

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
(MATRIMONIAL)**

DOMHMT2018/0071

BETWEEN:-

LAWRENCE ETIENNE

Applicant

And

NOBERTINE ETIENNE

Respondent

Before: The Hon. Justice M E Birnie Stephenson

Appearances:

Miss Chelsea Frampton of Prevost & Roberts for the Applicant

Mrs Dawn Yearwood Stewart for the Respondent

2019: July 25, 26

ORAL RULING

[1] **STEPHENSON J.:** This is an application for leave to present a petition for the dissolution of marriage before the expiration of the period of three years from the date of marriage.

[2] This application was made by Originating Application dated 10th August 2018 with two affidavits sworn by the Applicant dated the 10th August 2019 and 9th October 2018 with supporting exhibits. The respondent has filed a single affidavit dated 7th September without any exhibits.

[3] The parties herein were married on the 14th day of January 2017 twenty one months after they were married.

[4] Learned Counsel representing the parties each made brief oral submissions to the court. Thereafter the court reserved its decision and I now rule.

[5] This application is made pursuant to Rule 5 of the Matrimonial Causes Rules 1977 and Section 3 of the Matrimonial Causes Act 1973. The section imposes a restriction on the presentation of petitions for divorce before the expiration of three years from the date of the marriage and is in these terms:

i. "Subject to subsection (2) below, no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage.
(hereinafter in this section referred to as "the specified period.")

ii. A judge of the court may, on application made to him allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the Applicant or of exceptional depravity on the part of the respondent but in determining the application the judge shall have regard to the interest of any child of the family and to the question whether there is reasonable probability of a reconciliation between the parties during the specified period."

[6] The applicant for leave in the case at bar must comply with rule 5 of the Matrimonial Causes Rules 1977, which is in these terms:

"(1) An application under section 3 of the Act of 1973 for leave to present a petition for divorce before the expiration of three years from the date of the marriage shall be made by originating application.

(2) The application shall be filed in the divorce county court to which it is proposed to present the petition, together with –

(a) an affidavit by the applicant exhibiting a copy of the proposed petition and stating –

(i) the grounds of the application,

(ii) particulars of the hardship or depravity alleged,

(iii) whether there has been any previous application for leave,
(iv) whether any, and if so what, attempts at reconciliation have been made,
(v) particulars of any circumstances which may assist the court in determining whether there is a reasonable probability of reconciliation between the parties,
(vi) the date of birth of each of the parties or, if it be the case, that he or she has attained 18; (
b) a copy of the application and of the supporting affidavit for service on the respondent; and
(c) unless otherwise directed on an application made ex parte, a certificate of the marriage. (3) C.C.R. Order 6, rule 4 (2) (c) (ii) and (d) (which deal with the service of an originating application), shall not apply but the registrar shall annex to the copy of the application for service a copy of the supporting affidavit and a notice in Form 1 with Form 6 attached."

Applicant's submissions:

- [7] Learned Counsel Chelsea Frampton on behalf of the applicant stated that the application for leave to file the divorce petition within 3 years of marriage was being brought by the applicant on the ground that the respondent has behaved in such a way that has caused extreme cruelty and hardship on him.
- [8] Learned Counsel made reference to the case of **Hellier –v- Hellier et anor**¹ in support of her application for the court to exercise its discretion. In **Hellier** it was held that that in exercising its discretion under the Act the Court should approach each case subjectively. Miss Frampton asked the court to look at the particular circumstances of the case at bar and submitted that it can be held that it would be exceptional hardship on the applicant to hold up his petition and to wait for three years.
- [9] Learned counsel further submitted that in the case of **Fay –v- Fay**² it was held that the judge has to make a provisional determination that the case is one of exceptional hardship before she can exercise her discretion. That the determination is made by looking at the facts from the point of view of both parties.

