

HARRIS v HARRIS

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COURT OF APPEAL FOR SIERRA LEONE, Civil Appeal 20 of 1975, Hon Mrs Justice AV Awunor-Renner PJ, Hon Mr Justice SB Davies JA, Hon Mr Justice CS Davies JA, 18 March 1976

- [1] **Family Law – Divorce – Petition for divorce must be served personally – Service could not be accepted by solicitor – Matrimonial Causes Rules r 8(1)**
- [2] **Family Law – Divorce – Petition for divorce – Time limit within which respondent to appear must be obtained by order from court – Registrar had no jurisdiction to set time limit and endorse petition – Matrimonial Causes Rules r 9(1), (2), Supreme Court Rules O 8 r 4.**

The appellant appealed against an order of a Decree Nisi for a on the basis that a certified copy of the petition for divorce was never served on his wife as required by rule 8(1) of the Matrimonial Causes Rules. The appellant also contended that the Registrar's endorsement of 30 days on the petition as the period within which the respondent was to appear was done without authority and without the leave of a judge or a court.

Held, per Awunor-Renner J, allowing the appeal:

1. Rule 8(1) of the Matrimonial Causes Rules requires personal service of the petition for divorce on the respondent and this cannot be dispensed with. It was not sufficient for the solicitor for the appellant to accept service of the petition on behalf of the respondent.
2. Under rules 9(1) and (2) of the Matrimonial Causes Rules and Order 8 rule 4 of the Supreme Court Rules, the Master and Registrar had no jurisdiction to have fixed 30 days as the time limited for appearance to be endorsed on the petition. An order should have been obtained from the court to this effect. Therefore the notice to appear which should be endorsed on the petition and which forms part of the petition should be set aside

Legislation referred to

Court of Appeal Rules 1973 r 27

Matrimonial Causes Rules rr 8(1), (4), 9(1), (2), 29(1)

Supreme Court Rules Order 8 r 4

Other sources referred to

Encyclopedia of Court Forms and Precedents in Civil Proceedings Volume 8 p 252

Rayden on Divorce 6th Edition, pp 188, 267 para 90

Appeal

This was an appeal by the husband, Winifred E Harris, against an order of a Decree Nisi for divorce from the respondent, his wife, Roxy J Harris, obtained in the High Court on 26 August 1975. The facts appear sufficiently in the following judgment.

Mr TS Johnson for the appellant.

Mr SH Harding for the respondent

AWUNOR-RENNER PJ: This is an appeal from the order of a Decree Nisi obtained in the High Court and contained in a judgment dated the 26th of August 1975.

At the hearing of the appeal, counsel for the appellant obtained leave by virtue of rule 27 of the Court of Appeal Rules 1973 to adduce evidence in support of his grounds of appeal. Leave having been granted he then proceeded to argue his grounds of appeal as contained in his notice of appeal. The evidence adduced was contained in an affidavit sworn to by the appellant.

Counsel for the appellant argued in his ground 1 that a certified copy of the petition as filed was never served on the respondent as required by law and referred the Court to rule 8(1) of the Matrimonial Causes Rules. This rule states:

"unless otherwise directed a certified copy of every petition shall be personally served upon every respondent and co-respondent named therein".

There is no doubt that this ground of appeal was rightly taken. In *Rayden on Divorce* 6th Edition at paragraph 90 page 267 it is stated as follows:

"Unless otherwise ordered every petition must be served by delivery of a copy either personally or by registered post to every respondent and co-respondent. In the case of *Milne v Milne* 27 Digest at page 391 it was held that acceptance of service by an Attorney on behalf of a respondent is not sufficient. Nor can appearance and pleading cure this defect. See the case of *De Niceville v De Niceville* (1868) 37 L & M 43."

