

IN THE SUPREME COURT OF TONGA
FAMILY DIVORCE JURISDICTION
NUKU'ALOFA REGISTRY

FD 49 of 2014

SG.
66/02/15
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BETWEEN: 'ALAIVALULOA SITALEKI - Petitioner

AND: FOLIAKI SITALEKI - Respondent

BEFORE THE LORD CHIEF JUSTICE PAULSEN

J U D G M E N T

The petitioner, 'Alaivaluloa Sitaleki, and the respondent, Foliaki Sitaleki, were married at Ha'apai on 18 May 1994. They have one child, Ane Sitaleki, born on 2 May 1995.

rec'd 06/02/15
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3 The petitioner seeks dissolution of the marriage. He relies on Section 3(1)(f) Divorce Act (Cap. 29) which provides as a ground for dissolution:

'that the respondent and petitioner have been separated for a continuous period of two years or more immediately preceding presentation of the petition without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other.'

3 The petition was filed on 4 April 2014 and alleged that the parties had been separated since February 2012 without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other.

4 The respondent opposed the petition relevantly alleging:

1. That the parties did not separate in February 2012 but in around March 2014; and
2. That she did not want to get divorced from the petitioner.

The case was set down for hearing on the basis that the only issue was whether the parties' separation commenced in February 2012 or March 2014.

The husband's case

The petitioner gave evidence that the respondent had taken many trips overseas. This included a lengthy trip to New Zealand in 2011 which it appears from the petitioner's perspective brought an end to the marriage. There is also evidence in the form of pages from the respondent's passport which show that she was a very frequent traveler. She took at least eleven (11) international flights in the period May 2012 to April 2013 alone.

The petitioner's evidence is that as far as he was aware the respondent remained overseas from when she left Tonga in 2011 until October 2013 and he only learned of her return to Tonga through the parties' daughter.

8. The petitioner said that before the parties separated they were living at Halaleva where he remained until February 2012. In February 2012 he left Halaleva and moved into a rental house at 'Anana where he has remained. He said he left behind all matrimonial property at Halaleva.

9. Under cross-examination the petitioner was asked whether in February 2012 he told the respondent that he wanted a divorce. He said that he had told her. It was put to him that the respondent had lived with him at 'Anana. He denied that. He also denied paying for the respondent's trips overseas or having sexual intercourse with her after February 2012 or providing support except for the parties' child or as ordered under a maintenance order of the Magistrates Court that was made in May 2014.

10. The petitioner called evidence from a Mr. Lotu Mohoki who lived with the petitioner for about a year from February 2013 at 'Anana. Mr. Mohoki's evidence was that at no time while he lived at 'Anana had the respondent lived at that house.

The wife's case

11. The respondent's evidence was significantly different. She said that there was no separation in February 2012 but that she was travelling overseas so that the parties' adopted daughter could obtain medical treatment for an ear infection. She said that the petitioner paid for that trip which had originally been for three months but it was extended to put the adopted daughter into school as she had been born in New Zealand.
12. The respondent also said that during the trip she was in constant telephone contact with the petitioner. She said that when she returned from the trip (which her passport would indicate was in May 2012) she began living with the petitioner at 'Anana and when she traveled throughout 2012 and returned to Tonga she always stayed with him at 'Anana and this continued up to March 2014.
13. In her view the parties did not separate until March 2014 which was when she accepted that the petitioner had told her that he wanted a

divorce. Shortly after that the respondent issued her proceedings for maintenance in the Magistrate's Court

14. As to the evidence that had been given by Mr. Mohokoi the respondent said that he was lying.
15. Under cross-examination the respondent confirmed that she had traveled often including trips to New Zealand, Australia and the United States of America but she said that all these trips had been with the petitioner's agreement.
16. When asked why it was necessary for her to travel so often she said that her husband wanted her to travel and that it assisted him with his business. She said that she spent time overseas acquiring equipment for the petitioner's electrical business. She said it cost more money to have someone else provide equipment from overseas than if she did it. This was despite the fact that her role in the business was as a bookkeeper.

