SEISAY v SEISAY

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COURT OF APPEAL FOR SIERRA LEONE, Divorce Petition Civil Appeal, Hon Mr Justice Beccles Davies JA, Hon Mr Justice Cole JA, Hon Mr Justice Navo JA, 20 December 1979

[1] Family Law – Divorce – Matrimonial Causes Rules – Procedure – Effect of non-fulfilment of rule 6 of Matrimonial Causes Rules – Omission by petitioner to state in affidavit whether cruelty had been condoned – Whether viva voce evidence rectified defect – General rule is that evidence in divorce proceedings should be oral – Matrimonial Cause Rules rr 6(1), 25(1)

[2] Civil Procedure – Affidavit – Effect of omission in affidavit – Viva voce evidence to rectify ommission

Rule 6(1) & (2) of Matrimonial Causes Rules (Public Notice No. 96 of 1950) requires an affidavit to be filed with every petition for judicial separation verifying the facts of which the deponent has personal cognizance and deposing as to the belief in the truth of the other facts alleged in the petition, and such affidavit according to sub-rule (2), where the ground of the petition is cruelty, should also state whether the petitioner had in any way condoned the cruelty.

In this case, the appellant argued that there had been a breach of the mandatory provision of Rule 6(2) of Matrimonial Causes Rules as the respondent's affidavit had omitted to state whether she had in any way condoned the alleged cruelty, and that therefore the proceedings were a nullity and ought to be set aside.

The respondent petitioner on the other hand contended that her oral evidence at the hearing had superseded the affidavit.

Held, per Beccles Davies JA, dismissing the appeal:

1. The combined effect of rule 25(1) and (4) of the Matrimonial Cause Rules 1950 and ss 7 and 14(1) of the Matrimonial Causes Act (Cap 102) is that the general rule upon a presentation of a petition for judicial separation is that the evidence of the witnesses, including that of the parties, should be viva voce. This is subject however to an order being made by the judge that some particular aspect of the case shall be proved by affidavit evidence, which he is at liberty to refuse if the interests of justice demand it.
2. The affidavit under r 6 of the Matrimonial Causes Rules was merely a preliminary step that gave the security of the oath of the party that the proceeding is bona fide. The viva voce evidence in court takes over from the evidence an affidavit where there is no order that such affidavit shall be treated as evidence at the hearing. *Deane v Deane* (1858) 1 SW Tr 90 applied.
3. The oral evidence of the petitioner at the hearing that there was no condonation of the respondent's cruelty had corrected the defect in her affidavit.
4. The appellant's point, if it was going to be raised, should be done at any stage before the hearing and not after the petitioner's evidence averring that very point.

Cases referred to
Deane v Deane (1858) 1 SW Tr 90

Legislation referred to
Matrimonial Causes Act 1857 rr 41, 46 [UK]

Matrimonial Cause Rules (Public Notice No 96 of 1950) rr 6(1), 25(1)
Matrimonial Causes Rules 1937 r 6 [UK]
Matrimonial Causes Act (Cap 102) Laws of Sierra Leone 1960 ss 7, 14(1)
Rules of the High Court Order L, XL VIII r 1

Appeal
This was an appeal on a submission on a point of law made by the respondent in a suit for judicial separation, saying that there had been a breach of the mandatory provisions of rules 6(1) & (2) of the Matrimonial Causes Rules 1950, with the result that the whole proceedings were a nullity. The facts appear sufficiently in the following judgement.

Mr T S Johnson for the appellant.
Ms A Dworzak for the respondent.

