MATILDA NAKAI MATHE

Versus

NYAMBE MATHE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 25 AUGUST 2011 & 26 JANUARY 2012

N Mazibuko for plaintiff
No appearance for the defendant

Unopposed application

NDOU J: The issue here is whether the plaintiff complied with Order 35 Rule 272 (1) of the High Court Rules, 1971. The salient facts are the following. The plaintiff issued out, at this court, summons incorporating a declaration on 10 June 2011. The summons, together with plaintiff's declaration were served on the defendant personally by the Deputy Sheriff of Bulawayo on 10 June 2011. The defendant did not contest the summons. After the expiry of the *dies induciae*, the plaintiff set the matter down for 28 July 2011. The notice of service of set down was served on the defendant personally on 14 July 2011. The defendant was not in attendance on 28 July 2011. It is common cause that the plaintiff did not serve the defendant with a notice described in Rule 272(1) *supra*. Rule 272(1) provides:

> "(1) In an action for restitution of conjugal rights, divorce, judicial separation or nullity of marriage where the defendant has failed to enter appearance –
>
> (a) If the declaration has not been served with the summons the plaintiff wishing to obtain judgment shall file and deliver his declaration and either simultaneously or subsequently a notice in accordance with Form No. 30 calling upon the defendant if he wishes to defend, to purge his failure to enter appearance to plead, answer or except or make claim in reconvention within twelve days of the date of delivery of the notice and informing him that in default thereof judgment will be prayed against him;
> (b) If the declaration has been served with the summons, the plaintiff wishing to obtain judgment shall file and deliver the aforesaid notice to the defendant after the expiry of the *dies induciae*, as calculated in the proviso to Rule 119.
>
> (2) Thereafter the plaintiff may –

(a) in the case of an action for conjugal rights set the case down for trial without notice to the defendant.

(b) in the case of a claim for a final order of divorce, for judicial separation or for nullity of marriage, set the case down for trial but shall serve personal notice of set down upon the defendant, and in such case the court shall not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or that for good and sufficient reason the giving of personal notice is impracticable." (Emphasis added)

Reading Rule 272(1) (b) *supra*, in isolation, the plaintiff is not entitled to the order prayed for because she did not file and deliver to the defendant the notice defined in Rule 272(1)(a), *supra*,

But when Rule 272(1) is read with Rule 269A a different picture emerges.

Rule 269A reads –

"The summons commencing an action mentioned in this Order may, at the option of the plaintiff, be issued in Form No. 30A, to which a copy of the plaintiff's declaration shall be annexed, in which case the provisions of Rule 272 shall not apply to such an action." (Emphasis added)

The summons in this case was issued in Form 30A and a copy of plaintiff's declaration was annexed thereto. Both the summons and declaration were served on defendant. In the circumstances the provisions of Rule 272 do not apply. There is no need for the plaintiff to file and deliver the notice prescribed in Rule 272 (1). This construction does not, however, dispense with the requirement for the personal service of the notice of set down as discussed in *Strydom* v *Strydom* 2003 (1) ZLR 379 (H). The requirement that there be personal service is not only premised on the provisions of Rule 272. It is also based on the salutary rule of practice. As stated by TREDGOLD CJ in Butler v Butler 1951 SR 122 –

"It has always been the practice in this court that where the divorce is sought on the grounds of desertion the restitution order must come to the personal knowledge of the defendant: in other words although he has knowledge of the proceedings and has authorized attorneys to act on his behalf the court has always insisted that in its final stages he should be given personal notice of the proceedings in order that he might reconsider his position. It seems illogical that in other cases where a divorce reaches its final point it should be allowed to proceed without any notice to the defendant … So this seems to me to be a salutary rule of practice." (Emphasis added) – see also *Africa* v *Africa* 1944 CPD 78; *Le Roux* v *Le Roux* 1957 R &

N 831 (SR) and *Barkehuizen* v *Kruger* 1959 (3) SA 506 (O). This salutary rule is informed by the irreparable harm that may result in a final decree of divorce. Divorce results in a finality in the change of status of the parties.

Accordingly, because the plaintiff filed and served the summons in Form 30A together with a declaration, there is no need for her to serve the notice prescribed in Rule 272. It is for these reasons that I granted the divorce as prayed for.

Calderwood, *Bryce Hendrie & Partners*, plaintiff's legal practitioners