

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

2014/HP/D.077

(Divorce jurisdiction)

BETWEEN

BWEMBYA KATONGO MUGALA

PETITIONER

AND

SAMUEL IMBANJI MUGALA

RESPONDENT

Before: Hon. Mrs. Justice B.M.M. Mung'omba on this 29th day of August, 2014.

*For the Petitioner - In Person
For the Respondent - In Person*

JUDGMENT

Legislation Referred To:

- 1. The Matrimonial Causes Act No. 20 of 2007; Section 9 (1) (a) (b).**

On 11th April, 2014, the Petitioner, **BWEMBYA KATONGO MUGALA**, took out of the Principal Registry, a petition for dissolution of his marriage to the Respondent, **SAMUEL IMBANJI MUGALA**. The petition is made pursuant to **Section 9 (1) (a) (b)** of the **Matrimonial Causes Act, 2007**.

The Petitioner avers that she was lawfully married to the Respondent on 3rd March, 2007 at the Office of the Registrar of Marriages at Lusaka Civic Centre in the City and Province of Lusaka in the Republic of Zambia. They last cohabited as husband and wife at House No. 1080/15, Kamwala South in Lusaka. Both are domiciled in Zambia.

The Petitioner avers that she is a Registry Officer at the Zambia Police Service Headquarters, Lusaka, whilst the Respondent is a Businessman operating his business at Lusaka Intercity Bus Terminus, in Lusaka. The petition reveals that there are now living two children of the marriage; **SALIFYANJI GRACE MUGALA**, a girl born on 7th July, 2007, and **PRINCE MUTENDE MUGALA** born on 3rd March, 2011. The Petitioner further states that there are other children now living born to the Respondent during the marriage so far as is known to the Petitioner, namely, **KENNETH MUGALA**, a boy and another whose name is not known.

The petition discloses further that there have been previous proceedings in the Boma Local Court of Zambia with reference to the said marriage between the Petitioner and the Respondent with reference to any property of either or both of them. The Petitioner contends that there are no proceedings continuing in any country outside Zambia which are in respect of the marriage or are capable of affecting its validity or subsistence.

The petition also reveals that the Petitioner and the Respondent have not agreed on any terms with regard to property settlement and support of the Petitioner or children.

The Petitioner claims that the said marriage has broken down irretrievably as the Respondent has behaved in such a manner that the Petitioner cannot reasonably be expected to live with the Respondent. The Petitioner disclosed the particulars of unreasonable behavior as follows:

- a) That throughout the subsistence of the marriage, the Respondent has been unfaithful by having multiple sexual relationships, and has a girlfriend in Kafue, which made the Petitioner leave the matrimonial home sometime in February 2013 to date. That despite the Petitioner confronting the Respondent about his conduct, the Respondent has been violent, adamant and unrepentant about his actions and continues to interact with girlfriends without any regards to the feelings of the Petitioner.
- b) That as a result of the Respondent's unfaithful conduct, the Petitioner has lost affection and sexual attraction for him. That, in this respect, the Respondent has denied the Petitioner the conjugal right for over a long period of time, in some instances, for over six months without justification.
- c) That the parties have lived apart and separate for a continuous period of at least one year and without any communication with each other.
- d) That sometime in 2010 when the Petitioner conceived their second born child, the Respondent denied responsibility. That the Respondent would beat the Petitioner and threaten to kill her including the unborn child. Further, that the Respondent would lock the Petitioner outside the matrimonial home forcing the Petitioner to spend nights at the neighbor's place or her sister.
- e) That the Respondent left the matrimonial home when the Petitioner was eight (8) months pregnant and she gave birth on 3rd March, 2011 in the absence of the Respondent who only re-surfaced when the baby was three month old in July, 2011. That, upon his return to the matrimonial home, the Respondent continued to beat up the Petitioner resulting in him being detained at Kabwata Police on a charge of assault the Petitioner.

- f) That the Respondent's behavior has negatively affected the Petitioner who no longer feels any love and trust for the Respondent and that she does not desire to live with the Respondent anymore.

