justified in not only proceeding to hear the matter but equally so that in the light of the allegations contained in the petition if supported by evidence satisfying the required standard of proof, the order made by him was on the face of it a proper order and one that he could lawfully make.

When the Motion to set aside the Decree Nisi was heard, however, based upon the allegations contained in the notice of motion as well as in the Affidavit of the respondent filed in support thereof, an examination of the Record (Court file) revealed a situation which can only be described as a number of startling irregularities which sought to establish the merits of the

respondents application making the eventual order setting aside the order of Orr J. (acting) inevitable as it was clear that material facts of such a nature were excluded from the Judges Bundle and this had the effect of rendering the hearing before that Court a nullity.

In order to fully appreciate the state of affairs which the Court was faced with in this matter it is necessary to set out the Notice of Motion and the Affidavit in support of it in its entirety, as although the petitioner sought to file an Affidavit in reply, it did not seek to challenge the contents of the respondent's affidavit in so far as it amounted to a true representation of the history of the matter leading up to the hearing of the petition.

The Notice of Motion dated 12th June, 1989, having referred to the particular cause and the parties as well as the venue in the body thereof stated:-

> "Take Notice that this Honourable Court sitting at the Supreme Court Public Buildings, East Block, King Street, Kingston will be moved on Thursday the 13th day of July, 1989 at 10:00 o'clock in the forenoon or so soon thereafter as Counsel may be be heard on behalf of the Respondent Burnham Jon Scott, for an Order setting aside the order of Decree Nisi made on 24th April, 1989 declaring that the marriage had and solemnised between the petitioner and the respondent is dissolved on the grounds that the aforesaid Order of Decree Nisi is void having been illegally obtained in that the material facts were withheld from the Court, in that the petition was heard as an undefendad petition when in fact the respnndent entered appearance and filed and served an Answer and Cross Petition." (Emphasis supplied).

The respondent sought thereafter in the Notice of Motion to rely upon his affidavit sworn to on 12th June, 1989 which as it has already been stated from documents contained in the Court file relating to this matter accurately reflects the facts deponed to in the respondent's affidavit in support.

The affidavit of 12th June, 1989 states in the body thereof:

"I, Burnham Scott being duly sworn make oath and say as follows:-

1. That I reside at and have my true place of abode at 1 Sharrow Close, Kingston 8 in the Parish of Saint Andrew and my postal address at 17A Duke Street, Kingston.

2. That I am an Attorney-at-Law and the respondent in this action.

3. That the petitioner filed petition for a dissolution of marriage dated 6th May, 1988 on 6th May, 1988.

4. That the respondent filed Memorandum of Appearance and Notice of Appearance on 10th October, 1988 and served the same on the Attorney-at-law on the Record for the Petitioner, Messrs. Myers, Fletcher, and Gordon, Manton and Hart on 21st October, 1988.

5. That the respondent filed answer and grounds for relief for dissolution of marriage endorsed with notice to appear on 10th October, 1988 and served same on the Attorneys-at-Law on Record for the Petitioner on the 11th October, 1988 and on the co-respondent on 19th October, 1988.

6. That on the 15th day of August, 1988 the petitioner's Attorneys-at-Law forwarded to the respondent Ex Parte Summons to amend petition and affidavit in support for attention. The amendment was to insert the words, "Audrey Lilieth Scott" after the words, "then" appearing in line 1 of paragraph I of the petition and to delete the words "notwithstanding the adultery committed by your petitioner during the marriage."

7. That on 7th October, 1988 the respondent filed an affidavit for the purpose of contesting the Ex Parte Summons.

8. That on the 7th October, the Attorneys-at-Law for the petitioner informed the Attorneys-at-Law for the respondent that the application to amend by deleting the words "notwithstanding the adultery committed by your petitioner during the said marriage," will be abandoned. It was abandoned.

9. That at the hearing of the application the respondent was represented by Counsel.

10. That a Summons dated 20th October, 1988 was served on the respondent's Attorneys-at-Law on 27th October, 1988 applying for an Order that the respondent discontinue his molestation of the petitioner at her business place at 8 Belmont Road, Kingston 5 and 32 Merrivale Avenue, Kingston 8. It came up for hearing on 3rd November, 1988. The respondent filed an affidavit in reply. When the summons came for hearing it was withdrawn by the petitioner.

