



**Civil Court – Family Section**

**Mr. Justice Robert G. Mangion LL.D.**  
**Dip.Tax (MIT), P.G.Dip. Mediation (Melit.)**

**- EC REGULATION NUMBER 1393/2007 –**

**- “ON THE SERVICE IN THE MEMBER STATES OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (SERVICE OF DOCUMENTS)”.**

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**- NULLITY OF JUDICIAL ACTS -**

**Today the 14<sup>th</sup> day of July 2016**

Application No. 26 / 16RGM

Number on list: 1

**A B**  
**vs**  
**C D B**

**The Court,**

Having seen plaintiff’s application filed on the 21<sup>st</sup> April 2016 which reads as follows:-

“That plaintiff filed this application for divorce on the 19th January 2016, and the first hearing of this lawsuit was scheduled for the 9th March 2016;

That until such date, no reply had been filed by defendang or any agents of hers [as she resides in Austria], notwithstanding same defendant had been duly served in Austria, according to Law;

That this notwithstanding, counsel for defendant appeared at the first hearing, demanding that this Honourable Court grant additional time for the filing of a reply, and this Honourable Court in its wisdom and magnanimity, grinted such

request imposing a deadline of 20 days for such reply to be filed, and this notwithstanding the fact that in effect, defendant was in a state of contumacy;

That on the 29th of March 2016, exactly on the deadline imposed by this Honourable Court a reply was filed on behalf of defendant by P.L. Jolene Pace Ciscaldi;

That, as plaintiff pointed out to this Honourable Court during the hearing of the 12th April 2016, this reply is null and void, and should be removed from the Acts of the case in its entirety, for the reasons that shall follow;

That C D B is an Uzbekistan national, who acquired British citizenship through her first marriage, and who now resides in Austria - she left Malta permanently following the breakdown of her short marriage to plaintiff on the 30th May 2011, as has been declared in the contract of separation that forms part of these Acts. In fact, the separation process was completed through the assistance and representation of Dr. Lorraine Schembri Orland, now an honourable judge of the Courts of Malta;

That notwithstanding the fact that same defendant has been absent from Malta since 2011, the reply in these proceedings was filed in the name of C D B, with no evidence whatsoever that she was physically present in Malta at the time the reply was filed in her name;

That according to Law, an absentee cannot file judicial acts, and any judicial acts need to be filed by a specified agent with a specified mandate to do so - plaintiff contends that at the moment of filing of the reply no person in Malta possessed lawful representation of defendant that would allow such person to sue or be sued on defendant's behalf, or act as defendant's lawful representative in pending proceedings;

That during the hearing of the 12th April 2016, during oral submissions on this point Dr. Jeanine Giglio, appearing for defendant, confirmed to this Honourable Court that she was not in possession of a power-of-attorney entitling her to assume lawful representation of defendant, further to her instructions to act as counsel;

That this effectively confirms plaintiff's assertion that no person in Malta enjoyed legal representation of defendant, and that defendant was not present in Malta at the time of filing of the reply;

That this creates a situation wherein the reply is defective, and should be considered null and void by this Honourable Court, and consequently should not

be considered by this Honourable Court, and should be removed from the acts of this case;

That there is no way at Law in which such defect in the judicial act can be fixed that the Court can consider to attempt to save the validity of the judicial act under discussion;

That the removal of the reply from the Acts of this case will place the defendant once more into a state of contumacy, and plaintiff is making it clear that he will object to any further attempts on the part of defendant to re-present a reply to this lawsuit, once:

- a) defendant failed to present a reply by the first hearing, in good time;
- b) notwithstanding the fact that this Honourable Court granted a further period of 20 days within which to file said reply, the one filed at the 11th hour was effectively null and void, and therefore should not be considered;

Therefore, plaintiff respectfully demands that this Honourable Court to:

- 1) Declare that the reply filed on behalf of defendant on the 29th March 2016 is null and void;
- 2) Consequently order the removal of the reply from the Acts of the case;
- 3) Consequently declare that defendant is in a state of contumacy, and should not be permitted to participate in the case;

Saving any other decision that this Honourable Court may deem appropriate”.