She therefore prays for a decree of dissolution of marriage; that the Petitioner be granted custody of the children of the family; that there be property adjustment and that each cost to this suit be borne by the Respondent.

The Respondent has contested the petition, an answer being filed into Court on 29th May, 2014 in which the Respondent resists the prayer for dissolution of marriage on the grounds advanced by the Petitioner. Save in so far as the same consists of admissions, the Respondent joins issue with the Petitioner on her petition. He, however, avers that the Respondent only had one child born before the subsistence of the marriage and not two as alleged by the Petitioner. The Answer reveals that the Respondent denies the 'behavior' ground and avers that: the Respondent loves the Petitioner so much that it is not possible to deny her conjugal rights; that the Respondent has been supportive to the Petitioner and that he has had no girlfriend as alleged by the Petitioner. The Respondent admits that he left home when the wife was about 8 months pregnant but that he had gone on a trip to Tanzania and the wife was aware. He further states that when the Petitioner delivered the baby, she informed him about the birth of their baby boy.

The Respondent therefore prays that the Court should not grant the Petitioner her prayers in the Petition.

When the matter came up for hearing on 5th August, 2014, the Petitioner recited what was contained in her petition.

She testified that problems in their marriage began towards the end of the year 2009. That her husband was prone to violent behavior and on several occasions he would beat her up and lock her out of the matrimonial home. She would then seek refuge in her neighbor's home. It was her evidence that the violent episodes continued unabated and at one point she was compelled to report her husband to Kabwata Police but later withdrew the charge. The couple underwent counseling but this did not yield any results as he continued with the same behavior. She added that when she was about 7 months pregnant they had a fight and the Respondent left the home only to return when the child was about 2 months old. According to her, the relationship was not the same as the bond of trust was broken as she was unaware of his whereabouts when he had disappeared.

She said that the Respondent suggested that it was advisable for them to separate otherwise they would end up killing each other. In response she asked to be given time in order to find a home where she could relocate to with the children. This she did in February 2013 and has been living there to date.

She implored the Court to dissolve the marriage. The Respondent indicated he would not cross-examine his wife.

The Respondent for his part admitted that the marriage had undergone problems. He admitted that he left home when the wife was about 8 months pregnant but his explanation was that he had gone on a trip to Tanzania and the wife was aware of his whereabouts; that when she delivered the baby, she informed him about the birth of their baby boy.

He highlighted the nature of the problems as being his wife's late coming to the home which caused him to lock her outside.

He said that he had attempted to reconcile with his wife by contacting his in laws. As he was in the process of preparing for the meeting to discuss

their marital differences with the in laws his wife packed her belongings and left.

Further attempts at reconciling have proved futile. The Respondent stated that during the period the wife has been away from home she had the tendency of not picking up his calls. There was a time when his calls went unanswered for a period of 3 months. She later started answering his calls after he had visited her home and asked for forgiveness. He testified that she had been going to his home of purposes of getting requirements for the children as well as school fees.

That they have been communicating and the wife had informed him that she had forgiven him. That they had agreed that once he finishes construction of a bigger home they would move in together.

He concluded by urging the Court not to dissolve the marriage but to broker reconciliation. He pleaded for forgiveness from his wife and said he had been under the influence of the devil in the past but has since repented. In his journey of reformation he has stopped imbibing alcohol as he has identified it as a source of their marital problems. He stated that he was desirous of the two of them reconciling to enable them raise their children who are still very young.

Under cross-examination he maintained that he had travelled to Tanzania when he was away for 3 months. He denied the assertion that he had threatened to beat his wife again if he found her home. He insisted that their problems were attributable to the devil who had taken residence in their marriage.

He denied running away from efforts to reconcile them. He continued to beg for forgiveness from his wife on the ground that he had been lost but now was found and had repented.

I have carefully considered all the evidence that has been placed before me. I will begin by referring to the governing legislation for Matrimonial Laws which is the Matrimonial Causes Act No. 20 of 2007:

“9(1) for purposes of Section eight, the Court hearing a petition for divorce shall not hold a marriage to have been broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts:

(b) that the Respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the Respondent.”

