

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

2016/HP/D322

BETWEEN:

PAUL JERE

AND

SIANGA AKALEMWA JERE



PETITIONER

RESPONDENT

Before the Hon. Mrs. Justice M.C. Kombe

For the Petitioner: In person

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 Petitioner **PAUL JERE** filed a petition on 17th November, 2016 for the dissolution of his marriage to **SIANGA AKALEMWA JERE** the Respondent herein.

The said petition shows that the marriage was contracted at Chilanga Civic Center; Chilanga District in the Lusaka Province of the Republic of Zambia on 10th July, 2014; after the celebration of the marriage, the Petitioner and the

Respondent lived briefly lived together as husband and wife at House No. B15, Munda Wanga Compound, Chilanga District.

The petition also reveals that the Petitioner and the Respondent are both domiciled in Zambia; the Petitioner is an Animal keeper with the Zambia Wildlife Authority and resides at the aforementioned house whilst the Respondent is a teacher and resides at House No. Section 3a Kantanshi, Mufulira.

The petition further reveals that there is one child of the family now living born to the Petitioner and the Respondent namely **TAONGA JERE** female born on 28th October, 2014 and **GEORGE JERE**, male born to the Petitioner on 1st August 2008 before the subsistence of the marriage; that there are two (2) children known as **LUNGOWE SITUMBEKO** aged twelve (12) years old and **MARGARET MOONGA** female aged fourteen (14) years old born to the Respondent before the subsistence of the marriage.

The petition also shows that there are no previous proceedings in any court in Zambia or elsewhere with reference to the said marriage (or any child of the family) or between the Petitioner and the Respondent with reference to any property of either or both of them.

The Petitioner in his petition alleges that the said marriage has broken down irretrievably as the parties have lived apart for a period of more than two (2) years immediately preceding the petition, namely from the inception 10th July, 2014 to date.

The petition includes particulars which are couched as follows:

- (i) The Petitioner and the Respondent have been living apart for more than two (2) years from the inception of the marriage and there is no love and affection.

- (ii) The Respondent has on several occasions refused to transfer from Mufulira to Lusaka and she has cancelled one transfer requesting for a divorce.
- (iii) Over the last few months, the Petitioner and the Respondent have not properly interacted in any manner as husband and wife. This has caused the Petitioner grave mental distress and torture.

The Petitioner therefore prays that:

- (1) The marriage be dissolved.
- (2) The Respondent be granted custody of the child of the family.
- (3) The court makes no order as to property settlement.
- (4) That the Respondent be granted an order of maintenance of the child of the family.
- (5) That the court orders the Respondent to pay costs of the petition.

1. THE PETITIONER'S CASE

At the hearing of the petition, the Petitioner aged 31 years old gave evidence on oath and did not call any witnesses. He told the court that he had petitioned for the dissolution of the marriage based on the fact that the parties to the marriage had lived apart from inception. He stated that the Respondent went to live in Mufulira where she works so that she could get a transfer; a week after that they were issued with a Marriage Certificate. However, she did not manage to get a transfer as she canceled it and said that she wanted a divorce.

He further told the court that the Respondent would go back to the matrimonial home from time to time but during these periods, they would not meet sexually as they would quarrel most of the times. He added that the times the Respondent would go back to their home, she would perform her chores as a wife as she would cook and wash for him and that they shared the same bed but nothing much would happen. However, she would not take care of the

children and this was the cause of the problems they encountered. The Petitioner further stated that the Respondent stopped performing her chores when she finally left the matrimonial home in January 2016.

The Petitioner further testified as per the petition filed and told the court that he wanted the court to dissolve the marriage because that is what the Respondent wanted as well. He added that their families had tried to reconcile them but to no avail as they were always quarrelling. He stated that during the time that the Respondent would go back to the matrimonial home, he considered the marriage to be subsisting because of the Marriage Certificate but the Respondent's family thought that there was no marriage.

In cross examination, he told the court that he met the Respondent in Chilanga and after that the Respondent went to live in Mufulira in 2010; that he paid the bride price on 18th December, 2013 and that they got the Marriage Certificate *in July 2014* when she came back to Lusaka.

He further told the court that the Respondent had a problem looking after his son George and his young sister as she would not bathe them. He also added that they would quarrel a lot over George as the Respondent alleged that George was getting more money than her child.

2. THE RESPONDENT'S CASE

In her evidence, the Respondent aged 32 years old, a teacher at Kasumba Primary School, confirmed to the court that the marriage had broken down irretrievably. However, she denied that the marriage had broken down irretrievably on the fact that they had lived apart for a period of at least two (2) years immediately preceding the presentation of the petition. She explained that in August 2016, she was still at the matrimonial home as they had not separated in any way. She told the court that the separation was caused by the long distance marriage because she worked in Mufulira whilst the Respondent

worked in Chilanga. She further explained that the Petitioner sent her clothes to Mufulira in December, 2016 when she stopped going to the matrimonial home because according to the Petitioner, there was no marriage.

She went on to tell the court that after he sent the clothes, he called her and informed her that there were documents that she needed to sign but she didn't know that he had processed the divorce papers. She stated that she agreed to sign the forms because she considered that they were living separately.

In August 2016, after the elections, she told the Petitioner that she was going to go the matrimonial home. However he told her not to go because he was on medication and the doctor had advised him not to be sexually active; that even though he told her that they continued meeting as husband and wife.

The Respondent explained that their marriage was just like any other marriage the only problem which they encountered was that it was a long distance marriage and they had separated because of her work.