Having seen defendant’s reply filed on the 4<sup>th</sup> May 2016 which reads as follows:-

1. “That as plaintiff correctly points out the reply was filed on the 29<sup>h</sup> of March 2016 by L.P. Joeline Pace Ciscaldi on behalf of the defendant, that is within the time-frame granted by this Honourable Court in its good judgment and spirit of justice in light of the circumstances of this particular case, by the legal procurator and in accordance with Article 180 of the Code of Organisation and Civil Procedure, Chapter 12 of the laws of Malta (COCP);

2. That as justly submitted by the plaintiff the defendant resides in Austria and has permanently left Malta since 2011, thus unlike the plaintiff who until last year still visited Austria regularly, the defendant no longer has any connection with Malta; and the plaintiff is employing all means possible to preclude the defendant from obtaining a sentence in Austria;

i. firstly by filing the present proceedings for divorce in Malta even though such proceedings were already instituted in Austria with which he was duly served,

ii. secondly by trying to attack the validity of the reply submitted by the defendant on the 29th March 2016 for the defendant to be declared to be in a state of contumacy and hence denying defendant the fundamental human right of having access to the Court, and

iii. thirdly the plaintiff withheld from this Honourable Court mandatory information of fundamental importance in the Court proceedings such as the reconciliation of the parties within the four year period required for the declaration of the divorce;

3. That what plaintiff is contending, that at the moment of filing the reply no person in Malta possessed lawful representation of the defendant is incorrect and untrue, and this is also in line with the judgment delivered by the Court of Appeal on the 25th May 2012 in the names Cassar pro et noe vs Cardona et whereby the Court stated that when a person is domiciled in the EU such person is not to be considered absent from Malta and hence such absence need not be reflected in the names of the proceedings by stating that a mandatory is appearing on behalf of such a person;

4. That without prejudice to the above, what the plaintiff is contending, that at the moment of filing the reply no person in Malta possessed lawful representation of the defendant is incorrect and untrue and this for the following reasons;

i. Advocate Dr Jeannine Giglio was approached by Dr Martin Deuretsbacher the lawyer representing the defendant in the divorce proceedings in Vienna who briefed her on the current situation of his client and this was followed by further exchanges of emails and telephone calls;

ii. Subsequently, further correspondence was exchanged between the defendant and her lawyer whereby all the relevant information in regard to the divorce proceedings that were being carried out in Austria was forwarded;

iii. That Dr Martin Deuretsbacher informed Dr Jeannine Giglio that it was not possible for the defendant to come over to Malta and asked whether Dr Giglio or anyone from the firm could assist the defendant by acting as her lawful representatives as can be seen through the correspondence attached and marked 'Doc P1' and 'Doc P2';

iv. Following such correspondence with Dr Martin Deuretsbacher, a series of correspondence and telephone calls ensued with the defendant whereby the defendant once again confirmed that she was desirous that Dr Giglio or anyone from the firm act as her lawful representative in Malta since it is very difficult for her to co-ordinate trips to Malta due to her two young sons;

5. That without prejudice to the above, although a traditional mandate in writing did not exist at the time of filing of the reply which is presently being attacked this does not mean that there existed no mandate. For a mandate to be valid it does not need to be constituted in any specified form, but it can be given verbally and even tacitly, as provided for under Article 1857 of the Civil Code, Chapter 16 of the Laws of Malta; therefore the assertion made by the plaintiff that the defendant did not have a lawful representative in Malta to file a reply is untrue and unfounded;

6. That contrary to what the lawyer for plaintiff is alleging, during the hearing of the 12<sup>th</sup> of April 2016, Dr Jeannine Giglio confirmed to this Honourable Court that she was not in possession of a mandate in writing entitling her to assume the lawful representation of the defendant, but she had a verbal mandate which was also confirmed through various correspondence between herself, the defendant and the legal counsel in Austria;