11. Affidavit of Search dated 22nd February, 1989 filed by the Petitioner's Attorneys-at-Law on 22nd February, 1989. That a search was made in the Registry of the Supreme Court and that since 6th May, 1988 the

respondent had not entered Appearance to the petition nor filed Answer and Cross Petition.

12. That the Notice of Trial was never served on the respondent or his Attorney-at-Law.

13. That the certificate ofNon-Appearance was issued by the Registrar on the 20th March, 1989.

14. That the petition was heard as an undefended petition and Order of Decree Nisi made on 26th April, 1989, notwithstanding the admitted adultery of the petitioner during the course of the marriage." (Emphasis supplied).

It is abundantly clear from what has been stated in the respondent's affidavit and which is fully supported by the documents on the Court Record that the Bundle prepared for the use of the Judge at the hearing of the Petition in so far as as it sought to exclude material facts from the Court amounted ipso facto to sufficient grounds providing a basis for the relief sought in the Notice of Motion. In short, by virtue of the Answer and Cross Petition which was filed and which still remains as part of the permanent record of the proceedings the matter was a contested cause. What the Bundle sought to represer to the Judge hearing the petition was one of an undefended cause. There is no doubt that had the Bundle accurately refected the history of the matter the Learned Judge wuld have refused to hear it. This petition was one to which the Matrimonial Causes Rules 1939 applied before the Current rules took effect.

Rule 1 Inituted "Title Commencement and Intepretation" at paragraph 3 states:-

"3. In these Rules, the following expressions have the meanings hereinafter respectively assigned to them:

"undefended cause means a matrimonial cause in which no answer has been filed or in which all the answers filed have been struck out. ....." (Emphasis supplied).

An Answer and Cross Petition having been filed in the matter which are still on the Record removed the matter from the category of an undefended cause and in so far, therefore, as the proceedings befofe Orr J. (acting) was represented in that light those proceedings were a nullity. It is this state of affairs that operates to found a jurisdiction in this Court to hear the Motion and to grant the relief sought. It is by virtue of the inherent jurisdiction of the

Court that this Court is empowered to hear this application. Although Rule 55 of the Matrimonial Causes Rules in so far as it is applicable to this petition prescribes that:-

> "Subject to the provisions of these Rules and of any statute the practice and procedure laid down in the Code and Rules and Orders of the Supreme Court of Judicature of Jamaica shall notwithstanding any provisions to contrary apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these Rules relate," and would tend to suggest therefore, that the Civil Procedure Code would govern to some extent the procedural requirements in matrimonial causes, this view view was fully canvassed and rejected in Loftman vs. Loftman [1967 11 WIR 286; [1967] 10 JLR 170. The dictum of Sir Herbert Duffus P. at page 289 ahad sought to deal with the matter in this manner.
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> "In my opinion, it is quite wrong to say that a decree nisi is analogous to a judgment by default. Matrimonial causes are entirely in their nature different to the type of proceeding in which a plaintiff obtains a judgment by default due to either non-appearance by the defendant or failure to file a defence, or any other cause.
>
> Matrimonial proceedings are concerned with the status of husband and wife in which the interest of the public is vitally concerned. Judgment by default is completely unknown in matrimonial causes add in petitions for divorce it is not possible for either spouse to consent to an Order. As the Learned Author of Rayden on Divorce (9th Edition) at page 231 put it:-
>
> "2. No Judgment by default -
>
> A decree must be refused even if the suit be not defended where there is no jurisdiction to make it or in the absence of sufficient proof of the allegations put forward, for judgment by default is unknown to matrimonial causes: jurisdiction of the Court is not affected by consent the public interest does not allow it and no admission binds the Court: the anology of ordinary actions cannot be applied." (Emphasis supplied).

