

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(DIVORCE JURISDICTION)

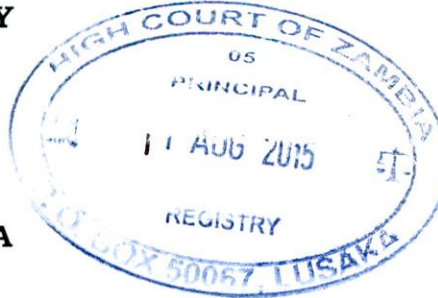
2014/HP/D/301

BETWEEN:

ROSE MAKWALA MAIMBOLWA

AND

FRED NAWA MAIMBOLWA



PETITIONER

RESPONDENT

BEFORE HON. MRS. JUSTICE P. C. M. NGULUBE ON THE 11TH AUGUST
2015

FOR THE PETITIONER : Mr B.C. Mutale- Messrs BCM Legal
Practitioners

FOR THE RESPONDENT : Mr G. Pindani- Messrs Chonta,
Musaila and Pindani Advocates

JUDGMENT

Cases referred to:

1. *Mahande v Mahande* (1976) Z.R. 287
2. *Mable Mary Bbuku Yoyo v Arthur Yoyo* (SCZ Judgment no.73 of 1998)

Legislation referred to:

1. *The Matrimonial Causes Act, No.20 of 2007*

This is a Petition for dissolution of marriage filed on 29th December, 2014 by Rose Makwala Maimbolwa, the Petitioner. The Petition is pursuant to section 9

(1) of the Matrimonial Causes Act of 2007. The Petitioner seeks to dissolve her marriage to Fred Nawa Maimbolwa, the Respondent, on the ground that the marriage has broken down irretrievably due to the unreasonable behavior on the part of the Respondent as set out in paragraph 9 of the Petition.

In the Petition, the Petitioner stated that she married the Respondent on 26th September, 1992 at Lusaka Central New Apostolic Church in Lusaka, Zambia. That they last cohabited at House no. 21 Holbeche Road, Sulton, Coldfied, West Midlands, B75, 7LL, United Kingdom. Both the Petitioner and the Respondent are domiciled in the United Kingdom.

That the Petitioner is a Nurse woman working at Heart of England NHS, Bordesley Green, East Birmingham, B9 5 ST in the United Kingdom and currently resides at House no.21 Holbeche Road, Sulton, Coldfield, West Midlands, B75, 7LL, United Kingdom and the Respondent is a Medical Doctor whose work place is unknown to the Petitioner and currently resides at 196 Edenhurst Road, Longbridge, B31 4PN in the United Kingdom.

There are no children of the family born to the Petitioner and the Respondent during the subsistence of the marriage. There have been no previous proceedings in any other Court in Zambia with reference to the marriage or between the Petitioner and the Respondent with reference to any property of either or both of them and that there are no proceedings continuing in any country outside Zambia which relate to the said marriage or are capable of affecting its validity or substance.

That the marriage has broken down irretrievably by the fact that the parties cannot reconcile due to the fact that the Respondent has behaved unreasonably and cannot reasonably be expected to live with the Petitioner.

The Petitioner advanced the following particulars of unreasonable behavior;

- a. Immediately after the Respondent joined the Petitioner in the United Kingdom where she had relocated, the Respondent lost affection for the Petitioner thereby causing distress to the Petitioner;
- b. When the Respondent separated with his employers in Zambia, he received the sum of over K48, 000.00 as separation package and never declared it or shared it with the family;
- c. The Respondent has been verbally abusive and has been exhibiting such behavior in the presence of the family friends and church members thereby causing distress to the Petitioner;
- d. The Respondent has been very irresponsible and does not provide or contribute to the welfare of the family;
- e. The Respondent has from early 2012, engaged in an adulterous extra marital affair with a woman, and currently cohabits with her, a situation which has caused embarrassment, distress and mental anguish to the Petitioner.
- f. The Respondent has incessantly been asking the Petitioner to accede to sharing matrimonial property by executing an unreasonable property settlement deed.

Based on the above the Petitioner prayed for the following that the said marriage be dissolved, maintenance pending suit, property settlement, lump sum maintenance and Costs the proceedings as well as incidental to.

The Respondent filed an Answer and a cross petition on 24th March, 2015 where he asserted that he works as a consultant occupational Health Physician at Health Management Ltd, in the United Kingdom (UK). That he has one male child born long before he married the petitioner, namely, LubindaMaimbolwa aged 24 years who has graduated from Leicester University and is currently looking for employment.

That he agreed that the marriage had broken down irretrievably but it was due to the Petitioner's unreasonable behavior and that he had found it intolerable to live with the Petitioner. Further that they have been on two years separation.

That they have had misunderstandings and arguments prior to his moving to the United Kingdom (UK) to join the Petitioner. The two had a particular argument and some misunderstandings prior to the Respondent moving to the UK in June 2004 to join the Respondent which resulted in the child who had ordinarily lived with the parties in Zambia travelling separately to the UK to live with his biological mother who was already residing in the UK and has lived with his biological mother instead of the parties. The parties have had frequent arguments and differences in the past and these continued when they were together in the UK.

