COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 208 of 2023

B E T W E E N

SIAMONE F. MCKENZIE
Appellant

AND

NATHANIEL MCKENZIE

AND

SAMUEL THOMPSON
Respondents

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Madam Justice Charles, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Ms. Metta McMillan-Hughes, KC with Mr. McFalloughn Bowleg, Counsel for the Appellant**

Appearance by First Respondent

No appearance by or on behalf of the Second Respondent

DATES: **15, 19 December 2023**

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Civil appeal - Nunc Pro tunc - Decree Nisi - Decree Absolute – Lodging of Notice of Application to Make Decree Absolute – Filing of Notice of Application to Make Decree Absolute - Section 64 of the Matrimonial Causes Act - Rule 37 of the Matrimonial Causes Rules

On 24 November 2009 a Decree Nisi dissolved the marriage of the Appellant and the Second Respondent. The Decree Nisi was not to be made Absolute within three months of that date. Nearly one year later, on 7 October 2010 a Notice of Application to Make the Decree Nisi Absolute was filed. On 23 October 2010, the Appellant married the First Respondent. On 5 November 2010 a Certificate making the Decree Nisi Absolute was signed by the Registrar.

The appellant filed an Originating Summons, seeking a Declaration that on 23 October 2010 it was lawful for her to marry the First Respondent by reason of the fact that the three-month period following the grant of the Decree Nisi had expired. The court below found that the appellant was

not legally able to marry the First Respondent on 23 October 2010 and the appellant appealed that decision.

Held: Appeal allowed. Declaration granted that on 23 October 2010 it was lawful for the Appellant to marry the First Respondent. The Court also ordered that the Decree Nisi, certified as being Made Absolute on 5 November 2010, be varied and certified nunc pro tunc as being made Absolute on 7 October 2010.

The relevant statutory provisions are section 64 of the Matrimonial Causes Act and Rule 37 of the Matrimonial Causes Rules.

Rule 37(1) requires the lodging of an application in the Registry of the Supreme Court to make a Decree Nisi, Absolute. Following the expiration of the period prescribed for making the Decree Absolute and the Registrar being satisfied that there is no application for rehearing and no person has shown cause against the Decree being made Absolute, the Notice shall be filed.

In the present case it is not apparent whether the Notice of 7 October 2010 was ever lodged, but it was filed. Given that the Notice was in fact "filed" by the Registrar the presumption is that all prerequisites had been complied with by the Registrar.

Rule 37(2) of the Matrimonial Causes Rules provides that "Upon the filing of the [Notice of Application to Make the Decree Absolute]" the Decree Nisi shall become Absolute. Once the learned judge found that the Notice of Application was filed on 7 October 2010 then Rule 37(2) is determinative.

Even if the Notice was lodged on 7 October 2010 and not filed, the authorities suggest that the making of a Decree Absolute is a single act beginning with the lodging of the Notice of Application for the Making of a Decree Nisi Absolute and the Decree Absolute would relate back to the time when the Notice was first lodged.

Seaford v Seifert [1968] 2 WLR 155 applied

REASONS FOR DECISION

Delivered by the Honourable Sir Michael Barnett, P:

1. This was an appeal against the judgment by Newton, J. dated 27 September 2023 and her Supplemental Ruling of 12 December 2023 whereby she refused the Declaration sought by the appellant, Siamone McKenzie, in an Originating Summons filed on 11 October 2022.

2. By that Originating Summons the appellant sought a Declaration that on 23 October 2010, it was lawful, pursuant to section 64 of the Matrimonial Causes Act (the Act) for the Appellant

to marry the First Respondent, by reason of the fact that as of the aforesaid date the period of three months limited for appealing against the Decree Nisi of Divorce granted on 24 November 2009 had expired and no appeal had been presented against the decree Nisi and, a Declaration having been made under section 73 of the Act and there was no impediment to the issue of the Certificate of Making the Decree Absolute. It also sought an order that the Certificate filed on 5 November 2010 be varied and certified nunc pro tunc as being made absolute on 7 October 2010. The Appellant agreed that the date 30 September 2010 contained in the Originating Summons was an error.

3. The facts of this case are not in dispute.

4. On 24 November 2009 the Court made a Decree Nisi dissolving the marriage between the appellant and Samuel Thompson. The Nisi provided that it should not be made Absolute within three months of that date.

5. On 7 October 2010, a Notice of Application to Make the Decree Nisi Absolute was filed. We use that word deliberately as the document contained in the Record of Appeal has a Supreme Court stamp on it dated 7 October 2010. That stamp could only have been impressed on the document by the Registry of the Supreme Court. In her Ruling of 27 September 2023, the trial judge refers to the Notice as having been stamped, but she says that the stamping was done prematurely. This had significant implications in this judgment.

