IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC 14051

IN THE MATTER of The Divorce and Matrimonial Causes Ordinance 1961 and the Divorce Matrimonial Causes Rules 1980

BETWEEN: SIAOSI MELEISEA of Afega, Lecturer

Applicant

A N D: ANNA ELAINE ASOLEAGA MELEISEA of Apia, Bank Clerk

Respondent

Counsel: T. Malifa for Applicant
P. Meredith for Respondent

Hearing: 17th May 1994

Decision: 24th May 1994

DECISION OF SAPOLU, CJ

On 17 May 1994, the Court heard the present application and decided to strike our the application with costs of $300 awarded to the respondent. Counsel for the applicant pointed out that the issues involved in this case are novel issues as far as Western Samoan law is concerned. I told counsel that I will prepare a written decision with reasons and give it to counsel in due course. That written decision is now given.

The present application is brought under section 37 of the Divorce and Matrimonial Causes Ordinance 1961 and section 62 of the Maintenance and

Affiliation Act 1967 seeking recognition of a decree of divorce claimed to have been obtained by the applicant from the Family Court, First Circuit of the State of Hawaii, United States of America, as well as registration of a child support maintenance order obtained by the applicant from the same Court. The application for registration of the child support maintenance order was abandoned at the hearing of this application so the Court will not deal with that application.

The evidence placed before the Court was in the form of personal affidavits (with annexures) by the parties who were married in Apia on 13 December 1984. They have two children from their marriage. The first child was born in 1985 and the second child in 1989. In January 1991, the applicant left for Hawaii under an exchange visitor program to undertake post-graduate studies for a master's degree in horticulture. In July 1991, he was joined in Hawaii by the respondent and their children. However it turned out that the applicant's student allowance was inadequate to maintain and upkeep his family and so the respondent and the children returned to Samoa while the applicant continued with his studies in Hawaii. In March and July 1992 the applicant came to Samoa to visit and see the respondent and their children and then returned to his studies in Hawaii. He was expected to pay another visit for Christmas in December 1992 but failed to do so.

Then according to the respondent she was shocked when she received a phone call on New Years Eve 1992 from the applicant and he suggested to her to file a petition to divorce him as he wanted to remarry. She refused as she and the applicant had never separated and the only purpose for the applicant being in Hawaii was for his post-graduate studies in horticulture.

Then about 13 May 1993, the respondent received through the mail a complaint for divorce which the applicant appears to have filed in the Family Court, First Circuit of the State of Hawaii, United States of America, on 26 April 1993. The ground for divorce alleged in the complaint was that the applicant's marriage to the respondent had irretrievably broken down. The respondent was required to send a written answer within 20 days of receipt of the complaint which she did by sending a written answer on 18 May 1993 by courier to the chief clerk of the Family Court, First Circuit of the State of Hawaii, United States of America and to the attorney for the applicant.

In the respondent's written answer she opposed the complaint for divorce as her marriage to the applicant had not irretrievably broken down. She says that the applicant was only in Hawaii since 9 Janaury 1991 for post-graduate studies under an exchange visitor program, that she and her children had joined the applicant in Hawaii in July 1991 but had to return to Samoa as the applicant's student's allowance could not support them in Hawaii, and that in March and July 1992 the applicant visited the respondent and their children and was expected to pay a visit again for Christmas 1992. She also opposed the complaint for divorce on the ground that she and the applicant had never been separated. Mr Meredith, counsel for the respondent told the Court during the hearing that the respondent never received a reply to her written answer so that she did not even know when when the Court in Hawaii would hear the case. So the respondent did not know the hearing date and could not have been present at the proceedings if she had wanted to do so. If this is the true position, one would have expected that when the respondent filed an opposition to the complaint for divorce, the principles of natural justice would have required that the respondent should have been informed of the date of hearing so that she

could appear or be represented if she wished. It should, however, be mentioned that there is no evidence before this Court as to the procedure for dealing with a complaint for divorce in the State of Hawaii.

