Tangimana v Makoni

Privy Council
Appeal No 4/1984

21 April 1986

Divorce - discretion of court to refuse decree - should be exercised in favour of petitioner where marriage has clearly ended.

The parties were married in 1973 and had two children. In 1979 they agreed that the husband go to USA alone for a 3 month holiday. He did not return and the last communication from him was in 1981. In 1986 the wife petitioned for divorce but he Supreme Court declined to grant a decree. The wife appealed to the Privy Council.

HELD
Upholding the appeal.

(1) The clear inference was that the husband was in desertion since 1981 at least;

(2) It is contrary to public policy that a party should remain bound to a marriage that had clearly ended, and so the decree of divorce should be granted.

Privy Council

Judgment

This is an appeal against the refusal of Harwood J. to grant a decree in divorce on the ground of wilful desertion for two years or more.

The petition was filed on the 3rd January 1984 alleging desertion from June 1981. Substituted service of the petition on the Respondent was ordered as his whereabouts was unknown. He did not appear, and was not represented, at the hearing in the lower Court or before this Council. The Appellant was the sole witness in the lower Court and her evidence was that she had married in January 1973 and had two children of the marriage (now 13 and 11 years) in her custody. It appears that in 1979 the couple agreed that the Respondent should go alone to America for a three month holiday. Her last communication from him was in 1981 when he sent money but with no intimation when, if ever, he might return. She has not heard from him since and has been unable to communicate with him or find out where he is living. At the conclusion of the evidence Harwood J. said, "I am not satisfied with the evidence": and dismissed the petition. He gave no other reasons.

At this stage it is seven years since the Respondent left home and five years since the Appellant last heard from him. The clear inference is that the Respondent is in desertion at least since 1981 and probably before. It is contrary to public policy that the Appellant should remain bound to a marriage that has clearly ended.

It is the opinion of this Council that the Learned Judge erred in refusing the decree, and accordingly the appeal is allowed. There will be a decree nisi to be moved absolute after the expiration of 6 weeks and the petitioner is granted custody of the chidlren of the marriage. Reservations of access or orders for costs would be pointless in the circumstances.