GRENADA

IN THE COURT OF APPEAL

MOTION NO. 13 OF 1999

BETWEEN:

MONICA PATSY GREUNER

Applicant

and

CARL EUGENE GREUNER

Respondent

Before:

The Hon. Mr. Justice Albert N.J. Matthew – Justice of Appeal.

Appearances:

Mr. J. Bristol and Mrs. L. Grant for the Applicant
Mrs. C. Edwards and Mrs. N. Byer for the Respondent

2000: February 21 and 29.

JUDGMENT

[1] **MATTHEW J.A.**: This is an application for extension of time to appeal from an Order of Decree Nisi made by Alleyne J on June 4, 1999 and the Decree Absolute which followed on July 23, 1999.

[2] The Parties are both medical doctors. The Applicant was born in Grenada on December 20, 1948 and the Respondent was born in Germany on May 16, 1930. They were married on August 18, 1973 and separated in 1994. There are two children; Steven born August 2, 1979 and Michelle born June 5, 1982.

[3] On January 14, 1997 the Respondent caused to be filed a petition for divorce in the High Court of Grenada in Suit No. 5 of 1997. As indicated above decrees nisi and absolute were made in June and July last year.

[4] The motion for extension of time was filed on December 3, 1999 and it was supported by an affidavit filed by the Applicant on December 13, 1999.

[5] In his submissions learned Counsel for the Applicant stated that there were concurrent proceedings in the U.S.A. and those proceedings existed at the time proceedings in Grenada commenced. The Applicant avers that it was not until October 1999, some months after the decree nisi was granted, that she first became aware of the proceedings in the U.S.A.

[6] Counsel concedes that the Applicant's averment is contested but asks the Court to conclude that the Applicant had no knowledge of these proceedings in 1994 as alleged by the Respondent, and there is in fact no evidence by the Respondent asserting knowledge by the Applicant prior to October, 1999.

[7] According to the Applicant, in her affidavit, she discovered in October 1999 that the Respondent had filed a complaint for divorce in Tennessee, U.S.A. on January 4, 1995. She admitted that she was not given notice at any time prior to that date of the divorce suit. However, on October 25, 1999 she filed an answer to the complaint and on October 28, obtained a temporary Restraining Order in the Circuit Court for Williamson County, Tennessee, restraining the Respondent from taking further action in the proceedings filed in the High Court of Grenada.

[8] Learned Counsel for the Applicant submitted that they have been deprived of the opportunity of putting to the High Court arguments that the Grenada proceedings should be stayed pursuant to the law and the U.S. proceedings should govern the dissolution of the marriage. Counsel submitted that a requirement of the law is to put all things before the Court to determine whether there should be a stay.

[9] The Applicant asked that the matter be referred to the High Court for rehearing.

[10] In the course of his submissions learned Counsel referred to the following authorities:

(a) Rayden and Jackson's Law and Practice in Divorce and Family Matters, Family Proceedings Rules 1991, Appendix 2.
(b) Domicile and Matrimonial Proceedings Act 1973, Sch 1.
(c) West Indies Associated States Supreme Court (Grenada) Act, Cap 336, Section 33 (2) (e).
(d) Wiseman v Wiseman 1953 Law Reports, P 79.
(e) Rayden and Jackson's Law 16th ed. Para 14.7.

[11] Learned Counsel for the Respondent referred to the case of Harold **Simon v Carol Henry** a decision of this Court where the principles applicable for grant of such applications were laid down. Counsel submitted that the length of the delay was inordinate and in considering the reasons the Applicant had to be forthright. Counsel made reference to the affidavits of the Respondent and submitted that the Applicant's contentions that she knew of the Tennessee proceedings only in October 1999 were untrue.

[12] Learned Counsel submitted that the Applicant was not forthright with the Tennessee Court. Counsel stated that months after the decree absolute in Grenada, without being served in the Tennessee proceedings, she makes answer and files a counter claim and then obtains an injunction to stay the Grenada proceedings. Counsel points to the exhibits MPG 1 and MPG 2 and the affidavit in support of the Applicant's motion.