7. That without prejudice to the above, for the peace of mind and to assure the plaintiff that the legal representative of the defendant has always been in possession of a mandate from the defendant herself to lawfully represent her in these proceedings, lawyer Dr Jeannine Giglio is hereby attaching a traditional mandate in writing marked 'Doc P3', whereby the defendant is granting authority to Lawyer Dr Jeannine Giglio, amongst others, to be her lawful representative in these proceedings, and for the avoidance of any doubt it is further confirming therein that such mandate existed since the 23<sup>rd</sup> of February 2016 and hence in any case and without prejudice to the above in virtue of Article 1880 (2) of the Civil Code, the defendant ratified all the acts done by her representative on her behalf;

8. That without prejudice to the above, it has always been the spirit of the law that any lawful representatives, agents. or curators are appointed for the benefit of the party in order to protect and defend the rights and interests of the persons either absent or which are not capable to represent themselves on their own, rather than used as a bar precluding the party from representing itself;

9. That moreover, what the defendant is contending, that is that Lawyer Dr Jeannine Giglio is not the lawful representative of the defendant, was rebutted and

proved as incorrect when during the sitting of the 12<sup>th</sup> of April 2016 the plaintiff asked to serve his reply on Dr Jeannine Giglio as the lawful representative instead of serving it on the defendant herself;

10. That without prejudice to the above and in subsidium any such defect, if such defect in fact exists, this defect does not bring along the nullity of the defendant's reply since the law itself makes provision for the such defect to be corrected with the permission of this Honourable Court in accordance with Article 175 of the COCP, and the defendant hereby reserves her right to ask for the permission of the Court that the names of the defendant be corrected by the addition of the words 'Dr Jeannine Giglio as special mandatary of' before the words 'C D B holder of British Passport number 707809268';

That for the above reasons, that is mainly because at the time the reply was filed, Lawyer Dr Jeannine Giglio was entitled to represent the defendant, the respondent respectfully submits that what the plaintiff is contending in his reply is totally unfounded and untrue and thus the demands put forward by the plaintiff cannot be accepted.”

Having heard the oral submissions made by counsel during the court sitting of the 2<sup>nd</sup> June 2016 when the application was adjourned for a final decree.

Having seen the acts of the case;

The facts leading to this court case briefly are the following:-

The parties married in Malta on the 27<sup>th</sup> November 2010. They were *de facto* separated since the 30<sup>th</sup> May 2011 and formalised their personal separation by means of a contract of personal separation published on the 1<sup>st</sup> March 2012. According to plaintiff's application of the 19<sup>th</sup> January 2016, he resides in Malta whilst defendant resides in Austria. Plaintiff is an Austrian citizen<sup>1</sup> while Defendant is a British citizen<sup>2</sup>.

On the 19<sup>th</sup> January 2016 Plaintiff filed an application for divorce which was notified by means of registered post to Defendant in Austria on the 17<sup>th</sup> February 2016 by means of registered post. During the first Court hearing held on the 9<sup>th</sup> March 2016 Counsel for Defendant requested further time to file Defendant's reply. The Court acceded to the request and extended the time limit for the filing of the reply by twenty days. The reply was eventually filed on the 29<sup>th</sup> March 2016.

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<sup>1</sup> Vide. Plaintiff's affidavit a fol. 17

<sup>2</sup> Vide copy of Defendant's passport a fol. 18

By an application of the 21<sup>st</sup> April 2016 Plaintiff requests that the said reply of the 29<sup>th</sup> March 2016 should be declared “null and void” because it was filed in the name of Defendant personally and not in the name of a mandatory of Defendant. Plaintiff submits that the appointment of a special mandatory was required on the part of Defendant since she was not present in Malta when here reply was filed. According to Plaintiff a person who at the time of filing of a judicial act in his name is not present in Malta has, under pain of nullity, to appoint a special mandatory to file in his name the judicial act and assume the acts on his behalf. file judicial acts in Malta in his or her name when he or she are not in Malta. According to Plaintiff, any person in the position of Defendant must appoint a representative who is present in Malta at the time of filing and who assumes in the capacity of nomine the acts of the case as a special mandatory.