The respondent also produced a copy of a faxed letter from one Rex Fransden, the bishop of the Church of Jesus Christ of Latter Day Saints for the Laie Fifth Ward in Hawaii saying that he married the applicant and one Roxanne Robinson on 26 June 1993 in Kailua, Hawaii. This faxed letter is addressed to one of the partners for the law firm acting for the respondent and is signed by Rex Fransden. The document produced by the applicant as the decree granting divorce shows that the date of hearing of the divorce complaint was 25 August 1993. This document produced as the divorce decree calls for comment.

It says a hearing was held before a Judge but counsel for the respondent says the respondent was not informed of a date of hearing so that she could not have attended the hearing and present her side of the case if she had wanted to or arrange for legal representation. I am not at all casting any reflection on the presiding Judge as it is not clear who was responsible for informing the respondent as to the date of hearing. There is also no evidence before this Court as to the procedure for dealing with a complaint for divorce under the laws of the State of Hawaii where a respondent who resides overseas has opposed a complaint for divorce. This document then says that the divorce decree is effective after it is signed and filed. And it appears from the third page of the document that the applicant signed above his printed name with the date of 25 August 1993 and his attorney also signed approving the form of the document. Then it also appears that someone signed above the respondent's printed name without

a date, and there is also no signature by an attorney for the respondent. It is clear from the evidence that the respondent did not sign this divorce decree but counsel for the applicant says the Judge who heard the divorce complaint signed above the respondent's printed name. I must say that I find it most difficult to believe without proper evidence that any responsible Court will sign the name of the presiding Judge in a divorce decree above the printed name of a party to divorce proceedings without the knowledge of that party. The presiding Judge does not even sign where his own name appears twice in the divorce decree. There is a seal beside the name of the Judge where it appears on the third page of the decree but it is not an informative seal as the seal contains only the word "seal" and nothing else. There is no signature accompanying the seal. Be that as it may, counsel for the respondent submits that as the divorce decree is not to be effective until it is signed and only the applicant, and not the respondent has signed, the divorce decree must on its own terms be legally ineffective. I will come back to this submission in the course of this decision.

Counsel for the applicant also produced two fresh documents to the Court during the hearing of this application. The first document appears to be a copy of a fax from the attorney who acted for the applicant in Hawaii and is dated 17 May 1994 and addressed to Mr Malifa. The fax is quoted hereunder.

MEMORANDUM

TO: Mr Malifa
FR: Jean Malia Orque-Lee, Esq
RE: Meleisea

Hawaii is a no-fault divorce state and as long as the 3-month jurisdiction requirement is met, anyone can obtain a divorce. Domicile was met by Siaosi having lived here 3 months or more continuously prior to filing for divorce. Anna was served by registered mail, return receipt requested this was sufficient "service" under the Hawaii law (copy enclosed), therefore is sufficient "notice" to Anna. The fact that Anna filed "an answer" to the divorce shows that sh received notice of the Complaint being filed.

> The initials above Anna's name in the Divorce Decree filed 9/9/93 is Judge John C Bryant, Jr (his initials), and was put there by the Court. Anna was notified of the hearing (copy of transmittal enclosed) set for 8/25/93 at 9.30am; a relative called my office confirming the hearing. Anna was not represented but divorce was granted nonetheless.

This fax says that the applicant satisfied the requirements for domicile prior to filing divorce proceedings in Hawaii having lived in Hawaii for a continuous period of not less than 3 months. It also says that sufficient service of the divorce proceedings under "Hawaiian law (copy enclosed)" was effected on the respondent. A copy of that Hawaiian law in relation to service was not submitted to this Court. Then follows the statement which says that the initials in the divorce decree above the respondent's printed name are those of the presiding Judge. As already stated, I find it most difficult in the absence of proper evidence that any responsible Court would do such a thing. Then there is the statement that the respondent was notified of the date of hearing of the divorce proceedings "(copy of transmittal enclosed)" and a relative called the office of the applicant's attorney to confirm the hearing. Here again there is no copy of the aforesaid "transmittal" submitted before this Court and no mention is made of the name of the respondent's relative who called in to the office of the applicant's attorney. This faxed document is also unsigned, unsworn and non-notarised.