[13] Learned Counsel submitted that there was little chance of the appeal succeeding and that one cannot have proceedings ad infinitum. In the course of her submissions Counsel referred to the case of Wiseman and the West Indies Associated States Supreme Court (Grenada) Act and in addition made reference to the following:

(a) Callaghan v Andrew Hanson and Another 1992 1 ALL E.R. 56.
(b) Bromley's Family Law, Eight Edition, Pages 231, 237.

[14] **Harold Simon** was decided in Antigua by the Full Court on July 3, 1995. Since then I have followed that decision in **Ramsgate Resources N.L. v P.H. Nominees Lt** a case from Tortola in February 1998; in **Albinus Powlette v Gordon Nash** a case from Grenada decided on July 16, 1998; and several others. The cases state that **Order 64 Rule 6(2)**

requires that every application for extension of time when made to a Judge of the Court shall be supported by an affidavit setting fourth substantial reasons for the application and by grounds of appeal which *prima facie* show good cause therefore. In **Harold Simon** *Singh J.A.* indicated the matters which the Court takes into account in deciding whether to grant an extension of time. They are the following: -

(a) the length of the delay;
(b) the reasons for the delay;
(c) the chances of the appeal succeeding if the application is granted;
(d) the degree of prejudice to the respondent.

[15] **Length of delay**: The decree nisi was made on June 4, 1999 and the decree absolute on July 23, 1999. The motion for extension of time to appeal was more than four months after decree absolute. This is an appreciable length of time.

[16] **Reasons for delay**. It appears that the Applicant had no reason to appeal against either the decree nisi or the decree absolute before October 19, 1999 when according to her she first heard of the Tennessee proceedings. It is therefore reasonable to suppose this is the only reason for the appeal.

[17] The Applicant must have realised that the decree absolute was granted close to 3 months earlier yet she waited another period in excess of six weeks to file the notice of motion. I am not persuaded by the reasons she gave for not acting earlier. She was very active in Tennessee taking steps in an action in which she was not served and ignoring the Grenada decrees. She could have sought the opinion of Counsel before the time she did. She certainly did not behave like the wife in WISEMAN at page 97 who, "when she did know of it she immediately took steps to set it aside."

[18] I shall not adjudicate upon the respective affidavits of the Parties as to who is speaking the truth, each accusing the other of falsehoods. It is perhaps safer to agree with learned Counsel for the Applicant and conclude that the Applicant had no knowledge of the Tennessee proceedings before October, 1999.

[19] Yet I observe in an affidavit filed by the Respondent on November 20, 1998 in Suit 5 of 1997, after stating that it was untrue that the Applicant was unaware that he contemplated divorce, said that he had instituted proceedings in Nashville and sought an injunction to protect Steven and himself from the Applicant's harassment and when the Applicant discovered he had filed for divorce she became upset and increased her harassment and profanity and out of fear he instructed his lawyer to discontinue all proceedings.

[20] This was an affidavit filed in the divorce suit 5 of 1997 on November 20, 1998. It would seem to follow that from that the date the Applicant knew or ought to have known that he was saying he had filed divorce proceedings in Tennessee and had discontinued them.

[21] The reasons advanced for the motion are that the Respondent was untruthful to the Grenada Court in not disclosing that there were concurrent proceedings in the U.S.A. The picture becomes clearer from a reading of the affidavits of two lawyers, one from Grenada and one from U.S.A. who at different times represented the Respondent.

[22] Margaret Wilkinson said that she was instructed to file divorce proceeding for the Respondent against the Applicant on December 30, 1996 and before filing the divorce petition the Respondent instructed her that he had filed a divorce petition in Tennessee but due to threats from the Applicant he had instructed his solicitors to withdraw the filed but unserved divorce petition. It was in these circumstances it was stated in paragraph 7 of the petition that there were no divorce proceedings continuing in any country outside Grenada which relates to the marriage or capable of affecting its validity or subsistence.

