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IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

2014/HP/D.282

BETWEEN:

FINGANI WATSON MHONE

AND

KOMBE NAMFUKWE MHONE



PETITIONER

RESPONDENT

Before the Honourable Justice Mrs. M. C. Kombe this 25th day of June 2015

For the Petitioner : *In person*

For the Respondent : *Mrs. M. Mwenya – Legal Aid Counsel from Legal Aid Board.*

JUDGMENT

Cases referred to:

1. Ash V Ash (1972) 1 ALLER 585
2. Mahende V Mahende (1976) Z.R 293
3. Livingstone-Stallard V Livingstone Stallard (1974) 2 ALL ER 766
4. O'Neil V O'Neil (1975) 3 ALL ER 292
5. Kats V Kats (1972)3 ALLER 219

Legislation and other material referred to:

1. Matrimonial Cause Act No. 20 of 2007
2. Principles of Family Law Fifth Edition (Butterworths) London at 107

3. Rayden's Law and Practice in Divorce and Family Matters, Eleventh Edition (Butterworths) London

The Petition of Fingani Watson Mhone shows that the Petitioner and the Respondent Kombe Namfukwe Mhone were lawfully married at the United Church of Zambia's Saint Paul's Congregation on 5th May, 2006.

The Petitioner and the Respondent last resided as husband and wife on Plot number 1209/2B Woodlands Extension Lusaka.

The Petitioner is employed as Financial Director for Heifer International Zambia. The Respondent is employed at D.H.L Zambia as a Customer Care Advisor.

There are two children of the family having born from the said marriage namely:

- (i) Tamara Mhone born on 22nd July, 2007
- (ii) Temweka Mhone born on 7th January, 2014

There have been previous proceedings in the Lusaka High Court for Zambia with reference to the said marriage between the Petitioner and the Respondent and there are no proceedings continuing in any Court outside Zambia, which are in respect of the marriage or capable of affecting its validity or subsistence.

The Petitioner alleges that the marriage has broken down irretrievably because the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to continue living with her.

The particulars of the unreasonable behavior are stated from number one (1) to eight (8) of the Petition as follows:

1. That the parties have been on separation from September 2012.
2. Whilst on separation, the parties tried to reconcile and a child named Temweka Mhone was born, however the parties have failed to reconcile even after coming to court at first instance.
3. There has been previous proceedings under cause number 2012/HP/D212 which was before Judge D. Y. Sichinga S.C,
4. That the Respondent has found another man she intends to get married to and also boasts about finding a bigger and better lover.
5. That the Respondent openly confessed early November 2014 that she has been having sex with other men at her home and that is partly the reason she decided to bring back our daughter as she is old enough to see what her mother is doing.
6. The Respondent is very rude, proud and condescending this has further created the division between us and made it very difficult for us to reconcile.
7. The Respondent has on several occasions, during our church counseling sessions told me in front of church elders that she does not love me and has no feelings for me.
8. There has been too much interference from the Respondent's family. This has made it extremely difficult for me and my wife to reconcile as she has to consult her family in all matters.

The Petitioner prays for the following:

1. That the Decree of divorce be granted.
2. Custody of the daughter as is the current position.
3. That there be no property adjustment.
4. Costs be in the cause.

The Respondent did not file an Answer to the Petition.

1. PETITIONER'S EVIDENCE

At the hearing, the Petitioner gave viva voce evidence and didn't call any witnesses. The Petitioner repeated in substance the contents of the Petition. He testified that on 25th November, 2014 he filed a Petition for divorce based on unreasonable behaviour. He stated that to the best of his knowledge, the Respondent had not filed an Answer to the Petition. He informed the Court that he married the Respondent on 5th May, 2006 at the United Church of Zambia St Paul's congregation. That there were two children of the family namely: Tamara Mhone born on 22nd October 2007 and Temweka Mhone born on 7th January, 2014. That there were previous divorce proceedings before High Court Judge Dominic Sichinga but the Petition was withdrawn by the Respondent herein who was the Petitioner in that case. The witness testified that they had been on separation since September, 2012 and that the Respondent had during the time of separation demonstrated unwillingness to reconcile. That it was during the period of separation that Temweka was conceived.

The Petitioner further testified that the Respondent had openly confessed of having sex with other men. The Petitioner testified that the Respondent made the confession in November 2014 when he visited her at her house. That several weeks later, he discovered messages on her phone from five other men in question. It was also his evidence that there had been too much interference from the Respondent's family and that this had made it extremely difficult for them to reconcile. He testified that the Respondent had not been able to make decisions on her own and this was evidenced during the counseling sessions with church elders when the Respondent mentioned that she needed to seek permission from her family to return home. That in addition, the Respondent's uncle called one of the counselors General Lopa to discontinue the counseling.