The Respondent in her evidence admitted that she had signed the consent form to have the marriage dissolved but she denied that they had lived apart for a period of two (2) years before the petition was filed. She told the court that they only separated in December 2016 because that is when she received the divorce papers and the Petitioner stopped her from going to the matrimonial home. She further stated that she last went to the matrimonial home in September, 2016; that although she signed the consent for the dissolution of the marriage, she did not understand the contents.

In cross examination, the Respondent admitted that she signed the consent form because the Petitioner forced her to sign the forms; that she didn't understand the forms because they were court documents.

In response to a question asked by the court, the Respondent testified that she moved to Mufulira on 1st December, 2010 and that at the time the marriage was contracted, she was already in Mufulira. She only came to Lusaka during the four (4) days holiday so that they could get a Marriage Certificate; that she did not consider that they were living apart because they were still husband and wife; they only started living apart in December, 2016 to date.

The Respondent also told the court that they had not lived apart for two (2) years because in August 2016, she was still in Chilanga during the holiday and that the Petitioner even withdrew money from his account and bought a stove.

That was the evidence adduced by the parties.

3. THE LAW

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:

'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. The relationship does not end by reason of a separation brought about by the pressure of external circumstances such as absence on professional or business pursuits, or in search of health or may be even pleasure.'

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.

Furthermore, the same authors on 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 the decree nisi and must be a valid subsisting consent when the case is heard.'

Lillian Mushota, 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 said 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. THE FINDINGS

The Petitioner has alleged in his 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 that is from the time they got married until the time he presented the petition.

On the other hand, the Respondent has denied that they have lived apart as alleged by the Petitioner. According to her, the parties have been living separately from the time they got married because it was a long distance marriage as she works in Mufulira whilst the Petitioner works in Chilanga.

I have carefully considered the evidence adduced in relation to the first ingredient and I find the following facts as proved:

- (i) When the parties got married on 10th July, 2014, they were living separately because the Respondent was working in Mufulira whilst the Petitioner was working in Chilanga.
- (ii) That the Respondent started living in Mufulira in 2010.
- (iii) The Respondent used to go back to the matrimonial home and during her stay she would perform her duties as a wife and the parties would enjoy their conjugal rights.

- (iv) Both parties recognized the marriage relationship as continuing even though they were living separately.
- (v) In December, 2016, the Petitioner sent the Respondents clothes to Mufulira as well as the court process for the dissolution of the marriage.

Given the foregoing proven facts, I am of the considered view that even though the parties were living separately the relationship did not end or the parties were not living apart as both parties recognized the marriage relationship as continuing. I should add that it is not whether or not the family members recognize the marriage as continuing but whether the parties to the marriage recognize it as continuing.

Furthermore, even if I accept the evidence by the Petitioner that the Respondent left the matrimonial home in January, 2016, the parties would still not have lived apart for a period of two (2) years immediately preceding the presentation of the petition because the petition was filed on 17th November, 2016.

In view of the foregoing, it is clear that the separation was brought about as a result of the external circumstances as the Respondent works in Mufulira whilst the Petitioner works in Chilanga. The separation was therefore for professional pursuits and according to the authorities I have referred to, the relationship does not end by reason of separation brought about by external circumstances. As the Respondent rightly stated, it was a long distance marriage and the Petitioner did not challenge this.

In this regard, I find that the parties have not lived apart for a continuous period of two (2) years immediately preceding the presentation of the petition, that is from the time when they got married as alleged by the Petitioner. The Petitioner has therefore failed to prove this ingredient of the fact relied upon.

On the second ingredient of consent, the Petitioner's evidence is that the Respondent has consented to the decree nisi being granted as she signed the consent forms.

The Respondent has admitted that she signed the consent forms. However, she contends that she did not understand the contents of the forms as they were court documents and the Petitioner forced her to sign them.

As I have already alluded to, the Respondent has to consent to the decree nisi being granted and the consent must be obtained without the use of force.

Although the Respondent signed the consent for dissolution of the marriage which is on record, I am inclined to accept her evidence that it was not freely and voluntarily given because she was forced to sign it by the Petitioner. I say so because I listened attentively to the evidence of the Respondent and observed her demeanour. I found her version of the evidence to be more credible than that of the Respondent because she was very consistent and she did not strike me as a person who came to court to fabricate a story.

Furthermore, her evidence that she was forced by the Petitioner to sign the consent forms was not challenged by the Petitioner in cross examination even when the Respondent stated that the Petitioner sent her clothes to Mufulira as well as the forms for her to sign.

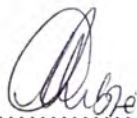
In view of the foregoing, I find that there was no valid consent given by the Respondent at the time the petition was heard as the consent which is on record was not voluntarily given by the Respondent. The second ingredient of the fact relied upon has therefore not been proved.

The upshot of my findings based on the foregoing is that I find that the Petitioner has failed to prove his case that the marriage contracted between the Petitioner and the Respondent on 10th July, 2014 at the Registrar of Marriages

at Chilanga Civic Center in the Chilanga District of the Lusaka Province of the Republic of Zambia has broken down irretrievably in terms Section 9(1) (d) of Matrimonial Causes Act. Consequently, the petition by the Petitioner for the dissolution of the marriage is dismissed. I make no order as to costs.

Leave to appeal granted.

Delivered at Lusaka this 2nd day of October, 2017.



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M.C. KOMBE
JUDGE