1953 No. 1640

The Kenya Protectorate (Non-Domiciled Parties) Divorce Rules, 1953

Made - - - - 12*th November*, 1953
Coming into Operation 26*th November*, 1953

In exercise of the powers conferred by the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950(**a**), and the Colonial and Other Territories (Divorce Jurisdiction) Order in Council, 1953(**b**), the Secretary of State for the Colonies with the concurrence of the Lord Chancellor hereby makes the following Rules, namely:—

Citation, commencement and interpretation

1.—(1) These Rules may be called "The Kenya Protectorate (Non-Domiciled Parties) Divorce Rules, 1953."

(2) They shall come into operation on the Twenty-sixth day of November, 1953.

(3) In these Rules the expression "the Acts" means the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950.

Appointment of judges

2.—(1) As soon as may be after the coming into operation of these Rules the Chief Justice of the Supreme Court of Kenya shall submit to the Lord Chancellor through the Secretary of State for the Colonies the names of such number of judges of the Court not exceeding four (including, if he thinks fit, the name of the Chief Justice himself) as he may consider necessary for the purpose of exercising jurisdiction under the Acts and these Rules.

(2) Upon the approval of the Lord Chancellor to any nomination so submitted being signified to the Chief Justice by the Secretary of State for the Colonies, the Chief Justice shall cause the names so approved to be notified in the Kenya Official Gazette as judges appointed to exercise jurisdiction under the Acts, and the judges whose names shall have been so notified shall thereupon have power to exercise jurisdiction accordingly.

(3) At any time after the first nominations under these Rules have been approved, the Chief Justice may propose the names of a further judge or judges to take the place of, or to exercise jurisdiction in addition to, the judge or judges for the time being having powers under the Acts, and when such further nominations are approved they shall be notified as aforesaid.

Hearing of petitions and appeals

3. Every petition under the Acts shall be heard by a single judge nominated and approved as hereinbefore provided, sitting without a jury, and an appeal shall lie within thirty days or such time as the Court may order to a bench of two other judges who have been similarly nominated and approved against any decree or order which would be appealable if it had been made in proceedings under the Matrimonial Causes Ordinance (Chapter 145 of the Revised Edition of the Laws of Kenya, 1948), and shall be disposed of accordingly.

(**a**) 16 & 17 Geo. 5. c. 40, 3 & 4 Geo. 6. c. 35 and 14 Geo. 6. c. 20.
(**b**) S.I. 1953/882, p. 1017 above.

4. An appeal shall lie from a judgment given by a bench of two such judges to Her Majesty in Council in any case where an appeal would lie in England from a similar decision of the Court of Appeal to the House of Lords.

Application for leave to present a petition within three years of marriage

5.—(1) An application for leave to present a petition for divorce before three years have passed since the date of the marriage shall be made originating summons.

(2) There shall be filed in support of the summons an affidavit by the applicant stating the grounds on which the application is made, particulars of the hardship or depravity alleged, whether there has been any previous application under this Rule, whether there are living any children of the marriage, and, if so, the names and dates of birth or ages of such children where and with whom they are residing, whether any, and if so what, attempts at reconciliation have been made and any circumstances which may assist the Court to determine the question whether there is reasonable probability of a reconciliation between the parties. A copy of the intended petition shall be exhibited to the affidavit.

(3) When the summons is issued, it shall be made returnable for a fixed date before a judge in chambers and shall be accompanied by a form of acknowledgment of service.

(4) Unless otherwise directed, the summons shall be served on the respondent at least five clear days before the return date.

(5) No appearance need be entered to the summons and no affidavit need be filed in reply, and the intended respondent may be heard without entering an appearance.

Commencement of proceedings

6.—(1) Save as provided by Rule 5, all proceedings under the Acts shall be commenced by filing a petition to which shall be attached a certified copy of the certificate of the marriage.

(2) A petition shall not be filed if there is before the Court another petition by the same petitioner which has not been dismissed or otherwise disposed of by a final order.

