



IN THE FAMILY COURT OF NAURU

Matrimonial Case No. 7 of 2019

BETWEEN: **AT**

Petitioner

AND: **GR**

Respondent

JUDGMENT

Petitioner: *Ms. Stella Duburiya*

Respondent: *Unrepresented*

Date of Hearing: *12th November 2021*

Date of Judgment: *30th November*

Catchwords:

Divorce—proof of breakdown—that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent

Divorce -proof of breakdown—that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent—the word “petitioner” in this phrase means the petitioner in this case, not some reasonable person in her position;

Divorce—proof of breakdown—that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent—the test is “Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and character and personalities of the parties?”

Cases referred to:

Ash v Ash [1972] 1 All ER 582.

Livingstone-Stallard v Livingstone-Stallard [1974] 2 All ER 766

O’Neill v O’Neill [1975] 3 All ER 289

Bergin v Bergin [1983] 1 All ER 905.

Bradley v Brandley [1973] 3 All ER 750

Introduction

1. The names of the parties have been anonymized in this judgment to protect the children.
2. The Petitioner (AT) and the Respondent (GR) were married on 29th June 2004 in Aiwo District. There is no evidence of how old they were at the time of marriage. They cohabited in Ewa District and had three children aged 17, 14 and 8 at the time of the hearing. The wife petitioned for divorce on 4th June 2019 but the affidavit of service was not filed until 10th September 2020. The original petition relied on the grounds that the parties had been separated for **about 5 years due** to irreconcilable differences and that there has been a continuous period of 2 years separation preceding the filing of the petition.
3. The respondent did not file any response but he did tell the court that he and the petitioner lived together until February 2021. He orally consented to the divorce. If the former is true, then the divorce cannot be granted under section 9(1)(a)(iii) that *"the parties have lived apart for a continuous period of at least two years **immediately preceding the presentation of the petition** and the respondent consents to a decree being granted.*
4. When this was pointed out to the Petitioner's counsel, they filed an amended petition on 7th October 2021 which claimed that the parties were married on 29th June 2004; that they thereafter cohabited until **sometime in 2014**; that the parties thereafter lived separately due to marital differences; and that the petitioner believed on 4th June 2019 that the marriage had broken down irretrievably and she changed her ground to rely on section 9(1)(a)(i) & (iii)
"that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; and
(ii) that the respondent deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition."
5. The Respondent said he did not object to the dissolution of the marriage. He obtained a pleader who appeared only once and never turned up again. No response was ever filed in this case but when he was asked whether he objected to the petition, he said he did not but that he and the petitioner were living together until February this year.
6. Before we examine the evidence, we would like to point out that it is imperative. when filing for divorce, for the petition to include the date at which the petitioner considered the marriage is over and the date of the separation so that the respondent knows the case he has to face if he opposes the divorce.
7. The date at which the petitioner considers the marriage as over is essential for a petitioner relying on the ground "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." The date on which the petitioner considers that the marriage is over is a unilateral date known only to him or her and it does not need to be communicated to the other party¹. It is to be included in the petition so that the respondent knows the claim against him so he can prepare his defence if he wishes to oppose the divorce. This date is also important because some parties may not be physically separated although the

¹ Santos v Santos [1972] 2 All ER 246 at 253-255 (Court of Appeal)

petitioner has already considered the marriage as over and separation by law has already taken place.

8. The date of actual physical separation should be specified in the petition because the respondent needs to know it for the preparation of his or her response to the petition. Evidence of these two key dates should be given in the hearing.

The law

9. The sole ground for the dissolution of a marriage is that it has broken down irretrievably.² Proof of the breakdown is set out in section 9 of the Act and the two heads that the petitioner is relying on are highlighted below: -

9 Proof of breakdown of marriage

(1) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless:

(a) the Court is satisfied of one or more of the following facts:

(i) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(ii) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(iii) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or

(iv) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition; or

(b) all the conditions set out in subsection (1) of section 10 are fulfilled

The Evidence

10. The evidence consists of affidavit evidence and the sworn evidence of the petitioner because the affidavit evidence stated that the parties lived apart when the respondent said they lived together until February 2021. Any conflict in affidavit evidence can only be settled by oral evidence where the witnesses can be cross-examined and the court decide whose version is to be believed.
11. The petitioner testified that she married the respondent on 29th June 2004 in Aiwo District. They then cohabited in Ewa District for several years and had 3 children now aged 17, 14 and 8. She said that they separated often because of fights they had about the food for the children and about his affairs. Some of the fights were about her temper because she often got angry.
12. The petitioner said her husband was working but often gave money for food that was enough only for one day and he would refuse to give any more. She said he assaulted her several times including one occasion when he hit her with the television screen. In 2005, she was assaulted by the respondent and she suffered injuries. She reported the matter to the police but she could not get a statement because government departments are not required to keep records for over 7 years. We believe her as her evidence was not contested.
13. The petitioner said the first affair that her husband had was with her younger sister who was 22 at the time. She caught them in bed and she assaulted her sister and

