

TULLY v TULLY (1965) ZR 165 (HC)

HIGH COURT

RAMSAY J

14th December 1965

Flynote and Headnote

[1] Courts - High Court - jurisdiction - domicile of petitioner in England - divorce cannot be granted:

The High Court lacks jurisdiction to grant a divorce to a petitioner domiciled in England.

[2] Family law - Divorce - jurisdiction of High Court - Petitioner domiciled in England - sections 1, 2 and 7 of Zambia Independence Act construed:

See [1] above.

Cases cited:

(1) *Mountbatten v Mountbatten* [1959] 1 All ER 99.

(2) *Hilton v Hilton* (1964) EALR 359.

Statutes construed:

(1) Zambia Independence Act (1964), ss. 1, 2 (1), 2 (3), 7 (1), 7 (2), 7 (3), 7 (4)

(2) Zambia Independence Order (1964), ss. 4 (1), 4 (6).

Kent, for the petitioner

No appearance, for the respondent

Judgment

Ramsay J: In this case, the petitioner prays that his marriage may be dissolved on the ground of his wife's desertion. She has not defended the suit. I am satisfied that she is in desertion and has been in desertion for the requisite period, but the petitioner is domiciled in England, and I must also be satisfied that the court has jurisdiction to grant the relief sought.

Prior to 24th October, 1964, the High Court of Northern Rhodesia had jurisdiction to make decrees for the dissolution of marriages where the parties to the marriage were British subjects domiciled in any part of the United Kingdom. This jurisdiction was conferred by the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, as read with the Colonial and Other Territories (Divorce Jurisdiction) Order in Council, 1953 (App. 7, page 30), and the Northern Rhodesia (Non - Domiciled Parties) Divorce Rules, 1953 (App. 7, page 32).

The Zambia Independence Act, 1964 (App. 3, pages 4 and 8 - 9), contains the following relevant sections:

'1. On 24th October, 1964 (in this Act referred to as "the appointed day"), the territories which immediately before the appointed day are comprised in Northern Rhodesia shall cease to be a protectorate and shall together become an independent republic under the name of Zambia; and on and after that day Her Majesty shall have no jurisdiction over those territories.'

'7. (1) On and after the appointed day no court having jurisdiction under the law of Zambia shall, by virtue of the Colonial and Other Territories (Divorce Jurisdiction) Act, have jurisdiction to make a decree for the dissolution of a marriage, or as incidental thereto to make an order as to any matter, unless proceedings for the decree were instituted before the appointed day.

(2) Except as provided by subsection (1) of this section, and subject to any provision to the contrary which may be made on or after the appointed day by or under any law made by any legislature established for Zambia, all courts having jurisdiction under the law of Zambia shall on and after that day have the same jurisdiction under the said Acts as they would have had if this Act had not been passed.

(3) Any rules made on or after the appointed day under section 1 (4) of the Indian and Colonial Divorce Jurisdiction Act, 1926, for a court having jurisdiction under the law of Zambia shall, instead of being made by the Secretary of State with the concurrence of the Lord Chancellor, be made by such authority as may be determined by the law of Zambia; and so much of the said section 1 (4) and of any rules in force thereunder as requires the approval of the Lord Chancellor to the nomination for any purpose of any judges of any such court shall cease to have effect.

- (4) The references in subsection (1) of this section to proceedings for the dissolution of a marriage include references to proceedings for such a decree of presumption of death and dissolution of marriage as is authorised by section 16 of the Matrimonial Causes Act, 1950.'

Mr Kent, counsel for the petitioner, has submitted that the High Court of Zambia has jurisdiction to grant the divorce. He bases his submission on two grounds.

His first ground is that subsection (2) of section 7 confers a new basis of jurisdiction which replaces the jurisdiction by virtue of the Colonial and Other Territories (Divorce Jurisdiction) Acts. I shall summarise the argument.

Subsection (2) provides that all courts having jurisdiction under the law of Zambia shall on and after the appointed day have the same jurisdiction under the Colonial and Other Territories (Divorce Jurisdiction) Acts as they would have had if the Zambia Independence Act had not been passed. There is excepted from this provision, the provisions of subsection (1) and the provision is subject to any provision to the contrary that may be made by any legislature established for Zambia. It was necessary to preserve the jurisdiction under the Acts because it was under them that pending proceedings had started, but subsection (2) creates a new basis of jurisdiction and confers on the court the same jurisdiction it had before. This jurisdiction now flows not from the Acts, but from the subsection itself. The later subsections support this view, as subsection (3) provides for new rules to be made by an authority in Zambia and dispenses with the necessity of the approval of the Lord Chancellor to the nomination of the judges who are to exercise the jurisdiction. This provision would not be necessary if jurisdiction had been taken away.

This is an ingenious argument, but I cannot accept it. It does not make sufficient allowance for the opening words of subsection (2), 'Except as provided by subsection (1) of this section'. The exact meaning of these words is not absolutely clear, and the clause might have been happier phrased. Subsection (1) has two parts:

- (a) it terminates the jurisdiction of the Northern Rhodesia and Zambia courts under the Colonial and Other Territories (Divorce Jurisdiction) Acts; and
- (b) it extends the jurisdiction under these Acts to enable the Zambia courts to continue any proceedings which were instituted before the appointed day.