BECCLES DAVIES JA: Mrs Josephine Seisay (to whom I shall for convenience refer as "the petitioner") instituted proceedings for judicial separation from her husband Mr Solomon George Seisay (to whom I shall refer as "the respondent"). The petition was founded on cruelty. The matter eventually proceeded to trial. At the close of the petitioner's case, Mr Johnson, the respondent's counsel, made what he described as "a submission on a point of law". The submission was that there had been a breach of the mandatory provisions of rules 6(1) and (2) of the Matrimonial Causes Rules (Public Notice No. 96 of 1950). The rule provides:

> 6(1) There shall be filed with every petition an affidavit by the petitioner verifying the facts of which the deponent has personal cognizance and deposing as to the belief in the truth of the other facts alleged in the petition and except in the case of a petition for restitution of conjugal rights, stating whether the petition is presented or prosecuted in collusion with the respondent or any of the co-respondents.
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> The pertinent portion of sub-rule (2) states:
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> (2) The affidavit shall also state:
>
> (a) In the case of every petition for judicial separation ... where the ground of the petition is cruelty, whether the petitioner has in any manner condoned the cruelty ...".

The affidavit sworn to by the petitioner in support of her petition was in the following terms:

> "I Josephine Seisay of HS 32 Government Quarters Freetown in the Western Area of the Republic of Sierra Leone Nursing Sister Ministry of Health, the above mentioned petitioner make oath and say as follows:
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> 1. That the statements contained in paragraphs 1, 2, 3(1), 4, 5, 6, 21, 23 and 24 are true.
> 2. That the statements contained in paragraphs 7, 8, 9, 10, 11, 12, 13, 14,16, 17, 18,19, 20, 22 and 25 are true to my knowledge information and belief."

The affidavit omitted to state whether the petitioner had "in any manner condoned the cruelty." Mr Johnson submitted that that omission had been a breach of the mandatory provision of rule 6. Therefore the proceedings were a nullity and ought to be set aside. Miss Dworzak contended that the viva voce evidence of the petitioner had superceded the affidavit. An unconditional appearance was entered to the petition. An answer was filed. The Registrar's Certificate was eventually obtained and the cause entered for trial. Nothing was done by the

respondent's solicitor to raise the issue now before this court. Mr Johnson, solicitor and counsel for the respondent has been frank with the court. He told this court that he had not adverted his mind to the rule under review. It was during the trial that he had done so.

The petitioner and her witnesses had given evidence and the case for the petitioner was then closed. The issue to be determined now is whether the omission in the affidavit as to whether the alleged cruelty had been condoned or not was fatal, after oral evidence had been given on that same issue by the petitioner. What is the value of the affidavit in support of the petition at the hearing?

Rule 25(1) and (4) of the Matrimonial Cause Rules 1950 provides:

> 25(1) Subject to the provisions of the Act and this Rule, the witnesses at the trial or hearing of any matrimonial cause shall be examined viva voce and in open Court:
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> Provided that a judge may on application made to him:
>
> a) subject to the provisions of para (2) of this rule, order that any particular facts to be specified in the order may be proved by affidavit; b) order that the affidavit of any witness may be read at the trial or hearing on such conditions as the judge may think reasonable.
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> Sub-Rule (2) is not relevant for present purposes. Sub-rule (4) then provides:
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> (4) Nothing in any order made under this Rule shall affect the power of the judge at the trial or hearing to refuse to admit evidence tendered in accordance with any such order if in the interest of justice he should think fit to do so.

I proceed to the Matrimonial Causes Act (Chapter 102 of the Laws of Sierra Leone) in so far as it is pertinent to the issue before this court. I will refer firstly to Section 14 (1). It provides:

> 14(1) A petition for judicial separation may be presented to the court either by the husband or wife on any grounds on which a petition for divorce might have been presented ... and the provisions of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed shall apply in like manner to a petition for judicial separation.

The duty of the court on the presentation of a petition for divorce which is the same as on a presentation of a petition for judicial separation and "the circumstances in which such a petition shall or may be granted or dismissed" are set out in s 7. That section provides, inter alia:

> 7 (1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter charge which is made against the petitioner.
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> (2) If the court is satisfied on the evidence that:
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> (i) the case for the Petitioner has been proved
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> (ii) ... where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and
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> (iii) the petition is not presented or prosecuted in collusion with the respondent ... the court shall pronounce a decree

> ... but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition....

