JANET MPOFU MWIBA v DICKSON MWIBA (1980) Z.R. 175 (H.C.)

HIGH COURT
CHIRWA, J.
31ST MARCH, AND 9TH APRIL, 1980
1979/HP/D/27

Flynote
Family loan - Divorce- Jurisdiction of High Court to grant - Whether extends to marriages other than monogomous ones.

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Headnote
The petitioner married under the Rhodesian African Marriages Act, Cap. 105. The judge found as a fact that this was a marriage contracted under the African customary law and was therefore potentially polygamous. The petitioner had instituted the proceedings under the Matrimonial Causes Act, 1973, on the ground that the marriage had broken down irretrievably.

Held:
The High Court has no jurisdiction aver potentially polygamous marries. It can only dissolve monogamous marriages following the practice for the time being prevailing In England.

Cases cited:
(1) Baindail v Baindail (1946) L.R.P. 122.
(2) Hyde v Hyde (1866) L.R.I.P.D.
(3) Sowa v Sowa (1961) P. 68

Legislation referred to:
High Court Act, Cap. 50, s. 11 (1).
Matrimonial Causes Act, 1973 s. 1 (2) (e).
Rhodesian African Marriages Act, Cap. 105.
Native Marriages Ordinance, Cap. 79 (Rhodesia).
Marriages Act, Cap. 150 (Rhodesia).
For the petitioner: R.C. Sikazwe, Assistant Senior Legal Aid Counsel.
For the respondent: In person.

Judgment
CHIRWA, J.:

This is an undefended petition for divorce on the grounds that the marriage has broken down irretrievably as the parties have lived apart for a period of more than five years as provided for under s. 1 (2) (e) of the Matrimonial Causes Act, 1973.

At the start of the hearing, I asked the respondent who was present in court whether he still doesn't

intend to defend the petition and he told me that he does not wish to defend the petition. I also raised a preliminary issue with Mr Sikazwe on the question of the type of marriage in question in view of the "Marriage Certificate" filed together with the petition. It appeared to me that the marriage was a potentially polygamous one and I questioned whether this court has jurisdiction over the matter. Mr Sikazwe, fairly, expressed surprise that as he was not originally seized of the matter and after looking at the marriage certificate he tended to agree with my observations. However, in view of the fact that I was told that the petitioner would be leaving Zambia for good on 15th April, 1980, and also the fact that the petition was not defended, I decided to proceed with the case and I would consider the preliminary issue together with the whole petition.

The petitioner gave evidence that they married in Bulawayo on 7th September, 1970, before a District Commissioner at the Boma, the petitioner then being Janet Mpofu and they were issued with a marriage certificate which she recognised in court and produced it as part of her evidence. This was accepted by the court and marked exhibit "P1".

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Soon after the marriage, the couple moved to Zambia and cohabited at various places and finally at house number 779 Matero in Lusaka. There are two children of the marriage namely, Danny Dube Mwiba born on 24th February, 1965, and Douglas Dube Mwiba born on 23rd January, 1967. That on 25th August, 1973, the parties parted and they have been lining apart since then. She therefore asks for divorce on the grounds of living apart for more than five years. The petitioner does not claim custody of the children but claims costs.

The marriage certificate, exhibit "P1" was issued under the Rhodesian African Marriages Act, Cap. 105. The certificate gives particulars of parties to the marriage and a witness and also the consideration paid and to be paid and it was issued by the African Marriage Officer; a District Officer. To have a better understanding of this matter, I reproduced here below the marriage certificate form, leaving out particulars which are filled in after marriage:

"G.P. & S. 23298-300-50B Z. 23 (T.A.)

SCHEDULE (Section 8)

No .....

CERTIFICATE OF AFRICAN MARRIAGE (AFRICAN MARRIAGES ACT (Chapter 105)

This is to certify that I have this day solemnised a marriage between:
Name of Husband .....
Registration Certificate Number .....
Kraal .....
Chief .....
and
Name of Wife .....
Name and Registration Certificate Number of Wife's

Guardian ....."Th
e said wife being the*.....Wife and having freely consented to the marriage.
Consideration paid .....
Value.....
Terms of Payment agreed upon .....
In the presence of.....
.....
GIVEN under my hand at.....
this .....day of ..... 19.....
.....
African Marriage Officer
*Here state whether first,second or subsequent wife."

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Our library does not have an up to date set of Rhodesia laws, which is unfortunate. I also checked the Attorney-General's Chambers Library, they too do not have a set of Rhodesian laws. However, our library has the 1939 edition of the Rhodesian laws and there is Native Marriages Ordinance, Cap. 79. Reading this Ordinance it is clear that there was (is) another Marriage Act, Cap. 150. Under s. 12 of the Native Marriages Ordinance it is clear that Marriages Act, Cap. 150 is a Christian Marriage Act as opposed to a marriage under the Native Marriages Ordinance this is particularly so when one reads that the registering officer has to satisfy himself, among other things, that there is no other subsisting marriage and he has to explain to the parties "that the marriage which it is proposed to contract shall, during its subsistence, be a bar to either party thereto entering into any other marriage". It seems to me that marriages under Native Marriages Ordinance are under African customary law and as such they are not Christian marriages.

