



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO 67 OF 1977

C E SPETITIONER

VERSUS

E A M S.....RESPONDENT

JUDGMENT

This is the husband's petition for divorce on the grounds of the wife's adultery with the co-respondent, and cruelty. Before the arguments commenced, the petitioner withdrew his allegation of adultery, and consequently paragraph 8 of the amended petition was struck off with costs to the co-respondent.

Before the hearing of the petition commenced, Mr Cassidy for the respondent informed the Court that he wished to raise the issue of domicile of the parties as a preliminary point, and that he had earlier on the same morning appraised Mr Malik, for the petitioner, of that point. Although the issue of domicile had not been raised in the answer to the petition, both parties agreed that, before I could hear the petition on its merits, it was necessary to determine the issue of domicile, as that was fundamental to this court's jurisdiction in the matter; and that if I ruled against the petitioner, the petition would have to be dismissed.

It has been averred in paragraph 7 of the petition "that the petitioner and the respondent are Italian citizens and are domiciled in Kenya". The petitioner gave evidence in support of this averment. He stated that he was forty years old, that he had lived in Italy for thirty seven years of his life, during which period he had travelled abroad but never before worked outside Italy; that he came to Kenya on 30th January 1976; that he had lived in Kenya since then; that at the moment he was employed by Uchumi Supermarket Ltd, Nairobi (hereinafter referred to as "the Uchumi"); that he had no intention of going back to Italy; that he had made Kenya his home; and that he intended to reside in Kenya.

The law on the question of acquiring domicile of choice has been dealt with in some detail by the Court of Appeal for East Africa in *Field v Field* [1964] EA 43 and in *Thornhill v Thornhill* [1965] EA 268. I will not, therefore, reiterate it here; but will content myself by stating its broad principles, before endeavouring to apply them to the facts of the present case. Domicile of choice is acquired by the actual removal of an individual to another country accompanied by his *animus manendi*. Any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country, other than that of his domicile of origin, with the intention of continuing to reside there indefinitely. The burden of proving that a domicile has been chosen in substitution for the domicile of origin is on him who asserts that the domicile of origin has been lost; the intention must be proved with perfect clearness. It is not necessary that a change of nationality should be intended, or any steps taken to secure naturalisation. If residence and intention of permanency are both present, a new domicile is acquired, even if a desire to retain the old one is expressed. To put it in different terminology, the standard of proof depends in some measure on the seriousness of the allegation: a change from a

domicile of origin to one of choice is always a serious matter and the standard required is accordingly a high one.

The petitioner testified on oath that he had made Kenya his permanent home. No evidence to the contrary was led by the respondent. The petitioner has also produced a "certificate of cancellation from the registry records" issued by the Municipality of Milan, where it is recorded that the names of the petitioner and his family, formerly recorded in that registry, had been cancelled because of permanent emigration abroad.

Has the petitioner then established that he has abandoned his domicile of origin and acquired a new domicile of choice in Kenya? In my judgment the answer is "No", because I consider that the circumstances of the matter and the conduct of the petitioner do not support his assertions.

The petitioner is in this country on what is known as a "management contract". That contract or agreement is between the petitioner's employers in Italy and the Uchumi and is for the duration of five years. However, there is no evidence that the petitioner is the only person who can fulfil the terms of that contract on behalf of his employers or, to put it differently, that his employers cannot recall him to Italy and appoint someone else in his place to carry out the terms of that contract. There is no evidence that the petitioner has taken any steps to sever his employment in Italy or negotiate a contract which is personal to him in view of his alleged intention of making Kenya his permanent home. Furthermore, there is no evidence from the Uchumi that only the petitioner, and nobody else, could fulfil the terms of the management contract or that irrespective of the terms of that contract, they would continue to engage the services of the petitioner personally.

The petitioner also owns a piece of land in Italy, where he claims that he intends to build a holiday cottage. But I think that it is a factor which, to some extent, indicates his intention to return to the country of his birth.

He has not up to now taken any steps to dispose of that piece of land. He has also his household goods stored in Italy. Had he really intended to emigrate permanently, it is reasonable to expect him to dispose of all such property before leaving a country which he was abandoning permanently.

Mr Malik has sought to place such reliance on the certificate from the Municipality of Milan, which was tendered in evidence from the Bar, Mr Cassidy not objecting to it as he did not (very properly) wish to cause the parties unnecessary expense. But I agree with his comments on that certificate, and I do not think that it carried the petitioner's claim much further. It is not clear in what circumstances the certificate came to be issued and what sort of declaration the petitioner had made to obtain it or whether it is purely an arrangement for municipal purposes. There is no evidence that the petitioner had visited Kenya earlier or that he had really decided to make Kenya his permanent home before accepting secondment on a management contract.

It is true that the respondent has not given any evidence to controvert the petitioner's evidence on his alleged domicile of choice, but what could she have said? There is no evidence that when the parties were on better terms, or for that matter at any time, the petitioner had indicated to her a desire to make Kenya his permanent home. In my view the facts of this case are clearly distinguishable from *Field v Field* and *Thornhill v Thornhill* already referred to. I was not favourably impressed by the petitioner as a witness and I am of the opinion that Kenya is not his domicile of choice but rather domicile of convenience.

The petitioner having failed to establish that he is domiciled here, and consequently that I have jurisdiction to hear this petition, I dismiss it with costs to the respondent.

Petition dismissed with costs.

Dated and delivered at Nairobi this 7th day of July 1978.

S.K SACHDEVA

JUDGE