Needless to say that on the evidence contained in the affidavit of the respondent as well as on an examination of the Record there was no jurisdiction in the Court hearing the petition to adjudicate in the matter as not only was an appearance entered which would have required at least a notice of trial for which service was acknowledged by the respondent's Attorneys-at-Law but moreover the filing of an Answer and Cross Petition now resulted in the cause becoming a defended one. These documents were on the Record as having been filed. Whether they were there properly or not is neither here nor there. If the petitioner's Attorney-at-Law were of the view that the Appearance, Answer and Cross Petition were not properly filed then the correct course to adopt was for them to take out a summons supported by an affidavit to have these documents struck out. This was not done. To cause a series of documents

to be executed which did not accurately reflect the state of the Record does not reflect well upon the Attorney-at-Law having the conduct of these proceedings and it clearly demonstrates either a total lack of appreciation for/a want of knowledge of the Matrimonial Causes Rules 1939 on the part of the Registrar who was responsible for issuing the certificate setting down the matter for hearing as an undefended cause.

There is no doubt that had a complete Bundle been prepared for the use of the Learned Judge which correctly reflected the true state of the Record that he would have been alerted to the presence of the Answer and Cross Petition as well as the non-service of a Notice of Trial, and refused to proceed to a hearing of the petition in the form that it had been set down.

As it is trite law that a want of jurisdiction is sufficient to ground a motion on the basis of nullity this is sufficient to dispose of the matter. The cavalerish manner in which the petition was processed, however, demands some further comment.

The Matrimonial Causes Rules 1939 which governed Petitions filed up to 31st May in so far as they were promulgated prescribe the manner in which Divorce Petitions should be brought and the process by which parties to a suit for decrees for dissolution of marriage ought to follow from the filing of a Petition and up the stage of the granting of a decree absolute. In this regard, every step in the proceeding is of importance and a failure to comply with the procedural requirements of any of these Rules and particularly so in so far as the service of material documents are concerned results in any subsequent order which is based upon the non-compliance with the requirement of the particular rule void and of no effect.

It is, therefore, of some significance that the three authorities which my researches have unearthed in which similar applications were made seeking to set aside a decree nisi, all of these cases were matters which sought to deal with the mode of the service of the petition. In the first two authorities of which Loftman vs. Loftman [1967] 10 JLR 170 has already been referred to and in Ogilvie vs. Ogilvie [1965] 9 WIR 371; [1966] 9 JLR 278, the other, both these applications were dismissed as there was no complaint advanced that the requirements of the Rules had been breached. As a result the Court held that in the circumstances, no basis existed by which the respondent could properly challenge the validity of the Order.

The third case King vs. King a matter for which I am unable to locate a reference but in which the respondent was resident abroad and in which the service of the petition was successfully challenged as it was there held that the irregularity in the mode of service provided a basis sufficient to cause the subsequent order to be set aside on the ground of nullity based upon a want of jurisdiction thereby making the resulting order invalid.

Matrimonial proceedings being a matter of public interest, therefore, the policy making powers of the legislature when examined as to its particular intent would tend strongly to suggest that the Rules in so far as they seek to regulate the procedural requirements provided for thereby calls for a strict construction to be applied in the interpretation of them.

The Question of Costs

The application having been opposed and the matter being argued and determined on its merits an order for costs was made in favour of the applicant such costs to be taxed if not agreed. Learned Counsel for the applicant further sought an Order that the costs to be ordered be paid by the Attorneys-at-Law for the petitioner on the ground that it was at their instigation that the petition was set down for hearing in the form and manner that had been. Learned Counsel who appeared for the petitioner did not seek to oppose this application.

On an examination of the petitioner's affidavit filed in reply to the respondent's affidavit in support of the application at paragraphs 6 - 8 it is clear that she acted in proceeding with the hearing of the matter as an undefended cause on the advice of her attorneys-at-Law who were responsible for preparing the Bundle for use of the Judge who heard the matter. Given the circumstances surrounding the matter, therefore, it is my view that the petitioner's Attorneys-at-Law ought to take full responsibility fof the matter proceeding in the form that it took and an Order that they pay the costs of the application is thereby not inappropriate.

The Order of the Court therefore, is that the Decree Nisi made on 26th April, 1989 is hereby set aside. Costs of this application to be agreed or taxed. Further ordered that such costs to be paid by the Attorneys-at-Law for the petitioner.

Stay of execution granted for six weeks in relation to the Order for costs.

Cases referred to
Leftman v Leftman (1967) 10 JLR 170
Ogilvie v Ogilvie (1965) 9 WIR 371; (1966) 9 JLR 278
King v King (no reference given)