

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

SUIT NO. HCV 978 OF 2006

IN CHAMBERS

BETWEEN JOAN EUNICE McCALLA APPLICANT

AND JOHN ARCHBALD McCALLA RESPONDENT

Mr. Charles Campbell for the Applicant

Respondent not appearing or being represented

**Divorce-Recognition of foreign decree- Requirements of the
Matrimonial Causes Act-Notice of proceedings in foreign court-
Natural Justice**

Heard: September 26, 2006

BROOKS, J.

“Takes no time, at all to get, a Mexican divorce.” Thus, runs a line in a song which was made popular by The Drifters. It took Mr. John McCalla a little longer than “no time”. He got his in eight days. His wife contests the validity of that decree and asks this court either to declare it null and void or to declare that it is not recognized in this jurisdiction.

The decision turns on the answer to two questions. Firstly, does the decree satisfy the provisions of section 24 of the Matrimonial Causes Act?

Secondly, did Mrs. McCalla have notice of the proceedings leading to that decree?

Background

I only have Mrs. McCalla's account as to the circumstances forming the backdrop for this claim. Mr. McCalla has not filed an acknowledgement of service, and he has not appeared to contest the application. I am satisfied however that he was properly served, and has knowledge of these proceedings.

The parties are Jamaican by birth and have their domicile of origin in this country. They are both teachers and went to the Bahamas to work. They however travelled back to Jamaica to be married and the ceremony took place on 26th December 2001. According to Mrs. McCalla the parties stayed only briefly in Jamaica and returned thereafter to the Bahamas. Unfortunately the marriage foundered. The parties grew apart and by January 2004 had separate households under one roof. It should be noted that Mr. McCalla spent some time away from home:

1. in July 2003, he was away from home for about three weeks without his wife knowing of his whereabouts,

2. in October 2004 “he went abroad and did not correctly disclose the purpose of his trip” (paragraph 12 of her affidavit in support),
3. in November 2004 he left the matrimonial home permanently.

Mrs. McCalla did not have any word from her husband until a mutual friend delivered to her, a decree that her marriage had been dissolved. She does not state when it was that she received the document. It is however exhibited to her affidavit which she has filed in support of her application. By way of background it only remains to be stated that Mr. McCalla currently lives in Nassau, Bahamas.

The Decree

The certified English translation of the decree document reveals that it is a “Final Decree of Divorce” issued out of the Civil Court of First Instance in the city of Calpulalpan in the state of Tlaxcala in the Republic of Mexico. The document shows that the suit was filed on January 21, 2005 and that the decree granted on January 28, 2005. The recitals show, among other things that:

1. Mr. McCalla was the Plaintiff and he had submitted to the jurisdiction of the Tlaxcalteca court.

2. Mrs. McCalla had been summoned and had not responded within the appropriate time.
3. "During the probationary term only the Plaintiff" had presented evidence to the court

The court considered that:

1. Its jurisdiction had been legally established.
2. The Plaintiff's legal status (apparently, including his marital status) had been accredited.
3. There was evidence of irreconcilable differences between the parties and by virtue of that the marriage ought to be dissolved.

The court therefore ruled that:

1. The suit had proceeded legally, the plaintiff had proved the action and the defendant did not contest or otherwise interpose in the action.
2. The marriage between the parties be dissolved.
3. Mrs. McCalla's maiden name was restored.
4. The "legal term of the sentence pronounced in this suit had elapsed without" there having been any legal intervention; the divorce became final as had been requested. Its finality was confirmed by the seal of the court and the signature of the presiding judge.

The Application

Mrs. McCalla's fixed date claim form sets out her application as follows:

- (a) That the Decree of Divorce obtained by the Defendant on the 28th January, 2005, in the City of Calpulalpan in the state of Tlaxcala, Mexico be ordered null and void, and or, is not recognized in this Jurisdiction.
- (b) That leave be granted to the Claimant to file a Petition for Dissolution of Marriage in the Supreme Court of Judicature of Jamaica....

On behalf of Mrs. McCalla, Mr. Campbell submitted that the requirements of section 24 (1) of the Matrimonial Causes Act (the Act), have not been satisfied. That section deals with the recognition of foreign decrees of dissolution of marriage. The main reason for the failure to comply, said Mr. Campbell, is that the requirements of residence, nationality or domicile, as outlined in the section, have not been fulfilled.

Secondly, submitted Mr. Campbell, even if Mr. McCalla could have been found to have been domiciled or ordinarily resident in Mexico, Mrs. McCalla ought to have been made aware of the proceedings. She did not know of them beforehand and thus the decree should not be recognized. He relied on the case of *Rudd v. Rudd* [1924] P. 72.