[23] And Deanna Bell Johnson, an attorney of Nashville, Tennessee, stated that on January 4, 1995 she filed a complaint in a case between the Applicant and the Respondent in the State of Tennessee, No. 95010. She said summons was issued and that she had planned to serve the Applicant personally but before she could successfully serve her, the Respondent contacted her and asked her to stop the divorce proceedings as he and his wife had decided to stay together and he no longer desired a divorce. She said she did not file a reconciliation notice with the Court or otherwise act to terminate the divorce proceedings.

[24] So there was a live action as stated by the affiant, Debbie Mc Millan Barnett, Clerk of the Circuit Court of Williamson County, Tennessee but it was dormant and one would have to bear the status of the U.S. action in mind at the time were the Grenada Court apprised of the true situation. The Applicant was not served. After decrees nisi and absolute and in the course of ancillary proceedings before the Grenada Court the Applicant puts herself on the Tennessee record and makes an answer.

[25] I note paragraph 3 of her Answer. In paragraph 3 of the complaint the Respondent had stated: "Husband further avers that he has participated in no other litigation concerning the custody of the minor children in this or any other State and has no knowledge of wife participating in any other litigation concerning the parties' minor children. Husband further avers that he has no information of any custody proceedings concerning the custody of the minor children pending in a court of this or any other State." In answer to the paragraph the Applicant states "Paragraph 3 is admitted as of the date of the filing of the complaint". This answer begs the question what is the position after the filing of the complaint and why it cannot be stated.

[26] Learned Counsel for the Respondent has drawn attention to paragraph 2 of the Applicant's counter claim in the Tennessee suit and has labelled it a falsehood. The paragraph is as follows: "Prior to the expiration of the customary 30 day notice period Carl Greuner applied for an urgent hearing in the divorce action in Grenada despite the fact that notice was served upon Monica Greuner in Tennessee for a hearing in Grenada. Unaware at the time that the divorce action had been filed in Tennessee and unaware of her option to contest jurisdiction in Grenada, Monica Greuner responded in Grenada to preclude a hearing in her absence. A further hearing is set in Grenada on November 5, 1999.

[27] In her affidavit in support of the motion before this Court the Applicant quite clearly states that it was the ancillary relief hearing that was adjourned to November 5, 1999. I cannot help but come to the impression that when one reads the paragraph of the counter claim referred to above, the Tennessee Court may well have formed the impression that the November 5, 1999 date was an adjourned hearing of the divorce petition.

[28] My view is fortified by the wording of the TEMPORARY RESTRAINING ORDER. It states:

> "From the verified counter claim of Monica Greuner, and her motion for a restraining order, it appears to the Court that the Petitioner, Carl Greuner, after filing this action on January 4, 1995, filed a subsequent action, also for divorce in Grenada, that Carl Greuner under oath in his Petition filed with the Court in Grenada stated that there was no previous proceedings with regard to the marriage or the children in Grenada or any other country, and that a hearing is set in Grenada on November 5, 1999 and that Monica Greuner will suffer immediate and irreparably injury before notice can be served and a hearing held thereon.
>
> It is, therefore, ORDERED that Carl Greuner is hereby restrained from taking any further action in the case of Carl Greuner, Petitioner, and Monica Patsy Greuner, Respondent, in the Supreme Court of Grenada and the West Indies Associated States High Court of Justice 1997 Suit No. 5."

[29] It is apt to refer to a passage by Lord Denning in the case of WISEMAN at page 91. There he said: "They were not in the least fraudulent, but they did not take any one of the many simple steps which would have enabled the petition to reach the wife. They did not make that full and frank disclosure to the Court which is incumbent on any person who applies for an order in absence of the other side. In my judgment the Applicant was wanting here.

[30] I do not find the reasons for the delay meritorious.

[31] **Chances of appeal succeeding**. Learned Counsel for the Applicant submitted on the authority of WISEMAN that appeals do lie from a decree absolute and he pointed to Section 33 (2) (e) of the Supreme Court Act in support. The provision states: "No appeal shall lie under this section from an order absolute for the dissolution or nullity of a marriage in favour of any party who, having had time and opportunity, to appeal from the decree nisi on which the order was founded, has not appealed from that decree."

[32] Learned Counsel for the Respondent was of the view that the provision was the hurdle which the Applicant could not cross. Both Counsel were agreed on the interpretation of the law. The narrow issue between them was a factual one. The Applicant was saying she had no time and opportunity to appeal while the Respondent says she had.

