



**CIVIL COURT
(FAMILY SECTION)**

MR. JUSTICE ANTHONY VELLA

Hearing on Thursday 10th October, 2019

Application No ; 277/14 AGV

AB in her own name and as a
curator *ad litem* of her children CD
and ED

vs

FD

The Court,

Having seen the plaintiff's application filed on the 10th December, determines the following pleas:-

1. Plaintiff married defendant on the 31st October, 2010 copy of the marriage certificate is hereby being attached and marked as Dok. A. They had two children, CD and ED siblings D, and they were born on the 6th of September, 2011 and on the 15th November, 2013 respectively and this as per copy of the birth certificates hereby attached and marked as Dok. B and Dok. C.
2. The matrimonial life between the parties has become impossible due to adultery, excesses, cruelty, threats or grievous injury committed by the defendant on the person of the plaintiff, AB.
3. The defendant's attitude has rendered their short matrimonial life impossible as it will be proven during submissions. The defendant lived a double life where in the said double life he indulged in sexual relations with several women both physically and virtually. His notion of the meaning of matrimonial life is severely impaired as the extra-marital affairs and memberships of network shows. In particular he was in favour of an open relationship while knowing all along that the plaintiff was not. Because of his attitude they were unable to build a matrimonial life together.
4. They tried to save their marriage however plaintiff could not live with the fact that he had these perverse and illicit sexual tendencies as well as the fear that these perverse and illicit sexual tendencies could have a detrimental effect on her children as they had left such an effect on her husband, the defendant, who by his own admission was exposed to such perverse and illicit sexual tendencies by his father.

5. There is no reasonable prospect for reconciliation and therefore these proceedings had to be initiated for which the plaintiff should not be made to bear any costs and thus all judicial costs are to be borne by the defendant.
6. For these reasons plaintiff asked and obtained the relevant authorisation required by this Honourable Court to proceed in these proceedings after the mediation proceedings were terminated according to law (Dok. D).
7. Plaintiff personally knows of all the declared and duly numbered facts.

Therefore, plaintiff humbly asks this Honourable Court to:-

1. Pronounce the personal separation between the parties for the reasons stated which are imputable to defendant and which are adultery and/or excesses, cruelty, threats or grievous injury against the plaintiff as stated above and this according to 38 and/or 40 of Chapter 16 of the Laws of Malta and/or because of the fact that their matrimonial life has been rendered impossible because the marriage has been irretrievably broken down and this according to Article 40 of Chapter 16 of the Laws of Malta.
2. Order that the care and custody of the minors CD and ED, siblings D, is exclusively given to the plaintiff save for due access to the defendant and this according to the best interests of the said minors.
3. Order and fix an adequate maintenance towards their children according to Law and according to the means and conditions of the parties, as well as the conditions as stated in Article 54(2) of Chapter 16 of the Laws of Malta and orders the defendant to pay the plaintiff such established maintenance with all the due and necessary modalities such as that it should be increased

periodically with such an increase which should make good for the cost of living as provided in Article 54(4) of the Laws of Malta.

4. Apply against the said defendant all the effects and dispositions found in Articles 48 and 51 of the Civil Code *in toto* or *in parte*.
5. Declare the dissolution of the community of acquests between the parties and orders that the said objects forming part of the community of acquests are divided into two portions and which should be assigned, one to the plaintiff and one to the defendant, which portions should be composed by having established the date as the date when the defendant can be considered as being at fault for the separation in such a way that the defendant loses all rights for any acquisition made by the plaintiff according to law and this by the appointment if needs be of judicial referees to liquidate the said community and by nominating a notary to receive the relative act and curator to represent the eventual contumacy on the said act.
6. Order the defendant to pay and/or deliver to the plaintiff all her paraphernal and dowry objects.
7. Order the sale of the matrimonial home, that is, of Boulevard San Michel, 25/1, 1040, Etterbeek, which is found in Belgium and this after all the home's debt is deducted and the remaining balance is divided into two portions as per the fifth claim as stated above, which portions must be given to the parties always according to the terms of the fifth claim as stated above.