In relation to paragraph 4 of the Petition, the Petitioner testified that the Respondent had communicated to him in November 2014 that she had found a bigger and better lover whom she wanted to get married to. That she communicated to him via text message.

In relation to paragraph 6 of the Petition that the Respondent was rude, proud and condescending, the Petitioner testified that when the Respondent deserted him in 2012, she would get angry when he suggested to her to return home so that they could undergo counseling. He further testified that when the Respondent deserted him, he approached the church to help reconcile them. That during one of the counseling sessions, the Respondent informed the elders that she no longer loved the Petitioner and had no feelings left for him.

He testified that as a result of this behaviour by the Respondent, he was left with no choice but to release her as all efforts of reconciliation had proved futile. He testified that he would not want to expose himself to the risks of infection to which the Respondent had exposed herself to as she had openly confessed of having sex with other men. He testified that he had children to look after.

His prayer was that the Court grants the divorce and that the current custody arrangement should continue. He testified that he had custody of Tamara Mhone ever since the Respondent deserted him and that Tamara had settled well at home and her grades at school had improved. He told the Court that Tamara visited the Respondent and her brother when the Respondent made a request. He also testified that there should be no order for property adjustment and that costs be borne by each party.

In cross examination the Petitioner testified that due to the events that had taken place in the marriage, the marriage had broken down irretrievably as he could not be reconciled with the Respondent.

That was the close of the Petitioner's case.

2. RESPONDENT'S EVIDENCE

The Respondent in her evidence testified that she had no objections to the marriage being dissolved and had consented to the divorce being granted. She testified that she agreed to the particulars of unreasonable behaviour as they appeared in paragraphs 1 to 8 of the Petition. She prayed that the Court grants the divorce.

On the issue of custody of the children, her evidence was that she wanted joint custody of the children so that she could have her daughter whenever she needed to see her.

She further testified that there was no chance for her and the Petitioner to reconcile as she had moved on with her life having been on separation since 2012.

In cross examination, she testified that there was no arrangement between the Petitioner and herself on the mode of communication regarding their daughter. She stated that they had been communicating using Short Message Service (SMS) and WhatsApp. She told the Court that Electronic mail (email) was rarely used.

In response to the question by the Petitioner as to when he last saw his son Temweka, the Respondent stated that the Petitioner last saw Temweka when he was born. However, when she was questioned further by the Petitioner as to the truthfulness of her statement, the Respondent

admitted that she lied to the Court when she said that the Petitioner last saw Temweka when he was born. She also informed the Court that she had denied the Petitioner access to Temweka as she thought the Petitioner wanted to take him for a paternity test.

In re-examination, the Respondent explained that she started denying the Petitioner access to Temweka after the Petitioner started saying that Temweka was not his child. As a result of this, she didn't want to subject her child to Deoxyribonucleic Acid (DNA) as she felt it was an insult.

In response to a question from the Court, the Respondent confirmed that she was not contesting the Petition based on unreasonable behaviour.

That was the close of the Respondent's case.

3. THE LAW

The sole ground upon which a marriage may be dissolved is that the marriage has broken down irretrievably. This is in accordance with Section 8 of the Matrimonial Causes Act No. 20 of 2007 which sets out the sole ground for divorce as being irretrievable breakdown of the marriage. The said section reads as follows:

'A Petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.'

The Petitioner has presented this Petition on the basis that his marriage to the Respondent has broken down irretrievably. On the issue of proof of the breakdown of marriage, the Petitioner relies on Section 9(1) (b) of the Matrimonial Causes Act which provides as follows:

'For the purpose 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:

(a)

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

Notwithstanding the fact that the Respondent has not filed an Answer to the Petition, and has no objection to the marriage being dissolved, I have a duty under Section 9(2) of the Matrimonial Causes Act to inquire so far as I reasonably can, into facts alleged by the Petitioner and into any facts alleged by the Respondent. This is because I have to be satisfied that the marriage between the Petitioner and the Respondent has broken down irretrievably based on the fact cited above: namely that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

The test applicable in determining whether a party would find it unreasonable to live with the other party was spelled out by Bagnall J in the case of **Ash V Ash**⁽¹⁾ when he stated that:

'I have to consider not only the behaviour of the respondent ...but the character, personality, disposition and 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 attributes, good or bad and having regard to his or her behaviour during marriage, reasonably be expected to live with the respondent?'

