CIV.APP. 9/99

IN THE COURT OF APPLAL FOR SIERRA LEONE

BETWEEN:-

VICTORIA DAVIES - APPELLANT

AND

FRANKLYN BRODIS DAVIES - RESPONDENT

BETWEEN:-

HON MRS. JUSTICE V.A.D. WRIGHT - J.A.
HON. MR. JUSTICE N.D. ALHADI - J.A.
HON. MR. JUSTICE M.E. TOLLA-THOMPSON- J.A.

A. TEJAN-COLE ESQ., FOR APPEALLANT
P.S. CONTEH ESQ., FOR THE RESPONDENT

JUDGEMENT DELIVERED THIS 24TH DAY OF JULY, 2000

WRIGHT J.A.

This is an Appeal by the appellant from the Judgement of Nylander J delivered on the 8th September, 1999.

The Respondent filed a Petition for the dissolution of Marriage on the Grounds of Desertion & Cruelty. In the appellant's answer she alleged adultery and cross petitioned on the grounds of cruelty.

Leave was granted to amend the Notice and Grounds of Appeal as contained in the records. The Grounds of Appeal are as follows:-

1. That the Learned Trial Judge was wrong in making the Decree Nisi Pronounced on the 8th September, 1999 absolute on the 2nd December, 1999 even though the the Appellant had filed an Appeal dated 2nd October, 1999.

145

2. That the Learned Trial Judge was wrong in Law in making the Decree Nisi Pronounced on the 8th September 1999 absolute on 2nd December, 1999 even though an Appearance had been entered for an intervener dated 7th October, 1999.

3. That the Learned Trial Judge was wrong in law and in fact in delivering Judgement in favour of the Respondent in that

(a) The Petition and the evidence adduced in Court discloses no, or insufficient evidence.

(b) The Respondent failed to discharge the burden and(of standard of proof).

4. That the Learned Trial Judge was wrong in law and in fact in delivering Judgment in favour of the Respondent in that a cardinal principle of natural justice to wit, audi altem partem was not observed.

5. That the Learned Trial Judge erred in hearing the cause during the High Court vacation.

Ground 6 was abandoned, A. Tejan-Cole Esq., Learned Counsel for the Appellant stated that the Decree Nisi was made on the 8th September, 1999 and the Decree absolute was Pronounced on the 2nd December, 1999 even though the Notice of Appeal was filed on the 2nd October, 1999. There was an Affidavit filed by Learned Counsel for the Appellant deposing that he had filed a Notice of Appeal exhibiting the Notice of Appeal on the 6th October, 1999. He submitted that it was wrong in law to have pronounced the Decree Nisi absolute while an Appeal was pending.

Even though there a Notice of Appearance was entered

by an intervener on the 7th October, 1999 and an Affidavit filed by the intervener the Learned Trial Judge Pronounced a Decree Absolute on the 12th December, 1999.

A. Tejan-Cole Esq., submitted that the evidence does not support a divorce being granted on cruelty or desertion and the standard of proof was not discharged. He further submitted that there was no date of commencement of the trial contrary to Order 25 Rule 4 of the High Court Rules and also that the said Notice of Trial and entry for trial did not comply with High Court Rules Order 25 Rule 3. He said that there was no application for a Speedy Hearing even though the High Court Rules Order 25 Rule 9 provides that an action should take its turn in the cause list unless otherwise ordered. I agree with Learned Counsel that the above Rules had been flouted.

Learned Counsel for the Respondent F.S. Conteh Esq., conceeded to the Appeal and also that there was a Notice of Appeal filed before the Decree Absolute was granted and filed therefore making it a nullity.

It is clear from the evidence that the Decree Nisi was Pronounced on the 8th September 1999 and made absolute on the 2nd December even though the Appellant had filed an Appeal on the 2nd October 1999. It was wrong for the Learned Trial Judge to Pronounce the Decree Nisi Absolute after a Notice of an Appeal had been filed. See Civ.App. 81/95 and 11/96 Strong V. Stronge unreported Judgment of the Court of Appeal. The Matrimonial Causes Rules Rule 36(3) states:-

"No application under this Rule shall be entered in the cause list unless an

147

affidavit has been filed that search had been made in the proper books of the Divorce Registry up to within four days of the time appointed and that at such time no person had intervened or obtained leave to intervene in the cause and that no appearance had been entered or any affidavits filed by or on behalf of any person wishing to show cause against the decree nisi being made absolute and, in case leave to intervene had been obtained or appearance entered or affidavits filed by or on behalf of such person, affidavits showing what proceedings, if any, have taken thereon".

It was therefore wrong in law for the Learned Trial Judge to Pronounce the Decree Nisi Absolute even though an Appearance was filed by an intervener.

Looking at the Petition filed there are no particulars of the cruelty or desertion.

Let me here review the evidence of the Respondent on the desertion and cruelty alleged. He said in the Lower Court, "Respondent left the matrimonial home on 30/3/89. There had not been any previous proceedings of divorce. Respondent left to attend a house warming ceremony of her sisters' guest house. She never returned since then. At first all was well in the home. Respondent fail to perform her matrimonial duties to me. She did not take care of the home, never prepared food. I made several attempts for Respondent to return but to no avail. My conjugal rights were therefore denied. The Respondent

told me that she will not return to me".

The burden is on the Petitioner throughout the statutory period. See Pratt v. Pratt (1939) A.C. 417 420 H.L. 1939 3 ALL E.R. 437, 438. The Court must be satisfied on the evidence that the desertion is proved. See Brown v. Brown (1898) 7 LT 102. This must be proved by a proponderance of probability. Also corroboration although not required as an absolute rule, See Williams v. Williams (1932) 147 LT 219 is in practice insisted unless its absence can be satisfactory accounted for. Looking at the evidence I am satisfied that neither cruelty or desertion was proved. What constitutes curuelty regard must be had to the circumstances of each particular case. See Edwards vs. Edwards 1948 1 All E.R. 157. In Collins v Collins 1964 A.C. 644 where Lord Reid said that the proof a spouse normal in health and mind had been reduced to ill health" by inexcuseable conduct of the other spouse persisted in although he knew the damage which he was doing. Established Cruelty.

An answer and cross petition was filed by the appellant and having heard Learned Counsel for the Appellant and on examining the evidence I find that the grounds of desertion and cruelty have not been proved.

This matter came up for hearing on several occasions before another judge after which it was adjourned to a date after the vacation.

The matter then came up for hearing before the Learned Trial Judge on the 16th July, 1999 and after two adjournments the evidence of the Respondent was taken. Learned Counsel for the appellant told the court that no notices were sent to either himself or the Appellant

during the vacation, On searching the file I could not find any affidavit of service on the Appellant or the Appellant's Solicitor to establish that notices were sent to either of them.

I hold that the Learned Trial Judge ought not to have proceeded with the matter during the vacation unless both parties had consented as such proceedings are voidable see Macfoy V.U.A.C. (1961) 3 AER 1169. In the light of all what I have said before a Decree Nisi ought not to be pronounced by the Learned Trial Judge as the whole proceeding were a nullity. The Decree Nisi and Decree Absolute are accordingly set aside. The Respondent is to pay the taxed costs to the Petitioner.

(sgd) Hon. Mrs. Justice V.A.D. Wright - J.A.

I agree Hon. Mr. Justice N.D. Alhadi - J.A.

I agree Hon. Mr. Justice M.E. Tolla-Thompson - J.A.