The second fresh document produced by counsel for the applicant during the hearing cannot, in the absence of proper evidence before this Court, be described as the relevant law of the State of Hawaii on the question of "jurisdiction". There is a proper mode for proving foreign law in domestic proceedings and I cannot without proper evidence accept

what counsel for the applicant says that this one leaf document represents the relevant law of the State of Hawaii as to a Hawaiian Court's jurisdiction when granting a divorce decree on the basis of domicile. In the first place there is no mention in the unsigned faxed memorandum dated 17 May 1994 already referred to that this one leaf document represents the relevant law of the State of Hawaii on the question of the Court's jurisdiction to grant a divorce decree on the basis of domicile. There is also no mention of the publication from which this one leaft document was photocopied. In all I do not regard this document without proper evidence as sufficient proof of the relevant law of the State of Hawaii on the question of domicile as applicable to this case. I should also mention that it is not clear from this document whether what it means is that "domicile" and "physical presence" are synonymous or different concepts. It gives no assistance as to the meaning of "domicile" as it applies in the law of the State of Hawaii for the purpose of divorce proceedings.

Having said all that, it must be made clear that I am not saying or suggesting that the evidence supplied by the applicant is untrue. It may very well be true. What concerns this Court is the insufficient cogency or probative force of the applicant's evidence to satisfy this Court on the required standard of proof that the application should be granted.

I turn now to the law which applies to this case. As already stated counsel for the respondent told the Court that the issues involved in this case are novel issues as far as Western Samoan law is concerned. That is most probably correct. At least there is no reported decision by a Western Samoa Court on the issues raised in this case. It is for that reason that both counsel for the applicant and the respondent would welcome

a written decision from the Court in the case. For the same reason, I have decided to give this written decision.

Now section 37(1) of the Divorce and Matrimonial Causes Ordinance (insofar as it is relevant and could be applicable to this case) provides as follows :

> "37(1) The validity of any decree or order or legislative "enactment for divorce or nullity of marriage made (whether "before or after the commencement of this Ordinance) by a "Court or legislature of any country outside Western Samoa, "shall, by virtue of this section, be recognised in "Western Samoa if -
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> "(a) That Court or legislature has exercised jurisdiction -
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> " (i) In any case, on the basis of the domicile of " one or both of the parties to the marriage " in that country; or
>
> " (ii) In any case on the basis of the residence of " one or both of the parties to the marriage " in that country if at the commencement of the " proceedings such party had been resident in " that country for at least years; or
>
> " (iii) .....
> " (iv) .....
> " (v) .....
> " (vi) .....
>
> "(b) The decree or order or enactment is recognised as valid " in the Courts of a country in which at least one of the " parties to the marriage is domiciled or is deemed by " the law of that country to have been domiciled".

Section 37(2) then goes on to provide :

> "37(2) Nothing in this section shall affect the validity of "any decree or order or legislative enactment for divorce or "nullity of marriage or of any dissolution of marriage other- "wise than by judicial process that would be recognised in "the Court apart from this section".

The application in this case is founded exclusively on section 37(1)(a)(i), that is, the applicant was domiciled in the State of Hawaii at the material time. Counsel for the applicant did not base his application on any other ground. This suggests that the divorce decree was granted in Hawaii on the basis of domicile. Counsel for the applicant then says that under the law of the State of Hawaii no person may file a divorce complaint unless he has been domiciled in Hawaii for three months prior to the filing of such complaint but six months domicile is required before a divorce decree is made absolute. As I have already stated, I am not saying or suggesting that what counsel for the applicant submits as the relevant law of the State of Hawaii is untrue. It may very well be true. But the proof he has placed before the Court of that law does not satisfy this Court on the required standard of proof.

