C I V I L C O U R T
(Family Section)

MR. JUSTICE ROBERT G. MANGION

Today the 30th January 2018

Sworn Application No 196 / 17RGM

Number on list: 7

L-Avukat Maxilene Ellul bhala mandatarja specjali ta' X W
vs
Y W

The Court,

Having seen the sworn application filed by the plaintiff, where he premised and subsequently made the following demands:-

That the parties were married in Malta on the 26th December 2002 in the Public Registry of Malta and their marriage was registered in the same Public Registry by virtue of certificate number six stroke two thousand and three (6/2003), as would result from the attached marriage certificate marked as "Dokument A";

That the parties have been separated *de facto* for more than ten years and indeed they are involved in relationships with third parties as would result from their joint sworn declaration which is attached and marked as "Dokument B";

That the parties' matrimonial regime is that of separation of estates as would result from the attached "Dokument C";

That the parties also instituted mediation proceedings as required in terms of Regulation 4 of Subsidiary Legislation 12.20, which provides that any party wishing to proceed to initiate a suit for divorce against the other spouse shall first

demand authority to proceed by filing an application for mediation proceedings and proceed with the cause for divorce only if duly authorised by the Court (Dokument D);

That there exists no reasonable prospect for reconciliation between the parties;

That the parties possess no common movable or immovable property;

That the parties do not have any children;

That the parties forfeited all rights to claiming and receiving maintenance from each other and have no pending claims for maintenance against each other;

That the undersigned advocate is authorised as special mandatory to institute and continue these proceedings since X W is absent from these Islands;

That these premised facts satisfy all the conditions required for the attainment of a divorce in terms of Article 66B of the Civil Code, Chapter 16 of the Laws of Malta;

Requests this Court to:-

1. Pronounce the dissolution of the marriage celebrated on the 26th December 2002;

2. Authorise Y W to revert to her maiden surname that is Starostenko;

3. Order the Registrar of Courts to notify the divorce of the parties to the Director of the Public Registry, within the period allowed by the Court for this purpose, so that the same shall be registered in the Public Registry.

Having seen that defendant, during the course of the hearing of the 4th December 2017, declared that she has taken cognisance of the sworn application and the notice for the appointment of the hearing, and that she has no objection to plaintiff's claims and that she will not be engaging a lawyer to file a sworn reply;

Having seen its Decree dated 4th December 2017 whereby it acceded to plaintiff's request that the proceedings are conducted in the English language due to the fact that defendant does not understand the Maltese Language.

Having seen all the acts of this case, and

Having seen that the case was adjourned for judgement for today,

Makes the following considerations;

Plaintiff expressly premised in his sworn application that his demand for the dissolution of the parties' marriage is based on the provisions of Article 66B of the Civil Code, and he maintains further that in this case, all conditions required for granting a divorce have been satisfied.

The relevant provisions of Article 66B stipulate the following:-

"*Without prejudice to the following provisions of this article, divorce shall not be granted except upon a demand made jointly by the two spouses or by one of them against the other spouse, and unless the Court is satisfied that:*

(a) on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least four years out of the immediately preceding five years, or at least four years have lapsed from the date of legal separation; and
(b) there is no reasonable prospect of reconciliation between the spouses; and
(c) the spouses and all of their children are receiving adequate maintenance, where this is due, according to their particular circumstances, as provided in article 57:

Provided that the spouses may, at any time, renounce their right to maintenance…"

The Court also deems the following provisions of Article 66D of the Civil Code to be relevant to this case:-

66D. *(1) Without prejudice to the other provisions of this Sub-Title, where an application for divorce is made by one of the spouses, it shall* ***not*** *be necessary for the spouse making the demand to impute to the other party any fault leading to the making of such demand.*
…
(3) Where the spouses are not separated by means of a contract or a court judgement, the spouse making the demand for divorce ***may****, together with the same demand, make all those demands that are permissible in a cause for separation in accordance with Sub-Title III of this Title. The court shall hear and determine these demands as provided in the said provisions mutatis mutandis. The other party may, in addition to the defences mentioned in previous sub-article, put forward all those defences which that party would have been entitled to make in a cause for separation.*