Given the facts before me the question that arises is: has the petitioner adduced sufficient evidence to warrant a finding that the marriage has broken down irretrievably?

This being a behaviour petition the test to be applied is whether the Respondent has behaved in such a way that she cannot reasonably be expected to live with him. This test was propounded in **Livingstone Salland (1974)** in the following words:

“Would any right thinking person come to the conclusion that this husband has behaved in such a way that his wife cannot reasonably be expected to live with him, taking into account the whole of the circumstance and the characters and personalities of the parties?

Culnan A.J.S. in the case of **Machande vs Machande** expressed himself as follows:

“I have to consider not only the behaviours of the Respondent as alleged....but the character, personally, disposition and the behaviour of the Petitioner. The general question may be expanded thus: Can

this petitioner with his or her character and personality, with his or her faults and other attribute, good and bad, and having regard to his or her behaviour during marriage, reasonably be expected to live with this Respondent.”

I have also perused the learned authors of **Bromley’s Family Law, 9th Edition**, which I have found to be instructive, particularly at page 228 where they state that:

““This provision (relating to unreasonable behaviour) is frequently but erroneously, abbreviated to “unreasonable behaviour,” thereby suggesting that all one has to look at is the quality of the Respondent’s behaviour, whereas in fact what is important is the effect of that conduct upon the Petitioner.”

Taking into account the law and assessing the behaviour of the Respondent and applying the test, I have asked myself whether the behaviour of the Respondent is sufficiently grave to fulfill that test, that is to make it unreasonable to expect the Petitioner to endure it, to live with the Respondent.

I am guided by what **Bagnall, J.**, said in **Ash vs Ash** that:

“The Court must consider the effect of the behaviour on the particular Petitioner and ask the question: is it established, not that she is tired of the Respondent or, colloquially, fed up with him, but, that she cannot reasonably be expected to live with him? In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the Court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him.”

The petitioner has particularized the Respondents alleged unreasonable behavior in her petition. The major ones that stand out and which qualify as unreasonable are the violent behavior, with the implication of beating the petitioner as well as the denial of conjugal rights for long periods, in some instances for over six months without any justifiable cause.

Faced with such serious allegations the Respondent was mute. His only response was that the devil was to blame and he asked for forgiveness as he has since repented.

He did not deny the fact that he was violent and used his wife as a punching bag. He admitted locking her outside of the matrimonial house but assigned reasons. On all the allegations leveled against him his main argument was for forgiveness and reconciliation.

During the course of the hearing I keenly observed the demeanor of both parties. The Respondent pleaded with his wife to forgive him and attributed his bad behavior to the devil. He shed tears and appeared very remorseful.

The petitioner on the other hand was adamant that she could not reconcile with the Respondent. Even as he shed tears and pleaded with her she appeared unmoved by the tears. I saw in her a certain resolve to end the marriage. She was not in the slightest bit affected by the tears perhaps she considered them to be crocodile tears and has seen them before. From her demeanor I concluded that she has reached her tethers end as the damage has been done.

I am therefore, satisfied that the marriage has broken down irretrievably and the provisions of Section 9 (1) (a) (b) have been satisfied.

I accordingly *decree* that the said marriage be dissolved and a *Decree Nisi* shall therefore issue. The same is to be made *absolute* unless

application is made to Court in these proceedings within 6 weeks of the date hereof, to show cause why such *decree* should not be made *absolute*.

I award custody of the children to the petitioner's as prayed with the Respondent having reasonable access to children.

The question of maintenance generally, and property settlement, if not sooner settled by consent of the parties, are adjourned for hearing before the learned Deputy Registrar and either party is at liberty to apply.

Each party to bear their own costs.

Leave to appeal granted.

DELIVERED AT LUSAKA THIS DAY OF..... 2014

Hon. Judge B.M.M. Mung'omba
HIGH COURT