This was the approach adopted by the Supreme Court of Zambia in the case of **Mahende V Mahende**⁽²⁾ when it held that:

'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 and bad, and having regard to her behaviour during the marriage.'

Further, it was observed in the above case 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?'

Therefore in dealing with the fact of the Respondent's behavior, I should ask myself the question asked by Dunn J. in the case of **Livingstone-Stallard V Livingstone Stallard**⁽³⁾ and adopted by the Court of Appeal in the case of **O'Neil V O'Neil**⁽⁴⁾ that;

'would any right-thinking person come to the conclusion that this husband (wife) has behaved in such a way that this wife (husband) cannot reasonably be expected to live with him or her, taking into account the whole of the circumstances and the characters and personalities of the parties?'

4. FINDINGS

I have considered the evidence of the Petitioner in the light of the foregoing authorities. As I have already alluded to, the Respondent did not file an Answer and therefore, she has admitted that the particulars of unreasonable behaviour as alleged by the Petitioner are true.

The Petitioner has alleged that the Respondent is rude, proud and condescending, does not love him anymore and has not shown willingness to reconcile. I have seriously considered the alleged behaviour and I am of the view that these allegations are not sufficiently grave to fulfill the test that is to make it unreasonable to expect the Petitioner to endure them, or live with the Respondent. These allegations of the Respondent's behaviour are merely demonstrative of the Respondent's

character or her attitude. I am guided by what Barker P. stated in the case of ***Katz v Katz***⁽⁵⁾ that:

'...Behaviour is something more than a mere state of affairs or a state of mind such as for example a repugnance to sexual intercourse, or a feeling that the wife is not reciprocating his love, or not being demonstrative as he thinks she should be. Behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a course of conduct and in my view it must have some reference to the marriage.'

Having said so, however, there is evidence, from the Petitioner that the Respondent confessed to him that she was sleeping with other men during the time they were on separation and that she had found a better and bigger lover whom she intended to get married to. In my view this is an admission of adultery on the part of the Respondent. The learned authors on page 178 paragraph 6 of ***Rayden's Law and Practice in Divorce and Family Matters*** have defined adultery as:

'Consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse during the subsistence of the marriage.'

Further, on page 207 paragraph 29, the same authors state that:

'The Petitioner can rely on such adultery when alleging that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the respondent.'

In the present case, the Petitioner has relied on the admission by the Respondent of her adulterous associations with other men, I am of the view that this allegation is sufficiently grave to fulfill the test. Therefore, in answer to the question asked by Dunn J. in the ***Livingstone-Stallard case*** I find that this evidence is sufficient to prove the Petitioner's case and that any right thinking person would come to the conclusion that

the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. The marriage has therefore broken down irretrievably.

I am fortified in my findings that the marriage has broken down irretrievably by considering what the learned authors of ***Principles of Family Law 5 Edition*** at page 107 stated when discussing the two distinct requirements that need to be established by the petitioner under the fact of 'respondent's behaviour'. They stated that:

'it is not the behaviour that needs to be unreasonable but the expectation of cohabitation.'

In view of the above, I have assessed the impact of the conduct of the Respondent on this particular Petitioner and whether the Petitioner can be expected to continue cohabiting with the Respondent. The Respondent's adulterous association with other men not only proves infidelity in the marriage, it also proves risk taking behaviour which exposes not only herself, but the Petitioner as well to the risk of being infected with life threatening diseases. In my view, the effect of the Respondent's adulterous association with other men makes it unreasonable to expect the Petitioner to continue living with the Respondent.

On the basis of this uncontroverted evidence adduced by the Petitioner, I am satisfied that the Petitioner has proved his case. Therefore the marriage solemnized under the provisions of the Marriage Act between Fingani Watson Mhone and Kombe Namfukwe Mhone on 5th May, 2006 at United Church of Zambia's St Paul's Congregation in Lusaka has broken down irretrievably in terms of Section 9(1) (b) of the Matrimonial Causes Act No. 20 of 2007.

I accordingly decree that the said marriage be dissolved and a decree nisi is hereby granted dissolving the marriage. The said decree is to be made absolute within six (6) weeks of the date hereof unless sufficient cause is shown to the Court why it should not be so made.

With regard to the issue of custody of the children of the family, the same shall be heard before me in chambers upon a formal application being filed by either party.

The Petitioner has prayed that there be no property adjustment. That notwithstanding, either party is at liberty to make a formal application before the Learned Deputy Registrar should there be need.

I order that each party shall bear its own cost of the Petition.

Leave to appeal is granted.

Delivered at Lusaka this.....25th.....day of.....June.....2015.



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**M. C. KOMBE
JUDGE**