The combined effect of the above cited provisions is that the general rule upon a presentation of a petition for judicial separation is that the evidence of the witnesses including that of the parties should be viva voce. This is subject however to an order being made by the judge that some particular aspect of the case shall be proved by affidavit evidence, which he is at liberty to refuse if the interests of justice demand it.

At the hearing of the petition, the judge has to satisfy himself from the evidence, that is viva voce evidence subject to the order for affidavit evidence which I have just deal with, that inter alia there is no condonation, connivance, or collusion. Despite the defect in the affidavit the petitioner had gone on to give viva voce evidence that there was no condonation of the respondent's cruelty. I am not saying that the evidence is true as that is a matter for the judge under section 7.

Miss Dworzak cited *Deane v Deane* (1858) 1 SW & Tr 90. It is a very helpful case. The headnote to that case reads:

> "The affidavit of the petitioner required by section 41 will not be taken as evidence at the hearing, but the parties must produce sufficient evidence to prove the petition independently of such affidavit. The court is bound by the Rules of Evidence as observed at Common Law, Section 48."

Section 41 referred to in that head note is s 41 of the Matrimonial Causes Act 1857 (20 & 21 Vict C 85). It reads:

> 41. Every person seeking ... a decree of Judicial Separation, shall together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the despondent and the other party to the marriage.

The above section was expanded by rule 6 of the English Matrimonial Causes Rules 1937 which is virtually the same as Rule 6 of the Sierra Leonean Matrimonial Causes Rules (Public Notice 96 of 1950). I have referred to *Deane's* case in order to demonstrate the effect of the contents of the affidavit in support of the petition. In *Deane's* case the Judge Ordinary (Sir Creswell) said in the course of his judgment:

> "The affidavit of the petitioner under Section 41 is a preliminary step merely – it gives the security of the oath of the party that the proceeding is bona fide. No person is allowed to commence a proceeding without pleading on oath to the truth of the facts (within his or her knowledge) upon which the proceeding is founded: but I have considered the point you mention, and am of the opinion that I am not at liberty to take any notice at the hearing of the affidavit of the party so given. The 48th Section of the Divorce Act is precise in its directions, that "the rules of evidence observed in the superior courts of common law at Westminster shall be applicable to and be observed in the trial of all questions of fact in the Court". This confines me within the limits of 14 and 15 Vict C 99, and you must deal with this case as if there were no evidence at present before the court ...".

I ought to mention in passing the old practice in the Ecclesiastical Court. Evidence was almost always taken by means of written documents verified by affidavit. It was section 46 of the Matrimonial Causes Act 1857 (UK) which altered the rule by directing that oral evidence in open court should be the rule, subject to affidavit evidence being allowed in exceptional circumstances, and the deponents being liable to be examined and cross- examined in open court.

The affidavit under Rule 6 is merely a preliminary step and in the words of Sir Creswell, "it gives the security of the oath of the party that the proceeding is bona fide." The viva voce evidence in court takes over from the evidence on affidavit, where there is no order that such affidavit shall be treated as evidence at the hearing.

The oral evidence of the petitioner at the hearing had supplied the defect in her affidavit. I am not to be taken as saying that the point raised in this appeal cannot be raised at all. If it is going to be raised, then it should be done at any stage before the hearing and not after the petitioner's evidence covering that very point.

I wish to deal with one more point. It concerns the reference by the judge, in his ruling, to Order L of the High Court Rules. The order deals with non-compliance with the Rules of the High Court. It had been cited by the judge in the course of resolving the point raised. The judge was clearly in error. Order XLVIII Rule 1(c) excludes the application of Order L to Matrimonial Proceedings. Order XLVIII Rule 1 provides:

> Subject to the provisions of this Order nothing in these rules, save Order L1 and as expressly provided shall affect the procedure or practice in any of the following causes or matters: ... (c) proceedings for divorce or other matrimonial causes.

The points raised by counsel for the appellant have been interesting. Nevertheless the appeal fails. I would order that the matter be restored to the High Court's list for further hearing and completion. Costs to the respondent, order accordingly.

Reported by Melinda Palmer