

**IN THE SUPREME COURT OF BELIZE, A.D. 2014**

**CLAIM NO. 498 OF 2013**

**BETWEEN:**

**JENNIFER BERNADIN**

**Claimant**

**AND**

**JEAN BERNADIN**

**Defendant**

In Court.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

June 16 & 19, 2014.

Appearances: Mr. H. Elrington, SC for the Claimant.  
Mr. Anthony Sylvestre for the Defendant.

**JUDGMENT**

[1] The parties were married on February 12, 2005 and they cohabited thereafter. By a Petition for Divorce filed on April 23, 2013, the Defendant sought the dissolution of the marriage on the ground of irretrievable breakdown and that the parties had lived separate and apart since May 4, 2008. The proceedings were not defended and the decree nisi was granted on May 31, 2013. The said decree was made absolute on July 2, 2013.

[2] The Claimant commenced suit by Claim Form and Statement of Claim filed on September 25, 2013 seeking a declaration that the Defendant by fraudulently representation dishonestly induced the Supreme Court to make an Order Nisi ending the marriage between the Claimant and Defendant. In the Statement of Claim the Claimant prayed for the following declarations and orders:

- “1. A Declaration that the Decree Nisi issued by the Court on the 2<sup>nd</sup> day of July, 2013 was obtained by the fraudulent misrepresentations made by the Defendant in his Affidavit in support of his Divorce Petition.
2. A Declaration that the said Decree Nisi is null and void and of no effect.
3. A Declaration that the Decree Absolute issue (sic) in the said proceeding on the 2<sup>nd</sup> day of July, 2013 was obtained by the fraudulent representations made by the Defendant in the course of the said proceeds (sic) and that the said Decree Absolute is null and of no effect.
4. An Order directing the Defendant to deliver up the Decree Nisi obtained by him in the Divorce proceeding to the Registrar of the Supreme Court for cancellation immediately.
5. An Order directing the Defendant to deliver up the Decree Absolute to the Registrar of the Supreme Court for cancellation immediately.
6. An Order directing the Registrar to cancel on delivery up to her, the Decree Nisi and the Decree Absolute.
7. Costs.
8. Such further or other orders as the Honourable Court deems just.”

The Defendant duly acknowledged service of the Claim and filed a Defence on October 15, 2013.

[3] The present application arose from the averment by the Claimant in her Statement of Claim that the Divorce Petition was never served on her and that she had no knowledge of the filing of the Petition and the ensuing proceedings. It was asserted that the Claimant became aware of the Divorce when she was informed by the Defendant on July 2, 2013 that he had divorced her.

[4] The Defendant mounted a challenge to the jurisdiction of the Court to determine the Claim. By a Notice of Application filed on January 14, 2014, the following orders were applied for:

- “(1) A declaration that this Court lacks jurisdiction to make a determination in the Claimant’s claim;
- (2) In addition or in the alternative, that the Court strikes out the Claim pursuant to Rules 26.1 and 26.3(1) of the Supreme Court (Civil Procedure) Rules, 2005 (CPR) on the basis that the Court lacks jurisdiction to hear the claim;
- (3) The time for the Defendant to file witness statements be contingent on the Court’s determination of this application;
- (4) Costs of this application be costs in the cause.”

In the grounds stated in the application, the Defendant conceded that the application was not filed within the period prescribed for the filing of the Defence as required by Rule 9.7(3) of the Supreme Court (Civil Procedure) Rules, 2005 (“CPR”); but rather the challenge to the jurisdiction was made by notice of application filed after the Defence was filed. The main ground relied upon was that the Court did not have jurisdiction to set aside or overturn the decree absolute order of the Supreme Court in favour of the defendant made on July 2, 2013, nor did it have jurisdiction to grant the reliefs sought in the Claim.

[5] In his affidavit in support of the application, the Defendant stated that he was advised and verily believed that the Claimant ought to but did not make an application to the Court within one month of the making of the decree nisi. It was deposed that the Claim to set aside or overrule, the decree absolute was not permissible and the Court had no power to grant the orders sought by the Claimant.

[6] Upon the matter coming up for case management conference, it was pointed out by the Court and acknowledged by Counsel on both sides, that the pivotal issue in the matter was whether or not the Claimant had been served with the petition commencing

divorce proceedings against her by the Defendant. Accordingly, it was ruled that the application by the Defendant be heard. Directions for the hearing mandated that the affidavit of Joy Arana, the alleged process server, filed on November 11, 2013 and the affidavit of the Claimant filed in response to the application both stand as examination-in-chief and that both deponents be made available for cross-examination.

