

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

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FD 91 of 2014

BETWEEN : 'EMELINE ANE MOA

Petitioner

AND : SITALEKI PAULA MOA

Respondent

AND : HALAMEHI FA'ASE'E

Co-Respondent

BEFORE THE LORD CHIEF JUSTICE

Date of hearing: 24 April 2015

Appearances: Mr. K. Piukala for the petitioner
No appearances for respondent
and co-respondent

RULING

[1] This is an undefended application for an order dissolving the marriage between the petitioner, 'Emeline Ane Moea, and her

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husband, Sitaleki Paula Moa. The petition is based on section 3(1)(a) of the Divorce Act and alleges that since the petitioner and respondent married the respondent has committed adultery with the co-respondent.

[2] When the petition came on for hearing before me the petitioner gave evidence and no other witnesses were called. In summary the petitioner said in her evidence:

[2.1] That her husband had assaulted her in 2009 and this had caused the marriage to fall apart.

[2.2] That the respondent had moved away from the home only the previous week but that she had stopped washing and cooking for him since June 2014 (which I note coincides with the filing of the petition).

[2.3] That she had been told by a couple who live near the co-respondent that the co-respondent was her husband's girlfriend.

[2.4] That she was not upset about this alleged relationship.

- [2.5] That neither the respondent nor the co-respondent had admitted to adultery although she had spoken to both of them about the allegation.
- [2.6] That she asked the co-respondent to give evidence in support of her petition for divorce but the co-respondent would do not so.
- [2.7] That she did not know where the respondent had gone to live.
- [2.8] That when the co-respondent was served with the petition she threatened to sue the petitioner.
- [3] At the conclusion of hearing I advised Mr. Piukala that I did not consider the petition was made out but that I would give him an opportunity to provide me with written submissions. These were received on 1 May 2015. Mr. Piukala argues that on an undefended petition the Court does not require proof of adultery. He submits that the failure by the respondent and/or co-respondent to file an objection to the petition is evidence of the truth of the allegation of adultery. This, he says, was the practice, of the former Chief Justices as far as he can recall. I do not accept Mr. Piukala's submission.

- [4] The grounds relied upon in a petition must be proved to the appropriate standard. Section 3 of the Divorce Act provides that a party may present a petition "*praying the Court to dissolve the marriage upon evidence...*" of the grounds relied upon. Under Section 5(1), it is the Court's duty to satisfy itself as far as it reasonably can "*both as to the facts alleged and also whether the petitioner has been accessory to or has connived at or condoned the adultery or not*". Section 5(3) provides that if "*on the evidence*" the Court is "*not satisfied*" that the alleged adultery has been committed the Court shall dismiss the petition.
- [5] I note also that under the Divorce Rules every petition, (including an undefended petition) is set down for trial. Rule 11 provides that if the Court is satisfied that a party is entitled to the relief sought the Court may grant a *decree nisi* but if not so satisfied it must dismiss the petition or adjourn the trial. There would seem to be little point in requiring undefended petitions to be set down for trial if a failure by the respondent to file an objection was sufficient proof of the facts alleged in the petition.
- [6] It is well established that an allegation of adultery is a serious matter and must be proved to the satisfaction of the Court. In *Faingata'a v*

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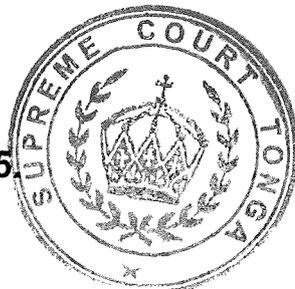
Tau'alupe [2003] Tonga L.R 308, 314 Ford J said that adultery must be proved on the preponderance of probabilities and that:

“Although, as Halsbury goes on to note, direct evidence of adultery is rare and it can normally only be inferred from circumstantial evidence, the Court is not bound to infer adultery even when there is evidence of inclination coupled with opportunity”

[7] In this case there was no evidence of inclination, opportunity or the fact of adultery.

The Result

[8] I find that the petitioner has failed to satisfy me by a large margin that her husband committed adultery with the co-respondent. Accordingly the petition is dismissed as is the claim against the co-respondent for damages. I note that in the petition maintenance was sought but Mr. Piukala led no evidence about this. For that reason I can regrettably make no order.



A handwritten signature in black ink, appearing to be "O.G. Paulsen".

O.G. Paulsen

DATED: 8 May, 2015

LORD CHIEF JUSTICE

N.'Inafo
08/5/2015.