That the Respondent received the remaining money (terminal benefits) held in Trust for him from ZCCM Holdings and used most his money to help out relatives in Zambia as he was not working whilst in the UK for several years other than doing casual work unrelated to his medical profession. The Respondent could not sit and watch while his family was about to lose a house and a plot, hence he contributed a substantial amount to help them meet the costs applicable. The Respondent also used some of the money to pay for his further educational training and exams he sat for in the UK to allow him to practice as a Medical Doctor in the UK.

That the Respondent has never abused the Petitioner as stated or at all. If anything, he usually avoided arguments by keeping quiet and keeping to himself. The parties had prior to their relocation attended church regularly and together as a couple and family. However, upon relocating, the Petitioner stopped attending church with the Respondent stating that she was always busy working. She appeared to have lost interest in attending the usual church they had attended in Zambia. The Respondent therefore always attended

church alone or with a step daughter they were living with in the UK. This made several Church Members and other acquaintances ask him as why they were not together with the Petitioner and the Respondent would truthfully respond that she had not been attending church with him because she was always working, which answer she took offence at. When the Respondent asked the Petitioner why she would not find time to attend church with him once in a while at least at the local church, she told him that, she had to work to support the family.

On one particular occasion when the Petitioner attended at the local church, some church members were delighted to see her and commented that they were glad to see her as they understood she was usually busy working. The Petitioner told the Respondent when they got home that she had taken offence at such comments and declared that she would not attend church with him and continued to work literally all weekends.

That the Petitioner refused to attend social occasions with the Respondent when invited by his friends except at home of her friends. The Respondent therefore always went alone to such events unaccompanied by his wife (Petitioner). She gave the same reason of being busy working and the Respondent's friends would always ask him where the Petitioner was. Eventually, the Respondent got a trainee job to contribute fully to the household needs. When asked why she had continued to work on weekends as before even when the Respondent was now working in a full time job and was contributing substantially to the household income, she said that she was now working hard to save money for her retirement.

That the Respondent was not working at some point and consequently had no other source of income. He eventually started contributing financially towards the buying of household provisions and paying bills when he did odd jobs and his contribution was proportionally less at first because his income was less in

comparison to hers. However, when he got a job in the NHS with better pay, he contributed substantially and the parties sometimes shared the costs equally. The Respondent spent a lot of his finances making improvements to the house they bought together in Birmingham. From the time the Respondent moved out of the house in 2012, he has cut down his contribution towards the house maintenance but has continued to pay towards the mortgage. The Petitioner has continued to live in the house the parties bought together.

The Petitioner paid the deposit and legal fees for the house when they got the mortgage because she had saved for years. The Respondent was also paying for his son's university fees for 2 years and a good proportion of his MSc training costs and other further studies he pursued.

That the Petitioner no longer loves him.

The Respondent further stated that he only made a suggestion to the Petitioner on how they could share the matrimonial property and proceed with the divorce. That the Petitioner did not present any alternative proposal and she did not agree to mediation or discussion on the matter but instead wanted the Court to determine how it could be settled. The Respondent's proposal was presented for the Petitioner's consideration and that if she did not agree with it, a formal divorce application was to be made in the UK courts and formal due process of the law was to follow.

The Respondent averred that he did not object to the marriage being dissolved and having the Court determine property settlement. That each party should bear their own cost since the petitioner is in gainful employment with a lot of savings.

In cross petition, the Respondent asserted that the marriage has broken down irretrievably due to two facts. That is, the Petitioner and the Respondent have

lived separately for a continuous period of more than two (2) years immediately preceding the presentation of this cross petition and the Petitioner has consented to the divorce by instituting divorce proceedings herself. The parties went on separation around 27th August, 2012 and have been on separation to date. Further that the Petitioner has behaved in such a way that the Respondent cannot reasonably be expected to live with the Petitioner.

The particulars of the Petitioner's unreasonable behavior were stated as follows;

1. The Petitioner stopped using her marriage name when she went to the UK. She only used her marriage name at her main job but everything else such as rent, contract, waterbills and electricity bills were all in her maiden name and she has failed to give any good explanation when asked by the Respondent much to his embarrassment when people find out and ask him.
2. At the time of applying for a mortgage in 2010, the petitioner again openly refused to use the marriage name when consulting with an advisor. She only agreed to use it in the end when the parties were told that the mortgage will not be granted if she did not use her marriage name.
3. The Petitioner is usually very moody and has always lived with anger alleging that the Respondent had divulged personal information about her to others. The parties cannot even have any meaningful conversation to address differences between them without it culminating into a bitter quarrel. Under the circumstances, the Respondent took a low profile to avoid arguments.
4. The Petitioner has been unwelcoming to the Respondent's friends visiting him at home but was agreeable for friends who were spouses to her friends to do so. She was unwilling for a new work colleague who just moved into town to visit the Respondent or for a fellow Zambian man of religion to visit the Respondent at home when he returned from his

abuse in that the Respondent had moved out of their matrimonial home and is staying with another woman. That before he moved out, he would bring food cooked by the said woman into their matrimonial home.

