

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Family Jurisdiction)

2017/HPF/D265

BETWEEN:

CHANDA MWAMBA BWALYA

AND

FRIDAY BWALYA



PETITIONER

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 12th DAY OF
JANUARY, 2018**

*For the Petitioner : Ms K. Chulu and Ms P. Kafumbe, Legal Aid Counsel,
Legal Aid Board*

For the Respondent : In person

J U D G M E N T

LEGISLATION REFERRED TO:

- 1. The Matrimonial Causes Act No 20 of 2007**
- 2. The Matrimonial Causes Rules 1973**

OTHER WORKS REFERRED TO:

- 1. Rayden and Jackson's Law and Practice in Divorce and Family Matters
Volume 1, 16th Edition, Butterworths London, 1991**

This petition for the dissolution of marriage was filed on 19th October, 2017, pursuant to the provisions of Sections 8 and 9 (1) (d) of the Matrimonial Causes Act, No 20 of 2007. The petition states that the Petitioner and the Respondent were lawfully married on 29th June, 2013 at the Kitwe Civic Centre. That the parties who are both domiciled in Zambia last lived together as husband and wife at Number 5 Omnia

Flats, Fairview in Mufulira on the Copperbelt Province of the Republic of Zambia.

The petition states that the Petitioner is self-employed and resides at Plot 12092/D Harry Mwanga Nkumbula Road in Woodlands Chalala, Lusaka and the Respondent, a Micro-Biologist working for Seed Co resides in Chalala, which is also in Lusaka. It is stated that there is one child of the family now living, namely Mutemwa Bwalya born on 24th September, 2013.

That there have been no proceedings in any Court in Zambia or elsewhere with reference to the said marriage or the property of either or both of them, and that there are no proceedings continuing in any court in Zambia with respect to the marriage that are capable of affecting its validity or substance. Further that no arrangements have been made for the support of the Petitioner. The Petitioner contends that the marriage has broken down irretrievably as the parties have lived apart for a continuous period of two years immediately preceding the presentation of the petition, and the Respondent consents to the marriage being dissolved. She prays that the marriage be dissolved, and that each party bears their own costs.

The Respondent did not file an answer or fill in the acknowledgement of service, but signed the consent to dissolve the marriage. At the hearing both parties testified, and the Respondent called one witness.

In her testimony, the Petitioner confirmed that she is the person that had filed the petition to dissolve the marriage. She repeated the contents of the petition, adding that she had filed a photocopy of the marriage certificate as proof that the parties were married. The Petitioner also stated that the marriage has broken down irretrievably as the parties

have lived apart for a period of two years immediately preceding the presentation of the petition, having separated on 6th September, 2014, and that the Respondent consents to divorce being granted.

When cross examined, the Petitioner stated that the Respondent did not chase her from the matrimonial home, but that she left to go to school to complete her studies. She agreed that the Respondent was supportive during that period, and that he paid her school fees in the final year of her study. The Petitioner also agreed that she would use the Respondent's car to go to school, but testified that her parents paid the maid as the Respondent did not send enough money for her upkeep.

When cross examined further, the Petitioner stated that she left the matrimonial home around October, 2013 as the Respondent was abusive, and that this was a month after the child was born. It was her evidence that she did not want to get married, as she wanted to wait until she completed her education, but the Respondent wanted to get married because of the child. She went on to state that after they separated, she made efforts to reconcile with the Respondent, but he went around tarnishing her name.

The Petitioner agreed that the Respondent had filed a petition for divorce at the High Court in Kitwe, but her evidence was that the matter did not proceed as the documents filed were wrong. She however agreed to having responded to the said petition.

In re-examination, the Petitioner testified that she left the matrimonial home as she was unhappy, and had married under duress, as she was pregnant. It was her testimony that the Respondent was abusive even when she was pregnant, and that he was not supportive during the marriage as he expected her to survive on the allowance that she was

paid at school. Further that the Respondent wanted her to stay home and raise their son. Over the petition before the High Court at Kitwe, the Petitioner testified that when she followed up, she was told that the file could not be found, and was advised to sue here as that is where both parties are based.

The Respondent in his evidence agreed that he had been served the petition, and that he is the person named therein. His evidence was that he was not contesting the divorce as he agreed that the two had lived apart for a continuous period of two years, as they separated in September, 2014. He asked to be heard on maintenance and custody of the child, testifying that the Petitioner has worked for five different companies in Lusaka, Chipata, Ndola and Solwezi, and is therefore unstable.

He told the court that their son has lived in four different homes, and at one time he had a life threatening injury, and therefore the child is best placed to be in his custody. Further that the child has attended three different schools in one year, which is not conducive.

