

DECKER v. DECKER, JOHNSON and JOHNSON

SUPREME COURT (Cole, Ag. C.J.): January 7th, 1966  
(Divorce Case No. 5/64)

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[1] Family Law — divorce—parties—striking off or dismissing parties—  
woman named, served but not appearing, not made respondent though  
costs claimed against her—final address too late for application to  
strike off on that ground: Where the woman named in a divorce peti-  
tion, which contains a claim for costs against her, has been served and  
has not entered an appearance, an application in counsel's final address  
to strike off or dismiss her from the cause on the ground that she  
has not been made a respondent is belated and will not be granted  
(page 340, line 39—page 341, line 14).

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[2] Family Law—divorce—petitioner's adultery—discretion of court—con-  
siderations on which exercised: In exercising its discretion to grant a  
decree of divorce notwithstanding the petitioner's adultery, the court  
will bear in mind the following considerations:

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(i) Whether there is a reasonable prospect of reconciliation be-  
tween the petitioner and the respondent if the marriage is not dis-  
solved.

(ii) The position and interest of any children of the marriage.

(iii) The interest of the party with whom the petitioner has com-  
mitted adultery, with special regard to their remarriage.

(iv) The interest of the petitioner and in particular the interest that  
the petitioner should be able to remarry and live respectably.

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(v) The interest of any children born of the adulterous connection  
between the petitioner and the person with whom the petitioner has  
committed adultery.

(vi) The interest of any children born of any adulterous connection  
formed by the respondent.

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(vii) Whether the petitioner or the respondent was the more res-  
ponsible for the break-up of the marriage.

(viii) What was the nature of the misconduct which necessitates  
the prayer for discretionary relief and were there mitigating or  
aggravating circumstances?

(ix) Whether the petitioner was partly, and if so to what extent,  
responsible for the break-up of any other marriage.

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(x) What was the petitioner's general conduct otherwise, *e.g.*,  
towards the children?

(xi) What were the reasons for any non-disclosure of adultery?

(xii) Was there perjury on the part of the petitioner?

(xiii) Was the petitioner always frank when questioned about the  
adultery and non-disclosure?

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(xiv) Is the court finally satisfied that it has been told the whole  
truth by the petitioner? (page 339, line 24—page 340, line 7).

[3] **Family Law—divorce—undue delay—delay prima facie raises doubts as to genuineness of complaint:** The reason the court requires a satisfactory explanation of delay in presenting a petition for dissolution of marriage on grounds of cruelty, adultery and desertion is that *prima facie* the mere fact of delay upon a complaint of matters so fundamental to marriage raises doubts as to the validity of the evidence of the complaining party in support of the complaint (page 339, lines 14-18). 5

[4] **Family Law—divorce—undue delay—no bar unless delay implies petitioner recognises the marriage:** Delay in presenting a petition for dissolution of marriage is no bar if unaccompanied by facts or circumstances which so plainly imply on the part of the petitioner a recognition of the existence and validity of the marriage as to render it inequitable and contrary to public policy to permit the petitioner effectually to challenge it (page 339, lines 19-23). 10

The petitioner petitioned for the dissolution of her marriage with the respondent on the grounds of his adultery with the woman named, cruelty and desertion and asked the court to exercise its discretion in her favour as to her own adultery. The respondent by his answer alleged that the petitioner had committed adultery with the party cited and asked the court to exercise its discretion in his favour as to his adultery and dissolve the marriage. 15 20

The woman named did not enter an appearance and took no part in the proceedings. The party cited entered an appearance and filed an answer denying adultery with the petitioner and pleading conduct condoning on the part of the respondent in the alternative. 25

When the petition was presented, the petitioner and the respondent had been married for over 16 years. The petitioner had a son born before the marriage of whom the respondent was the putative father. There was one child of the marriage, a son born in the third year. Four months after his birth the marriage broke down owing to the respondent's cruelty. He drove the petitioner from the matrimonial home on a false charge of practising fetish and she and the children went to live in her stepfather's house. Her mother tried to salvage the marriage and after four years the respondent began to visit the petitioner and eat food prepared by her. This went on for nine years, when the woman named objected and quarrelled with the petitioner and the present proceedings followed a year and some months later. 30 35

At the time of the hearing, the petitioner had two surviving children by the party cited and the respondent had four children by the woman named. 40

The petitioner and the respondent both filed discretion statements. The petitioner lied to the court about her association with other men, including the party cited, and found great difficulty in fully disclosing her several acts of adultery. She said she had committed adultery with the party cited because the respondent had left her without financial support.

The petition contained a claim for costs against the woman named and respondent's counsel in his final address asked that she should be struck off from the cause because the court had not directed that she be made a respondent.

Case referred to:

(1) *Bull v. Bull*, [1965] 3 W.L.R. 1048; [1965] 1 All E.R. 1057, applied.

Statute and Rules construed:

Matrimonial Causes Act (Laws of Sierra Leone, 1960, *cap.* 102), s.6(2):

"On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent."

Matrimonial Causes Rules (Laws of Sierra Leone, 1960, *cap.* 7), r.10(1):

The relevant terms of this rule are set out at page 341, lines 4-11.

*Buck* for the petitioner;

*McCormack* for the respondent;

*Taylor-Harding* for the party cited.

The woman named did not appear and was not represented.

COLE, Ag. C.J.:

This is a wife's petition for dissolution of marriage. By her petition dated February 18th, 1964 she prays this court—

"that the court will exercise its discretion in her favour notwithstanding the adultery of the petitioner during the said marriage, and decree:

1. That the said marriage may be dissolved.

2. That she may be granted the custody of the two children of the marriage.

3. That she may be granted such sums of money by way of alimony pending suit as may be just.

4. That she may be granted a recovery of her personal belongings left in the matrimonial house or their appropriate value £130.

5. That she may be granted such secured provision and such sums of money by way of maintenance for herself and the said children of the marriage as may be just.

6. That the respondent and the woman named may be condemned to pay the costs of this suit.

7. That she may have such further and other relief as may be just."

She founds her prayer on cruelty, adultery and desertion alleged to have been committed by the respondent since the celebration of the marriage.

The respondent in his answer prays the court to exercise its discretion in his favour and reject the prayer of the petitioner and decree: "(a) A dissolution of the marriage with the petitioner herein. (b) Custody of the children of the marriage. (c) Such further and other relief as may be just. (d) Damages."

By her reply dated September 17th, 1964, the petitioner repeated the prayers contained in her petition of February 18th, 1964. That being so, although it was amongst other things ordered on May 28th, 1965 that "the proceedings arising from the prayer of the petitioner be stayed and that the cause do proceed on the prayer of the respondent's answer," the court in the circumstances on October 4th, 1965 ordered a removal of that stay.

The woman named, Louisa Johnson, did not enter an appearance, did not file any answer and did not take any part in the proceedings. The party cited, Jimmy Johnson, entered an appearance and filed an answer in which he denied having committed adultery with the petitioner and further alleged that if he committed adultery with the petitioner, which was not admitted, the respondent by his conduct conduced to the adultery.

Before the hearing of the petition the petitioner withdrew her prayer for permanent alimony for herself and her children.

Both the petitioner and the respondent filed discretion statements. The petitioner's was filed on March 18th, 1965 and the respondent's on June 17th, 1965.

The petitioner Mozeline Decker, then Mozeline Jones, was on June 5th, 1947 lawfully married to the respondent George Emanuel Decker at Bishop Crowther Memorial Church, Cline Town. Before their marriage the petitioner had on September 10th, 1944 given birth to a son, George, of whom the respondent was the putative father. The petitioner and the respondent cohabited at various places in Freetown after their marriage and finally at 7 Upper

Easton Street, Freetown. On August 4th, 1949 the only child of the marriage was born, namely Bankole Decker, now aged 15 years. The marriage broke down on December 19th, 1949 when the petitioner had cause to leave the matrimonial home, No. 7 Upper Easton Street, Freetown.

[The learned judge reviewed the evidence of the petitioner and the respondent and continued:]

Both sides have told lies in this case. That is my honest view. I shall endeavour as much as I can to fathom the truth.

I find it difficult to believe that if the petitioner had been practising fetish as alleged by the respondent and he was going to investigate in any case, as he himself said he was, it would take him a week to do so. Furthermore, the petitioner, if it is true that she had been carrying on such practices, had ample opportunities of disposing of the bottle and *sebeh* which the respondent said the petitioner dug up from the kitchen and which he said he found in her room. In spite of his story that neighbours were present when the bottle was dug up by the petitioner from the fireplace, not one has been called to give evidence and no reason was given why none was called. If the respondent's story about the fetish is true, why should the petitioner protest so vehemently at the family meeting as his witness Thomas Arthur Elton Campbell deposed? I do not believe the respondent on this point. I do not believe that the petitioner had anything to do with the practice of fetish and I so find. In my view, the marriage had deteriorated to such an extent due to the fault of the respondent that the respondent was determined to get rid of the petitioner at all costs and so he used the suggestion of her practising fetish as a ruse to get her out of the way. I find on the evidence that the respondent deserted the petitioner.

Although the petitioner in her evidence mentioned a number of specific acts of cruelty committed on her by the respondent, the respondent in his evidence-in-chief made no answer to these allegations. It is true as I have already said that the petitioner told a great deal of lies, but I find that these lies are confined to her association with other men, including the party cited. It is my view that she lied in an endeavour to protect some person or persons. I am, however, satisfied on the evidence that the petitioner has proved her case of cruelty as well as her case of desertion.