That he would talk on the phone with his friends and family over his intentions of leaving the matrimonial home after completing his Masters Degree study programme. And that he would invite them to meet the said woman while he was still with the Petitioner.

The Petitioner further averred that the Respondent would get rentals from their house in Kabwe and just squander it on himself.

Based on this, the Petitioner reiterated her prayer for the dissolution of the marriage, maintenance, property settlement and costs.

In cross examination, the Petitioner stated that the Respondent moved out of the house in August, 2012. That the house in which she is currently living is mortgaged and that she and the Respondent are paying for it. That the Respondent pays a minimum amount towards the mortgage.

The Petitioner further stated that she was aware that the Respondent had a son long before she got married to him and that she is the one who brought him up from the age of two. That when she moved to the UK the son would visit over holidays.

That as bread winner she would cook for the Respondent when she was at home. That her work schedule stopped her from attending church and other social functions as she had no time. That she had to work weekends so that she could earn enough to take care of herself, the Respondent and the son.

Further that she was not using the Respondent's name at work because her identity documents only bore her maiden name.

That the Respondent only started supporting the family in 2010 by agreeing to share the paying of home bills. That during the Respondent's course of study, the Petitioner supported him by way of providing shelter, food and transportation in the form of a car.

The Petitioner stated that both parties contributed to the problems in the marriage and that the Respondent was not a responsible man hence there being no peace between them.

In re-examination, the Petitioner stood by her petition.

The Respondent did not appear before me but filed submissions in support of his answer and cross petition through Counsel. The gist of the submissions were that the Respondent was praying for the dissolution of the marriage. That since the Petitioner admitted to having gone on separation with the Respondent since August, 2012 and have been living separately since then for a period of more than 2 years and commenced this action. That this showed that he is *consenting* to the divorce as he does not want to continue living such a life.

On the issue of costs, it was submitted that each party should bear their own costs so as to lessen the acrimony between the parties. That the issue of property settlement should be referred to the Deputy Registrar for determination.

I have considered the Petition, the Answer and Cross Petition as well as the testimony of the Petitioner and the Respondent's submissions made through Counsel.

Under the Matrimonial Causes Act, no. 20 of 2007, the only ground for dissolution of a Marriage is that it has irretrievably broken down and section 9 stipulates the facts that prove the irretrievable breakdown.

The Petitioner alleges that the marriage has broken down due to the unreasonable behavior on the part of the Respondent. Section 9 (1) (b) provides for the fact by stipulating as follows;

“For purposes of section eight, the Court hearing a petition for divorce shall not hold the marriage to have 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;...”

In line with the dictates of section 9(2) and (3) of the Matrimonial Causes Act, I have to satisfy myself with the veracity of the facts alleged for me to grant the decree of dissolution of marriage. In this vein I shall now proceed to inquire into the factors alleged by the petitioner.

The Petitioner averred that during the time that they were staying together, the Respondent used to abuse her psychologically by bringing food cooked by another woman into the house as well as expressing his intentions of leaving. Further that the Respondent did not render financial support to the Petitioner despite being in employment. That despite getting his benefits from his former employer, the Respondent did not share it with the family. Further that the Respondent had moved out of the Matrimonial home in August 2012 to live with another woman.

In considering the factors, the question I must address is whether the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

The standard applicable when considering the question was aptly stated in **Mahande v Mahande (1976) Z.R. 287** as follows;

“The phrase ‘cannot reasonably be expected to live with the respondent’ necessarily poses an objective test and the petitioner means the particular petitioner in the case under consideration, bearing in mind the Petitioner’s faults and other attributes, good or bad, and having regard to her behavior during the marriage.”

In the case at hand, I find that the parties have been having difficulties in their marriage for a while as is evident from the admissions stated in the Answer to the Petition as well as the testimony of the Petitioner. The said problems which mainly revolve around the lack of financial support from the Respondent later culminated in the Respondent moving out of the matrimonial home in 2012 to stay with another woman.

I hasten to point out that the issue of lack of financial support ended in 2010 as admitted by the Petitioner in that the Respondent started contributing towards the paying of household bills. However, I find from the facts that this did not improve the couple’s relations as the Respondent later moved out in August, 2012.

The Respondent’s act of moving out to cohabit with another woman is unreasonable and a testament of the current state of the marriage. The element of companionship is missing and it would be an injustice to tie the Petitioner to such a marriage.

As was stated by Chirwa, J.S. **in Mable Mary Bbuku Yoyo v Arthur Yoyo (SCZ Judgment no.73 of 1998)**,

“it is not a matter of maintaining the status of “Mrs” there must be mutual love between the spouses.”

Based on the foregoing, I am satisfied that the Marriage has broken down irretrievably on the grounds that the Respondent has behaved in a manner that the Petitioner cannot be expected to live with him.

The Petitioner having proved the irretrievable breakdown of the marriage, I see no reason in delving into the Cross Petition.

The Property adjustment and settlement shall be determined by the Deputy Registrar.

Costs to the Petitioner.

Dated this 11th August, 2015



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P.C.M. NGULUBE
HIGH COURT JUDGE