Neutral Citation: [2011] IEHC 558

THE HIGH COURT

FAMILY LAW

[2007 No. 19 M]

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996, AND IN THE MATTER OF THE FAMILY LAW ACT 1995, AND IN THE MATTER OF AN APPLICATION FOR SECURITY FOR COSTS IN NULLITY APPLICATION

BETWEEN

M.R.

APPLICANT

AND

B.M.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 3rd day of June, 2011

1. The applicant wife and the respondent husband were married to one another on the 30th October, 1970, in the then Federal Republic of Germany. The parties went through a divorce procedure in the Dominican Republic in 1998, the validity of same in this jurisdiction is being challenged by the applicant. On the 19th March, 1991, an order was made in the Circuit Court in this jurisdiction for judicial separation of the parties. The respondent has since been married, divorced and remarried in other jurisdictions and is currently a citizen of Israel and resides therein. By special summons dated the 28th February, 2007, the applicant claims in this Court an order pursuant to s.5(1) of the 1996 Act for a decree of divorce. Initially, in the respondent's answer to the applicant's claim in his replying affidavit of the 21st January, 2008, the respondent asserted as valid within the jurisdiction of the Courts of Ireland the divorce from the applicant obtained by him in the Dominican Republic on the 5th May, 1988. Subsequently, after his solicitors came off record, the respondent was permitted by the court to amend his defence and counterclaim for a decree of nullity against the applicant in respect of their marriage in 1970, in respect of which the applicant claims a decree of divorce.

2. By notice of motion herein the applicant sought an order pursuant to O.29 of the Rules of the Superior Courts directing the respondent (petitioner) to provide security for the applicant's costs in relation to the nullity proceedings which will be heard prior to the divorce proceedings and for further or other relief. Under this general application for relief the court ruled that such further relief was to include a claim for an alternative order pursuant to O.70, r. 75 of the Rules of the Superior Courts directing the petitioner/respondent to pay to the applicant up to the date of the application and her further costs *de die in diem* to the trial of the action.

3. The grounds upon which the applicant relied for security for costs were as follows:-

> 1. The petitioner/respondent resides outside the jurisdiction in Israel.
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> 2. The petitioner has a satisfactory defence to the claim for nullity on the grounds that the petitioner is estopped from denying the marriage by reason of his submission to the jurisdiction of the Irish Courts with the best legal advice available, and the granting of a decree of judicial separation and further on the alternative, claiming as a defence in the divorce proceedings herein the recognition of the alleged divorce in the Dominican Republic quite apart from any defences on the merits in relation the nullity claim itself which claims lack of capacity on the part of the petitioner/respondent.

4. The hearing of the application took place on the 28th and 29th March, 2011. The petitioner was personally represented and argued what he described were thirteen points against the making of an order for security for costs. These may be summarised in relation to the most arguable points as follows:-

> 1. The cases decided by courts in this area generally related to the protection of defendants from spurious or fairly plainly unmeritorious claims by impecunious persons not ordinarily resident in the State and did not relate to nullity proceedings which were proceedings in relation to the status of persons.
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> 1. The applicant had taken the benefit of the divorce in the Dominican Republic and she has been paid maintenance in consequence thereof.
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> 3. The imposition of a requirement for security for costs (however described) would be an unlawful restriction on the right of the petitioner for access to the Courts in Ireland and a denial of his right to a fair trial contrary to the provisions of the Constitution and the European Convention on Human Rights by reason of the fact that while the petitioner once was a wealthy man in terms of capital and income, his business had collapsed and he was now a man of insubstantial means and by reason of having recently gone through a divorce in Israel and having sold his family home, would be unable to put up substantial funds as might be required for security for costs.
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> 4. He had shown through his involvement with the proceedings and frequent travel from abroad to appear in court that he was committed to the proceedings and also continued to pay substantial maintenance to the petitioner as evidenced in the petitioner's affidavit of means. As two afterthoughts in relation to his arguments he suggested that the whole problem of having to have security for costs would be obviated by the applicant if she mediated with the petitioner with a view to having an acceptance and/or recognition of the Dominican Republic divorce and withdraw her proceedings on an amicable basis and also that, while he was not ordinarily resident in the State, he had, as the only residue of his former business involvement, a London based pension fund which would be available to him (and by implication be available to satisfy any

claim for costs by the applicant) in due course.

Decision

5. In relation to the argument that an order for security for costs was not available in respect of applications relating to the status of persons, the judgment of the High Court i*n E.L. v. S.K.* [2012 IEHC 617] is clear authority that an order for security for costs may be made in judicial separation proceedings and by implication divorce and other proceedings relating to status. That case was argued on both sides by the most eminent counsel experienced in family law matters and the power of the court to grant such an order in relation to status matters was not even argued by those same counsel involved. In any event, the specific rule of O.70, r.75 in relation to costs and security for costs *de die in diem* highlights the particular jurisdiction relating to matters of status existed not only in the present Rules of the Superior Courts but in earlier rules. I was further assisted in coming to this view by reason of the fact that Ms. Cawley B.L. for the applicant produced to the court a redacted order in one of the appeals in the well known *K. v. K.* series of cases in which the Supreme Court made an order requirement requiring security for costs, not clearly saying but presumably following the template of O.29 of the Rules of the Superior Courts. Furthermore, the mentioning of the afterthought to have a mediation 'recognise' the Dominican Republic divorce shows that the petitioner is not really worried about his 'status' but rather wants to avoid an Irish divorce by any means available.