[33] In my judgment the Applicant had sufficient time and opportunity to appeal from the decree nisi before she filed the motion more than six weeks after, according to her, she first knew

of the Tennessee proceedings. This being the case her chances of success must be minimal if she has no right.

[34] There is no doubt that the Grenada Court had jurisdiction to try the suit. In an affidavit filed by the Applicant on March 5, 1997 in the said suit the Applicant stated that she and the Respondent last lived together as husband and wife in Grenada and that she was temporarily residing in the U.S.A. to complete her residency programme and she stated further that she is also domiciled in Grenada. It follows that both Parties are domiciled in Grenada and are probably both resident here as well. That jurisdiction is not being challenged but the Applicant says she is being deprived of the opportunity of putting to the High Court argument that the Grenada proceedings be stayed.

[35] At the time *Alleyne J* heard the divorce proceedings there was at most a dormant suit in Tennessee which the Respondent thought he had properly discontinued. True, his solicitor, Ms Johnson, was at fault not to properly terminate the proceedings. I cannot imagine that the Grenada Court could have told the Respondent anything else but to go and properly terminate the U.S. proceedings before it proceeds further. I do not imagine the Court would have told him go and serve the Applicant with the proceedings begun in Tennessee in 1995 and I will refuse to hear your petition.

[36] As the authorities cited above show, the power to stay proceedings in these matters is a discretionary one consistent with the balance of fairness including inconvenience. As *Bromley* puts it at page 231: "The Court may order a stay only if the balance of fairness (including inconvenience) is such that it is appropriate that the other proceedings should be disposed of first, and in deciding this the Court must have regard to all relevant facts at the time including the convenience of the parties and witnesses and any delay or expense that might otherwise result." I agree with learned Counsel for the Applicant that the exercise of this discretion is that of the Trial Judge.

[37] Having regard to what I have said above and in particular the application of the facts as I find them to section 33(2)(e) of the West Indies Associated States Supreme Court (Grenada) Act I have come to the conclusion that the Applicant has little chance of

success in the appeal. Learned Counsel for the Applicant had asked me to follow what was done in Wiseman, that is, extend the time for appealing and treat this application as the hearing of the appeal. He then invited me to refer the matter back to the learned Trial Judge.

[38] Learned Counsel for the Respondent has referred me to a passage in *Bromley* at page 237. It states: "If there has been a fundamental procedural irregularity – for example, if the petition is presented within the first year of the marriage or is never served on the respondent – the decree will be void and may be rescinded even though it has been made absolute." A footnote states: "But a decree absolute will not be rescinded in any other circumstances, for example on the ground that it has been obtained by fraud **Callaghan v Hanson-Fox**".

[39] **Callaghan** was a first instance judgment of *Sir Stephen Brown P* where he held that in the absence of want of jurisdiction on the part of the Court pronouncing a decree absolute or any procedural irregularity rendering the decree voidable, the decree was unimpeachable and stood against all the world. If the learned President of the Family Division is right this goes to strengthen the premise that the Applicant has little chance of success on appeal.

[40] **Degree of prejudice**. As learned Counsel for the Respondent has submitted there must be finality of proceedings. This was a contested divorce proceeding which was adjudicated upon by the learned Trial Judge and the Applicant went away on June 4, 1999 perhaps not fully satisfied but content enough not to challenge the order. She went back to Tennessee and resuscitated a suit which was virtually dead to re-open litigation with the Respondent. She must not be allowed to do that.

[41] So in the final analysis the delay between the Order of *Alleyne J* on June 4, 1999 and the motion for extension of time filed on December 3, 1999 is inordinately long; the reasons for the delay are manufactured by the Appellant and are unmeritorious; the chances of success having regard to section 33(2)(e) of the West Indies Associated States and my finding of fact that the Applicant had time and opportunity to appeal before she did are slim; and the prejudice to the Respondent is evident.

[42] The application for extension of time is therefore refused with costs to the Respondent to be taxed if not agreed.

A.N.J.MATTHEW
Justice of Appeal