

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

2017/HP/D107

BETWEEN:

MULIYA SIOKA SIAME

AND

BERNARD SIAME



PETITIONER

RESPONDENT

Before the Honourable Mrs. Justice M.C. Kombe

For the Petitioner : *Ms. Nana Mpande - Messrs Lusitu Chambers*

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.**

The petition filed by the Petitioner **MULIYA SIOKA SIAME** on 24th April, 2017 shows that she lawfully married **BERNARD SIAME**, the Respondent herein at the Lusaka Civic Center in the Lusaka City and Province of the Republic of Zambia; that the parties lived in Chainda, Lusaka immediately after the marriage and that this is where they last lived together as husband and wife.

That there are no children of the family now living but that the Petitioner has one child from her previous relationship and the child was known to the Respondent; that there had been no previous proceedings in the High Court in Zambia between the Petitioner and the Respondent in reference to the marriage and the matrimonial property. Furthermore, that there were no proceedings continuing in any country outside Zambia which were in respect of the marriage or capable of affecting its validity or subsistence; that no arrangements had been made or proposed to be made between the parties for the support of the Petitioner.

The petition further shows that the Petitioner alleges that the marriage has broken down irretrievably as the parties have lived apart for a continuance period of at least two (2) years immediately preceding the presentation of the petition and that the Respondent had consented to the decree nisi being granted.

The Petitioner therefore prayed that the marriage be dissolved and that the Respondent bears the legal costs.

At the hearing of the petition on 15th September, 2017, the Petitioner aged thirty four (34) years old a Social Worker at Women in Law and Development in Africa (WILDAF) testified as per the petition filed in court on 24th April, 2017 that she got married to the Respondent on 5th July, 2013. That they did not have any children together but she had a child before the marriage by the name of Naomi Simambo born on 9th February, 2004. However, the Respondent did not have any child before or during the subsistence of the marriage.

She told the court that she had not presented any court process in Zambia or outside Zambia that could affect the validity of the marriage; that the parties had made arrangements in relation to the property that had been acquired during the subsistence of the marriage. Furthermore, that they had made

financial arrangements that the Petitioner would support herself and the Respondent would support himself.

She testified that the marriage had broken down irretrievably and there was no room for reconciliation because the parties had lived apart for more than two (2) years. This was from November 2013 when she decided to leave the matrimonial home and that the Respondent had consented to a decree nisi being granted. She identified the consent signed by the Respondent and filed into court on 6th June, 2017. The Petitioner also identified a copy of the Marriage Certificate that was issued to them. The same was admitted in evidence and marked **P1**.

The Petitioner prayed that the court dissolves the marriage.

There was no cross examination.

In his evidence, the Respondent aged thirty three (33) years old, a Pastor at Sharma Miracle Embassy confirmed the contents of the petition filed by the Petitioner on 24th June, 2017. He told the court that the marriage had broken down irretrievably as the parties had lived apart since November, 2013 and that they had failed to reconcile notwithstanding the fact that they had held several meetings with their respective families. He added that he felt betrayed that his wife had another child when they were on separation.

He confirmed to the court that he had consented to the dissolution of the marriage and that to this effect he had filed his consent into court; that no one forced him to sign the consent as it was voluntarily given; that the said consent was subsisting at the time of hearing the petition.

There was no cross examination.

When the court asked the Petitioner if she had another child as revealed by the Respondent, her answer was in the affirmative. She told the court that she had a child by the name of Emmanuel Siyauya born in August 2015.

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 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 (2) 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:

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.

Regarding consent which is the second ingredient, what is important to consider is consent to the decree being granted and not consent to the separation. As to 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).

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 and the applicable law in relation to the fact relied upon by the Petitioner. The Petitioner has alleged in her petition 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 November 2013. The Respondent also confirmed this to the court as he stated that the parties

had failed to reconcile and that he felt betrayed by the Petitioner who had a child whilst they were on separation. He had therefore consented to a decree nisi being granted. The said consent was signed on 11th May, 2017 and filed into court on 6th June, 2017. It reads as follows:

'I BERNARD SIAME, being the Respondent herein do consent to the Dissolution of marriage between the Petitioner and I that was solemnized on 5th July, 2013 due to the fact that we have lived apart for a period of at least two years.

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 15th September, 2017 and that the parties are not willing to reconcile.

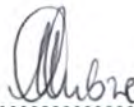
For the foregoing reasons, I hold that the marriage contracted under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia between **MULIYA SIOKA SIAME** and **BERNARD SIAME** on the 5th day of July, 2013 at the Office of the Registrar in the Lusaka District of the Lusaka Province of the 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 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 18th day of September, 2017.



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M.C. KOMBE
JUDGE