

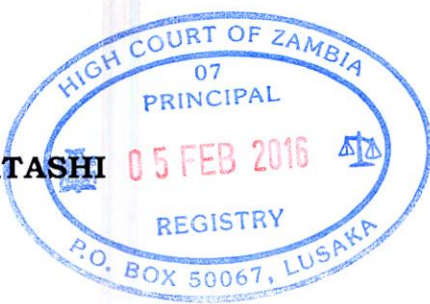
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IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

2015/HP/D138

BETWEEN:

FIONA CYNTHIA NDHLOVU MATASHI



PETITIONER

AND

EVANS MATASHI

RESPONDENT

Before the Honourable Mrs. Justice M.C. Kombe on the 5th day of February 2016.

For the Petitioner : *Mrs. Natasha Chilambwe- Zimba – Legal Officer – National Legal Aid Clinic for Women.*

For the Respondent : *In person*

J U D G M E N T

Legislation and other material referred to:

1. **The Matrimonial Causes Act No. 20 of 2007.**
2. **The Marriage Act, Chapter 50 of the Laws of Zambia.**
3. **Rayden’s Law and Practice in Divorce and Family Matters, Eleventh Edition, London, Butterworth’s.**
4. **Lillian Mushota, Family Law in Zambia, Cases and Materials, UNZA Press, 2005.**

On 27th May, 2015, the Petitioner **FIONA CYNTHIA NDHLOVU MATASHI** filed a petition for the dissolution of the marriage with the Respondent **EVANS MATASHI**.

The Petitioner alleged that the said marriage had broken down irretrievably as the parties had lived apart for a continuous period of two years immediately preceding the presentation of the petition and that the Respondent had consented to a decree being granted.

She therefore prayed that the marriage be dissolved and that each party should bear their own costs.

1. PETITIONER'S EVIDENCE

At the hearing of the petition, the Petitioner gave *viva voce* evidence and called no witnesses. The Petitioner told the Court that she got married to Evans Matashi on 17th September, 2005 and that the marriage was solemnized at St. Andrews United Church of Zambia in Ndola. As proof of the marriage, the Petitioner produced the marriage certificate which was admitted in evidence as 'P1'.

It was the Petitioner's evidence that she last cohabited with the Respondent as husband and wife at Plot No. 7740A Mwapatisha Close Woodlands Extension. This was on 13th April, 2013.

The Petitioner further testified that the Respondent was currently residing in Chililabombwe and was working for Konkola Copper Mines as an Electrician; that there were no children of the family and that both parties did not have any children outside the marriage; that there had been previous proceedings for divorce before another court and that the parties were advised to resolve their differences and that if they failed, the Petitioner could file for dissolution of marriage again.

The Petitioner further informed the court that the marriage had broken down irretrievably as she had not been in good terms with her husband. The Petitioner also confirmed to the court that she had been on separation with her husband for two (2) years and that her husband had accepted the decision to have the marriage dissolved.

It was also the Petitioner's evidence that attempts were made by their respective families to resolve their differences but to no avail. Her prayer to the court was therefore to have the marriage dissolved.

That was her evidence and there was no cross examination.

In answer, to a question from the court, the Petitioner told the court that the Respondent had consented to the dissolution of the marriage and had filed his consent into court.

2. RESPONDENT'S EVIDENCE

In his evidence, the Respondent confirmed that he married the Petitioner on 17th September, 2005 and that they first lived in Siavonga and later on moved to Plot No. 7740A Mwapatisha Close in Woodlands Extension.

The Respondent testified that the parties never had any children during the marriage; that the first petition for divorce was dismissed and they were advised to resolve their differences. However, the problems they were facing were not resolved. In this regard, he agreed with the Petitioner that the marriage had broken down irretrievably as they had lived apart for a continuous period of two (2) years that is, from 2013. The Respondent also confirmed that he had consented to the decree being granted and had filed the consent into court. The consent was produced in evidence and marked as '**R1**'.