As regards adultery, both sides have admitted having committed adultery. The petitioner says that the respondent conduced to her adultery and the respondent says that the petitioner conduced to

his adultery. In view of my finding on the question of desertion, I hold that the petitioner did not in any way conduce to the respondent's adultery. On the contrary, I find on the evidence that the *causa sine qua non* as well as the *causa causans* for the petitioner's adultery was the desertion and wilful neglect of her by the respondent. 5

Although desertion took place on December 19th, 1949, the petitioner did not present her petition till February 18th, 1964, a period of at least fourteen years having elapsed. The petitioner however explained that she refrained from presenting her petition before then because her mother was trying her best to see if what was left of the marriage could be salvaged. It would appear that it was in pursuance of this that the respondent was encouraged to visit the petitioner at No. 23 Patton Street and to eat of the petitioner's food. The reason for requiring delay to be explained to the satisfaction of the court is that *prima facie* the mere fact of delay upon a complaint of a matter so fundamental to marriage raises doubts as to the reliability of the evidence of the complaining party in support of the complaint. In this case no such doubts arise. I accept the explanation of the petitioner. I do not find in this case facts or circumstances proved which so plainly imply on the part of the petitioner a recognition of the existence and validity of the marriage as to render it inequitable and contrary to public policy to permit her effectually to challenge it. 10 15 20

I now come to the question of the exercise of the court's discretion. In dealing with this question I bear in mind the principles laid down in the case of *Bull v. Bull* (1). I have taken into consideration the fact that the petitioner found great difficulty in disclosing fully her several acts of adultery. In view of what I have already said and also taking into consideration her mentality I do not feel she was consciously or deliberately trying to hide these matters from the court or to mislead the court. I am prepared to overlook her conduct in this regard. In any case the whole truth has come out and I am finally satisfied that the petitioner has in the end told the whole truth. I am satisfied that there is no reasonable prospect of reconciliation between the petitioner and the respondent. The only child of the marriage is now 15 years old. I do not think that his interest would not best be served if I dissolve the marriage. By the dissolution of the marriage, the petitioner would be in a position to marry the father of her adulterous children. It is true that she swore that she would no longer consider subsequent marriage. This, however, I do not take seriously. The interest of the children born 25 30 35 40

of the party cited would best be served if the petitioner were in a position to marry. As I have already found on the evidence, it was the respondent and not the petitioner who was responsible for the break-up of their marriage. Abundant evidence exists of mitigating circumstances on the petitioner's side. There is no evidence that the petitioner was responsible for the break-up of any other marriage. It is my considered view that on the whole the considerations telling in favour of the petitioner are so weighty that I am inclined to exercise my discretion in her favour and I so do. I therefore grant her prayer for a decree nisi and reject the prayer of the respondent for a decree.

As regards her prayer for custody, this is now confined to Bankole, aged 15. He has lived with her mother for the best part of his life and is now living with her mother. His conduct generally, according to the evidence, does not reflect well on his parents and in particular on the mother. He appears to have been a difficult lad and I do feel that perhaps a change, though rather late, might be to his interest. I therefore grant custody of the child of the marriage, Bankole, to the respondent, the petitioner to have reasonable access.

With regard to the petitioner's prayer relating to the recovery of her personal belongings left in the matrimonial home or their approximate value, I am not satisfied that the petitioner has proved this claim. It is true that she was pushed out of the matrimonial home by the respondent. Although she said in her evidence that she went with her mother subsequently to the respondent at No. 7 Upper Easton Street, there was no discussion about the petitioner's things left behind. She also swore that her mother went to the respondent after that. There is no evidence of her having claimed any of the petitioner's things left behind. Furthermore, the petitioner swore that the respondent later visited her regularly at No. 23 Patton Street for some time and ate with her. She said she asked the respondent for her things but the respondent said she should wait. She continued to cook for him. In this regard I prefer the story of the respondent that the petitioner left the matrimonial home with all her belongings. This prayer is therefore refused.

I now come to that part of her prayer which asks that the woman named should be condemned in costs. Mr. McCormack, learned counsel for the respondent, in his final address urged me to strike off or dismiss the woman named from the cause, on the ground

that the provisions of s.6(2) of the Matrimonial Causes Act (*cap.* 102) have not been complied with. I think the objection is belated. Rule 10(1) of the Matrimonial Causes Rules provides that—

“Unless otherwise directed a petition shall not proceed to hearing unless the respondent and every co-respondent thereto and every person named therein has entered an appearance or unless it has been shown by an affidavit in accordance with Form 7 in the Appendix which shall be filed, that the respondents, co-respondents and persons named have been duly served with the petition and by certificate issued out of and filed in the Divorce Registry that they have not appeared.”

This provision has been complied with. In any case I would not in the circumstances of this case condemn the woman named in costs.

The respondent in his prayer contained in his answer has prayed the court to grant damages. It is not stated against whom the damages are being claimed nor the amount of the claim. If it is against the party cited then, as I have already found on the evidence that the respondent was guilty of conducing to the adultery committed by the petitioner with the party cited and of other matrimonial offences, I do not feel myself justified in the circumstances in granting the respondent any damages. His prayer on this claim is therefore refused.

On the question of custody of the child of the marriage I grant both the petitioner and respondent liberty to apply.

The respondent is ordered to pay the petitioner's costs in this cause, such costs to be taxed. I make no order as to costs in the case of the party cited.

*Order accordingly.*