It is quite clear on the above authorities that rule 8(1) of the Matrimonial Causes Rules requires personal service on the respondent and that this cannot be dispensed with. Therefore when the solicitor for the appellant accepted service of the petition on behalf of the respondent he was wrong in doing so and the situation was even made worse when he got a solicitor, one Blyden Jenkins Johnston, to enter an appearance on behalf of the respondent without getting any definite instructions to this effect from her.

Counsel for the appellant also contended that the Registrar's endorsement of 30 days on the petition as filed as the period within which the respondent was to appear was done without authority and without the leave of a judge or a court. He referred the court to rules 9(1) and (2) of the Matrimonial Causes Rules, which also in turn refers to Order 8 rule 4.

Rules 9 (1) and (2) of the Matrimonial Causes Rules state as follows:

Rule 9(1):

"A petition, originating summons notice or other document in a matrimonial cause or matter may be served out of the jurisdiction without leave and subject as aforesaid the practice for the time being in force in respect of the service of a writ of Summons or notice of a writ of summons out of Jurisdiction in other civil causes or matters before the Court shall apply to the service of any such petition, originating summons, notice of other document out of the jurisdiction provided that the certificate of service shall in the case of document of which personal service is required by these rules show the servers means of knowledge as to the identity of the person served".

Rule 9 (2):

"Where a petition, originating summons or notice of a petition for ancillary relief is to be served out of the jurisdiction, the time limited for appearance to be endorsed on the petition or contained in the originating summons or notice shall be fixed having regard to the place or country where or within which the petition or originating summons or notice is to be served in accordance with the practice adopted under Order VIII Rule 4 of the Supreme Court Rules".

Order 8 Rule 4 states as follows:

"Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or the country where or within which the writ is to be served or the notice given".

From the above rules it can be seen therefore that the Master and Registrar had no jurisdiction to have fixed 30 days as the time limited for appearance to be endorsed on the petition. An Order should have been obtained to this effect. Having failed to do so we feel that since the notice to appear which should be endorsed on the petition and which forms part of the petition should be set aside (see *Encyclopedia of Court Forms and Precedents in Civil Proceedings* Volume 8 by Lord Atkins at p 252).

Counsel for the appellant finally contended that the Registrar's certificate which had been granted on the 30th of June 1975 under rule 29 of the Matrimonial Causes Rules was improperly obtained. He alleged that the application for the Registrar's certificate contained certain misstatements:

1. That the petition was personally served on the respondent.

The time limited for appearance as endorsed on the petition was for 30 days but that on the application for Registrar's certificate the number of days limited for entering appearance was stated as 8 days. He also said that it was for the Registrar to see that the proceedings and pleadings were in order before granting his certificate.

Rule 29(1) of the Matrimonial Causes Rules states that:

"The Petitioner or any party who is defending a Matrimonial cause shall before setting the case down for hearing refer the pleadings and proceedings in the cause to the Registrar for his certificate that the pleadings and proceedings are in order and for directions as to the place of hearing and if the cause is one which the discretion of the Court is prayed under section 7(2) of the Act statement informing the Registrar of the fact shall be lodged with the pleadings".

In *Rayden on Divorce* 6th Edition at page 388, it is stated that before any cause can be set down for trial the pleadings and proceedings must be referred to the Registrar for his certificate that all necessary steps have been taken and two parts of the information which should be contained in this application are:

- (1) the place at which the petition was served and
- (2) the time limited for appearance.

On the evidence before this court there is no doubt that the petition was never served personally on the respondent and on the application for the Registrar's certificate all that is stated is that the respondent was duly served on the 26th of May 1975, by whom or where was not stated and whether personal service was effected was not stated either. Finally the application for the Registrar's certificate stated that the time limited for appearance was 8 days. This is clearly not the case. The Registrar therefore before granting his certificate under Rule 29 should have checked to see that all the pleadings and proceedings were in order. This he failed to do.

We therefore order that the petition and all subsequent proceedings be set aside. Respondent herein to pay the cost of this appeal.

Reported by Anthony P Kinnear