With costs against the defendant who is hereby being summoned to testify under oath.

Having seen the preliminary plea raised by the defendant which states:-

1. Whereas, by way of a preliminary plea, the respondent points out that this Honourable Court lacks the jurisdiction to hear the present case and this on the basis of the European Council Regulation bearing number 2201/2003 dated 27th November, 2003, which is directly enforceable in each Member State of the European Union.

FACTS

1. Plaintiff had moved to Brussels in 2004, where she went to work for a Maltese MEP. During this time, Malta continued to be her place of residence, since she states that she paid tax in Malta, she had a Maltese contract and she also retained a Maltese address. She was also entitled to be flexible to come down to Malta whenever it was required.

Plaintiff admits that when she joined the European Commission, she joined knowing that after ten years of working with the Commission, she would be entitled to a pension from the Institutions if she were to return to Malta and if something had to happen to her parents, she could take up a post with the EU institutions here in Malta and at the same time she could also avail herself of up to 12 years of unpaid leave that the Commission provides in the interim period.

Preoccupied that she would not have a place to live if she decided to come back to Malta, she decided to buy her own property, mainly because her parents always lived in rented premises. In such a way she always ensured she maintained close links with Malta.

At the end of January, 2008, plaintiff met defendant. Initially it was an unstable relationship, but then it ended up leading to a marriage on the 31st October, 2010. The marriage was celebrated in Malta. From this marriage they had two children. The eldest child Christopher was born in September, 2011.

According to plaintiff, when their child started to attend the creche, there were a lot of shortcomings and the school offered a poor quality of service, which made them consider a relocation to Malta, where the child would have a better opportunity of schooling, as well as having family members close by. Plaintiff admits that both her and defendant were getting tired of living in Brussels, so in view of these circumstances, they started to apply for jobs in Malta and this was in the summer 2012 and 2013. Meanwhile, defendant added that once their child was no longer attending school, his in-laws came over to Brussels to help them out with the minor child, since they both had to work.

Plaintiff admits that it was not easy to simply find a job and relocate to Malta and by November, 2013 they were still in Brussels and they had another child. Plaintiff does confirm what defendant reiterated, that subsequent to the child's birth they purchased their own property in January, 2013, but this was common amongst Maltese living in Brussels, because it was always an investment and easily rented. Furthermore, not having a guaranteed and secure job in Malta, they still registered their eldest son at the British school in Brussels, though he never ended up attending this school.

In December, 2013, plaintiff discovered that defendant had been in a threesome and was involved in sexual relations both virtually and in reality. She also discovered that he formed part of a network called “The Infidelity Group of Brussels.”

Defendant conveniently enough, does not mention any of these accusations, which have been adequately proved by plaintiff. It was the discovery of an email containing sexual content, that was the turning point for plaintiff. The European Parliament elections were due and plaintiff decided to come to Malta with the children to vote, but her intentions where to come for an indefinite period, because of the problems in their marriage. She needed time to reflect. Infact, further proof of these intentions are identified in her informing the school that as from the 19th May, 2014, her son Christopher would not be attending school.

At this point, defendant admits that he had no problem with his wife and children not having a definite date to return to Brussels, because it was quite the norm for her to come to Malta and stay for a while.

On her arrival to Malta, the child started attending nursery soon after. She accepted that defendant come and visit the children in August, 2014, but due to the issues related to the sexual problems that defendant had, she started to have a bigger urge to protect her children and she was more and more convinced that Malta was the only place where she could guarantee it. Because when the children were not with her, there were always her parents to look after them. Malta, thus became a condition for their marriage to survive.

Since plaintiff was still on parental leave she was receiving her allowances from Brussels, whereas defendant's job with the Commission were not looking so good and she was trying very hard to find him a job in Malta with the gaming industry.

So, plaintiff admits that her dilemma in August, 2014 was her marriage, not living in Malta, as that decision had long been taken, prior to the discoveries she made regarding the defendant and she states that this is what she meant when she told defendant that “*I don't feel ready to come back,*” meaning as a married couple living together in Brussels.

