IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FAMILY DIVISION

SUIT NO. F-1994/S.152

BETWEEN	OSWALD ALBERT STEPHENSON	PLAINTIFF
A N D	MARCIA ELAINE STEPHENSON	DEFENDANT

Miss N. Anderson for the Petitioner.

Mrs. C. Bravo instructed by Playfair, Junor, Pearson and Company for the Respondent/Applicant.

Heard: January 9, 1997

REASONS FOR RULING

KARL HARRISON J.

On the 12th September, 1996 a Notice of Motion was filed in the Registry of the Supreme Court seeking an order to set aside Decree Nisi and Decree Absolute made in a husband's petition for dissolution of marriage. The decree nisi which was granted on the 23rd day of January, 1995 was pronounced absolute on the 7th day of April, 1995. The hearing for the Motion to set aside was set for hearing on the 9th January, 1997.

At the hearing of the Motion, Miss Anderson made a preliminary objection as to the Court's jurisdiction to hear the Motion. The short point was that the respondent ought to have proceeded by way of an appeal to the Court of Appeal rather than by motion. I heard arguments and reserved my ruling for the 16th January when the objection was over-ruled. The Court decided to hear the Motion but the applicant/respondent was unable to proceed due to certain difficulties with a particular witness. The motion was adjourned sine die subsequently and leave to appeal granted regarding my ruling on the preliminary objection. I did promise to put my reasons in writing for overruling the preliminary objection so I now seek to fulfil that promise.

Miss Anderson argued that the Court ought not to hear the Motion as the decree nisi was made absolute on the 7th April, 1995. She placed great emphasis on the provisions of sections 18 and 19 of the Matrimonial Causes Act ("The Act") and the cases of **Gatherer v. Gatherer 10 JLR 187** and **Loftman v. Loftman 10 JLR 170**. Section 18 of the Act states as follows:

> "18 - Notwithstanding anything contained in this Act, where a decree nisi has been made in proceedings for a decree of dissolution of marriage, the Court may, on the application of a party to the marriage at any time before the decree becomes absolute, rescind if the Court is satisfied that the parties have become reconciled."

Section 19 of the said Act states as follows:

> "Where a decree nisi has been made, but has not become absolute, the Court may, on the application of a party to the proceedings or on the intervention of the Attorney General, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, supression of evidence or of any other circumstances, rescind the decree and if it thinks fit, order the re-hearing of the proceedings."

The Motion is yet to be heard, so I cannot go into the merits or otherwise of the application. The procedure is what is being objected to, but in order to deal with the point raised, one has to look at the grounds upon which the respondent is seeking to set aside the decree nisi. It is being alleged inter alia, in the Notice of Motion that a material irregularity has arisen. The respondent has deponed that she was never served with the husband's petition for the dissolution of their marriage and that she had no knowledge of the existence of the petition until after the final decree had been pronoucned.

It was my considered opinion therefore, that in light of the irregularity complained of, section 18 of the Matrimonial Causes Act had no relevance at all. Section 19 on the other hand, deals with rescision of a decree for miscarriage of justice. The section sets out the circumstances in which a party to the proceedings or the Attorney General may move the court. It would seem however, that the section envisages a situation where application is made before the decree becomes absolute. Are there any provisions then in the Matrimonial Causes Rules for an application to set aside the decree nisi after it has become absolute? Rule 42 speaks only of a rescision under section 19 of the Act. It provides that a party to proceedings who makes application for rescision under section 19 of the Act of a decree nisi shall file an affidavit stating the facts and circumstances upon which

he or she relies. There is therefore, no express provision for the question posed above. Is it the end of the matter? Was it intended in these circumstances for the applicant's only recourse to be by way of an appeal? I think not, and I will try to justify this approach. Of course, one must also examine Rule 3 of the Matrimonial Causes Rules and see whether it can be of any help. This rule states:

> "Subject to the provisions of these Rules and of any enactment, the provisions of the code will apply to the proceedings under the Act as they apply to other proceedings in the Supreme Court, with the necessary modifications."

The Code referred to above has been defined to mean the Judicature Civil Procedure Code as amended by subsequent enactments and Rules of Court.

As I have said before, Miss Anderson had referred me to the cases of Gatherer and Loftmen respectively (supra). Both are Jamaican cases heard by the Court of Appeal in 1967. The latter case seem to have been centred on the failure of the respondent to file an appearance within the prescribed time fixed by the Registrar of the Supreme Court. The petition was thereafter set down for hearing. The learned trial judge took oral evidence of the husband and witnesses, the wife not appearing, and pronounced a decree nisi as prayed by the husband. Subsequently, an appearance was entered on behalf of the wife and a notice of motion filed to move the court to set aside the decree nisi, and make an order for the re-hearing of the action. The motion was supported by an affidavit which stated inter alia, that the wife had been served with the petition and that it was her desire to defend the proceedings instituted by her husband and to file a cross-prayer for judicial separation on the ground of desertion and cruelty. The order was made accordingly. On appeal it was held that the learned trial judge was wrong when he set aside the decree nisi and ordered a re-hearing of the case as he had no jurisdiction or authority to do so.