Contents of petition

7.—(1) In the body of a petition praying for the dissolution of a marriage there shall be stated—

(i) the names of the parties to the marriage the place and date of marriage and the name, status and domicile of the wife before the marriage ;

(ii) the status of the husband and his domicile at the time of the marriage and at the time when the petition is presented, and his occupation and the place or places of residence of the parties at the time of institution of the suit ;

(iii) the principal addresses where the parties have co-habited, including the addresses where they last resided together in the Kenya Protectorate ;

(iv) whether there is living issue of the marriage, and if so the names and dates of birth or ages of such issue ;

(v) whether there have been in the Divorce Division of the High Court of Justice in England or in the Court of Session in Scotland or in the High Court of Northern Ireland or in the Supreme Court of Kenya any, and if so what, previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings ;

(vi) the matrimonial offences charged set out in separate paragraphs with the times and places of their alleged commission ;

(vii) in the case of a petition for presumption of death and dissolution of the marriage, the last place of co-habitation of the parties, the circumstances in which the parties ceased to cohabit, the date when and the place where the respondent was last seen or heard of, and the steps which have been taken to trace the respondent ;

(viii) in the case of a petition for nullity of marriage on any ground mentioned in section 8 (1) (*b*), (*c*) or (*d*) of the Matrimonial Causes Act, 1950(a), whether the petitioner was at the time of the marriage ignorant of the facts alleged and whether marital intercourse with the consent of the petitioner has taken place since the discovery by the petition of the existence of grounds for a decree ;

(ix) the claim for damages, if any ;

(x) the grounds on which the petitioner claims that in the interests of justice it is desirable that the suit should be determined in the Kenya Protectorate.

(2) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages, any claim for costs, and any order for custody of children which is sought, and, where appropriate, a prayer that the Court will exercise its discretion to grant a decree notwithstanding the adultery of the petitioner during the marriage.

Verification of petition

8. The statement contained in every petition under these Rules shall be signed by the petitioner, and in cases where the petitioner is seeking a decree of dissolution of marriage the petition shall include a declaration that no collusion or connivance exists between the petitioner and the other party to the marriage, that the petitioner has not condoned the adultery or, as the case may be, the cruelty alleged in the petition, and that neither the petitioner nor, within the knowledge of the petitioner, the other party to the marriage, has instituted proceedings which are still pending for the dissolution of the marriage in the United Kingdom.

Co-respondents and interveners

9. Unless the Court shall otherwise direct, where a husband's petition alleges adultery, the alleged adulterer shall, if living at the date of filing of the petition, be made a co-respondent in the suit and where a wife's petition alleges adultery with a woman named and contains a claim for costs against her, she shall be made a respondent in the suit.

10. Where a person charged with adultery is not made a co-respondent or respondent under Rule 9, a copy of the pleading containing such charge shall, unless the Court for good cause shown otherwise directs, be served upon such person accompanied by a notice that he or she is entitled, within the time therein specified, to apply for leave to intervene in the cause.

(a) 14 Geo. 6. c. 25.

Service of petition etc.

11. Every petition, originating summons, or notice referred to in these Rules shall be served on the party to be affected thereby, either within or without the Kenya Protectorate, in the manner prescribed by the Civil Procedure Rules for the time being in force for the service of summonses:

Provided that unless the Court for good cause shown otherwise directs, service of all such petitions, originating summonses, and notices shall be effected by delivery of the same to the party to be affected thereby, and the Court shall record that it is satisfied that service has been so effected.

Answer and subsequent pleadings

12. A respondent or co-respondent, or person to whom leave to intervene has been granted under Rule 10, may file in the Court an answer to the petition.

13.—(1) Any answer which contains matter other than a simple denial of the facts stated in the petition shall be signed in respect of such matter by the respondent or co-respondent as the case may be, and when the respondent is husband or wife of the petitioner the provisions of Rule 8 shall, with the necessary modifications, apply to the answer as they apply to a petition.

(2) Where the answer of a husband alleges adultery and prays for relief, or where the answer of a husband or wife contains a claim for costs against an alleged adulterer, he or she shall, if living at the date of filing of the answer, be added to the title of the suit as "A.B. cited" and shall be served with a copy of the answer, together with a notice to appear in like manner as a petition. Where no relief is claimed a copy of the answer shall be served upon the alleged adulterer together with a notice as under Rule 10 that he or she is entitled within the time therein specified to apply for leave to intervene in the suit, and upon application such person may be allowed to intervene, subject to such direction as shall then be given by the Court.