6. On 23 October 2010, the Appellant married Nathaniel McKenzie.

7. On 5 November 2010 a Certificate making the Decree Nisi Absolute was signed by the Registrar. The Certificate was in the following terms:

> **"Referring to the Decree Nisi made in this cause on the Twenty-fourth day of November A.D., 2009 whereby it was decreed that the marriage had and solemnized on the Twenty-third day of March, A.D., 2002, between the Petitioner Siamone F. Thompson, nee Evans (a spinster), and the Respondent Samuel Thompson, (a bachelor), by Reverend Lindo Wallace, a marriage officer at Church of God Temple in the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas BE DISSOLVED by reason that since the celebration of the said marriage the Respondent has treated the Petitioner with cruelty unless sufficient cause be shown to the Court within three (3) months from the making thereof why the said Decree should not be made absolute, and no such cause having been shown, IT IS HEREBY CERTIFIED that the said Decree was on the 5th day of November,**

A.D., 2010 made final and absolute and that the said marriage was thereby dissolved."

8. It is to be noted that although the Notice of Application was filed on 7 October 2010, the Certificate signed and filed by the Registrar states that the marriage was dissolved on 5 November 2010, almost a month later.

9. The question was whether on 23 October 2010 the appellant was eligible to marry Nathaniel McKenzie.

10. Justice Newton held that she was not. The appellant appealed as a matter of urgency, because she needed a decision by Monday, 18 December 2023.

11. The relevant statutory provisions are section 64 of the Act and Rule 37 of the Matrimonial Causes Rules (the Rules).

12. Section 64 of the Act provides:

> **"64. When the time (if any) limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal, any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death."**

13. Rule 37 of the Rules provides:

> **"37. (1) An application by a spouse to make absolute a decree nisi pronounced in his favour shall be made by lodging in the Registry where the cause is proceeding a notice of application in accordance with Form 13 on any day after the expiration of the period prescribed for making the decree absolute. If the Registrar, after searching the court minutes, is satisfied —**
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> > **(a) that no application for rehearing under rule 34 is pending; and**
> >
> > **(b) that no appearance has been entered, or, if appearance has been entered, that no affidavits have been filed within the time allowed for filing, by**

or on behalf of any person wishing to show cause against the decree being made absolute,

the notice shall be filed:

Provided that if the application is made after the expiration of one year from the date of the decree nisi there shall be lodged with the notice an affidavit by the applicant accounting for the delay, and the notice shall be filed without leave.

(2) Upon the filing of the said notice the decree nisi shall become absolute." [Emphasis added]

14. These statutory provisions are similar to those found in English legislation.

15. With respect, we did not agree with the trial judge that the effect of these provisions is that the appellant was not able to marry Nathaniel McKenzie prior to 5 November 2010.

16. There were two basis for coming to this conclusion.

17. Firstly, once the judge found that the Notice was in fact filed on 7 October 2010, then, in our judgment, Rule 37(2) is determinative. In her Ruling the trial judge said:

"The Applicant, a Bahamian, was married to Samuel Thompson … from whom she was granted a Decree Nisi of divorce on the 24th November, 2009. A Consent Order with a Declaration pursuant to section 73 was filed on the 29th September, 2010 and a Notice of Application to make the Decree Nisi Absolute was filed on the 7th October, 2010."

18. And later:

"I do not accept that the Registrar delayed in issuing the Certificate, as Counsel submitted, rather the Notice of Application was filed prematurely. It ought to have been first lodged in the Registry." [Emphasis added]

19. Whether the Notice was in fact ever lodged in the Registry, is not apparent from the judgment. There is nothing in the Record to show a method for evidencing that a Notice is 'lodged'. What is in fact known is that the Notice was filed and should only have been filed if it was in fact 'lodged'.

20. The maxim omnia praesumuntur rite esse acta provides that, in the absence of evidence to the contrary (a) something which should have been done was in fact done, or (b) something which has been done was done in accordance with all relevant technicalities.

21. In our judgment, given that the Notice was in fact "filed" by the Registrar the presumption is that all prerequisites had been complied with by the Registrar. Rule 37(2) clearly provides that upon the filing of the said notice the Decree Nisi shall become Absolute.

22. It should be noted that there is no suggestion that any of the requirements of Rule 37(1) had not been satisfied.

23. Indeed, the date of 5 November 2010 contained in the Certificate would be inconsistent with Rule 37(2) and therefore cannot be allowed to stand.

24. Further, even if the Notice was in fact lodged and not filed on 7 October 2010, the decision of Willmer LJ in the English Court of Appeal in **Seaford v Seifert** [1968] 2 WLR 155 supports the position that the Certificate takes effect from the date of the lodging of the Notice on 7 October 2010.

