

1984 September 28

[PIKIS, J.]

NADIN KYPREOS,

Petitioner,

v.

COSTAKIS KYPREOS,

Respondent.

(Matrimonial Petition No. 35/83).

Practice—Discontinuance of proceedings—Principles applicable—Discontinuance of Matrimonial Petition—Regulated by Order 26 of the old English Rules of the Supreme Court which is applicable by virtue of rule 102 of our Matrimonial Causes Rules.

5 This was a petition by the wife for the dissolution of a civil marriage on the ground of desertion. By his answer the respondent raised a preliminary issue whereby he questioned the legitimacy of the proceedings on the ground that the marriage between the parties was dissolved by a valid order of the ecclesiastical Court made on the 18th May, 1982. Before the completion of the hearing of the preliminary issue the petitioner signified her wish to withdraw the petition, a course opposed by the respondent.

On the application for withdrawal:

15 *Held*, that withdrawal of a matrimonial petition is, by virtue of rule 102 of our Matrimonial Causes Rules, regulated by the provisions of Order 26 of the old English Rules of the Supreme Court; that after a formal step is taken, subsequent to defence, signifying unequivocally a decision to pursue litigation, the leave of the Court is required before a party is allowed to discontinue litigation; that the primary object of the rule requiring leave is to empower the Court to refuse leave whenever it is sought thereby to gain a tactical advantage; that a party will not be ordinarily compelled to litigate against his will and the Court will normally
20
25 allow a party to discontinue provided that no injustice will

be caused to the defendant; that there is no suggestion that the petitioner seeks, by withdrawing the proceedings, to secure any collateral or other advantage, or that any injustice is likely to be occasioned to the respondent; and that, accordingly, leave to withdraw the petition must be granted. 5

Petition discontinued.

Cases referred to:

Covell Matthews & Partners v. French Wools Ltd. [1977] 2 All E.R. 591 at p. 594.

Matrimonial Petition. 10

Wife's petition for dissolution of marriage on the ground of desertion.

E. Michaelides, for the petitioner.

P. Anastassiades, for the respondent.

Cur. adv. vult. 15

Pikis J. read the following judgment. This is a petition for the dissolution of the civil marriage of the petitioner and respondent, founded on desertion. By his answer the respondent questioned the legitimacy of the proceedings, contending the marriage between the parties was dissolved by a valid order of the ecclesiastical Court made on 18.5.1982. Consequently, the marital tie was severed and the parties were restored to their premarital status. Subject to the above preliminary objection bearing on the justiciability of the proceedings, the petition is opposed and the charge of desertion denied. 20 25

Before hearing the case of the petitioner, it was judged appropriate, with the consent of the parties, to set down the preliminary objection, to the justiciability of the petition, for consideration and decision. What was at issue was the effect of the ecclesiastical decree of divorce in view of the history of the marriage of the parties. The respondent is a Cypriot, a member of the Greek-Orthodox Church, while the petitioner is a foreign subject, belonging to a different Christian religion. At the start, the parties contracted a civil marriage; thereafter, they were ecclesiastically married at a Greek-Orthodox church. The preliminary issue involved consideration of the proviso to para. (c) of Article 22.2 of the Constitution. Before the completion of the hearing of the preliminary issue, petitioner 30 35

signified her wish to withdraw the petition, a course opposed by the respondent. It was argued on his behalf that having regard to the advanced stage of the proceedings, leave was required to withdraw the proceedings and such ought to be
5 refused in order to make possible litigation of the preliminary matter. Learned counsel who appeared on behalf of Mr. Anastassiades for the respondent, Mr. Mavrantonis, submitted, the matter is regulated by the provisions of r.102 of the Matrimonial Causes Rules that makes applicable, in respect of with-
10 drawal of matrimonial proceedings, the pertinent provisions of the English Matrimonial Causes Rules 1957, notably r. 82, in the absence of specific provisions in our Rules. Now, r. 82 adopts in turn, subject to necessary modifications, the relevant Rules of Court applicable to civil proceedings, notably
15 Ord. 26. We are referring, of course, to the old Rules of the Supreme Court. Ord. 15 of the Cyprus Civil Procedure Rules, it may be noted, is modelled on the provisions of Ord. 26.

I take it to be settled that the law and practice, applicable to matrimonial proceedings under s. 19(b)* of the Courts of
20 Justice Law—14/60, is the matrimonial law and practice in force before 1960, that is, the law and practice, then applicable in England. Therefore, the submission made on behalf of the respondent, that withdrawal of a matrimonial petition is regulated by the provisions of Ord. 26 of the old English Rules
25 of the Supreme Court, is sound.

The Rule conditioning withdrawal of proceedings after a certain stage, that is, after a formal step is taken with a view to continuing the litigation after the filing of defence, replaced
30 the common law rule to claim a nonsuit, and the rule of equity entitling a party to dismiss his bill at his own option that permitted the plaintiff to discontinue proceedings at any stage before judgment. The object of the new rule is to ensure no abuse is made of the judicial process. A litigant will not be
35 allowed to withdraw an action in anticipation of the outcome of the proceedings. After a formal step is taken, subsequent to defence, signifying unequivocally a decision to pursue litigation, the leave of the Court is required before a party is allowed

* Jurisdiction has now been transferred to the District Court by virtue of Laws 29/83 and 51/84.

to discontinue litigation*. A party will not ordinarily be compelled to litigate against his will.

This is not the object of the rule requiring leave. The primary purpose of the rule is to empower the Court to refuse leave whenever it is sought thereby to gain a tactical advantage. 5
Graham, J., I believe with respect, put the matter in a nutshell: when he said;

“The principles to be culled from these cases are, in my judgment; that the Court will, normally at any rate, allow a plaintiff to discontinue, if he wants to, provided no 10
injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will”—*Covell Matthews & Partners v. French Wicks Ltd.* [1977] 2 All E.R. 591 at p. 594, letters A–B.

There is no suggestion in the instant case that the petitioner 15
seeks, by withdrawing the proceedings, to secure any collateral or other advantage, or that any injustice is likely to be occasioned to the respondent. Respondent opposed the proceedings solely, in order to make possible litigation of the preliminary objection to the viability of the proceedings and thereby secure a judicial 20
pronouncement as to legal effect of the ecclesiastical divorce. Discontinuance of the present proceedings will in no way prejudice his right; if any, to seek a declaration on the implications upon his status of the ecclesiastical decree or, in fact, any other 25
remedy to which he may be entitled.

Hence, leave to discontinue is hereby granted. Bearing in mind the extraordinary rule with regard to costs in matrimonial proceedings applicable by rules 94–96 of the Matrimonial Causes Rules, I shall make no order as to costs.

*Petition discontinued with 30
no order as to costs.*

* Sec. *The Annual Practice* 1958, p. 592.