

LOUISE M. SAMUELS, Appellant, v. **LEONARD E. SAMUELS**, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
MONTSERRADO COUNTY.

Argued May 7, 8, 1957. Decided June 14, 1957.

A motion for continuance should be granted upon a showing that a party who is a material witness would be physically unable to attend the proceeding in question.

On appeal from judgment granting a final decree of divorce, case *remanded for new trial*.

R. F. D. Smallwood for appellant. *P. J. Bracewell* for appellee.

MR. JUSTICE HARRIS delivered the opinion of the Court.

From the records certified to this Court in the above-entitled case, it is revealed that Leonard E. Samuels, appellee, plaintiff in the court below, instituted an action of divorce for desertion against the appellant, defendant in the court below, the pleadings extending as far as the reply. On January 11, 1956, the case was assigned to trial on the facts stated in the complaint and answer, trial date being January 17, 1956. Louise M. Samuels, appellant, defendant in the court below, being in Freetown, Sierra Leone, might not have been able to have been present on the date assigned for the trial of the case. Her counsel, R. F. D. Smallwood, filed a motion for continuance of the cause to the March, 1956, term of the court.

The said motion avers that the appellant, defendant below, was a material witness in her own behalf to prove that it was the appellee, plaintiff below, who deserted her, and not she who deserted him, said motion being supported by an affidavit as required by law. The trial Judge heard and denied the motion on January 16, 1956, one day before the date for which the trial had been assigned, and at the same time ruled the case to trial. To this ruling the appellant, through her counsel, excepted.

The trial ended in a verdict in favor of the plaintiff below, now appellee, to which verdict appellant, defend-ant below, excepted and filed a motion for new trial, which was denied, and final judgment was rendered against her, to which she excepted and has brought the case before this Court upon a bill of exceptions containing eleven counts. Count "1" alone we regard as material to the determination of the case, and hereunder quote :

"Defendant not being within the bailiwick of the court, filed a motion for continuance on January 12, 1956, which motion was resisted by plaintiff on the grounds that the reason laid out in Count "1" of the motion does not fall within the usual reasons for motions for continuance, and that a motion for continuance is addressed to the sound discretion of the Judge and not based on the right of any party. Upon these grounds the court overruled said motion, to which ruling defendant excepted."

Count "1" of the motion for continuance alleges as follows :

"That she is the defendant in this case and is a material witness for the defense, but she is presently in Freetown, Sierra Leone, and is therefore not able to be physically present at the trial of the case this term ; that as said material witness, as well as defendant, she is to testify to the fact that it is plaintiff who deserted her, and not she the defendant."

It is contended by the plaintiff below, now appellee, in his resistance to the motion for continuance, that the reason laid out in Count "1" of the motion for continuance, which is absence of a material witness, does not fall within one of the usual reasons for motions for continuance.

Counsel for the defendant in the court below stated in the motion for continuance that he wanted to prove by the witness that it was he who deserted her and not she, and this issue being a material and controlling one in an action of divorce for desertion, the motion for continuance should have been granted, especially so when supported by an affidavit.

"But a continuance should be granted where the application complies with the statutory requirements, and the proof expected to be made by the absent witness is not only material on the controlling issues but is also such as the party cannot fully and satisfactorily make by other witnesses." 6 R.C.L. 558 *Continuances* § 15.

From the above quotation it is seen that absence of a material witness is good ground for the continuance of a cause. Rule "7" of the Circuit Court provides :

"At the call of the civil docket should the parties in any case not be ready for a hearing, said case shall be passed and placed at the foot of the docket, until it shall again be reached in the course of dispatch of business during the particular term for

which it was docketed. No case however shall be continued beyond the term for which it is filed and set down for trial, except upon a proper motion for continuance, provided however, that should the business of the court be such that a particular case is not reached during the session, the court shall in all such cases upon the application grant continuance. In case no motion is filed for continuance, the cause shall be stricken from the docket."

What is conspicuously observed is that the trial court seemed to have been over-anxious to try the case ; and hence, after ruling on the motion for continuance and denying it, proceeded with the trial of the cause on January 16, 1956, when the assignment had been previously made for the 17th, a day after the trial was commenced. Why such anxiety? Why could the court below not have followed the rule cited, *supra*, and placed the case at the foot of the docket, even had a motion for continuance not been filed in the first instance, and if not filed at all, order the case stricken from the docket as the rule directs?

This Court is of the opinion that the motion for continuance of the cause should have been granted. The case is therefore remanded and a new trial awarded. Costs to abide the final determination of the cause. And it is hereby so ordered.

Remanded.