The case of Gatherer was referred to by Miss Anderson in order to demonstrate the procedure adopted in that case. There, the husband had obtained an order to dispense with personal service of the petition on the wife and for substituted service to be effected by publication in the New York Times newspaper. The advertisement did not come to the attention of the wife and no appearance was entered for her. The cause was set down for hearing and undefended and a decree nisi granted.

That decree was subsequently made absolute. The wife learnt later of the divorce proceedings and she applied and was subsequently granted leave to appeal out of time against the decree nisi and decree absolute. On appeal, it was held inter alia, that the husband had failed to make a sufficient or candid disclosure in his application for substituted service. Accordingly, the order for substituted service was voidable and should be set aside, and as a necessary consequence, the decree nisi and the decree absolute would also be set aside.

What Loftman's case shows is that the respondent was served but desired to defend the action. Clearly, the learned trial judge had no jurisdiction nor authority to set aside the decree nisi. In the present case it is being contended that the respondent was never served with the petition. The Court of Appeal in Gatherer's case found that had the petitioner make a sufficient or candid disclosure, the order for substituted service simply by advertisement in the particular newspaper would not have been made. In the event, the wife did not have any knowledge of the proceedings. But, having read this case, I see no statement by the Court of Appeal that the applicant could not have applied to the court below to set aside the decree. The principle stated by Lord Wright in the House of Lords in the case of **Lazard Bros. & Co. v. Midland Bank Ltd. [1933] A.C. 289** at p. 307:

> "The court has discretion to set aside an order made exparte when the applicant has failed to make sufficient or candid disclosure."

is well known. The case of **Wiseman v. Wiseman [1953] Q.B.D. 601** is also authority for the proposition. Mrs. Gatherer chose however, to proceed by way of appeal instead rather than filing a motion in the Supreme Court.

I have found the cases of **Joseph v. Joseph (1969) 15 W.I.R. 388** and **Tam-Kai v. Tam-Kai (1960) 2 W.I.R. 229** most persuasive. They both deal with the setting aside of a decree nisi in divorce proceedings. In the former case the appellant was unaware that decree nisi was granted and a motion was filed to set aside the decree. The learned trial judge held that the proper course of setting aside was not adopted. On appeal it was held:

> "1. That the HIgh Court of Trinidad and Tobago, by virtue of section 9(1) of the Supreme Court

> of Judicature Act 1962 had inherited from the ecclesiastical courts of England the jurisdiction to make an order directing the re-hearing of a matrimonial cause and the trial judge was wrong to refuse the order.
>
> 2. That the application to set aside may be made by a party to the suit and the procedure by motion was the correct procedure to be followed in the absence of specific provision in the Divorce and Matrimonial Causes Rules 1932."

In the Tam-Kai's case the husband had obtained a decree nisi which was made absolute. By motion the wife applied for an order to set aside the decrees nisi and absolute and dismiss the petition of the husband on the ground that the proceedings on which the decrees were made were a nullity. Lack of service of the petition was one of the grounds stated in the motion. A preliminary objection was taken by Counsel for the husband who contended that a final decree obtained in proceedings which were a nullity could only be set aside on appeal, or by fresh action brought in the case of fraud. The Court of Appeal held:

> "1. Failure to serve the petition on the wife was a defect which would make the proceedings a nullity, and if established would entitle the wife, ex debito justitiae, to have the orders made therein set aside.
>
> 2. The court had an inherent jurisdiction to set aside its own orders in proceedings which are a nullity and the motion was therefore properly before it."

In the case before me, there is an allegation that the respondent/applicant was not served with the petition. Would this amount to a nullity? I hold, that if proved, this would certainly amount to be a nullity. What then is the correct procedure for establishing a nullity? I further hold that the Court has a duty to see that justice is done between the parties and will therefore resort to its inherent jurisdiction since there is no express provision for such an application in the Matrimonial Causes Rules.

Accordingly, it would seem from the dictum of Lord Greene, M.R. in **Craig v. Kanseen [1943] 1 All E.R. 108** that the matter can be dealt with either by the court

of original hearing on the exercise of its inherent jurisdiction or quite probably by the Court of Appeal if the appeal is made in proper time. Lord Merriman in **Everitt v. Everitt [1948] 2 All E.R. 545** in his judgment confirmed Craig's case (supra) and he made the following statement at page 546:

> "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."

He continued further at page 547 as follows:

> "Manifestly, this general principle applies with full force to a judgment affecting the status of the party."

The above case appear to establishh that an order which can properly be described as a nullity is one which the person affected by it is entitled ex debito justitiae to have set aside. It also seems to me that the court in its inherent jurisdiction can set aside its own order and that an appeal from that order is not necessary. "The court must possess an inherent power to act in the interests of justice and would I think, be failing in its duty if it allowed the exercise of its proper jurisdiction to be stultified by the absence of a specific rule of procedure." (Per Fraser J.A. in Joseph v. Joseph (1969) 15 W.I.R. 388 at page 393). I adopt these words of a great jurist; they are quite apt in the present situation.

I held therefore that failure to serve the petition on the wife/applicant, would make the proceedings a nullity, and if established would entitle her ex debito justitiae to have both decree nisi and decree absolute set aside. Further, the court has an inherent jurisdiction to set aside its own orders in proceedings which are a nullity. It was for these reasons why I over-ruled the preliminary objection.