The requirements of Section 3 (1)(f)

17. The Court of Appeal considered Section 3 (1)(f) in *Halapua v Tonga* [2004] TOCA 5. Relevantly the Court of Appeal held that the phrase '*have been separated*' in Section 3(1)(f) is the equivalent of '*have been living apart*' and there was no requirement that the separation be by consent, expressed or implied, of both parties [at 20].
18. The second matter of importance decided in *Halapua* was that the plain meaning of the words '*without both maintaining ...normal marital relations*' is that if both the petitioner and the respondent have maintained marital relations the petition will be refused but that '*If both do not, and obviously that will be the case if one of them does not, the petition can be granted*' [at 23].

When did the parties separate?

19. On this issue I accept the petitioner's evidence and reject the evidence of the respondent. I found the petitioner to be an honest

and compelling witness but I found much of what the respondent told me to be unbelievable.

20. The petitioner was clearly very upset about his wife's regular overseas travel. His conduct in February 2012 of leaving Halaleva, moving to 'Anana and leaving all the relationship property behind is a strong indication that from that point the parties had begun to live apart. I accept his evidence that he did not know that the respondent had returned to Tonga after February 2012 until October 2013. This is entirely plausible when one looks at the regularity of her travel. The fact that she returned to Tonga and did not contact the petitioner before leaving again is very clear evidence in my view that the parties were leading separate lives.

21. It is most likely that given the state of the relationship and his unhappiness about the respondents' trips overseas that the petitioner would have advised his wife in February 2012 of his desire to get a divorce. In cross-examination he said that he did tell her that he wanted a divorce. I have not overlooked the fact that in his evidence-in-chief the petitioner said that after she went overseas in 2011 his

wife did not stay in touch by telephone. I think he is likely mistaken about that. Clearly there was some contact as the petitioner said the respondent did telephone their daughter who the petitioner was looking after when she was not at boarding school. The respondent's evidence was that she had regular contact with her husband by telephone while on that trip.

22. The evidence of Mr. Mohoki is important as it confirms the petitioner's evidence that the respondent never lived with him at 'Anana. Although the respondent said that Mr. Mohoki was lying his evidence was not discredited in cross-examination and the respondent did not call any witness who could confirm that she ever lived at 'Anana with the petitioner. I have no reason to disbelieve Mr. Mohoki.

23. The respondent's evidence that the petitioner funded her trips overseas, that she travelled with his agreement and that the travel was beneficial because she could act as a buyer for his business is all so implausible that I do not accept it.

19. In this case I am satisfied on the balance of probabilities that the parties began living apart and did not maintain normal marital relations from February 2012

The wife did not want to separate

20. As I have said the hearing proceeded on the basis that there was a single issue which was the date of separation. However, in his submissions for the respondent Mr. Pouono noted that the respondent did not want to separate and in reliance upon a decision of former Chief Justice Scott in *Tevita Tominiko Fangumahua 'I Vaiola Lemoto v Ilisapesi Veikune* (FD 17/2013) made the submission that before the Court could grant the petition '*both parties must either maintain or intend to maintain or renew normal marital relations or co-habitation*'.

20. The case upon which Mr. Pouono relies was decided on the basis that the parties had not been living apart for 2 years immediately preceding presentation of the petition. In so far as the decision is

inconsistent with the principles I have set out from *Halapua* I do not follow it.

27. There is another argument that Mr. Pouono appears to raise in reliance upon *Lemoto* which is that the petitioner cannot rely on his own desertion of the respondent to file for divorce. The simple answer to that is that he did not desert the respondent. However, I believe the comment made by Scott CJ in *Lemoto* at [13] that a '*petitioner cannot seek relief on the basis of his own desertion..*' can only relate to cases where the petition is based on Section 3(1)(c).

The result

28. I find that the petitioner has made out the grounds to obtain a divorce under Section 3(1)(f) of the Divorce Act (Cap. 29).
29. Accordingly I order that the marriage solemnized on 8 May 1994 between the petitioner and respondent is dissolved unless sufficient cause is shown to the Court within six weeks why this decree should not be made absolute.

10. I note that the respondent has obtained a maintenance order and that their only child is now 19 years old. Mr. Pouono submits that any issues relating to matrimonial property can be brought as a separate proceeding. In those circumstances I certify that I am satisfied as to the matters in Section 11(1) Divorce Act (Cap 29).
11. No order for costs has been sought by the petitioner in his amended petition or in the respondent Counsel's written submissions and I make no order in respect of costs.

DATED 4 FEBRUARY 2015