The Respondent also told the court that the consent was given out of his own free will.

There was no cross examination and that was the close of the Respondent's case.

3. THE LAW

The 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 (the 'Act') which sets out the sole ground for divorce as being irretrievable breakdown of the marriage. The said section reads as follows:

8. '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 her marriage to the Respondent has broken down irretrievably. On the issue of proof of breakdown of the marriage, the Petitioner relies on Section 9(1) (d) of the Act which provides as follows:

9 (1) "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) ...

(c) ...

(d) That the Petitioner and the Respondent have lived apart for a continuance period of two years immediately

preceding the presentation of the Petition and the Respondent consents to a decree being granted.

Under this fact, the Petitioner has to prove that the parties have lived apart for a continuous period of two years immediately preceding the presentation of the Petition and the Respondent consents to a decree being granted.

The authors of Rayden on Divorce at page 248 paragraph 13.52 state that:

'Under Section 2(1) (d) irretrievable breakdown depends on the consent of the Respondent. The Court is not concerned when considering irretrievable breakdown in these circumstances with the question who was responsible for the separation... It does not follow that because there has been consent to separation there is also consent to divorce... A positive act of consent is required. The consent must continue to decree nisi and must be a valid subsisting consent when the case is heard.

The author of Family Law in Zambia at page 245 states that:

'The Respondent has to consent to the decree being granted and has the right to withdraw the consent at any time before the pronouncement of the decree. Consent must continue up to the end to the pronouncement of the decree.

In terms of the meaning of consent, the authors of Rayden on Divorce at page 252 paragraph 13.56 state that:

'Consent must mean true, voluntary consent not so called consent obtained by submission to force or threats or the like and the court must be satisfied as to the consent... The point of time at which consent is relevant for the pronouncement of the decree nisi is the date of the hearing of the petition.'(Underline mine for emphasis).

4. FINDINGS

In the present case, the Petitioner has alleged that the parties to the marriage have lived apart for a continuous period of at least two (2) years immediately preceding the presentation of the petition that is from 13th April, 2013 until she presented the petition on 29th May, 2015 and that the Respondent consents to the decree being granted.

At the hearing of the petition, the Respondent equally confirmed that they have lived apart for a continuous period of two (2) years and that he has consented to the decree being granted. The Respondent filed into Court his consent on 27th May, 2015. I have examined the said consent which reads as follows:

'I EVANS MATASHI of Chililabombwe, in the Copperbelt Province in the Republic of Zambia DO HEREBY confirm that I have lived apart from the Petitioner FIONA CYNTHIA NDHLOVU MATASHI for a continuous period of two (2) years immediately preceding the presentation of this Petition and CONSENT to a decree nisi, being GRANTED herein.'

I am satisfied that the consent by the Respondent was freely and voluntarily given and therefore was obtained without submission to force or threats. Although the consent was filed on 27th May, 2015, I am equally satisfied that there was a valid subsisting consent at the time when the petition was heard on 21st January, 2016.

On the basis of the uncontroverted evidence on record and the authorities referred to above, I find that the Petitioner and the Respondent have lived apart for a continuous period of at least two (2) years immediately preceding the presentation of the petition and that the Respondent voluntarily consents to the decree being granted.

For the foregoing reasons, I find that the Petitioner has proved her case and that the marriage solemnized under the provisions of the Marriage Act between **FIONA CYNTHIA NDHLOVU MATASHI** and **EVANS MATASHI** on 17th September, 2005 at St Andrews United Church of Zambia Congregation in Ndola on the Copperbelt Province of the Republic of Zambia has broken down irretrievably in terms of Section 9(1) (d) 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.

I order that either party is at liberty to file a formal application before the learned Deputy Registrar should the issue of maintenance and property adjustment arise.

Each party shall bear their own cost of the petition.

Leave to appeal is granted.

Delivered at Lusaka this 5th day of February, 2016.



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M.C. Kombe
JUDGE