Defence on the Merits

6. As O.29, r.3 provides:-

> 'No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.'

It is incumbent on the court to first address the possibility of the applicant being entitled to an order for security for cost and costs de *die in diem* pursuant to O.70, r.75 which is merely for the benefit of a wife in nullity proceedings regardless of the merits or otherwise of any defence he may have to it if the wife has no separate estate.

7. As the wife, in accordance with her affidavit of means, has modest assets consisting of family home, motor car, small share portfolio, very small pension and a very modest income it can be hardly said that she has no separate estate and thus, I consider that O.70, r.75 does not apply notwithstanding that an order for security for costs de die in diem might be in ease of the petitioner/respondent in terms of cash flow and might also assist the parties in concentrating their minds on not incurring extra costs by unduly prolonging the hearing of the petition. Therefore, having regard to the inapplicability of O.70, r.75, I must consider whether the applicant wife has in accordance with O.29, r.3 'a defence upon the merits'. In O'Floinn, *Practice and Procedure in the Superior Courts*, 1st Ed., (Dublin, 1996) p. 230 deals with the term 'has a defence upon the merits' as follows:-

> 'The defendant does not have to make out in proof a defence to the action, but he bound to lay before the court a "satisfactory" affidavit and must give some evidence to satisfy the court that there is a reasonable prospect of his establishing some more or less specific or ascertainable defence: *Walker v. Atkinson* [1895] 1 I.R. 246, *Denman v. O'Callaghan* 31 I.L.T.R. 141 and *Dennis v. Leinster Paper Co.* [1901] 2 I.R. 337. See also *Banco Ambrosiano v. Ansbacher & Co. Ltd* (Unreported, High Court, 19th July, 1985).'

The statement in this footnote is consistent with the analysis of this question in my judgment of the High Court above of *E.L v. S.K.* [2012 IEHC 617] and I accept same. I find that in accordance with the above criteria the petitioner does, in fact, have a defence on the merits in three aspects:-

> 1. The manifest and advised participation of the petitioner in the Irish judicial separation proceedings, giving rise to an estoppel.
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> 2. The recognition of the existence of the marriage subject to the separation proceedings by the purported divorce in the Dominican Republic, similarly giving rise to an estoppel.
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> 3. The particular averments of the wife denying any lack of capacity of circumstances giving rise to coercion relating to the marriage of the parties in Germany.

8. In relation to the petitioner's assertion that he had a significant pension fund in London, this constitutes a blowing of hot and cold in relation to his earlier allegation that his access to the courts would be barred by a security for costs in the face of his impecuniosity. This Court views that the existence of a pension fund ring fenced by trustees is not an asset which is particularly amenable to provide security for costs and the experience of the family law courts, even with the assistance of pension adjustment orders and more speculative arguments relating to the ability of a dependent spouse to enforce maintenance orders against pension funds abroad under the Brussels Convention and the Brussels I Regulations, the court could not take any comfort from the existence of such pension funds in a situation where enforcement of costs in respect of a nullity suit would not have the assistance of any special family law or European legislation.

9. As the petitioner also endeavoured to argue as a second aspect of his pension fund, announced to the court late in the day that this would provide a connection between him and the European Union such that would and should get the benefit of the proposition that the courts in this jurisdiction will not, save in exceptional circumstances, make an order for security for costs in respect of plaintiffs (petitioners) who are nationals of and residents in a Member State of the European Union. I consider that this argument is not available to the petitioner, not only by reason of the fact that he is not a national or resident in another member state but also was not able to show to the court that any bilateral agreement between Israel and the European Union put him in a similar position of a national or a resident as such. The court afforded the petitioner an opportunity to consider and investigate this latter aspect as the court was mindful that Israel is a signatory of the Hague Convention and whose courts and administration actively assist in the operation and development of the judicial co-operation thereunder in relation to child abduction, and where such a jurisdiction which might possibly seek some benefit of single market type measures in the European Union through a bilateral treaty or similar measure.

10. By reason of the opinion of the court in relation to the foregoing arguments, the court is satisfied that an order for security for costs should be made pursuant to O.29 of the Rules of the Superior Courts. The court is mindful that this is a discretionary remedy and the court should taken an overall view in deciding whether it is appropriate in all the circumstances that the order should be made notwithstanding that the narrow criteria are met. This Court finds that the final exercise of the discretion of the court to make an order requiring security for costs is very strongly tipped against the petitioner on the grounds that, since these proceedings were initiated in 2007 there has been very substantial delay caused by the requests and actions on the part of the petitioner, highlighted

by the fact that up until his solicitor's withdrew from the proceedings in 2009 nullity was not used as a defence at all and the petitioner used his position of asserting the validity of the Dominican Republic marriage as a bar to his obligation to provide an affidavit of means as he was entitled to do under the authority of the judgment in the Supreme Court in *W. v. C.*. The wife is thus in the position of pursuing a divorce action for almost four years without yet having the benefit of ascertaining what the means of her alleged spouse are. This substantial delay in such conditions, if they were eventually found by the court to exist, are bordering on the oppressive. This apprehension of oppression is, therefore, a very significant factor in convincing the court to exercise the discretion to make an order for security for costs.

Conclusion

11. This Court will make on order directing the petitioner to provide security for costs and will grant liberty to the applicant wife to apply to the Master to have the terms of such security fixed in accordance with the Rules of the Superior Courts.