The Respondent also testified that he had filed a petition for the dissolution of the marriage before the Kitwe High Court under cause number 2015/HK/D47, and that the said matter had not been disposed of, and that the original marriage certificate was filed in that matter. He further stated that as the Petitioner has not filed an answer in that matter, it had stalled. It was his testimony that he did not chase the Petitioner from the matrimonial home, but that she left to go and complete her final year of study, and that she declined to return home upon completion, asking him to look for a job in Lusaka.

Still in his testimony, the Respondent stated that the Petitioner and her family were not responsive to suggestions that the parties be counseled, and he stated that during the time that the Petitioner went back to school, he had supported her by paying her school fees, and the maid, as well as provided transport.

In cross examination, the Respondent stated that he does not wish to be married to the Petitioner, and therefore does not oppose the marriage being dissolved.

The Respondent's witness was Sumbi Mukumba Shimwambwa. She confirmed that the Petitioner left the matrimonial home to come and complete her studies at the University of Zambia (UNZA). However when she completed she gave excuses, and did not return to the matrimonial home, and that the two did not stay together after the marriage. RW2 also confirmed that a family meeting was held to try and resolve the differences that the two had, and that efforts to counsel the two failed. She concluded by stating that the child lives with the Petitioner's aunt and uncle.

In cross examination, RW2 confirmed that the parties have lived apart for two years, and that the marriage had broken down.

I have considered the evidence. The Petitioner relies on the fact 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 divorce being granted, as a basis for establishing that the marriage has broken down irretrievably. Before I go into the merits of the matter, I wish to address one pertinent issue that the Respondent raised during the proceedings. He contended that there is an active matter before the High Court at Kitwe under cause number 2015/HK/D47, under which

he petitioned for dissolution of the marriage, and which matter has stalled as the Petitioner has not responded to the petition.

The Petitioner agreed to this position, but her evidence was that when she went to follow up the matter, she was told that the record could not be found, and was advised to commence a fresh action here where the parties reside. I have perused the Matrimonial Causes Act, No 20 of 2007 and have been unable to find any provision that would preclude me for proceedings to hear this matter on account of the fact that there is a petition for dissolution of the marriage that was filed by the Respondent before the Kitwe High Court, and which has not been heard. Section 22 of the Act only bars the court from granting a decree for the dissolution if there is a petition based on nullity of the marriage, unless the petition for nullity of the marriage is dismissed.

However the Matrimonial Causes Rules of 1973 on the other hand in Rule 36 (3) states that where after directions for trial have been given, and the Registrar gathers from information given pursuant to Rule 9(2) of 21(4) or paragraph 4 of that Rule that there are proceedings continuing in any country outside England or Wales in respect of the marriage or which are capable of affecting its validity or substance, and considers whether the proceedings on the petition should be stayed, he shall fix a date and time for consideration of that question by the Judge, and give notice thereof to all the parties.

The learned authors *Rayden and Jackson's Law and Practice in Divorce and Family Matters Volume 1, 16th Edition, Butterworths London, 1991* at paragraph 18.6 on page 357 states that if there are family proceedings between the parties which ought to be dismissed or stayed before the suit proceeds to hearing, the suit will be stayed until such an action has been taken.

In this case the assertion is that there are proceedings before the High Court at Kitwe in relation to the marriage in the form of a divorce petition that have not been disposed of. This fact was only brought to light when the Respondent cross examined the Petitioner after she testified, and he did not file an answer wherein he could have stated those facts, and the Petitioner did not reveal this in her petition. Therefore the issue of the divorce proceedings before the High Court at Kitwe could not have been dealt with by applying to stay these proceedings until they were disposed of after directions were given, as this was not brought to the court's attention earlier.

Thus the question is whether at this stage it would be just to stay these proceedings on that basis? Seeing that the Respondent stated that the proceedings before the High Court at Kitwe have stalled as the Petitioner has not responded to them, while the Petitioner on the other hand stated that she had followed up the matter, and was told that the file could not be found, staying these proceedings would not be the just thing to do, as it appears that the Respondent who filed the proceedings has not actively prosecuted them. I will therefore proceed to determine the petition.

As already seen, the Petitioner relies on the fact 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 divorce being granted.

The Respondent in his testimony stated that he does not object to the divorce being granted on the basis that the parties have lived apart for a period of two years, as they separated in September, 2014. The petition was filed on 19th October, 2017, which is over three years since the parties separated, and the Petitioner has therefore proved the case on a balance of probabilities. I accordingly grant a decree nisi for dissolution

of the said marriage, which shall become absolute after a period of six weeks.

The parties are at liberty to agree on the custody of the child of the family, and file a consent order to that effect. In default thereof, either party can make an application to me at chambers. Issues of maintenance and property settlement are referred to the Registrar for determination. Each party shall bear their own costs of the proceedings.

DATED THE 12th DAY OF JANUARY, 2018

 S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE