

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST CHRISTOPHER AND NEVIS
(DIVORCE)
A.D.2009**

Claim No. SKBHMT2007/0031

Between

**MARY HERBERT
and
DESMOND HERBERT
ANGELA STANLEY
ANA SAMUEL**

Petitioner/Respondent

Respondent/Applicant

1st Co-Respondent

2nd Co-Respondent

Appearing:

Mr Nassibou Butler for the Applicant

Mr Adrian Scantlebury for the Respondent

2008: November 28

2009: April 3rd

DECISION

- (1) **BELLE J.** On April 18th 2007 Mary Herbert filed a Divorce Petition in which she alleged cruelty and adultery on the part of the Respondent Desmond Herbert and asked for relief including matters related to the matrimonial property of the parties. On June 17th 2007 Mary Herbert filed an Amended Petition in which similar allegations were made with a few changes and the same relief was prayed for.

- (2) On September 3rd 2008, The Applicant Desmond Herbert filed a Summons in which he claimed that the Petitioner Mary Herbert's Amended Petition for Dissolution of Marriage should be struck out on the grounds that:
 1. The amended Affidavit in support of the Petition filed herein does not depose as to the existence of collusion, connivance and condonation as is required where the petition alleges cruelty and adultery.
 2. While being headed "Amended Petition" that document purports to include within it a application for an order under Section 19 of the

Married Women's Property Act Chapter 328 of the 1961 Revised Laws of the Federation of St Christopher and Nevis

3. Orders under the Married Women's property Act Chapter 328 cannot be applied for by way of a Petition for dissolution of marriage or (an) originating process is required to initiate proceedings under the Married Women's Property Act.
 4. Claims numbers 2,3,4 and 5 are in truth and in fact claims under the Married Women's Property Act and not claims that are maintainable in a Petition for the dissolution of marriage. These are not claims for ancillary relief.
- (3) On November 6th 2008 the Applicant's Solicitor Mr Butler filed skeleton arguments in support of the Application. He cited section 22(2) of the Divorce Act 2005, which states that the applicable rules in matrimonial matters shall be the Matrimonial Causes Rules. (1937 No 1113). Mr Butler submitted that Rule 6 (2) (a) of the Matrimonial Causes Rules 1937 states that the affidavit in support of a Petition "Shall also state in the case of every Petition for Divorce or Judicial separation where the ground of the Petition is adultery whether the Petitioner has in any manner been accessory to or connived at or condoned the adultery, and where the ground of the Petition is cruelty whether the Petitioner has in any manner condoned the cruelty."
- (4) Mr. Butler submitted that the affidavit in support of the Petition did not meet the necessary requirements.
- (5) Mr. Butler further submitted that an application under section 19 of the Married Women's Property Act is not an application for ancillary relief but is separate and distinct from Divorce proceedings and therefore an order under the Married Women's Property Act cannot be applied for by way of a Petition for dissolution of marriage. An originating process is required to initiate proceedings under the Married Women's Property Act. This process is governed by section 19 of the Married Women's property Act. Mr. Butler submitted that Summons means summons and not Petition.

- (6) Mr Butler cited in support the case of Strachan v Strachan [1965] 2 All E.R. 77 in support of the submission that the application should be done in a summary way which excluded a Petition. In that case Lord Pearce stated that,

“Section 17 of the Married Women's Property Act 1882 is a procedural section whereby questions between husband and wife as to property may be decided in a summary way.”

- (7) Furthermore Mr. Butler submitted Rule 4 of the Matrimonial Causes Rules 1937 lays down the format for a Petition and what the Petition must contain and there is nothing in that Rule which connotes an application under the Married Women's Property Act. In addition Rule 3 defines ancillary relief and does not refer anywhere to the application for the determination of ownership or possession of property as between spouses under the Married Women's Property Act.
- (8) He reiterated that Claims Nos. 2, 3, 4 and 5 are really claims under the Married Women's property Act and not claims for ancillary relief and are not maintainable in a Petition for the Dissolution of Marriage. Paragraphs 9-17 of the Petition also fall into the same error Mr. Butler submitted.
- (9) In response Counsel for the Respondent Petitioner filed an Application, which did not address these aforesaid issues but purported to attack the Respondent's Application on the ground that it was an attempt to avoid certain orders already made in relation to the matrimonial property issues. Mr. Butler responded with even more authorities in support of the Application. The argument somehow got sidetracked into whether the CPR 2000 was applicable to matrimonial proceedings. This was quite irrelevant at this stage since most of the preliminary property issues had already been heard and necessary orders given and their determination could not now be affected by the existence of the Divorce Petition.
- (10) However in spite of my finding that this argument in relation to the applicable nature of the CPR 2000 in no way rebuts Mr. Butler's submissions, I will add that I agree with Mr. Butler that Rule 81 of the Matrimonial Causes Rules cannot be utilized to open the door to the application of the CPR 2000. I agree that the language of Rule 81 coupled with the language of Rule 2 (2) 4 of the old Rules of the Supreme Court and Part 2.2 (3) (a) of

the CPR 2000 together have the effect that neither version of the rules of court apply to matrimonial or family proceedings. Their application only becomes relevant if the Matrimonial Causes Rules point to their use or are lacking in some way and require the application of the CPR 2000 or earlier rules to cure the lacuna in the law. But it has not been argued by counsel for the Respondent/Petitioner that there is any lacuna in the law. The Matrimonial Causes Rules are endowed with an extensive appendix, which set out the relevant court forms for various kinds of proceedings.

- (11) I also note that it is logical to assume that the principles governing the pleadings in any matter before the court would apply across the board in court proceedings and such principles would have been established in the civil practice of the court with some modifications. I would cite the fact that affidavits in support of applications should state facts and not law as one such rule.
- (12) It is also true that counsel has failed to rebut the argument that having served the Petition, it could not be amended in the manner in which it was, without leave of the court. I find that this submission is correct.
- (13) I will not engage in an unnecessary academic exercise on this matter since counsel for the respondent has not successfully attempted to rebut any submission made on the effect of the Matrimonial Causes Rules. He has therefore conceded that he is in error and I do not think that it is necessary to go beyond the literal interpretation of the rules to find in favour of the Applicant in this matter. Consequently the Amended Petition of Mary Herbert filed on June 17th 2007 is struck out for failure to comply with the Matrimonial Causes Rules in the manner submitted by Mr. Butler on the behalf of the Applicant.
- (14) The Respondent is ordered to pay the assessed costs of the Applicant in this matter.



Francis H V Belle
High Court Judge