From submissions made by both Counsel, it is clear that the validity of the notification to Defendant in Austria is not being contested. Once Malta became a member of the European Union, the whole corpus iuris of European Law became applicable in Malta including **EC Regulation number 1393/2007 “On the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)”**. Judicial acts may be notified to defendants residing in another member state other than the one were the proceedings were filed. There are only two exceptions. As declared by a decision of the General Court of the European Court of Justice in the names **Krystyna Alder et.v Sabina Orłowska** decided on the 15<sup>th</sup> June 2011 – these regulations are not applicable “(i) where the permanent or habitual residence of the addressee is unknown and (ii) where that person has appointed an authorised representative in the Member State where the judicial proceedings are taking place.”

The subject of this decree is whether Defendant, a citizen of a Member State, could file in her name a reply in the judicial proceedings filed before the Maltese courts against her when she was not present in Malta. Plaintiff requests the Court to declare Defendant’s reply to be null and void.

The Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) specifies under which circumstances a judicial act has to be declared null and void. **Article 789 of Chapter 12** provides that:

*(1) The plea of nullity of judicial acts is admissible –*

*(a) if the nullity is expressly declared by law;*

*(b) if the act emanates from an incompetent court;*

*(c) if the act contains a violation of the form prescribed by law, even though not on pain of nullity, provided such violation has caused to the party pleading the nullity a prejudice which cannot be remedied otherwise than by annulling the act;*

*(d) if the act is defective in any of the essential particulars expressly prescribed by law: Provided that such plea of nullity as is contemplated in paragraphs (a), (c) and (d) shall not be admissible if such defect or violation is capable of remedy under any other provision of law.*

*(2) The plea of nullity of an act, under sub-article (1)(c), shall not be admissible if the party pleading such nullity has proceeded, or has knowingly suffered others to proceed, to subsequent acts, without pleading such nullity.*

**Article 180 of Chapter 12** of the Laws fo Malta provides who may file judicial proceedings in Malta:-

*(1) Subject to the provisions of article 181, written pleadings may be filed –*

*(a) personally by the party pleading in his own name, or by the person pleading in a representative capacity as the parent of the children placed under his paternal authority, or as the tutor, curator, administrator of the community of acquests, executor, head of a department or other public administrator, or as attorney on behalf of any church, community, hospital, or other pious institution or as administrator of property under litigation, or as partner or representative of a commercial firm, or as any of the persons mentioned in article 181A(2) in the case of a body having a distinct legal personality, or as agent or representative of any other lawful association, or as attorney on behalf of persons absent from the Island, either of Malta or Gozo, in which the written pleading is filed;*

*(b) by a legal procurator;*

*(c) by any other partner of a commercial firm to which the written pleading refers;*

*(d) by an ascendant, descendant, brother or sister, uncle or aunt, nephew or niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, husband or wife, appointed as an attorney for the purpose, by the party pleading whose signature is duly attested in accordance with article 634(2);*

*(e) by any joint party to the suit;*

*(f) by an advocate, if the written pleading is to be filed in any of the inferior courts, or in the Court of Appeal in cases of appeal from judgments of the inferior courts.*



It is established jurisprudence that the law of procedure has to be interpreted *ad litteram* and given a strict interpretation. “Kif saput, il-procedura hi ligi ta’ ordni pubbliku u, allura, jekk il-provvediment tal-ligi jippreskrivi certu konvenzjonizmu, kemm ta’ forma jew ta’ kontenut, mhix ammessa interpretazzjoni ohra hlief dik letterali, u hi din li ghandha tigi osservata u segwita.” (Court of Appeal - “**John Mary Vella et vs Winston Azzopardi nomine**” – decided on the 6<sup>th</sup> October 1999).