…

(5) Notwithstanding the other provisions of this article and only where the community of acquests or the community of residue under separate administration shall have ***ceased****, the parties shall have a right, in any case,* ***if they both agree, to divorce without liquidating the assets which they hold in common****."*

[Emphasis of the Court]

Having considered;

That although the demand for divorce in this case was not made jointly by the spouses, but by one spouse against the other, and although the spouses are not already previously separated by means of a contract of personal separation or a court judgement pronouncing their separation, these circumstances do not constitute an obstacle to the demand for a divorce. Moreover, it is evident from the declaration made by defendant before the court during the hearing of the 4th December 2017 that she is in agreement with plaintiff's demand for a divorce.

That in any event, whether or not the demand for the divorce is made separately or jointly, and whether or not the spouses are already separated from each other, the Court, in order to pronounce the dissolution of the marriage, must be satisfied that the conditions listed in Article 66B are collectively satisfied. In this case, the parties each signed and confirmed on oath a declaration[1] that evidently substantiates plaintiff's claim that all conditions required by Article 66B have been fulfilled: the parties declare to have lived separately for over ten years, that in the circumstances there exists no reasonable prospect of reconciliation and that they possess no claims for maintenance against each other. Since the parties also agree and declare that they have no children, no issue of maintenance arises.

As for the requirement concerning reciprocal maintenance of the spouses, the Court observes that although plaintiff, in his sworn application, premises that the parties forfeited all their rights to maintenance, this declaration cannot be deemed but to apply solely to plaintiff. It does not result from the acts of the case that defendant expressly and unequivocally forfeited her right to receive maintenance from plaintiff. However, defendant did confirm in her sworn declaration[2] that there is no maintenance due from plaintiff. The Court considers that this declaration suffices in the circumstances as a renunciation by defendant of her right to maintenance for the purpose of Article 66B.

[1] Dokument B a fol. 5.
[2] Dokument B.

For these reasons the Court considers that the requisites of Article 66B to have been fully satisfied.

Having considered;

The Court observes that although the parties are not already separated from each other, plaintiff did not impute, in his sworn application, any fault leading to the demand for the dissolution of the marriage and nor did he make any demands that would be permissible in a cause for personal separation between the parties. Having regard to the above-cited provisions of Article 66D, the Court deems that plaintiff is fully entitled to proceed to obtain a dissolution of his marriage in the circumstances without imputing any fault, and without making demands that would ordinarily be made in the case of an action for personal separation.

Having considered further;

That the Court also notes that the regime of the community of acquests ceased to have effect as the patrimonial regime regulating the parties' marriage, by virtue of a deed published in the acts of Notary Dr. Mark Sammut on the 5th March 2008[3], where the parties also proceeded to establish in lieu, a system of separation of property. Although not expressly stated, upon examining the said deed the Court deems that the parties, having assigned the debts declared on the deed to plaintiff and having declared that they had no common property or creditors, had also proceeded to liquidate the community of acquests for all intents and purposes. This conclusion is further supported by the joint declaration[4] made by the parties under oath prior to the institution of this lawsuit, where they confirmed that they possess no common movable or immovable property. The Court therefore considers that the requisites of Article 66D which are applicable to this case, to be satisfied *in toto*.

Having considered;

Also of bearing in this case, where the spouses are not separated by means of a contract or a court judgement, are the provisions of regulation 4 sub-regulation (1) of Legal Notice 397 of 2002 (S. L. 12.20), to which plaintiff makes reference in his sworn application:-

"4(1) Any party wishing to proceed to initiate a suit for personal separation or divorce against the other spouse shall first demand authority to proceed from the Civil Court (Family Division) ..., by filing a letter, in the case of personal separation, or by filing an application, in the case of divorce, as the case may be,

[3] Dokument C a fol. 6 *et seq*.
[4] Fol. 5

to that effect in the registry of the Court addressed to the Registrar, stating the name and address both of the person filing the letter as well as that of the other spouse, and requesting the Court to authorise him or her to proceed. Such letter shall be signed and filed by the party personally or by an advocate or legal procurator on behalf of such party."

