

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



BETWEEN:

MALAMA MPILIKISHA

AND

MARTHA DAKA MPILIKISHA

RESPONDENT

**Before Honourable Mr Justice M.D. Bowa on 8th February
2019**

For the Petitioner: In person

For the Respondent: No appearance

JUDGMENT

Case referred to:

1. Buthler vs. Butchler (1947) 1 ALL ER p 319

Legislation referred to

The Matrimonial Causes Act, No. 20 of 2007

Other works referred to

*1. Dame Margaret Booth et al , **Rayden and Jackson's Law and Practice in Divorce and family matters** 16th edition Butterworths, London 1991*

This is a petition for dissolution of marriage filed into court on the 20th June 2018 presented pursuant to sections 8 and 9 (1) (c) of the Matrimonial Causes Act no 20 of 2007.

By his petition the Petitioner contended that he lawfully wed the Respondent on the 2nd of November 2013 at the Lusaka Civic Center. Following the celebration of their marriage, the newlyweds lived at House no 12 Chisali road in Lusaka's Chilenje residential area. Both the Petitioner and Respondent are domiciled in Zambia.

The Petitioner is a police officer whilst the Respondent is employed by the Ministry of Health in Kalumbila District in North Western Province. The Petitioner further averred that there is one child of the family born during the union named Blessings Mplikisha. The child is aged 4 and is school going.

The Petitioner discloses further that there are no previous proceedings in any court in Zambia or elsewhere with reference to the marriage or property of either or both parties. Further that there are no other proceedings subsisting in any court outside Zambia with reference to the marriage which are capable of affecting its validity or subsistence.

The Petitioner contended further that the marriage has broken down irretrievably as the Respondent had deserted the matrimonial house from the 3rd of January 2016 a period in

excess of 2 years immediately preceding the presentation of the petition. The Petitioner therefore seeks the following reliefs.

- 1. That the marriage between him and the Respondent be dissolved and a decree nisi be granted.*
- 2. That the Petitioner be granted custody of the child of the family with liberal access to the Respondent during weekends and holidays*
- 3. That there be no property settlement as there is no property acquired by the parties during the marriage*
- 4. That costs be in the cause.*

At the hearing I allowed the Petitioner to proceed with his petition in the absence of the Respondent having satisfied myself she was fully aware of the proceedings and took no steps to file an answer or to make an appearance at trial. The Petitioner confirmed the contents of his petition. He testified further that he now resides at house number 15 Mwatasha road in Chilenje Lusaka.

He explained further that their only child resides with the Respondent's relatives in Mkushi where she also attends school and that no arrangement or agreement has been reached regarding her welfare.

It was his testimony as stated in the petition, that the marriage has broken down irretrievably as the Respondent has deserted the matrimonial home for a continuous period of at least 2 years immediately preceding the presentation of the petition. The Petitioner asserted that the Respondent deserted the matrimonial home on her own following an incident of infidelity. He had tried to reach out to her to foster reconciliation but things did not work out. He was thus certain there was no possibility of a resumption of cohabitation between them. He reiterated his prayer for the dissolution of the marriage and for custody of the child of the family with liberal access to the Respondent.

I have considered the petition filed in this matter and the evidence before me. The only ground upon which a petition for divorce may be presented for a statutory marriage is provided in section 8 of the Matrimonial causes Act No. 20 of 2007 which reads:

“A petition for divorce may be presented to the court by either party to the marriage on the ground that the marriage has broken down irretrievably.”

To establish that the marriage has broken down irretrievably, the Petitioner is required to satisfy the court of one or more of the facts set out in section 9 (1) (a) to (e) of the Act. Section 9 (1) (c) which is relevant to the petition under consideration provides as follows.

“9 (1) For the purposes 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:

(c) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition”

The learned authors of ***Ryden and Jackson on Divorce and Family matters in its 16th edition at paragraph 13 .34 on page 228*** writing on the requirements to be satisfied in establishing desertion comment that:

“to establish the fact of desertion there must be two elements present on the side of the deserting spouse, namely the factum i.e. physical separation, and the animus deserendi, i.e. the intention to bring cohabitation permanently to an end; and two elements present on the side of the deserted spouse namely absence of consent and absence of

conduct reasonably causing the deserting spouse to form his intention to bring cohabitation to an end.”

They go on to state that:

“The requirement that the deserting spouse must intend to bring cohabitation at an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing thing which he knows his wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, he has deserted her whatever his desire or intention may have been:”

The authors base their writings on section 9 (I) (c) of the English Matrimonial causes Act of 1973 which is replicated in our own Matrimonial causes Act no 20 of 2007 as section 9 (I) (c) .In a nutshell, the fact of desertion requires proof of separation and the fact that the deserting spouse left with the intention of bringing cohabitation permanently to an end. In addition and in flipping the coin, that the deserted spouse on his part should not have consented to the deserting spouse departure and importantly that he should not have done anything that would have made the spouse leave or as a standard, any ordinary woman placed in the same position to do so.

Turning to the evidence before me, I find as a fact that the Petitioner and The Respondent were lawfully wed on the 2nd of November 2013. The marriage certificate was filed with the petition as proof of that fact. It is common cause that the petition is uncontested and the Respondent was not present and trial. The evidence given by the Petitioner therefore stands unchallenged for all intents and purposes.

The evidence before me is thus that the Respondent of her own free will deserted the matrimonial home on the 3rd of January 2016 following an alleged incident of infidelity. The Petitioner's efforts to foster reconciliation have proved futile. I am satisfied that the couple have lived apart in excess of 2 years following the Respondent's decision to leave the matrimonial house.

In **Buthler vs. Butchler**¹ it was held that the mere act of one spouse leaving the matrimonial home will make it easy to infer that the departing spouse intended to bring the matrimonial consortium to an end. In following this decision, I am ready to infer such intention in the circumstances of this case. There is nothing in the evidence before me to suggest that perhaps the Petitioner consented to the desertion or that he himself did

anything that constructively lead to the Respondent leaving the matrimonial home.

On the whole therefore I am prepared to find that the Petitioner has satisfied the requirements of section 8 and 9 (I) (c) and hold that the marriage has broken down irretrievably with no prospects of a resumption of cohabitation. I therefore dissolve the marriage celebrated between the Petitioner and Respondent on the 2nd of November 2013 and grant a decree nisi which will be made absolute within six weeks of this judgment unless sufficient cause is shown on why it should not be made so.

I further order that in terms of Statutory Instrument number 72 of 2018 and regulation 4 (4) in particular, the question of property settlement , maintenance and custody of the child of the family will be referred to mediation on application by either party.

I make no order as to costs

Dated at Lusaka this..... day of 2019.



JUDGE