14.—(1) If it appears to the Court that proceedings for the dissolution of the marriage have been instituted in the United Kingdom before the date on which the petition was filed in the Kenya Protectorate, the Court shall either dismiss the petition or stay further proceedings thereon until the proceedings in the United Kingdom have terminated, or until the Court shall otherwise direct.

(2) If it appears that such proceedings were instituted after the filing of the petition in the Kenya Protectorate, the Court may proceed, subject to the provisions of the Acts, with the trial of the suit.

Discretion Statement

15.—(1) Every party to a matrimonial cause praying that the Court shall exercise its discretion to grant a decree nisi notwithstanding his adultery shall file a statement (in this Rule called "a discretion statement") signed by him, stating that the Court will be asked to exercise its discretion in his favour notwithstanding his adultery, and setting forth particulars of the acts of adultery committed and of the facts which it is material for the Court to know for the purpose of the exercise of its discretion.

(2) The discretion statement shall be contained in a sealed envelope endorsed with a certificate that the statement is signed and dated, and that paragraph (4) of this Rule does not apply or has been complied with.

(3) A discretion statement shall be open to the inspection of the Proctor but, except by the direction of the judge, shall not be open to inspection by any other person.

(4) Where a discretion statement contains an allegation of adultery or other matrimonial offence on the part of the other spouse which is not referable to any specific allegation in the pleadings, notice of the allegation shall be given forthwith to that spouse:

Provided that the Court may at the trial dispense with the notice if it is satisfied that failure to give the notice was justified.

(5) Neither the fact that a discretion statement has been lodged or that such notice as aforesaid has been given nor the contents of the discretion statement or notice shall be given as evidence against the party lodging or giving the same in any matrimonial cause or matter except when that party has put the discretion statement or notice or the contents thereof in evidence in open court.

Showing cause against a decree nisi

16. The Governor in Council shall appoint a person to exercise within the jurisdiction of the Supreme Court of Kenya the duties assigned to Her Majesty's Proctor by sections 10 and 11 of the Matrimonial Causes Act, 1950, and the name of the person so appointed shall be notified in the Official Gazette by the designation of Proctor. Every Proctor so appointed shall in the exercise of his functions act under the instructions of the Attorney General of Kenya.

17.—(1) If any person during the progress of the proceedings or before the decree nisi is made absolute gives information to the Proctor of any matter material to the due decision of the case, the Proctor may take such steps as he considers necessary or expedient.

(2) If in consequence of any such information or otherwise the Proctor suspects that any parties to the petition are or have been in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may after obtaining the leave of the Court intervene and produce evidence to prove the alleged collusion.

18.—(1) When the Proctor desires to show cause against making absolute a decree nisi he shall enter an appearance in the suit in which such decree nisi has been pronounced and shall within a time to be fixed by the Court file his plea setting forth the grounds upon which he desires to show cause as aforesaid, and a copy of his plea shall be served upon the petitioner or person in whose favour such decree has been pronounced or his advocate and, if the plea alleges collusion, upon the other party or parties to the alleged collusion. On entering an appearance the Proctor shall be made a party to the proceedings, and shall be entitled to appear in person or by advocate.

(2) Where such plea alleges a petitioner's adultery with any named person a copy of the plea shall be served upon each such person, omitting such part thereof as contains any allegation in which the person so served is not named.

(3) All subsequent pleadings and proceedings in respect of such plea shall be filed and carried on in the same manner as is hereinbefore directed in respect of an original petition except as is hereinafter provided.

(4) If the charges contained in the plea of the Proctor are not denied or if no answer to the plea of the Proctor is filed within the time limit or if an answer is filed and withdrawn or not proceeded with the Proctor may apply forthwith for the rescission of the decree nisi and dismissal of the petition.

19. Where the Proctor intervenes or shows cause against a decree nisi in any proceedings for divorce, the Court may make such order as to the payment by other parties to the proceedings of the costs incurred by him

in so doing, or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

20. Any person other than the Proctor wishing to show cause against making absolute a decree nisi shall, if the Court so permits, enter an appearance in the suit in which such decree nisi has been pronounced, and at the same time file an affidavit setting forth the facts upon which he relies. A copy of the affidavit shall be served upon the party or the advocate of the party in whose favour the decree nisi has been pronounced and, if the affidavit alleges collusion, upon the other party or parties to the alleged collusion.