The Court is satisfied that plaintiff has furnished evidence of compliance with the requisites of this Regulation, in the form of "Dokument D" consisting of a legal copy of the acts of the mediation proceedings instituted upon an application filed by plaintiff on the 9th May 2017. The Court notes that in virtue of a decree dated 5th July 2017[5], plaintiff was duly authorised to proceed with the initiation of this suit for divorce after no reconciliation or agreement as contemplated by Article 66I, was reached between the parties. The Court therefore considers that the requirements laid down by the said Article 66I of the Civil Code have also been fulfilled.

Having considered finally;

That by means of the second demand in his sworn application, plaintiff requested the Court to authorise Y W to revert to her maiden surname, Starostenko. The Court notes that by virtue of Articles 66L(1) and 66L(4)(b) of the Civil Code, one of the effects of the pronouncement of a divorce is the applicability *mutatis mutandis* of Article 62, which provides as follows:-

*"**62.** (1) Notwithstanding the provisions of sub-article (4) of article 4 of this Code, the **wife** may, on separation, **choose to revert to her maiden surname** or to the surname of her predeceased husband. In the case of a consensual separation, a declaration of such choice shall be made in the public deed of separation, and in the case of a judicial separation, by a note filed in the records of the case before final judgment.*

*(2) The court may also, at the **request of the husband** which may be made at any time before judgment, **prohibit** the wife from continuing to use the husband's surname after separation, where such use may cause grave prejudice to the husband.*

… omissis …

(4) In the case of a consensual separation, a declaration of such choice shall be made in the public deed of separation, and in the case of a judicial separation, by a note filed in the records of the case before final judgment.

[5] Fol. 14

(5) The Court may also, at the request of ***any one of the spouses*** *which may be made at any time before judgment,* ***prohibit*** *the other spouse from continuing to use the surname of the other spouse after separation, where such use may cause* ***grave prejudice*** *to the spouse making the request."*

The Court, having observed that the demand for the wife to be authorised to revert to her maiden surname was made by the husband and not by defendant herself, does not consider that the demand as formulated, is one that can be legitimately upheld on its own merits. It is evident from the provisions of Article 62 that the choice of reversion to the wife's maiden surname is a prerogative that the law reserves solely to the wife. The only right afforded by the Law to the husband in this matter is to request that the wife is prohibited from continuing to use his surname where it is shown that grave prejudice may be caused thereby[6].

It does not result that plaintiff has requested that defendant is prohibited from continuing to make use of his surname, and neither has any allegation of prejudice been made. It does not result either that the defendant filed a note declaring her intention to revert to her maiden surname as required in sub-article (1) of Article 61.

However, in the circumstances, the Court cannot disregard defendant's declaration, expressly made before the court during the hearing of the 4th December 2017 to the effect that: "… *she has no objection to plaintiff's claims*…" After observing that her declaration was not in any way limited, the Court considers that defendant has thereby concurred with plaintiff that she should be authorised to revert to her maiden surname.

In any event, it is evident to the Court that the upholding *ut sic* of plaintiff's request as formulated cannot be of any prejudice to defendant who is not, in virtue of this judgement, being prohibited from making use of plaintiff's surname or ordered to revert to her maiden surname, but is merely being authorised to revert to her maiden surname in the event that she so wishes. It is in this particular sense that the Court upholds plaintiff's second request and gives defendant one month from today to file a sworn note in the English language if she elects to revert back to her mainden surname for the Court togive the relative decree.

Decide

For these reasons, the Court accedes to plaintiff's demands and consequently:-

[6] In virtue of the amendments brought into force by Act XXIII of 2017, this right was extended to both spouse but the criterion of grave prejudice remains applicable.

1. Pronounces the dissolution of the marriage celebrated by the parties on the 26th December 2002;

2. Gives defendant Y W one month from today to declare by means of a sworn note whether she elects to revert back to her maiden surname;

3. Orders the Registrar of Courts to notify, at the expense of plaintiff, the divorce of the parties to the Director of the Public Registry, within the period of one month from the date this judgement becomes res judicata, so that the same shall be registered in the Public Registry.

Each party to bear his or her own costs.

Judge **Deputy Registrar**