25. In that case a husband died between 9 p.m. and 4 a.m. on the night of 5/6 July 1965. A Notice of Application to Make Absolute a Decree Nisi granted to his wife was lodged at the registry at 8:30 a.m. on 6 July 1965. The wife claimed administration as the widow, on the basis that the Decree Absolute was a nullity. It was held by the Court of Appeal that as the husband had died before the lodgment of the Notice of Application this was a nullity, and the district registrar had no jurisdiction to make the Decree Absolute. The Court of Appeal held that there was no justification for applying the old common law doctrine under which a judicial act related back to the earliest moment of the day on which it took place. The plaintiff, being the wife of the deceased at the time of his death, was entitled to letters of administration of his estate. However, in his judgment, Willmer LJ said:

> **"In my judgment, that reasoning can be applied to the circumstances of the present case. It is true that, at the time of the purported decree absolute, the court was seized of the case in the sense that the suit as a whole was before it. There was, however, no jurisdiction to make the decree absolute unless and until the notice of application was lodged. Cairns J. considered, but rejected, this reasoning, holding that the notice of application and the making of the decree absolute together constituted a single judicial act. Otherwise, he thought, the doctrine of relation back could never be applied in any circumstances, since every judicial act must be preceded by some form of application for it. In that I think that he**

> **fell into error, in that he failed to have regard to the special and peculiar procedure laid down for making absolute a decree of divorce. The decree can be made absolute only by filing the notice of application. It is the notice of application which has to be filed. If there is no notice of application, there can be no decree. It is, therefore, not only permissible but necessary to look at the position as it was at the moment when the notice of application was lodged, for, until the notice was lodged, there could be no jurisdiction to make the decree absolute. Had the notice of application in this case been lodged on or before July 5, 1965, it may be that the District Registrar would have had jurisdiction to file it and make the decree absolute at the time when he purported to do so, and, in that event, it could well be said that the decree would relate back to the earliest possible moment of July 6. Here, however, the notice of application was not in fact lodged until 8.30 a.m. on July 6, by which time, as we now know, the deceased was already dead. The situation, therefore, was that the decree could not be made absolute before 8.30 a.m., because up to that time no notice of application had been lodged, and it could not be made absolute at any time after 8.30 a.m., because by then the court no longer had jurisdiction owing to the death of the deceased and the consequent destruction of the subject-matter of the suit. Once the peculiar nature of the procedure for making absolute a decree of divorce is appreciated I can see no answer to that dilemma." [Emphasis added]**

26. That judgment suggests that as the making of the Decree Absolute was a single act beginning with the lodging of the Notice of Application for the Making of a Decree Nisi Absolute, then the Decree Absolute would relate back to the time when the Notice was first lodged. In **Seaford v Seifert**, it made no difference because the husband had already died by the time the Notice was first lodged at 8:30 on the morning of 6 July 1965. As the judge indicated, if the Notice was lodged on 5 July 1965 and the husband had died on 6 July 1965 then the Absolute would have been effective even though signed and filed on 6 July 1965, after the husband had died.

27. In our judgment, this is consistent with fairness. If the Decree Absolute did not relate back to the time when the Notice was first lodged it could have a seriously adverse effect on the party who has applied to make his Nisi, Absolute. In between the time the person lodges his Notice and the Absolute is signed and filed by the Registrar, the person would remain married and subject to the consequences of marriage. Examples of these consequences would be pension and inheritance rights. If the Registrar, for whatever reason, takes months (as often occurs in

this jurisdiction) to sign and file a Certificate making a Decree Nisi, Absolute and the Certificate does not relate back to when the process first started with the lodging of the application, the implications could be significant and prejudicial to the applicant.

28. In our judgment, the trial judge erred, and the Declaration sought should have been granted.

29. We allowed the appeal and granted a Declaration that on 23 October 2010, it was lawful, pursuant to section 64 of the Matrimonial Causes Act for the Appellant to marry Nathaniel McKenzie by reason of the fact that as of the aforesaid date the period of 3 months limited for appealing against the Decree Nisi of Divorce granted on 24 November 2009 to the Appellant in respect of her marriage to Samuel Thompson, the Second Respondent, had expired and no appeal had been presented against such Decree Nisi and further by reason of the fact that the court had declared on 29 September 2010 that it was satisfied for the purposes of section 73 (1) (b) (i) of the Act that the child of the family to whom the section applied was Samuel Jonathon Thompson and that arrangements for the said child had been made and were satisfactory and that there was thus no impediment to the issuance of a Certificate of Making Decree Absolute and that a Notice of Application to Make the Decree Nisi Absolute was filed on 7 October 2010.

30. We also ordered that the Decree Nisi, certified as being made Absolute on 5 November 2010, be varied and certified nunc pro tunc as being made Absolute on 7 October 2010.

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The Honourable Sir Michael Barnett, P.

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The Honourable Madam Justice Indra Charles, JA

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The Honourable Mr. Justice Bernard Turner, JA

31. As a postscript to this judgment, it is imperative that the Supreme Court Registry take steps to make clear the distinction between documents which under legislation, whether by statute or subsidiary legislation, are required to be 'lodged' as opposed to documents which are 'filed'.