IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

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D. 37/80

BETWEEN : HENRY FIRTH of Waiheke
Retired

Petitioner

A N D : NAOMI JOYCE FIRTH of
Auckland, Married Woman

Respondent

Hearing : 25th July 1980

Counsel : T.F. Purcell for Petitioner
R.S. Garbett for Respondent

Judgment : 25th July 1980

(ORAL) JUDGMENT OF BISSON, J.

On the 29th May 1980 a decree nisi was granted to the petitioner after an undefended hearing. Mr. Purcell who appeared for the petitioner informed the Court that although no answer appeared on the Court file he had been served with a copy of an answer and later with an affidavit by a legal executive in the firm of solicitors acting as agents for the solicitors for the respondent that an answer had been filed in the registry of the High Court at Hamilton on the 24th March 1980. Mr. Purcell was also able to inform the Court that he had notified the solicitor for the respondent that the petition was set down for hearing in the undefended list for the 29th May 1980 and in fact he did so by letter dated 22nd May 1980. As there was no appearance for the respondent on the 29th May 1980 the Court

assumed that the respondent did not wish to proceed further on the answer and accordingly granted the decree nisi after hearing the appropriate evidence on an undefended petition. However it has now come to the notice of the Court that the failure of counsel to appear on the day of the hearing of the undefended petition was due to inadvertence and that being the case a motion is now before the Court for the decree nisi to be set aside. Mr. Garbett has appeared in support of this motion and submitted that the Court has an inherent jurisdiction or alternatively that the Court can order a new trial under Rule 40. However, Mr. Purcell has opposed the setting aside of the decree nisi on the second ground advanced by Mr. Garbett namely that s.72 of the Act does not allow a new trial to be ordered where the petition was heard before a judge alone. However, I have considered the decision of Hardie-Boyes, J. in B. v. B. & Anor. (1976) NZLR 925 in granting a motion for an order granting a new trial of a petition or alternatively setting aside a decree nisi and granting a new hearing in which he found that the Supreme Court as it then was has an inherent power to order the suit to be heard properly with the essential parties present before the Court if they or one of them explains absence from the earlier hearing but is available to give evidence at a rehearing. In my view this is a proper case for the Court to exercise its inherent jurisdiction ex debito justiciae because in the first place there has been a failure on the part of the Court administration itself to record and place on the file an answer which according to an affidavit of a legal executive was duly filed and I accept that evidence corroborated in a sense by the fact that a copy of the answer was duly served on the petitioner. It can be appreciated that in a busy court office a document such as an answer can unfortunately be mislaid and without there being any grave reflection on the efficiency of that office. Mr. Purcell as solicitor and counsel for the petitioner then did all that could be reasonably expected of him to enable the respondent to have

notice of the hearing of the petition in the undefended list and to be represented. However it has now come to light that through inadvertence counsel failed to appear and in those circumstances combined I feel this is an appropriate case for the Court to exercise its inherent jurisdiction so as to enable the suit to be heard properly with both parties being present before the Court and it is not in my view a sufficient answer to the motion to say that a decree nisi causes no irreparable harm to the respondent because a decision of the Court which affects status is still a vital matter notwithstanding the many changes to the law relating to domestic proceedings. Accordingly, the Court orders that the decree nisi granted on the 29th May 1980 be and hereby is set aside. I also order that an answer be filed within ten days giving full particulars as already sought and supplied to the petitioner and that the matter be accorded a priority hearing. On the question of costs, taking into account that the petitioner has had the expense of counsel appearing on the hearing of an undefended petition which through no fault of his own has now been aborted and that the petitioner has also been put to the expense of appearing on and quite properly opposing the motion to set aside the decree nisi, I consider that an appropriate award would be $150.00 and an order is made accordingly.

G.R. Brinsden J.