

ERIC KIKOLO -v- TEKAITI ABERAM

HIGH COURT OF SOLOMON ISLANDS
(FRANK O. KABUI, J.)

Civil Case No. 268 of 2001

Date of Hearing: 29th April 2002
Date of Judgment: 08th May 2002

Mrs A.N. Tongarutu for the Petitioner
Respondent was not in Court

JUDGMENT

(Kabui, J): This is a Petition for dissolution of marriage on the ground of desertion filed by the Petitioner on 3rd October 2001. The Petition was served on the Respondent's de facto husband on 15th September 2001. The affidavit of service was filed on 15th November 2001. The first Notice of Hearing was also served on that same date. No one attended Court on 30th November 2001. The second Notice of Hearing for 26th April 2002 was served on the Respondent on 2nd April 2002. The Respondent did not attend Court and the hearing was adjourned to Monday 29th April 2002 at 10:00 am. By letter dated 26th April 2002, the Solicitor for the Petitioner informed the Respondent of the next hearing date and time. The affidavit of service was filed on 29th April 2002 showing that the said letter was served on her at her work place in the Anthony Saru Building in Honiara. The Respondent did not attend Court and I granted leave for the Petitioner to proceed in the absence of the Respondent.

The Facts

The facts are not in dispute. The parties were married in Wagina in the Western Province on 21st December 1985. There is a Marriage Certificate to this effect. The parties had lived together in Honiara and Gizo. There is no issue of this marriage. On their return to Gizo the Respondent returned to her home at Wagina whilst the Petitioner went to Fiji to attend a training course there. Both parties agreed to this parting arrangement. The Petitioner was away for one year. Whilst in Fiji he wrote to his wife but he received no reply from her. When he returned to Solomon Islands, he went back to Gizo. He sent messages from there to her in Wagina but received no reply. He had learned from other source that his messages had been ignored. He sent further messages but the result was the same. He had learned that his wife was already staying with another male partner so he did not bother to go to Wagina. There has been no contact between the parties since. His wife is staying with that same male partner today. He met someone towards the end of last year and is currently staying with her.

The ground for dissolution of marriage

This Petition was filed under section 5(1)(b) of the Islanders Divorce Act (Cap. 170) which reads, **..."A petition for divorce may be presented to the Court, either by the husband or the wife on the ground that the respondent-**

- (a) **has, since the celebration of the marriage, committed adultery; or**
- (b) **has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or**
- (c) **has, since the celebration of the marriage, treated the petitioner with cruelty, or**
- (d) **has lived apart from the petitioner for a continuous period of at least five years immediately preceding the presentation of the petitioner; or**
- (e) **is incurably of unsound mind and has continuously been under care and treatment for a period of at least five years immediately preceding the presentation of the petition; and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.**

(2)....."...

My reading of this section is that the grounds for divorce are in the alternative to each other. That is, each ground is exclusive on its own. The Petition in this case does show that the Respondent has been committing adultery with the same male partner since 1986 the year the Petitioner left for Fiji and is continuing to do so. This is the easiest ground to prove in this case. I do not know why the Petitioner had chosen to allege desertion coupled with adultery as the ground for divorce. The other choice was to allege living apart for a continuous period of 5 years preceding the presentation of the Petition. This can be done under section 5(1)(d) of the Act. If the Court finds that the marriage has broken down irretrievably the court will grant a divorce. In time past, the only remedy for desertion was restitution of conjugal rights. By section 16 of the Matrimonial Causes Act, 1857 desertion without cause for 2 years became a ground for judicial separation only. Desertion was not a ground for a decree of separation under ecclesiastical or common law prior to the Matrimonial Causes Act, 1857 above. By section 27 of the same Act, divorce could be granted to the wife on the ground of desertion for 2 years without cause if adultery was also an element. In **Weatherley v. Weatherley** [1947] 1 A. E. R. 563 Lord Jowitt, L. C. had this to say, **..."Under the Matrimonial Causes Act, 1857, adultery, coupled with desertion without reasonable excuse for two years or upwards had been a ground on which a wife could obtain a decree of divorce, and desertion without cause was of itself a ground on which a sentence of judicial separation could be obtained. The Matrimonial Causes Act, 1937, for the first time, made desertion without cause a ground of divorce if it continued for three years immediately preceding the presentation of the petition. It is noticeable that in neither of these two Acts was**

desertion defined. In these circumstances I think we should first consider what was the state of the law as laid down in the decided cases dealing with the subject of desertion up to the date of the passing of the Act of 1937. In the absence of any statutory definition of desertion I should think it right to presume that the legislature, in using that word, used it in the understood and accepted sense“... The combination of desertion and adultery as a ground for divorce was subsequently saved by section 176 of the Judicature (Consolidation) Act, 1925 but otherwise that combination was not re-enacted. Section 176A of the Matrimonial Causes Act, 1937 separated adultery and desertion as two separate grounds for divorce. This section was re-enacted in section 1 of the Matrimonial Causes Act, 1950 upon which I think our Islanders' Divorce Act is based although section 1 of the Matrimonial Causes Act 1950 is no doubt attributed to section 176 as amended of the Judicature (Consolidation), Act, 1925. There is a world of difference between adultery and desertion. Desertion is not an act of adultery. The elements that constitute them are different and the manner of proof in each case is different. In this case, the Respondent and her partner have been living together as de factor husband and wife for more than 15 years and are continuing to do so. They are for all practical purposes married but outside of the law of marriage. Whilst it can be said that there is no proof of adultery in this case, that is not the point here. The point is that there is evidence of adultery in this case, which provides the basis for seeking the dissolution of the marriage on that ground. An act of adultery is not desertion. Adultery is a ground in its own right upon which the Petitioner may seek the dissolution of the marriage. By the same token, continuous acts of adultery in de facto relationship for a long period of time as in this case cannot become desertion or would co-exist with adultery, as it was the case for wives in 1857. I do not think this is a case of desertion. This Petition is dismissed. The Petitioner is of course at liberty to come back to Court on the proper ground for divorce.

F. O. Kabui
Judge