[7] In her affidavit, Joy Arana stated that she is a process server of the Supreme Court since 2003 and also the secretary to a law firm for the past thirteen (13) years. She recalled effecting personal service of a copy of the petition of divorce in Action No. 105 of 2013 upon the Claimant, Jennifer Bernadin, on April 30, 2013 by handing same to her. She went on to say that the Claimant threw the document on the ground and made verbal threats against her. Subsequently “on or around 9.00 a.m.” after a report was made to the Police, she was taken to the Queen Street Police Station detained and questioned as to why she had served the petition and in what capacity she had done so. Upon tendering an explanation to the Police, she was released. Exhibited to the affidavit, was the affidavit filed as proof of service in Action No. 105 of 2013. The latter affidavit provided the additional information that the copy of the petition was personally delivered to Jennifer Stevens Bernadin at the corner of Orange Street and Albert Street in Belize City at 12.15 p.m. on April 30, 2013.

[8] In her answers during cross-examination, the witness elaborated on how she came to serve the Claimant and what transpired during the encounter. She explained that the Claimant was first made known to her when the Defendant pointed her out while they were in a vehicle on Queen Street. She next saw her early in April entering Brodies on Albert Street. On the day of the service, she saw the Claimant on Orange Street coming towards Albert Street and she approached her and addressed her by saying: “Morning, Ms. Jennifer.” The Claimant responded and the witness then told her she had a paper for her. She opened her working bag, took out the document and showed it to her telling her she had a divorce petition for her. When given the copy, the Claimant took it, looked at it and, as the witness turned away, she threw it on her. It struck her on her back and fell to the ground. She said the Claimant began to “rail up”.

[9] In response to learned Senior Counsel, Ms. Arana said she had been given two addresses for the Claimant – one in Crooked Tree Village on the Old Northern Road and the other in St. Martins off of Central American Boulevard in Belize City. She was unable to give the exact address or location of where the Claimant lived and she freely admitted that she could not say whether or not the Claimant lived at either address. Subsequently, she told the Court “I never found out personally on my own where she was living.”

[10] While being questioned about how she came to know the Claimant, the witness recounted an incident which occurred on the lower premises of the precincts of the Court. She said that Mr. Elrington, learned Senior Counsel for the Claimant, accosted her and asked her “which one of the ladies is Ms. Bernadin?” She replied by pointing out one as Ms. Jennifer’s mother and the other as Ms. Jennifer before walking away. In her words, the Claimant was heard to say: “I don’t know you. You never serve me.” It should at once be pointed out that when asked about this exchange, the Claimant denied that her lawyer approached Joy Arana in her presence. This was somewhat curious given that Mr. Elrington never suggested to the witness that the incident did not take place or that it did not occur in the manner as described by Ms. Arana.

[11] The witness was questioned about the practice with regard to the service of documents. She explained that when documents are served at an office, a signature is obtained. However, she did not ask the Claimant to sign the front page as in her experience some persons cursed you when asked to do so while others were nice and cooperated by signing. She insisted that she put the document in the hand of the Claimant and never asked anyone to witness her doing so.

[12] In her affidavit, the witness sworn to having been detained by the Police and questioned. In direct response to a question posed by the Court she could not remember the name of the officer who questioned her. She only recalled his face and that he was of Spanish descent. During cross-examination, she spoke of being called by the Police on a Friday night about a month after serving the Claimant. She was on her way to Dangriga and promised to go into the Police Station on the following Monday morning. She revealed that the Police were inquiring why she never served the

Claimant with a copy of the Petition. It was suggested to her that she was never detained by the Police as deposed to in paragraph 5 of her affidavit and that she never received a call from the Police. She rejected both suggestions.

[13] The Claimant's affidavit in response to the application largely addressed the substantive Claim. The paragraphs relevant to the application were paragraphs 2 and 9 in which she said:

“2. At no time was I served with the Petition and with any papers relating to his Application for a Decree Nisi and a Decree Absolute ...”

...

9. I say emphatically that the process server, who has sworn that she served me the Petition at the corner of Albert Street and Orange Street in Belize City, Belize, on the 30<sup>th</sup> day of April, 2013, is not telling the truth.”

Further, as stated in paragraph 6 of her affidavit, she insisted at trial that she found out in July 2013 that the decree nisi and the decree absolute were made after the divorce proceedings had been concluded.

[14] Learned Counsel for the Defendant suggested to the Claimant that she had brought the Claim because the Defendant wanted to put her out of the house. At first, she denied this was so but later when it was put to her again, she admitted that that was the case. She said she did not know the process server, and that she never saw her nor was she ever approached by her.

[15] The hearing essentially pitted the oath of the Claimant against the oath of the process server, Joy Arana. The Court must decide on the balance of probabilities whether the defendant through the witness has established the fact of service of a copy of the divorce petition in Action No. 105 of 2013 upon the Claimant. There was no

corroborative evidence to support either witness. The testimony and demeanour of the witnesses therefore attained prominence.