It was close to Christmas, 2014 once again that plaintiff discovered that defendant was once again exchanging pictures of a pornographic nature. He did come to Malta to see the children, but plaintiff did not allow him to stay with them. Defendant wanted to attempt to save the marriage, so he planned to move here, living separately. So, they tried to rent their apartment, they sold their car and sub-let their studio flat.

However, once defendant was notified with the separation proceedings that plaintiff had instituted here in Malta, things took a different turn. Defendant believes that plaintiff had planned out things behind his back.

Since then plaintiff's leave with the Commission expired on the 1st November, 2015 and she asked for special unpaid leave to work for the University of Malta as an Assistant Lecturer in European studies,

since no opportunities with the Institutions in Malta have arisen. She has therefore also started paying tax in Malta.

As to the children they both attend school regularly here in Malta and also carry out a number of extra-curricular activities here.

Dr. GH, plaintiff's friend states that plaintiff had always intended to stay in Brussels temporarily and she always wanted to come back to Malta indefinitely. After their marriage, she explains that both plaintiff and defendant had been in their company and they had openly declared that they were considering returning to Malta since it was a better suited place for the upbringing of their children.

By May, 2014 when plaintiff returned to Malta she realised that she was determined more than ever to move to Malta as she was also seeking a permanent job here and she had also asked her to help her find a job for defendant in the gaming industry. She had even passed on his CV to her.

Evidence of her intentions to remain in Malta was when she enrolled the children at school and they had already built a circle of friends.

She also confirmed that plaintiff had purchased property here in Malta before her marriage.

Having seen all the evidence submitted.

Having examined all documents exhibited.

CONSIDERATIONS

The present Court has to determine defendant's preliminary plea raised before the separation proceedings instituted by plaintiff. Defendant argues that the said court has no jurisdiction to hear the case in terms of Article 3 of EC Regulation 2201/2003.

Having analysed the particular provision of the law, it results that the main bone of contention is on the applicability and interpretation of Article 3(a) that states as follows:-

“Jurisdiction shall lie with the courts of the Member State:-

(a) In whose territory:

-the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her “domicile” there.”

The parties produced their evidence on the basis of the preliminary plea raised, the defendant contending that plaintiff had intended to remain in Belgium and it was only when she returned to Malta and spent her time here, that she started to change her mind. He adds that when she bought a ticket to come to vote for the European Parliamentary elections, she arrived to Malta on the 19th May, 2014, choosing to leave it as an open ticket. He was not shocked, since it was quite the norm for plaintiff to come to Malta and prolong her stay with the children.

He always assumed that she was returning to Brussels, where they had purchased a house and had a car and moreover, they had even registered and paid a deposit for their eldest child to attend the British school in Brussels.

According to defendant, the children themselves were registered in Brussels and so all goes to show that they were habitually resident there. Moreover, plaintiff never resigned from her employment with the European Commission and therefore for all intents and purposes at law, she was going to return to Brussels,

Plaintiff argues that defendant is trying to give his own interpretation of Article 3 of Regulation 2201/2003 in that he states this article necessitates to prove that the spouse is either habitually resident in the Member State or else that she has been residing there for six months.

The Court agrees however, with the interpretation given by plaintiff, namely that the said Article 3 interprets “habitual residence” as tantamount to a six month period of residence in Malta prior to filing the application. Once this is proven, then the Maltese Courts has jurisdiction.

What therefore does the Court have to take into consideration to determine whether it has jurisdiction or not in this case? It necessitates an analysis of whether the evidence produced confirms the six months and therefore the habitual residence of plaintiff here in Malta.