The next difficulty is that counsel for the applicant told the Court that at all times the applicant was residing in Hawaii his intention was to return to Western Samoa at the end of his post-graduate studies. Because of that admission by counsel for the applicant, counsel for the respondent argued that under English common law the applicant could not have been domiciled in the State of Hawaii at all material times as he never had any intention to reside there permanently or for an indefinite period of time. His intention all along was to return to Western Samoa at the end of his post-graduate studies. Counsel for the respondent also argued that the kind of domicile advanced by the applicant is known to English common law as domicile of choice. Such domicile requires not only residence in a territory with a distinctive legal system but also the intention to reside there permanently. The word permanently in this context connotes an

intention to reside in a particular place for an indefinite period of time. I accept this argument as correctly reflecting the position under English common law with regard to a domicile of choice. I would add here that as the common law concepts of domicile of origin and domicile of dependency do not apply to the applicant here having regard to the circumstances of this case, the applicant would have to show whether he comes under the umbrella of domicile of choice. But with the concession made by counsel for the applicant that the applicant's intention at all times he was present in the State of Hawaii was to return to Western Samoa at the end of his post-graduate studies, there is no way he can satisfy the common law test for domicile of choice. So this application cannot succeed under section 37(1)(a)(i) of the Ordinance. I should also mention here that the common law test for domicile of choice applies in Western Samoa by virtue of Article 111 of the Constitution and I adopt the common law test for domicile of choice as part of Western Samoa law.

This places the applicant in a difficult situation because his application is founded exclusively on the basis that he obtained his divorce decree on the basis that he was domiciled in the State of Hawaii at all material times. And as the word domicile used in our Ordinance should be interpreted in accordance with Western Samoa law, this may create further difficulty for the applicant especially if the concept of domicile under the laws of the State of Hawaii bears the same meaning as the concept of domicile under Western Samoan law as it will be shown in the course of this decision.

For the sake of completeness, I will refer now to the other provisions of section 37 which have already been cited. Section 37(1)(a)(ii)

provides that an overseas divorce decree obtained in a foreign country shall also be recognised if at the time the foreign Court exercised jurisdiction in the matter one or both of the parties to the marriage had been resident for at least two years in that country. It is clear to me that this criterion would have been available to the applicant if his divorce decree was granted on the basis of physical presence in Hawaii as the uncontested evidence shows that he resided in the State of Hawaii from January 1991 to August 1993 before he commenced divorce proceedings in the Family Court, First Circuit of the State of Hawaii. However the present application is not founded on the basis of physical presence or residence in the State of Hawaii but founded on the basis of domicile.

There is then the criterion provided in section 37(1)(b) which provides that an overseas divorce decree shall be recognised in Western Samoa where that divorce decree is recognised as valid in the Courts of a country in which one of the parties to the marriage is domiciled or deemed to be domiciled. This clearly means that if an overseas divorce decree is recognised as valid in the Courts of a country in which one of the parties to a marriage is domiciled then such a decree is entitled to be recognised in Western Samoa. One would expect that by virtue of the United States Constitution divorce decrees of the Courts of the State of Hawaii would be recognised by the Courts of other States which make up the country called the United States of America. Applying section 1 of Article 4 of the United States Constituion which provides : "Full faith and credit shall be given in each state to the public act, records and judicial proceedings of every other state", there is no doubt that full faith and credit would be given to the divorce decrees of the Courts of the State of Hawaii by the

Courts of other States which make up the country called the United States of America : 24 American Jurisprudence 21 Dismissal Divorce and Separation para 948. Even though this criterion was not raised and no evidence was adduced to prove it, it is clear that if the necessary evidence was available to satisfy this Court that the applicant was domiciled in the State of Hawaii and the divorce decree is a valid one, this criterion provided in section 37(1)(b) could have been available to the applicant.

Now if an applicant who seeks recognition of an overseas divorce decree satisfies any one of the criterion provided in section 37(1) (including those not expressly mentioned here), then that is the end of his inquiry, he need not go any further. But if the applicant cannot satisfy any of the criterion provided in section 37(1), then he would have to proceed further to consider whether his application comes within section 37(2) which permits the application under Western Samoan law of the common law principle of private international law as developed in Travers v Holley [1953] P 245; [1953] 2 All E.R 794 and Indyka v Indyka [1969] 1 A.C 33; [1967] 2 All E.R 689.