² Section 8 of the Matrimonial Causes Act 1972

chased her husband away after 2 weeks. He left for 2 days but kept on coming back. She said that after she caught them: -

"I couldn't think right. I stayed at home. Even my family thought I was losing my mind. They took care of my children for me. Since that incident, I wanted to get a divorce, child. It affected me so much I gave my child away after birth. My second child was born 1 year after my oldest was born.... We stay together for 2 weeks and I send him away. Cant give exact dates. A lot of times he hit me, assault me—even hit me with a TV screen. I reported this matter to police but they wanted a medical report from hospital but they never got any."

14. Later, she was asked whether she could live with him, she replied: -

I can't go back to him as husband and wife because I don't want to go back to him. I can't live in peace and harmony with him. I am asking for divorce. Before, I really wanted maintenance from him [for the children] but now they are all grown up.

15. The petitioner's affidavit shows that the adultery with his sister-in law happened in 2005 and thereafter, she moved from her maternal to her paternal homes in Aiwo District. She tried to resolve the issue. The petitioner does not know how many times the respondent committed adultery with her sister but said as a result, her sister got pregnant.
16. The petitioner said that the second affair that her husband had was with her sister in law. She said her brother told her about it and warned her that he will beat her husband, the respondent; that her husband had other affairs which she could deduce from the love bites on his neck when he returned after a night out.
17. The petitioner testified that she has her own house and she spends most of her time there than with him. Their oldest child and youngest child like their father and so she goes with them to visit their father but that they return to her place after about 2 weeks. In her affidavit, the petitioner refers to this period as the time the respondent said she was with him in 2021³.
18. The petitioner said that she considers her marriage to have broken down irretrievably on 4th June 2019 although she said she considered 2014 as the time she started to believe it had broken down irretrievably and she could not live with the respondent because the respondent's behaviour was mentally, emotionally and physically discomfoting, unstable and insecure.⁴
19. The petitioner said that they had separated in 2014⁵ but that the respondent had deserted her and her children since 4th of June 2019.⁶
20. The petitioner said that should decree nisi be granted, she wants the children to decide about custody but she is agreeable to joint custody. The children are with her but she does not want any maintenance from him.
21. The respondent did not wish to cross-examine the petitioner and he did not want to give evidence or call any witnesses.
22. The evidence of the petitioner is therefore uncontested. We believe her evidence.

³ Para 18-19 of affidavit of the petitioner.

⁴ Para 23-24 of petitioner's affidavit.

⁵ Para 14 of the affidavit.

⁶ Para 25 of affidavit.

DISCUSSION

First Ground: That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent:

23. The petitioner relied firstly on section 9 (1)(a)(i) of the Matrimonial Causes Act 1973 which provides: -

9 Proof of breakdown of marriage

(1) *The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless:*

(a) *the Court is satisfied of one or more of the following facts:*

(i) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

24. A search of Paclii reveals that there is only one case in Nauru dealing with divorce but the issue there was whether a differently constituted court that did not hear the evidence could reach a decision on the case. We have therefore spent more time in preparing this judgment so that practitioners and parties can be given some guidance on the law in this area.
25. Section 9(1)(a)(i) of the *Matrimonial Causes Act 1973 (MCA)* is an exact copy of section 2(1)(b) of the *UK Divorce Reform Act 1969* and there are numerous decided cases in the All England Law Reports and Halsbury's Laws of England available in the Supreme Court Law library which can guide this court on the meaning of the words and phrases in the *Matrimonial Causes Act 1973*.
26. The ground of divorce (i) "*that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent*" has been interpreted by the Family Division of the High Court of England and Wales or the Court of Appeal in many cases which we will discuss below.

The test

27. The word "petitioner" in section 2(1)(b) of the *UK Divorce Reform Act 1969* was discussed by Bagnall J in *Ash v Ash*⁷: -

the word "petitioner" means the particular petitioner in the case under consideration and not an ordinary reasonable spouse looked at as a petitioner. The Court in determining for the purposes of s. 2(1)(b) whether the particular petitioner can or cannot reasonably be expected to live with the particular respondent must take into account the character, personality, disposition and behavior of the petitioner as well as the behavior of the respondent as alleged and as established in evidence.

(emphasis ours)

28. In *Livingstone-Stallard v Livingstone-Stallard*⁸, Dunn J of the Family Division of the High Court said the question before the court in an application relying section 2(1)(b) of the *UK Divorce Reform Act 1969* is:

.....the court must ask itself the question: -

"Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him,

⁷ [1972] 1 All ER 582, at 585

⁸ [1974] 2 All ER 766

taking into account the whole of the circumstances and character and personalities of the parties?