In the case **KATYA VELLA BAMBER VS PIERRE DUFLOU**¹
the Court had the following to say:-

“...allura l-Qorti trid li fl-ewwel lok tiddeciedi jekk verament l-attrici ghandhiex residenza ai termini tal-istess Artikolu u sussegwentement (jekk ikun il-kaz), liema Qorti ghandha pussess (stante li l-attrici tikkontendi li kienet ilha Malta b’dan li l-minuri anke attenda summer school hawn Malta) ...l-interpretazzjoni tal-ligi u r-Regolament ma tistax issir b’mod li tesigi lill-persuna li tkun qed tikkontendi li hemm residenza li tkun f’dak il-pajjiz b’mod konsistenti minghajr ma tallarga ftit mill-pajjiz ghal kwalunkwe raguni li tkun. Hija l-intenzjonj u l-kwistjoni ta’ fejn tistabilixxi d-dar taghha li twassal ghar-residenza u mhux il-fatt li tkun ilha f’pajjiz minghajr ma tkun assenti ghal ftit jiem.”

There is enough evidence produced to prove to the court that from when their eldest child starting attending nursery, they were not impressed with the quality of the service and it was at this point, that they pulled him out from school and started seriously considering whether they should move permanently to Malta, where life was better and moreover they would have the help of plaintiff’s parents.

Plaintiff produced concrete evidence to proof that both parties were seeking to find a job in Malta and this is further corroborated by plaintiff’s friend Dr. GH, who even went as far as to use her

¹ Citaz.Nru. 73/2015 decided on the 30th June, 2015.

influence to try and find a job for defendant in the gaming industry where she had contacts.

Things took a turn for the worse, when plaintiff discovered that defendant was involved in sexual perversions and having the opportunity to come to Malta to vote for the European Parliamentary elections, she came over and used her time to see what direction her marriage was going to take.

Defendant is correct in stating that plaintiff hadn't resigned from her job with the Commission, this even more so because she was entitled to seek a job with the EU Institutions in Malta. She explained that after ten years of working with the Commission, she would be entitled to a pension from the Institutions if she were to return to Malta and at the same time she could also avail herself of up to 12 years of unpaid leave that the Commission provides in the interim period. She envisaged the leeway to come to Malta, the defendant interprets the employment as a link to Brussels only.

In fact, she utilised the 12 year period of unpaid leave as soon as she found a job as a lecturer at the University of Malta. By July, 2014, the parties' children were attending a school and were also following extra-curricular activities here in Malta and also made their circle of friends. Having discovered that defendant was still making use of pornographic material, plaintiff was more convinced that the only place where her children were safe was Malta and in fact, if defendant wanted to see them, she placed the condition that they were not moving out of Malta, with the result that defendant tried to move here to be close to the children, until he was notified with the

court proceedings. By then they had rented out their property, sold their car and they had also sub-let their studio flat, all indicative that they were moving away from Brussels. Between 2014-2015 he admits to applying for various jobs, Malta included and this is confirmed by the various documents exhibited by plaintiff, contrary to the evidence given by defendant's mother Lisbeth Mirtrop, who was under the impression that it was her son's belief that moving to Malta was a very remote possibility.

It is essential to point out, that plaintiff's intentions of having her habitual residence permanently here in Malta were always evident, in that she bought property in Malta, way before she got married. She came to Malta regularly too. By May, 2014 this desire grew bigger and it was strengthened by the fact that her marriage was breaking down. In an email plaintiff sent to her husband dated 18th December, 2014 she made it clear that she was staying in Malta:-

“You would need to move to Malta. I am not willing to risk trying things out again in Belgium, for this to go wrong again in five/ten/fifteen years time when I would be older and more fragile, in a country that is not my home, when kids are older, family support might not be there any more, friends might have left. If I am to be a separated person, I want to be here.”²

So, essentially by the time plaintiff opened the court case in December, 2014 she had been in Malta for a period of over six

² Vide fol. 322

months, since she came over in May, 2014, when her marriage was under stress.

In consideration of all the above, the Court concludes that the plaintiff has satisfied the requisites required and for all intents and purpose of the Regulation, she had established a habitual residence in Malta, since she had been living on the island for a six month period.

DECIDE

For the aforementioned reasons, the court, rejects the defendant's preliminary plea.

Costs are to be borne by defendant.

Hon. Anthony G Vella
Judge

Cettina Gauci
Deputy Registrat