The common law principle which is said to have been laid down in Indyka's case is that the Court will recognise an overseas divorce decree if the applicant shows that there is a "real and substantial connection" between himself and the country where the divorce decree was obtained either because of the length and quality of his residence in that country or because of such other factors as nationality of that country. To what extent the Indyka principle is still applicable in England is not clear, but it is clear to me that the New Zealand Courts are of the view that section 82(2) of the Matrimonial Proceedings Act 1963 (NZ), as now replaced

by section 44(2) of the Family Proceedings Act 1980 (NZ), permits the application of the Indyka principle under New Zealand law : Re Darling [1975] 1 NZLR 382 per Casey J, and Godfrey v Godfrey [1976] 1 NZLR 711 per Mahon J. Section 82(2) of the Matrimonial Proceedings Act 1963 (NZ) and its successor, section 44(2) of the Family Proceedings Act 1980 (NZ), are identical word for word to section 37(2) of our own Divorce and Matrimonial Causes Ordinance 1961 and therefore New Zealand authorities on the interpretation of their relevant statutory provision are highly persuasive authorities in interpreting our counterpart statutory provision. I respectfully adopt the interpretation placed on the relevant New Zealand statutory provision by the Courts in Re Darling and Godfrey v Godfrey and hold that section 37(2) of our Ordinance permits the application under Western Samoan law of the common law Indyka principle to an application for recognition of an overseas divorce decree.

I will turn now to the circumstances relevant to this case where the Court may deny recognition of an overseas divorce decree. Section 37(1) provides that any decree by a Court of any country outside of Western Samoa "shall" be recognised in Western Samoa if that Court has exercised jurisdiction on the basis of any of the criterion provided in that section. Notwithstanding what appears to be the mandatory terms of section 37(1), the Courts have taken the view that it does not prevent the application of the common law rules to the effect that in certain circumstances the Courts will not recognise overseas divorce decree. As already stated, I will refer to only such circumstances as appear relevant to this case but they must not be treated as the only circumstances existing at common law where an overseas divorce decree may be denied recognition by the Courts. Under English law a general ground of being manifestly contrary to public policy

is available to refuse recognition of an overseas divorce decree : 8 Halsburys Laws of England, 4th ed., para 487.

Now where there is fraud which goes to the jurisdiction of the foreign Court which issued an overseas divorce decree, a Western Samoan Court will deny recognition of such a decree : Middleton v Middleton [1967] P 62; [1966] 1 All E.R 168. It must be made clear that I am not saying or suggesting that there was in fact fraud which goes to the jurisdiction of the Hawaiian Court in this case. With more evidence from the applicant, it may well be that there was no fraud whatsoever involved in this case. But I have touched on the point because of the clear implication that arises from arguments by counsel for the respondent which I will set out in this way.

If the concept of domicile as used in the law of the State of Hawaii means the same as the concept of domicile of choice as used in English common law then that gives rise to the inference that the divorce decree obtained by the applicant in Hawaii on the basis of his domicile in Hawaii may have been obtained by fraud through deception since his counsel admits that the applicant never had any intention to reside permanently or for an indefinite period of time in the State of Hawaii. That is the clear implication from the argument by counsel for the respondent that the applicant was not domiciled in the State of Hawaii when he obtained his divorce decree as the applicant never had any intention to reside in Hawaii permanently or for an indefinite period of time.

It appears to me that the argument by counsel for the respondent proceeds on the assumption that the concept of domicile of choice under English common

law bears the same meaning as the concept of domicile under the laws of the State of Hawaii. This is where the evidence put before the Court is far from clear. It may be that the concept of domicile of choice under English common law bears a different meaning from the concept of domicile under the laws of the State of Hawaii but there is no evidence. It is also to be noted that the basis on which the Hawaiian Court assumed jurisdiction, whether it was domicile or some other criterion, is not specified in the decree. If the true position is that the concept of domicile under the laws of the State of Hawaii bears a different meaning from the common law concept of domicile of choice and the applicant had satisfied the requirements of domicile under the laws of the State of Hawaii then there could not have been any deception amounting to fraud on the part of the applicant which goes to the jurisdiction of the Hawaiian Court. But if the true position turns out to be otherwise, then this Court may come to a different conclusion. Here I must point out that a party alleging fraud must lay an evidential foundation to support that allegation. Given the present state of the evidence, there is no fraud established as implied in the argument by counsel for the respondent.