29. The test in *Livingstone-Stallard v Livingstone Stallard* above was approved and applied by the Court of Appeal in *O'Neill v O'Neill*⁹ and by the Family Division of the High Court in *Bergin v Bergin*¹⁰
30. From the evidence, we found the petitioner to be a woman who was very angry with her husband and very frustrated with the delays in her case. She had tried to divorce her husband in 2006, following his adultery with her sister but had been frustrated when advised that she did not qualify for a divorce. Further, she filed an application to cease interim maintenance payments so that she could abandon her maintenance case to pursue this divorce.
31. The respondent did not give evidence and did not cross-examine the petitioner when given the opportunity. He did not deny the evidence of the petitioner.
32. The evidence reveals a course of conduct of ill-treatment over the years and breaches of the marital obligations by the respondent. The cumulative effect of the adultery, the withholding of money for food, the assaults and ill-treatment on the petitioner constitute the behavior that we have to consider on this particular petitioner. The effect of this behaviour on the petitioner is that "she could not live with the respondent because his behavior was mentally, emotionally and physically discomfoting, unstable and insecure."¹¹
33. Applying the test set out in *Livingstone-Stallard v Livingstone Stallard* we ask ourselves the question:

Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and character and personalities of the parties?
34. We have taken account of the personalities of the parties and the whole of the circumstances of their marriage and we conclude that no right thinking person would expect the petitioner AT to live with the respondent after the way he had behaved towards her. The petitioner's application would succeed under section 9(1)(a)(i) of the *Matrimonial Causes Act 1973 (MCA)* except for the issue of possible condonation which could be inferred from the fact that the petitioner continued to visit the respondent at his home after she had considered the marriage irretrievably broken down. In fact, after the affair with her sister in 2005, the petitioner had two more children with the respondent who were born in 2007 and 2014. She said they separated in 2014 and in her petition, she said her husband deserted her on 6th June 2019, the date she considered her marriage to have broken down irretrievably.
35. The only evidence that might be considered cohabitation after she considered the marriage over was for one week in 2021 and she has explained that she accompanied one of her children to visit a sister who was with their father. She further clarified that she was not cohabiting with him.
36. In *Bradley v Brandley*¹², (CA) Lord Denning said:-

⁹ [1975] 3 All ER 289 at 295

¹⁰ [1983] 1 All ER 905.

¹¹ Para 23-24 of petitioner's affidavit.

¹² [1973] 3 All ER 750 at 752

"Although in an ordinary case if the petitioner has lived with the respondent for a appreciable time after the behavior complained of it may be that the court cannot, or is at least unlikely, to conclude that "the petitioner cannot be reasonably be expected to live with the respondent," in exceptional circumstances, where it is shown that the petitioner has no option but to continue living there, the petitioner will satisfy the requirements of s. 2(1)(b).

37. Lord Scarman said a 753:

....the mere fact that she is living with him and was living with him when the case came to court, does not by itself establish that she could reasonably be expected to live with him. There are many many reasons why a woman will go on living with a beast of a husband because she believes it to be in the true interest of her children.

38. Clearly, this visit is not to renew cohabitation but merely to allow the children to visit their father and it does not affect the fact of her reliance on s. 9(1)(a)(i) for her divorce.

Conclusion

39. On this ground, we find that the marriage of the parties has broken down irretrievably and we order that decree nisi should issue.

Desertion

40. The petition also relied on the ground of desertion as set out in section 9(1)(a)(ii) of the *Matrimonial Causes Act 1973* states: -

" (ii) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition

41. This ground must fail as the evidence of the petitioner is that her husband deserted her on 6 June 2019. A petition for divorce based on this fact cannot be filed until 7 June 2021 as there must be desertion for at least two years before the petition is filed.

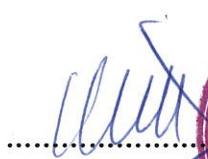
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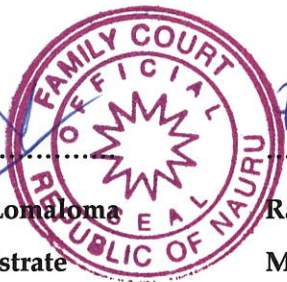

42. For the reasons given, *decree nisi* will issue today and unless stayed, *decree absolute* will issue on 23 December 2021.

43. The parties shall have joint custody of the children of the marriage.

DATED this.....^{30th} day of November 2021


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John Detagouwa
Member


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Penijamini R Lomaloma
Resident Magistrate
Chairman of Family Court



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Raelytta Daoe
Member