

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

**2016/HP/D0190**

**BETWEEN:**

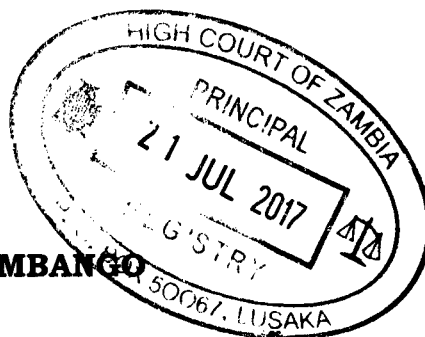
**MAYAMBA MWANAWASA**

**PETITIONER**

**AND**

**MICHAEL MWITUMWA MUYAMBANGO**

**RESPONDENT**



**Before the Honourable Mrs. Justice M.C. Kombe**

*For the Petitioner* : *Mr. B.C. Mutale- Messrs BCM Legal Practitioners*

*For the Respondent* : *Ms. C. Mweemba- Messrs Thandwe Legal Practitioners*

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## **J U D G M E N T**

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**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 15<sup>th</sup> July, 2016 the Petitioner **MAYAMBA MWANAWASA** filed a petition for the dissolution of the marriage with the Respondent **MICHAEL MWITUMWA MUYAMBANGO**. An amended petition was filed on 7<sup>th</sup> July, 2017 in which the Petitioner alleged that the said marriage had broken down irretrievably as the

parties had lived apart for a period of more than two (2) years preceding the presentation of the petition and that the Respondent had consented to a decree nisi being granted.

She therefore prayed for the following:

- (i) That the marriage be dissolved;
- (ii) That custody of the child of the family be granted to the Petitioner with the Respondent having reasonable access; and
- (iii) Costs incidental to the proceedings.

At the hearing of the petition, the Petitioner confirmed the contents of the petition that on 3<sup>rd</sup> October 2009 she got married to the Respondent Michael Mwitumwa Muyambango at Saint Ignatius Catholic Church in Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia; that there was one child of the family, a female by the name of Melissa Tumelo Muyambango born on 11<sup>th</sup> August, 2012; that to her knowledge there were no children born outside the marriage; that there were no previous proceedings in any court in Zambia or outside Zambia relating to the marriage.

The Petitioner told the court that she had petitioned for the dissolution of the marriage as the parties had never lived in the same house for more than two (2) weeks from the time they got married. She stated that they last cohabitated as husband and wife in May, 2014 and that she had been advised that the Respondent had consented to a decree nisi being granted.

Her prayer was that since they had lived apart for a continuous period of two (2) years then the marriage should be dissolved and that she should be granted custody of the child with reasonable access to the Respondent.

There was no cross examination.

In response to a question from the court, the Petitioner stated that the Respondent had been living in Western Province from the time that they got

married in 2009 and that they had only lived together as husband and wife from 2009 to 2014; that they last lived together as husband and wife in May 2014 as the Respondent had not been to Lusaka to live with her.

She further told the court that the parties last enjoyed conjugal rights way before 2014.

That marked the close of the Petitioner's case.

In his evidence, the Respondent confirmed to the court the contents of the amended petition to the effect that he married the Petitioner on 3<sup>rd</sup> October 2009 and that they last lived together as husband and wife at Plot 117A off Kudu Road, Kabulonga, Lusaka; that there was one child of the family by the name of Melissa Tumelo Muyambango; that there had not been any proceedings in any court regarding the marriage in and outside Zambia.

The Respondent also told the court that it was true that the marriage had broken down irretrievably because they had lived apart for a period of two (2) years and that he had consented to the dissolution of the marriage. He therefore stated that he had filed into court his consent on 7<sup>th</sup> July, 2017.

There was no cross examination.

In response to a question from the court, the Respondent confirmed that he stopped coming to Lusaka to live with the Petitioner in the year 2014.

That was the evidence from the parties.

I have carefully considered the contents of the amended petition and the evidence adduced by both parties.

According to Section 8 of the Matrimonial Causes Act No. 20 of 2007, the sole ground on which divorce may be presented to court is on the ground that the marriage has broken down irretrievably.

On the issue of proof, the Petitioner has to prove one of the five facts as outlined under Section 9(1). In the present case, the Petitioner has relied on Section 9(1) (d) 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.**

It is clear from the above provision that the Petitioner has to prove the following:

- (i) That the parties to the marriage have lived apart for a continuance period of two years immediately preceding the presentation of the petition; and
- (ii) That the Respondent consents to a decree being granted.

In relation to the first ingredient of the two years separation, the learned authors Rayden and Jackson on Divorce and Family Matters state that:

**'The day on which the separation took place is to be excluded when computing the period of time specified in the section...A husband and wife shall be treated as living apart unless they are living with each other in the same household.'**

In considering whether the period for which the parties to a marriage have lived apart has been continuous, no account is taken of any period (not exceeding

six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period for which the parties to the marriage lived apart. Furthermore, living apart does not exist so long as both parties bonafide recognize the marriage relationship as continuing even though the husband and wife are separated.

In relation to the second ingredient of consent, what is important is consent to the decree being granted and not consent to the separation. In terms of the meaning of consent, the said authors on Divorce and Family Matters 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).**

Thus, 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.'***

I have considered the evidence adduced and the applicable law in relation to the fact relied upon by the Petitioner. The Petitioner has alleged in her amended petition that the parties to the marriage have lived apart for a period of more than two (2) years preceding the presentation of the petition. In court the Petitioner testified that they have been living part since May 2014 when the Respondent who is based in Kaoma, Western Province stopped coming to Lusaka. The Respondent also confirmed this to the court and he stated that he has consented to a decree nisi being granted. The said consent was filed before court on 7<sup>th</sup> July, 2017 and it reads as follows:

**'I MICHAEL MWITUMWA MUYAMBANGO, the Respondent herein DO HEREBY Consent to the Decree Nisi being granted on the fact that I have lived apart with the Petitioner for a period of more than two years preceding the presentation of the Petition for the dissolution of marriage.**

Having considered the foregoing, I am satisfied that the Petitioner has proved the two ingredients of the fact relied upon as proof that the marriage has broken down irretrievably.

In this regard, 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 amended petition and that the Respondent freely and voluntarily consents to the decree nisi being granted. I also find that the said consent was subsisting at the time when the petition was heard on 13<sup>th</sup> July, 2017.

For the foregoing reasons, I hold that the marriage solemnized under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia between **MAYAMBA MWANAWASA** and **MICHAEL MWITUMWA MUYAMBANGO** on 3<sup>rd</sup> October, 2009 at St Ignatius Catholic Church in the Lusaka District of the Lusaka 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 for the determination of the issue of maintenance or property settlement should there be any need for such an application.

I order that the issue of custody of the child of the family shall be heard before this court upon filing of a formal application by either party.

Each party shall bear their own costs of the petition.

**Delivered at Lusaka this 21<sup>st</sup> day of July, 2017.**

