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

**2015/HP/D252**

**BETWEEN:**

**LAURA KANYANTA MWENSO CHINKULI**

**AND**

**LUBONA KINGSLEY CHINKULI**



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

*For the Petitioner* : *Mr. W. Muhanga & Ms. C. Bweupe - Messrs AKM Legal Practitioners.*

*For the Respondent* : *Ms. N. Chilufya - Messrs PNP Advocates.*

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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.**

The petition filed by the Petitioner **LAURA KANYANTA MWENSO CHINKULI** on 27<sup>th</sup> September, 2017 shows that she lawfully got married to **LUBONA KINGSLEY CHINKULI**, the Respondent herein at the Office of the Registrar of Marriages in

the Lusaka District of the Lusaka Province of the Republic of Zambia; that the parties lived in Kabulonga Square, Roan Road, Lusaka immediately after the marriage and that they last lived together as husband and wife at House No.31J Mutende Road, Woodlands, Lusaka on 18<sup>th</sup> June, 2015.

That there are three (3) children of the family now living namely; Lubona Michael Chinkuli (male) born on 28<sup>th</sup> January, 1998, Mweene James Chinkuli (male) born on 28<sup>th</sup> January, 1998 and Mutuna Webster Chinkuli (male) born on 6<sup>th</sup> April, 2003. Further that there are two (2) other children born from the Respondent during the subsistence of the marriage so far as is known by the Petitioner. These are Christian Chinkuli (male) and Nikita Chinkuli (female) and whose specific ages are not known by the Petitioner.

The petition also shows that there have been no previous proceedings in any Court in Zambia or outside between the Petitioner and the Respondent in respect of the marriage capable of affecting its validity or subsistence; that no arrangements have been made or proposed to be made between the parties in relation to maintenance of either party to these proceedings and the children of the marriage.

The Petitioner alleges that the marriage has broken down irretrievably as 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 the Respondent consents to a decree being granted.

The Petitioner therefore prays that:

- (i) The marriage be dissolved,
- (ii) There be joint custody of the children and both parties contribute to the children's maintenance and welfare;
- (iii) That each party bears their own costs.

At the hearing of the petition on 26<sup>th</sup> October, 2017, the Petitioner, a business woman aged forty three (43) years old testified as per petition filed in Court on 27<sup>th</sup> September, 2017; that she got married to the Respondent on 27<sup>th</sup> October, 2004 and that they last lived together as husband and wife on the 18<sup>th</sup> June, 2015 in Woodlands at House No.31J Mutende Road. The Petitioner identified a copy of the Marriage Certificate that was issued to them. The same was admitted in evidence and marked **P1**.

She testified that they have three children together two (2) of which are twins namely Lubona Michael Chinkuli and Mweene James Chinkuli born on the 28<sup>th</sup> of January 1998. The third child is also a male, Mutuna Webster Chinkuli born on 6<sup>th</sup> April 2013. She also testified that there are other children born from the Respondent namely Christian Chinkuli (male), and Nikita Chinkuli (female) whose ages she does not know.

She told the Court that there were no other proceedings in Zambia or elsewhere concerning this marriage. In relation to arrangement of children, she testified that

the three (3) children currently lived with her at Flat No. 3 Border view Woodlands Chalala; that the twins were currently in boarding school at Trident College in Solwezi and Mutuna was in boarding at Chalo Trust School in Chamba Valley Lusaka doing Grade 9. She stated that she did not know the education status of the other children born from the Respondent.

She testified that the arrangements had been made regarding the children just for convenience; that the Respondent was responsible for paying of the school fees and providing transport to and from school.

She testified that the marriage had broken down irretrievably and there was no room for reconciliation because the parties had lived apart for a period of two (2) years five (5) months from 18<sup>th</sup> June 2015; that the Respondent had consented to the granting of a decree. The Petitioner prayed that the Court dissolves the marriage.

There was no cross examination.

In his evidence, the Respondent aged forty six (46) years old, a Business Executive confirmed the contents of the petition filed by the Petitioner on 27<sup>th</sup> September, 2017. He told the Court that he married the Petitioner on 27<sup>th</sup> October, 2004 and they last lived together as husband and wife on 18<sup>th</sup> June, 2015. He also confirmed that there were three (3) children of the family and that he had two (2) other children but not with the Petitioner.

Regarding the living arrangement of the children of the family, the Respondent stated that the children lived with the Petitioner although they were at school.

The Respondent told the Court that he had no objection to the dissolution of the marriage as it had broken down irretrievably as the parties had lived apart for a period of two (2) years and five months that is from 18<sup>th</sup> June, 2015. He also told the Court that he wanted to have joint custody of the children.

When asked by the Court if he had consented to the dissolution of the marriage, he answered in the affirmative and stated that he had signed and filed his consent into Court on 3<sup>rd</sup> October, 2017. He added that he signed the consent out of his own free will.

There was no cross examination. That was the evidence adduced by the parties.

This is a petition for the dissolution of marriage contracted under the Marriage Act, Chapter 50 of the Laws of Zambia. 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.

A 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 apparent 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 (2) years immediately preceding the presentation of the petition; and;
- (ii) That the Respondent consents to a decree being granted.

The learned authors of Rayden and Jackson on Divorce and Family Matters state the following in relation to the first ingredient of the two years separation:

**'A husband and wife shall be treated as living apart unless they are living with each other in the same household.'**

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.

On the issue of consent which is the second ingredient, what is important to consider is consent to the decree being granted and not consent to separate. On

the meaning of consent, the authors of Rayden and Jackson Divorce and Family Matters 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).**

Words to much the same effect were used by Lillian Mushota, the author of Family Law in Zambia Cases and Materials at page 245 when she stated 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 by the parties and the applicable law in relation to the fact relied upon by the Petitioner. The Petitioner has alleged in her petition 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. In Court the Petitioner testified that they have been living part since 18<sup>th</sup> June, 2015. The Respondent also confirmed this to the Court as he stated that the marriage had irretrievably broken down as they had lived apart from June 2015 and that he had consented to a decree being granted. The said consent was signed and filed into Court on 3<sup>rd</sup> October, 2017. It reads as follows:

**‘I LUBONA KINGSLEY CHINKULI, of the City and Province of Lusaka in the Republic of Zambia ,DO HEREBY CERTIFY that I voluntarily and without coercion CONSENT to the dissolution of**

**the marriage herein between the Petitioner and myself, and I have no objections to the granting of a decree nisi. Therefore I do not intend to defend the matter.'**

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 petition and that the Respondent freely and voluntarily consents to the decree being granted. I also find that the said consent was subsisting at the time when the petition was heard on 26<sup>th</sup> October, 2017 and that the parties are not willing to reconcile.

For the foregoing reasons, I hold that the marriage contracted under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia between **LAURA KANYANTA MWENSO CHINKULI** and **LUBONA KINGSLEY CHINKULI** on the 27<sup>th</sup> day of October, 2004 at the Office of the Registrar 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 the issue of custody of the children of the family shall be heard before this Court upon filing of a formal application by either party.

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.

Each party shall bear their own costs of the petition.

**Delivered at Lusaka this 3<sup>rd</sup> day of November, 2017.**



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**M.C. KOMBE**  
**JUDGE**