I turn now to the next relevant ground on which the Court may deny recognition of the overseas divorce decree in this case. That is, if the overseas divorce decree was obtained contrary to the principles of natural justice for want of notice or the absence of an adequate opportunity for a party to present his or her side of the case, the Court may deny recognition of an overseas divorce decree : see **Rudd v Rudd [1924] P 72, 8 Halsburys Laws of England, 4th ed., para 487** and **Cheshire and North Private International Law, 10th ed., pp 385-386** which is the latest edition of this work available to the Court. In this case, counsel for the respondent says

that while the respondent was served with the applicant's divorce complaint and she replied opposing the complaint, the respondent was never informed of any date of hearing. Thus counsel for the respondent goes on to argue that the respondent did not have the opportunity to attend the hearing and present her side of the case or arrange for legal representation at the hearing.' I have already referred to the unsigned, unsworn and non-notarised fax dated 17 May '99- from the attorney for the applicant in Hawaii and the unsatisfactory features of that document. It says that the respondent was notified of the date of hearing of the divorce proceedings and a copy of the transmittal is enclosed but no copy of the said transmittal was placed before the Court. Then there is the statement in the fax that a relative of the respondent called into the office of the applicant's attorney in Hawaii to confirm the hearing. There is also no mention of the name of the respondent's relative alleged to have confirmed the hearing date. I find this part of the evidence very unsatisfactory.

I go on now to the third ground submitted by counsel for the respondent for denial of recognition of the divorce decree in this case. That is, the divorce decree on its own terms is legally ineffective. This is based on the fact that the decree itself stipulates that it will be effective after it is being signed and filed. As only the applicant but not the respondent has signed the decree it must therefore on its own terms be legally ineffective. Accordingly recognition should be denied. I accept as a matter of principle that if an overseas divorce decree is not legally effective in the country where it was obtained then recognition of that overseas divorce decree by the Courts will be denied. To recognise such a decree when it is legally ineffective in the country where it was obtained would be contrary to principle and good sense. I will leave open the question of what will

happen where a decree is validly granted but one of the parties refuses to sign. As already stated, counsel for the applicant asserts that the presiding Judge in Hawaii signed above the printed name of the respondent in the divorce decree. This assertion seems to be based on what is said in the unsigned, unsworn and non-notarised fax of 17 May 1994 from the applicant's attorney in Hawaii. I have already stated that I find it difficult to accept this assertion. There is no proof that the presiding Judge signed or had authority to sign above the respondent's name in the divorce decree since one would expect as a matter of common sense that a person whose printed name appears in the decree is the person to sign above that name. As it stands, the divorce decree in this case appears to be legally ineffective.

Counsel for the applicant, I must say, became aware during the course of the argument of the evidential problems he was confronted with and applied to the Court for leave to adduce further evidence to support his case. At the end of the argument I immediately decided that on the evidence before the Court the applicant has not satisfied the Court on the required standard of proof which is on the balance of probabilities and therefore the application is to be struck out but counsel for the applicant may adduce further evidence in the future if he wishes to do so and the Court will decide that issue when it arises. I also awarded costs of $300 to the respondent.

After that decision was delivered the Court considered whether the wording of its decision be modified. Upon further reflection I have come to the view that the Court might have been functus officio when it made its decision immediately after the argument. For that reason the decision

I made that the application be struck out and counsel for the applicant may adduce further evidence if he wishes to do so but that issue will be decided when it arises still remains. Likewise the decision that the applicant pays $300 costs to the respondent still remains.

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CHIEF JUSTICE