21. The party in the suit in whose favour the decree nisi has been pronounced may within a time to be fixed by the Court file an affidavit in answer, and the person showing cause against the decree nisi being made absolute may within a further time to be so fixed file an affidavit in reply.

Decree absolute

22. Every decree for the dissolution of a marriage under the Acts shall in the first instance be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof unless the Court by general or special order from time to time fixes a shorter time:

Provided that no decree nisi against which an appeal has been filed, including an appeal to Her Majesty in Council, shall be made absolute until after the decision of the appeal.

23.—(1) Application to make absolute a decree nisi shall be made to the Court by filing a petition setting forth that application is made for such decree absolute, which will thereupon be pronounced in open court at a time appointed for that purpose. In support of such application it must be shown by affidavit filed with the said petition that no proceedings for the dissolution of the marriage have been instituted and are pending in the United Kingdom, and that search has been made in the proper books at the Court up to within six days of the time appointed, and that at such time no person had intervened or obtained leave to intervene in the suit, and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of such person, it must be shown by affidavit what proceedings, if any, have been taken thereon.

(2) If more than twelve calendar months have elapsed since the date of the decree nisi, an affidavit by the petitioner, giving reasons for the delay, shall be filed.

Alimony, maintenance and custody of children

24. Proceedings relating to alimony, maintenance, custody of children, and to the payment, application or settlement of damages assessed by the Court shall be conducted in accordance with the provisions of the Matrimonial Causes Ordinance (Chapter 145 of the Revised Edition of the Laws of Kenya, 1948), and of the Rules made thereunder:

Provided that when a decree is made for the dissolution of a marriage the parties to which are domiciled in Scotland the Court shall not make an order for the securing of a gross or annual sum of money:

Provided further that the Supreme Court of Kenya shall not entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children unless the person on whose petition the decree for the dissolution of the marriage was pronounced is at the time such application is made resident in the Kenya Protectorate.

Certifying Officer

25. A certificate referred to in subsection (2) of section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926(**a**), as amended by the Indian and Colonial Divorce Jurisdiction Act, 1940(**b**), shall be in the form set out in the Schedule to these Rules and shall be signed by the Registrar of the Supreme Court of Kenya and sealed with the seal of the Court.

Procedure generally

26. Subject to the provisions of these Rules, all proceedings under the Acts between party and party shall be regulated by the Matrimonial Causes Ordinance, and by the Rules made thereunder.

27. The forms set forth in the Schedule to the Rules made under section 36 of the Matrimonial Causes Ordinance, with such variation as the circumstances of each case and these Rules may require, may be used for the respective purposes mentioned in the Schedule.

Given under my hand this Twelfth day of November, 1953.

Oliver Lyttelton,
Secretary of State
for the Colonies.

I concur.

Simonds, C.

SCHEDULE
(see Rule 25)

I, A.B. (Registrar) of the Supreme Court of Kenya at .....
hereby certify that the foregoing is a true copy of a $\frac{\text{decree}}{\text{order}}$ made by the aforesaid Supreme Court acting in exercise of the matrimonial jurisdiction conferred by the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, in Suit No. ..... of .....

Appeal No. ..... of ..... from judgment .....
.....

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and decree in Suit No. ..... of ..... in which the above-named C.D. was petitioner and the above-named E.F. was respondent and the above-named G.H. was $\frac{\text{co-respondent.}}{\text{intervener.}}$

Signed .....
Registrar.

EXPLANATORY NOTE

(This Note is not part of the Rules, but is intended to indicate their general purport.)

These rules are made under section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, as applied to the Kenya Protectorate by the Colonial and Other Territories (Divorce Jurisdiction) Order in Council, 1953.

They make provision for the manner in which proceedings shall be conducted before the Supreme Court of Kenya, in the exercise of divorce jurisdiction in certain cases arising in the Kenya Protectorate where the parties are domiciled in the United Kingdom.

(a) 16 & 17 Geo. 5. c. 40. (b) 3 & 4 Geo. 6. c. 35.