Section 24 of the Matrimonial Causes Act

Section 24 (1) of the Act states as follows:

24.-(1) A decree of dissolution or nullity of marriage

effected in accordance with the law of a foreign country shall, subject to subsections (3) and (4), be recognized as valid in Jamaica-

(a) if either party to the marriage was, at the relevant date-

(i) a national of; or

(ii) domiciled in; or

(iii) ordinarily resident in,

the country in which the decree was obtained; or

(b) if the decree, though made in a country in which neither party to the marriage was domiciled, would be recognized by the courts of the country in which either party was domiciled at the relevant date; or

(c) in a case where the country in which the decree was obtained uses domicile as a ground of jurisdiction for the dissolution or nullity of marriage, if, in the sense that the concept of domicile is understood in the law of that country-

(i) the respondent was, at the relevant date, domiciled in that country; or

(ii) the petitioner was, at the relevant date, domiciled in that country;

and either-

(iii) the petitioner had been ordinarily resident in that country for not less than one year immediately preceding the relevant date; or

(iv) the last place of cohabitation of the parties to the marriage was in that country.

There is no evidence before me as to whether the McCalla's, or either of them, have changed their country of domicile from that of their origin, which is Jamaica. Where a change of domicile is alleged, it is incumbent on the party alleging to prove that change. The proof must be by the "strongest evidence of determination to acquire a fresh one of choice" (per Horridge J. in *Rudd (supra)* at page 76). These parties have lived and worked in the

Bahamas for some years, and they are clearly ordinarily resident in that country. There is, however, nothing in the evidence to show that they have no intention of returning to Jamaica for permanent residence. These factors show that section 24 (1) (a) does not apply in this case.

I have no evidence as to the law of Tlaxcala, or of the Bahamas, concerning the matter of domicile. It follows that I have not been provided with evidence that the Bahamas would recognize the Tlaxcalteca decree. I am confident however that, on the evidence before me, Jamaican law would not recognize Mr. McCalla as being either domiciled or ordinarily resident in Tlaxcala. In light of the failure of the requirement of residence for not less than one year, the result is that neither paragraphs (b) nor (c) apply to these circumstances.

I therefore am obliged to find that the decree obtained by Mr. McCalla does not qualify to be recognized by this court, as is contemplated by section 24 (1).

Notice of the Proceedings

Even if I am wrong in finding that Mr. McCalla was not either domiciled or ordinarily resident in Tlaxcala, I am of the view that section 24 (4) also prevents this court recognizing the decree of the Tlaxcalteca court.

The subsection states:

(4) A decree of dissolution or nullity of marriage shall not be recognized as valid by virtue of subsection (1), (2) or (3) if, under the common law rules of private international law, recognition of the validity of such decree would be refused by a court in Jamaica notwithstanding that the foreign court by which the decree was granted was competent to do so.

In *Rudd v. Rudd* mentioned above, Horridge J. cited the common law principle of a party being made aware of proceedings which are likely to adversely affect him and also the principle of natural justice where such a party should be heard if he wishes to make an input to those proceedings. He said at page 76: "I believe, however that there must be a notice of proceedings to the party to be affected by them before the proceedings can bind that party". He also cited the case of *Shaw v. Attorney General* L.R. 2 P. & M. 156 where Lord Penzance said at page 162:

"No case has ever yet decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicil or residence. He has never submitted himself, either directly or inferentially, to the jurisdiction of such a Court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are ex parte and take place in the absence of the party affected by them."

I find that on the evidence Mrs. McCalla was not made aware of the proceedings before they were concluded and she was not allowed an opportunity to contest the petition. This is a departure from the standards of our system of justice which include the *audi alteram partem* rule. Because

of the departure section 24(4) prevents this court from recognizing the Tlaxcalteca decree.

CONCLUSION

It is not the length of time in which a decree of dissolution of marriage is obtained which determines its validity in this jurisdiction. It is whether the circumstances under which the decree is obtained satisfy the requirements of the Matrimonial Causes Act. In the absence of any evidence that Mr. McCalla had become domiciled in Tlaxcala or the Bahamas, or ordinarily resident in Tlaxcala, the Tlaxcalteca decree does not satisfy the provisions of section 24(1) of the Act. In any event, the failure to notify Mrs. McCalla of the proceedings, so as to afford her an opportunity to intervene, is a breach of a fundamental principle in our system of justice. That breach prevents this court recognizing the decree of the Tlaxcalteca court.

The order of the Court is as follows:

1. The Decree of Divorce obtained by the Defendant on the 28th January, 2005, in the City of Calpulalpan in the state of Tlaxcala, Mexico is not recognized by this Jurisdiction.
2. The Claimant is at liberty to file a Petition for Dissolution of Marriage in this Court.