IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. W079/98

BETWEEN NATALIE GAYE ELIZABETH WILSHIRE CLAIMANT

AND WAYNE ANTHONY WILSHIRE DEFENDANT

Mrs. A. McBean-Wisdom instructed by Frater, Ennis & Gordon for claimant.

Gordon Steer and Miss Judith Cooper instructed by Chambers, Bunny & Steer for defendant

Heard: January 8, March 16, and June 29, 2004

JONES, J.

When Natalie Gaye Wilshire obtained a Decree Nisi in dissolution of her marriage to Wayne Anthony Wilshire on December 9, 1998, little did she know that five years later the proceedings initiated by her would take a nasty and confrontational turn. On June 6, 2003, she filed an action in this court for a declaration that the Decree Absolute obtained by her husband Wayne Wilshire on December 13, 2002, be declared a nullity. She claimed that the Decree Absolute was granted by the court, without first giving her an opportunity to be heard, and in breach of the Matrimonial Causes Rules. In particular, she claimed that:

(a) She was not served with notice of the application;

(b) There was no indication as to whether the judge who granted the Decree Absolute certified that he was satisfied as to the arrangements for the care and upbringing of the relevant children of the marriage, in accordance with rule 38(7) of the Matrimonial Causes Rules.

(c) There was no affidavit setting out the arrangements proposed for the care and upbringing of the relevant children as required by Rule 38(8).

(d) There was no Affidavit of Delay filed by the Respondent in

accordance with Rule 38(2).

The facts (which are not disputed) were that Mrs. Wilshire filed an application in the Supreme Court of Jamaica for a Decree Nisi to dissolve her marriage. The application was heard, and Decree Nisi granted on December 11, 1998. Subsequently, her husband Wayne Wilshire applied for a Decree Absolute on October 15, 2002, which was granted on December 13, 2002. The Matrimonial Causes Rules provide that either party to a marriage can apply to make the Decree Nisi absolute. Sec. 38 (1) provides that:

> *"An application by either party to a marriage to make absolute a decree nisi shall be made to the court by filing a notice in writing setting forth that application is made for such a decree absolute, and a time shall be appointed for such decree to be pronounced in open court, being not earlier than six (6) weeks from the date of the decree nisi, unless the court shall by general or special order fix some earlier time."*

Mr. Wilshire's attorney-at-law, Mr. Gordon Steer, served the notice of application for the Decree Absolute on Miss Leila E. Parker, the former attorney on record for Mrs. Natalie Wilshire.

It should be noted that on March 4, 1999, Mrs. Margarette Macaulay filed a Notice of Change of Attorney in the Supreme Court indicating that she was now the attorney on record for Mrs. Natalie Wilshire. There was no

documentary evidence that the Notice was served on Mr. Wilshire's attorneys. However, in an affidavit filed in this matter, Mrs. Margarette Macaulay said that a Notice of Change of Attorney was served on the office of Chambers Bunny & Steer on March 4, 1999. Mrs. Macaulay contends that Mr. Steer knew that she was the attorney on record in the matter. On the other hand, Mr. Steer would be hard pressed to deny that he had no knowledge that Miss Leila Parker had ceased to act as Mrs. Wilshire's attorney. The evidence is that on several occasions - regarding related ancillary applications - he acknowledged the representation of Mrs. Macaulay as Mrs. Wilshire's attorney in the matter.

At the end of the day, it cannot be doubted that Mrs. Natalie Wilshire was not given any notice of the application for a Decree Absolute in this matter and as a result, was not given an opportunity to be heard.

Two issues arise from these facts:

1. Firstly, whether or not a Decree Absolute obtained in these circumstances is void and a nullity, or is voidable at the discretion of the court.

2. Secondly, if the Decree Absolute is voidable in the discretion of the court, on the facts of this case, should the court set it aside?

On the first issue:

Mr. Gordon Steer contended on behalf of Mr. Wilshire that the failure to serve the notice on Mr. Wilshire would not make the Decree Absolute void, but voidable at the discretion of the court. He argued that: as it was Mrs. Wilshire who filed for the divorce and obtained the Decree Nisi; as all the issues in relation to the welfare of the children had been settled by the parties; there is no injustice to Mrs. Wilshire if the Decree Absolute was not set aside. In supporting his contention, Mr. Steer referred the court to the case of ***Wiseman v Wiseman*** **[1953] 1 All ER 601.** In that case, the husband filed a petition for divorce against his wife on the ground of desertion. She was then abroad and after insufficient steps had been taken to discover the whereabouts of the wife, he obtained an order for substituted service of the petition by advertisement in a provincial evening newspaper. The advertisement never came to the wife's notice, and she knew nothing of the petition, which was undefended. The husband obtained a decree nisi against her, and later the decree was made absolute. A year later the wife heard of the divorce proceedings and applied: for leave to appeal out of time against the Decree Absolute; for the decree to be set aside; and for a new trial. The court held that the failure of the husband to make "a sufficient or candid" disclosure in his application for an order for substituted service rendered that order voidable and it would be set aside. Denning L.J concluded on page 607

that:

> *"In the present case I do not think that the failure of the husband and his solicitor to do their duty made the proceedings absolutely void. Suppose, for instance, that the wife had seen the advertisement at the time and entered an appearance, the defect would have been waived and no court would set the proceedings aside. That shows that the order for substituted service was only voidable, but not void. So also the proceedings which followed it down to and including the decree absolute are only voidable and not void."*

Mr. Steer also referred the court to a decision of the Family Court of Australia in ***Van Maxwell Cross v Annette Marie Cross* No. 2014 of 1994 ([1995] FLC 92-628)** where reference was made to dicta in ***Miller v Miller* [1983] FLC 91-328.** In ***Miller's case*** the effect of the decree was called in question before the Full Court by way of a case stated. Fogarty J said:

> *"In limited circumstances the Court may set aside a decree of divorce notwithstanding that it has become absolute or it may be treated or acted upon by the parties as a nullity...where there has been a procedural irregularity which has caused a denial of natural justice. For example where there has been no service of the proceeding and no order dispensing with service (as distinct from some defect in service or where there was an order dispensing with service which was later treated as having been inappropriately made)"*

Evatt CJ in commenting on the circumstances in which a court may set aside a Decree Absolute said:

> *"The other and more common situations arise when there is some failure to comply with procedural or other requirements which failure may render the decree voidable, but not necessarily void. Failure to comply with the rules as to service... may fall into this category. The decision whether to set aside the decree in these cases is exercisable on a discretionary basis, taking into account the consequences for the status of the parties of altering the status established by the decree and weighing these against the results flowing from a miscarriage of justice."*

The cases cited by Mr. Steer do not support his contention that failure to serve a document does not necessarily lead to the process being a nullity. The case of ***Wiseman v Wiseman*** (previously cited) relied on by Mr. Steer, can be distinguished from the facts of this case, as in that case, the husband obtained an order for substituted service by advertisement, and service was carried out in accordance with the order of the court. In this case there was a non-service of the required notice of application for the Decree Absolute. In addition, Mr. Steer's argument was unfairly dismissive of Mrs. Wilshire's inherent right to be heard in a matter that concerned her.

This court takes the view that lack of service of a document on which an order is based is not a mere irregularity, but a fatal flaw, which makes the

order a nullity. Support for this view can be found in the following passage taken from the judgment of Lord Greene in ***Craig v Kanseen*** **[1943] 1 All ER 104 at page 108:**

> *"The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."*

In the Trinidadian case of ***Tam-Kai v Tam-Kai*** **[1960] 2 WIR 229** it was held that the failure to serve the petition on the wife was a defect which would make the proceedings a nullity, and if established, would entitle the wife, as a matter of right, to have the orders made set aside.

The facts were that a husband obtained a decree nisi of divorce which was made absolute. The wife applied for an order to set aside the decrees nisi and absolute and dismiss the petition of the husband on the ground that

the proceedings on which the decrees were made were a nullity.

In support of her motion the wife in her affidavit denied the allegations of adultery in the petition, alleged want of service thereof on her and complained that she was given no opportunity of being heard. There were also allegations by her suggesting fraud. De la Bastide J., (as he then was) in giving the judgment of the court, summarized the applicable principle at page 233:

> *"this court has come to the definite conclusion that where there has been no service of the petition on the wife as has been here alleged and the proceedings have terminated in a decree absolute without her knowledge, she being thereby deprived of her inherent right to be heard by the court, such proceedings are null and void and of no legal effect whatsoever, and in the circumstances this court which was the court of original jurisdiction has an inherent right and power to act ex debito justitiae to set aside its own order."*

By parity of reasoning, the principle applied in ***Tam Kai's case*** (previously cited) would have equal application to the facts of this case where there was a failure to serve notice of application for Decree Absolute on the wife.

A further illustration of the principle appears in ***Wolfenden v Wolfenden*** **[1947] 2 All ER 653,** where a wife obtained a decree nisi of

divorce. Seven weeks later, the husband applied to the registrar for the decree to be made absolute, and on that day the application was granted. The husband had not complied with the statute as there was no summons to the registrar; no notice was served on the wife; and three months had not elapsed from the earliest date on which the application for the Decree Absolute could have been made. The court held that the husband had not complied with the statute, with the result that the making of the Decree Absolute was not just an irregularity, but a nullity and, therefore, the Decree Absolute must be set aside.

On the basis of the cases referred to, I have come to the conclusion that as there was no service of the notice of application for Decree Absolute on Mrs. Natalie Gaye Wilshire, the divorce proceedings initiated by her have concluded without her knowledge with the result that she has been deprived of her right to be heard. Accordingly, this court in the exercise of its inherent jurisdiction, declares, that the Decree Absolute obtained by Mr. Wayne Wilshire on December 13, 2002, is void and of no legal effect. Needless to say, as a result of the conclusion arrived at on this issue, it is unnecessary to deal with the second issue. Cost of these proceedings awarded to Mrs. Natalie Gaye Wilshire in accordance with Appendix B, Table 1 of CPR 2002.