It seems to me that the phrase, 'Except as provided by subsection (1) of this section' should be read as meaning 'with the exception of proceedings for a decree for the dissolution of a marriage instituted on or after the appointed day'. The substantive provision then follows that the Zambia courts will have the same jurisdiction under the Acts (to continue proceedings) as they would have had if the Independence Act had not been passed. Further, it would be incompatible with the new status of independence if the rules made under section 1 (4) of the Indian and Colonial Divorce Jurisdiction Act, 1926, were to continue to be made by the Secretary of State. Accordingly, power has been given for the rules to be made by such authority as may be determined by the law of Zambia. In addition, it is no longer necessary to have the Lord Chancellor's approval to the nomination of the judges who have jurisdiction to hear proceedings instituted under the Acts but which continue after the appointed day.

This construction of the section does not strain its meaning and it is in accordance with the spirit of section 2 of the Indian and Colonial Divorce Jurisdiction Act, 1926, which empowers Her Majesty, by Order in Council, to apply section 1 of the Act to any part of Her Majesty's Dominions other than a self-governing dominion. It may be appropriate for divorce jurisdiction to be given to the judicature of a dependency, but it is quite another matter for such jurisdiction to be given for all time to an independent republic over whose laws and judicature Her Majesty's Government has no control. In *Mountbatten v Mountbatten* [1959] 1 All ER 99 at 110 Davies, J, quoted with approval the following passage from Lord Merrivale's judgment in *H. v H.* (1928) P. at 212:

¹ '...under English law (I substitute "English" for "British") the jurisdiction to decree divorce depends on domicile; that the domicile of the husband determines the domicile of the wife; and that independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign states.'

The second ground of Mr Kent's argument was as follows. The Zambia Independence Act was passed on 31st July, 1965, and it fixed 24th October, 1964, as the appointed day. Section 2, subsection (1) and subsection (3) of the Act are as follows:

- '(1) Subject to the following provisions of this Act, on and after the appointed day all law which, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that day or has been passed or made before that day and comes into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Zambia, and persons and things belonging to or connected with Zambia, as it would have apart from this subsection if on the appointed day Northern Rhodesia had been renamed Zambia but there had been no change in its status.'
- '(3) Subsection (1) of this section applies to the law of, or of any part of, the United Kingdom, the Channel Islands and the Isle of Man, and, in relation only to any enactment of the Parliament of the United Kingdom or any Order in Council made by virtue of any such enactment whereby, any such enactment applies in relation to Northern Rhodesia, to law of any other country or territory to which that enactment or Order extends.'

The terms of these subsections are to preserve the existing law until such time as it is changed by the Parliament of Zambia. The Zambia Independence Order, 1964, was made on 15th October, 1964, and it is subsequent to the Independence Act. Section 4 (1) of the Order provides that the existing laws shall continue in force after the commencement of the Order as if they had been made in pursuance of the Order, and section 4 (6) defines 'existing laws' and the definition is wide enough to include the Colonial and Other Territories (Divorce Jurisdiction) Acts, which were applied by Order in Council dated 28th May, 1953, and the definition of 'existing laws' is repeated in the Republic of Zambia (Modifications and Adaptations) Order, 1964 (G.N. 497/1964). If all these provisions are read together, it follows that the existing state of affairs will continue until altered by the Parliament of Zambia.

This argument is that the Colonial and Other Territories (Divorce Jurisdiction) Acts were part of the existing law immediately prior to the appointed day, and that the Zambia Independence Order provided that all existing laws should continue in force unless and until they were changed. The definition in the Independence Order does not appear to me to be wide enough to include the Acts, but the definition in the Modifications and Adaptations Order is.

I cannot accept this argument. The Zambia Independence Act was expressly excluded from any modifications, adaptations, qualifications and exceptions; it is expressly excluded from the definition of 'existing laws' in section (2) of the Modifications and Adaptations Order; and section 2 (1) of the Act makes the operation of existing law as being 'subject to the following provisions of this Act'.

There is a development of this argument which I must consider though it was not put to me.

The corresponding provisions of the Kenya Independence Act, 1963, and in particular section 7 thereof are in almost identical terms with those of the Zambia Independence Act, 1964. The Kenya Independence Order in Council, 1963, also contains similar provisions to those in section 4 of the Zambia Independence Order.

In *Hilton v Hilton* (1964) EALR 359 there came up for decision by the Supreme Court of Kenya the question as to whether or not it had jurisdiction to entertain proceedings under the Colonial and Other Territories (Divorce Jurisdiction) Acts when proceedings were instituted after independence. The argument before that court was that while section 7 of the Act took away jurisdiction by virtue of the Colonial and Other Territories (Divorce Jurisdiction) Acts it did not take away jurisdiction arising by virtue of an Order in Council such as the Kenya Divorce Jurisdiction Order in Council, 1928 (or our Colonial and Other Territories (Divorce Jurisdiction) Order in Council, 1953), which it was said remained in effect as existing law. In a detailed and careful judgment, Rudd, J, held that the Order in Council could not apply to the extent of maintaining jurisdiction which had been expressly taken away by section 7 (1) of the Independence Act. With respect, I agree with this decision.

There are no grounds on which I can hold that this court has jurisdiction to grant decree. I therefore dismiss the petition.

Petition dismissed.