It has been held that “..in-nullità ta’ l-att gudizzjarju hija sanzjoni estrema li l-ligi trid timposta biss meta n-nuqqas – formali jew sostanzjali – fl-att, ma jistax assolutament jigi tollerat minghajr hsara ghal xi principju ta’ gustizzja procedurali. (First Hall - **Malta Development Corporation v. Paul Licari, Citaz. Nru. 489/98** - 22nd April 2004)

In “**Joseph Borg proprio et nomine et vs Pio Camilleri proprio et nomine** (citaz 1172/90 PA / JZM - 20<sup>th</sup> November 2011) the Court examined in detail the plea of nullity of judicial acts. : “Il-prassi segwita mill-Qrati taghna, anke a bazi tal-emendi introdotti bl-Att XXIV tal-1995, inkluz l-Art.175 tal-Kap.12 hija li formalizmu ezagerat ilu hafna li gie mnaqqas u limitat u bir-ragun il-ligi qeghda tkun aktar inklinata li tkompli tillimita l-formalizmu u n-nullitajiet ta` diversi forom li jnutruh (“**Fino vs Fabri noe**” – Qorti tal-Appell – 28 ta` Frar 1997) u konsegwentement l-atti ghandhom jigu salvati anziche` annullati jew dikjarati nulli (“**Ellul vs Coleiro**” – Qorti tal-Appell – 24 ta` Jannar 1994). [Ara wkoll – “**Guillaumier Industries Ltd vs Fava et**” – Prim`Awla tal-Qorti Civili – PA/RCP – 28 ta` Ottubru 1998, “**Attard noe vs Galea**” – Qorti tal-Appell – 12 ta` Mejju 1998 u “**Aquilina vs Cassar**” – Vol.LXXVI.IV.666] ..... Infatti l-kazi li fihom l-eccezzjoni tan-nullità ta` atti gudizzjarji tista` tinghata huma dawk imsemmija fis-subartikolu (1) tal-Art.789. cirkostanzi msemmija f`dak l-artikolu huma tassattivi fis-sens li biex dik l-eccezzjoni ta` nullità ta` att gudizzjarju tirnexxi, trid bilfors taqa` taht il-parametri ta` xi wahda minnhom. (“**K.B. Real Estate Limited vs Silvio Felice Limited**” – Prim`Awla tal-Qorti Civili – PA/JRM – 13 ta` Marzu 2003).

.....in linea generali, ghandu jinghad li l-interess tal-gustizzja ikun generalment moqdi b`decizjoni fuq il-punti sostantivi tal-kawza u dak huwa li l-partijiet fil-verità jkunu qed ifittxu. Ir-regoli tal-procedura qeghdin hemm primarjament sabiex id-dritt sostantiv jista` jitressaq ahjar u bis-sens. Id-dritt ghall-gustizzja ma ghandux jippermetti li r-regoli tal-procedura jiehdussovra, b`interpretazzjoni rigida u maghluqa, fuq id-dritt sostantiv b`mod li l-formalizmu jigi jiddetta t-twertieq tal-gustizzja skond il-ligi..”

Applying the law and jurisprudence on the nullity of judicial acts to the merits of this case, this Court concludes that Plaintiff failed to specify which provision of

the law of procedure renders Defendant's reply null and void. There is nothing in breach of procedure when Defendant, who resides in Austria, engaged a lawyer in Malta to file a reply in Defendant's name. The fact that Defendant resides in Austria and was not present in Malta when the reply was filed does not render the reply null and void. Once the proceedings were filed against Defendant personally when Plaintiff was aware that Defendant was not resident in Malta, Defendant could likewise file a reply to Plaintiff's application without being present on the day the reply was filed and without appointing a special mandatory to become a party to the proceedings on her behalf.

Furthermore, once Defendant was sued in her personal name, she had every right to file her reply in her personal name without the necessity of appointing a special mandatory to represent her in the proceedings. Defendant engaged the professional services of an advocate and of a legal procurator to represent her in these judicial proceedings.

Both parties agree that once Defendant resides in a Member State, Plaintiff could file the judicial proceedings against her personally and not against deputy curators for an absent person. Likewise, Defendant could file a reply to the original application without having to appoint a special mandatory to assume the acts on her behalf.

**Decide.**

For these reasons Plaintiff's application of the 21<sup>st</sup> April 2016 is rejected and dismissed.

Costs of this decree to be borne by Plaintiff.

**Judge**

**Deputy Registrar**