[16] It is useful to put the proceedings into context. The Claimant seeks to have the decree absolute in Action No 105 of 2013 declared null, void and of no effect on the basis of fraud by virtue of fraudulent representations allegedly made by the Defendant in the Divorce Petition and non-service of the said Petition. The Claimant has elected not to pursue any appeal. An appeal lies as of right to the Court of Appeal from a decree nisi order in a matrimonial cause by virtue of section 14(1)(d) of the Court of Appeal Act, Chapter 90. It is specifically enacted by section 14(4) of the said Act that no appeal shall lie from a decree absolute order for the dissolution of marriage by a party who has had time and opportunity to appeal from the decree nisi on which the decree absolute was founded and has not done so. Section 138(2) of the Supreme Court of Judicature Act, Chapter 91 allows for any person to show cause why the decree nisi ought not to be made absolute. In the substantive claim, it was plainly the case that the Claimant would run afoul of section 14(4) aforesaid. However, she has contended that she was not served with the divorce petition.

[17] The witness, Joy Arana, presented herself as a professional process server among other duties as an employee of an attorney-at-law for some thirteen (13) years. The Matrimonial Causes Rules made under the Supreme Court of Judicature Act, require that a sealed copy of the petition be served personally by delivery of such copy to the respondent (see: Rules 6, 7 and 8 of the Matrimonial Causes Rules). There is no requirement that the respondent sign as receiving the document. The witness told the Court that she placed the document in the hand of the Claimant who at first accepted it until she realised the nature of the document. Thereupon, it was flung at the retreating process server. It is quite conceivable that when confronted with service of a petition for divorce the intended respondent would react in such a manner. In this regard, I find the witness' testimony to be credible.

[18] The details of the exchange of words between the process server and the Claimant were never challenged by learned Senior Counsel except for an unvarnished suggestion that she never served the Claimant. Also as indicated before, the incident in

the lower premises of the Court was never challenged as not having occurred. The witness' account included a response by the Claimant denying that she knew the process server and that service was ever effected. Yet, the Claimant herself purported to deny being present when her lawyer approached Ms. Arana. This gave rise to a query as to whether the Claimant was being forthright.

[19] The Court was told by Ms. Arana of two occasions where the Police sought to make inquiries of her. On the first occasion soon after serving the document she was questioned as to her authority to serve a divorce petition. About a month later, on the second occasion, she was asked why she did not serve the Claimant with a copy. The witness rejected the suggestion that she was never questioned by the Police. On the other hand, there was no statement from the Claimant to the effect that she never made any report to the Police. In my view, since the intervention of the Police could only have been initiated by a report made by the Claimant, it behoved her to make it pellucid that she made no such report. This did not occur, leaving the Court to accept the account rendered by the witness.

[20] In contrast to the detailed and colloquially flamboyant testimony of the witness for the Defendant, the Claimant's testimony essentially amounted to vehement denials that she was ever served with or handed any document. There was nothing in her testimony or in her demeanour that rendered her credibility. As a result, the balance was tipped in favour of the witness for the Defendant whose testimony the Court finds to be believable.

[21] As I highlighted earlier, the Claimant has elected not to pursue an appeal; neither has she sought leave to appeal. It is also a matter of record that the Claimant did not avail herself of section 138(2) of the Supreme Court of Judicature Act within the period stipulated and the divorce proceedings underwent all the required procedural stages. There is no complaint raised as to the procedure save for the allegation that service of the divorce petition was not effected on the Claimant and therefore the decree absolute must be set aside as being void. No authority was cited but it is useful to refer to the case of **Ebrahim v Ali (or se Ebrahim) (Queen's Proctor intervening) [1983] 3 All ER 615** in which the petition and the decree nisi was pronounced and made absolute.



Arnold, P decided that the proceedings were invalidated by the failure to serve the petition and therefore the decree was set aside for want to jurisdiction. **Ebrahim's** case must be contrasted with that of **Callaghan v Andrew Hanson et al [1992] 1 All ER 56**, where the husband acknowledged service and consented to the decree being granted. He then sought to have the decree set aside on the ground of fraud. The Court held that there being no want of jurisdiction nor any procedural irregularity by the court granting the decree, the decree was unimpeachable and stood against all the world.

[22] On the authority of **Callaghan**, I am satisfied that by not taking part in the divorce proceedings, having been served with the petition, the Claimant cannot be heard to allege fraud and seek to impeach the decree nisi and the decree absolute granted by the Supreme Court. If the Court were to allow the Claim to proceed, it would be to allow the circumventing of the provisions of section 138 of the Supreme Court of Judicature Act and the appeal process.

[23] Accordingly, the Claim shall stand dismissed and it is ordered that the Claim be struck out with costs to the Defendant fixed in the sum of \$2,000.00.

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**KENNETH A. BENJAMIN**  
**Chief Justice**