¹[1958] 2 All E R 261

² 1982 AC 835

[10] Miss Frampton invited the court to look at the two affidavits filed by her client and also to look at the possibility of reconciliation. She submitted that her client is saying that there is no possibility of reconciliation and that in this instance the parties only lived together for a short period of six months until the applicant was forced to leave the matrimonial home in the interest of his own well being and peace of mind and this was because of the respondent's unbearable behaviour.

The Respondent's submissions

[11] Learned counsel Dawn Yearwood Stewart on behalf of the respondent opposed the application. The respondent denies that the circumstances as presented by the applicant amounts to exceptional hardship so as to justify the grant of leave.

[12] It was counsel's submission that the law is very clear as to what the court has to look at in order to determine whether or not to grant the application for leave in matters such as the case at bar. Reference was made to the learning in Bromley³ which Ms Yearwood Stewart submitted will guide the court. Counsel stressed on the need to prevent parties from rushing in and out of the marriage.

[13] Ms Yearwood Stewart submitted that in his affidavits sworn in support of his application, the applicant only hints at conduct leading to a nervous breakdown or cruelty. Counsel stated further that the grounds as stated by the applicant are insufficient and noted that the parties were married previously and that the applicant knew the type of wife he had and yet he remarried her again.

[14] Counsel on behalf of the respondent further submitted that the necessary elements required in an application for leave was not present in the application before the court. Learned Counsel submitted that the applicant has failed to show that he suffered exceptional hardship and in his affidavit he is calling on the court to speculate and it has to be more than that. That the applicant must state the facts which he relies on to prove exceptional hardship and in the case at bar it is the respondent's contention that the applicant has not done so. Reference was made to **Jervier-v- Jervier**⁴ and **Maswabi –v- Maswabi**⁵ as was cited in the **Jervier case**.

³ Bromley Family Law // Edition at page 191-193

⁴ DOMHMT 2013/0028 (Dominica)

⁵ 1999 2 B.L.

Court's considerations

[15] In applications for leave to file a petition for divorce when the parties have been married for less than three years the court should approach each case subjectively. The court is to look at all the material that is before it by carefully examining the affidavits filed. The court is also required to consider the possibility of reconciliation, which Lord Justice Denning referred to as “a most important consideration”.⁶

[16] Based on the established principles of law the applicant in the case at bar is required to establish a case of exceptional hardship suffered by him⁷.

[17] In determining whether there is exceptional hardship or exceptional depravity, this court can act on the *prima facie* evidence before it. The court must be satisfied that the allegations made in the applicant's affidavits are such that if proved would amount to exceptional hardship and depravity. This court must also take into account the affidavits filed in opposition. It is trite law that the court is not called upon to try the issues raised in the affidavit.

[18] The facts as stated by the applicant, is that the respondent has behaved in such a way that it has causes extreme cruelty and hardship on him. Has the applicant in his affidavits adduced any evidence that there are exceptional circumstances which have existed and continue to exist in his circumstances?

[19] In the **Hillier Case** it has been made clear that there is a need for the applicant to adduce full evidence as to the nature and extent of his suffering. I must agree with Counsel Ms. Yearwood Stewart that the evidence as adduced by the applicant in the case at bar falls woefully short of what is required of him to succeed in an application of this type.

[20] No evidence has been adduced by the applicant that the hardship he has and is allegedly suffering

⁶ Simpson –v- Simpson [1954] 2 ALL E R 546 at 547

⁷ Maswabi v Maswabi op cit, Hillier –v- Hillier et anor Op cit, C. v. C. (Divorce: Exceptional Hardship) [1980] Fam. 23, Fay –v- Fay [1982] A.C. 835

is out of the ordinary that is, judging it by the prevailing standards of acceptable behavior between spouses⁸, in order to permit the court to grant leave.

[21] It is noted that this application was filed in 2018 and has only come up for hearing at the end of this law year being July 2019, it is also noted that in another six months the three years since the parties remarried would expire, and the applicant will be free to petition the court for his divorce. The application is therefore refused.

[22] There shall be no order as to costs.

M E Birnie Stephenson

High Court Judge

(S E A L)

BY THE COURT

REGISTRAR

⁸ Fay –v- Fay op cit