

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(DIVORCE JURISDICTION)

2010/HK/D.22

IN THE MATTER OF: A SUIT FOR THE DISOLUTION OF MARRIAGE
AND

IN THE MATTER OF: THE MATRIMONIAL CAUSES ACT 1973

BETWEEN:

SAM KAFWELU - PETITIONER
AND
BRENDA LIMBUWA KAFWELU - RESPONDENT

Before the Hon. Mr. Justice I.C.T. Chali in Chambers on the **11th** day of **January**,
2011.

For the Petitioner: Mr. G. Nyirongo - Messrs Nyirongo & Company

For the Respondent: Mr. W. Banda - Messrs Wilson and Cornhill

RULING

Cases referred to;

1. Lisulo v. Lisulo (1998) Z.R. 75

Legislation referred to;

1. High Court Rules Chapter 27 of the Laws of Zambia

On 29th October, 2010 I delivered a ruling relating to two applications the Respondent had made, namely, for custody of the children of the family and for maintenance and property adjustment. Regarding those applications, the parties and their Advocates had relied on

affidavit evidence which I fully considered together with various authorities I had referred to in arriving at that decision.

In fact the affidavits of means of both parties were only filed after I had prompted counsel to do so in the course of hearing the two applications.

The Respondent now applies for a review of my said Ruling in terms of Order 39 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia. The application is again supported by an affidavit of the Respondent exhibiting various documents. Needless to say, the Petitioner opposes the application for review. I shall return to the contents of those affidavits and the submissions later in this Ruling.

Order 39 Rule 1 of the High Court Rules provides as follows;

“39. 1 Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him....., and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision.”

Mr. Nyirongo, counsel for the Petitioner, has attacked the application for review for not presenting any fresh evidence which was not available or which had only been recently discovered and which could not have been reasonably available to the Respondent at the time the court heard the two applications.

In the ruling now sought to be reviewed, I had considered, among other factors;

- (1). the length of the marriage having regard to the contents of the Petition and the Marriage Certificate;
- (2). the uncontested grounds for the breakdown of the marriage;
- (3). the properties acquired by the parties and the respective dates of acquisition as disclosed in their affidavits;

- (4). the parties' respective incomes, expenses and needs; and
- (5). the present and future needs and responsibilities of the parties, particularly after the settling the question of custody of the children of the family.

In her affidavit in support of the application for review, the Respondent contested virtually each and every statement of fact as found by the Court, starting from the date and length of their marriage, the dates of the property acquisition, as well as the grounds for the breakdown of the marriage. She claims, in paragraph 5 of her affidavit that these are **“facts which were not considered at the time of the ruling of the court which facts were not before the court at the time the application for property adjustment and custody of the children was being determined”**.

That may well be the case, but it does not mean that she did not have then all the information she has disclosed now. She simply chose not to disclose it or negligently omitted to do so.

The Supreme Court case of LISULO v. LISULO (1998) Z.R. 75 is quite instructive on such applications. It was held, *inter alia*,

- 1. That the power to review under Order 39 Rule 1 is discretionary for the Judge and there must be sufficient grounds to exercise that discretion;**
- 2. That evidence relating to the Appellant's financial statements was available throughout the hearing. Therefore, it cannot be said to be fresh evidence for the purposes of review under Order 39 Rule 1 of the High Court Rules;**

- 3. Order 39 Rule 1 the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful parties must enjoy the fruits of their judgment.**

Looking at the reasons for asking for review, it cannot be said that the new evidence only came to light later and that no proper and reasonable diligence and could earlier have secured it.

I find no merit in the application and I accordingly dismiss it with costs to the Petitioner.

Delivered at Kitwe in Chambers this **11th** day of January, **2011**

I.C.T. Chali
JUDGE