I have no reason not to believe that this Native Marriages Ordinance, Cap. 79, changed its title to African Marriages Act, Cap. 105 and it is under Cap. 105 that the parties hereto married. As it will be seen from the marriage certificate issued to the parties, there is an allowance for more than one wife as the certificate must indicate whether the wife is firsts second or subsequent wife. Such a marriage is potentially polygamous and the court has to decide whether it has jurisdiction over the matter.

Section 11 of the High Court Act, amp. 50, provides:

> "11 (1) The jurisdiction of the court in divorce and matrimonial causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England."

The basis of marriage in English law is the Christian marriage, the voluntary union for life of one man with one woman to the exclusion of all others and the Christian concept is not a religious one but a monogamous concept of marriage and that courts of matrimonial jurisdiction would therefore not dissolve or annul marriages unless they are monogamous unions within the meaning of the

English marriage.

In the case of *Baindail (otherwise LAWSON) v Baindail* (1) *at p*. 125 Lord Green M.R., after quoting with approval Lord Penzance in *Hyde v Hyde* (2) says:

> "For the purpose of enforcing the rights of marriage or for the purpose of dissolving a marriage it has always been accepted as the case, following Lord Penzance's decision, that the courts of this country exercising jurisdiction in matrimonial affairs do not and cannot give effect to or dissolve, marriages which are not monogamous marriages. The word 'marriage' in the Matrimonial Causes Act, has to be construed for the purposes of ascertaining what the jurisdiction of the English courts is in these matters. The reasons

> are that the powers conferred on the courts for enforcing or dissolving a marriage tie are not adopted to any form of union between a man and a woman save a monogamous union. If a man by the law of his domicile is entitled to have four wives and then becomes domiciled in this country and wishes to be divorced here, nice questions would necessarily arise as to whether in consorting with the other wives he had been guilty of adultery and various questions of that kind. At any rate, rightly or wrongly, the courts have refused to regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country."

In the instance case, I have no evidence that the respondent has married another wife and I therefore take it that the marriage, although potentially polygamous, is at the moment monogamous. In the case of *Sowa v Sowa* (3) the parties married under Ghana customary law, where the marriage was potentially polygamous although the husband promised to go through another ceremony under Ghanian law to turn the marriage into a monogamous one which he never did. In the present case the marriage is potentially polygamous although the parties were free to marry under the Marriage Act thereby turning the marriage into a monogamous one. *Holroyd Pearce*, L.J., at p. 84 had this to say:

> "It is argued that for practical convenience the courts could and should deal with marriages which though potentially polygamous are in fact monogamous. But the fact that a marriage happens at the moment to consist only of two formerly single spouses is irrelevant and may be altered at any time by the husband taking another wife. A husband could always invalidate a pending summons simply by so doing. Such a situation would be incongruous and shows the undesirability of seeking to alter the principle or the ground of convenience in particular cases. The essential question is what is the nature of the union, and what are the bonds and implications of the marriage ceremony in question. If the ceremony is polygamous then it does come within the word 'marriage' for the purposes of the Acts relating to matrimonial matters, nor do the parties to it come within the words 'wife', 'married woman', or 'husband'."

At p. 86 after considering other cases involving polygamous or potentially polygamous marriages

which have been recognised for the purposes of ascertaining other rights such as rights to succession he concluded:

> "They do not affect the principle that our matrimonial courts will not deal with polygamous marriages as a subject for the exercise of their jurisdiction."

Although I have been unable to look at the Rhodesian African Marriages Act, Cap. 105, I have no doubt that marriages under that Act are under African customary law and are also potentially polygamous. I say so because I take judicial notice that marriages among the indigenous Africans, especially in Central Africa pay what is commonly known as *lobola* and which has been referred to in the marriage certificate

exhibit "P1" as consideration. Consideration is not known in a Christian marriage. Further the marriage certificate itself has a space in which the marriage officer has to fill in whether the wife is first, second or subsequent wife. This puts the marriage into a potentially polygamous marriage. As the law and practice of this court is the same as in England I have to follow the law and practice for the time being prevailing in England. As the essence of Christian marriage is a union of one man and one wife to the exclusion of all others and as the present marriage, although *de facto* monogamous, is potentially polygamous, this court has no jurisdiction over the matter. I therefore decline to dissolve the marriage. The matter should be taken before a competent court for relief prayed for. The petitioner will bear her own costs.

Application for divorce rejected
