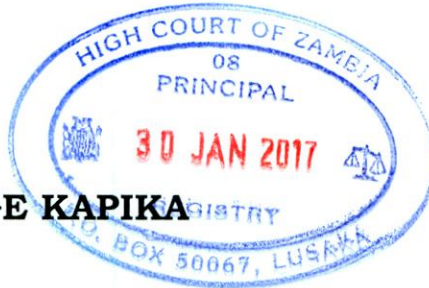


2016/HP/D287

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



BETWEEN:

KAREN KABANGE KAPIKA

PETITIONER

AND

CLAUDIO JIM MARAGIA

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 30th DAY
OF JANUARY, 2017**

For the Petitioner : Ms T. Limbali, Dzekedzeke and Company
For the Respondent : In person

J U D G M E N T

CASES REFERRED TO:

- 1. Ash V Ash 1972 1 ALL ER 582**
- 2. Katz V Katz 1972 3 ALL ER 219**
- 3. Livingstone Stallard 1974 2 ALL ER 766**
- 4. Mahande V Mahande 1976 ZR 287**

LEGISLATION AND OTHER WORKS REFERRED TO:

- 1. The Matrimonial Causes Act, No 20 of 2007**
- 2. Bromleys Family Law**

This is a petition for the dissolution of marriage filed by the Petitioner on 13th October, 2016, pursuant to Section 9 (1) (b) of the Matrimonial Causes Act No 20 of 2007. The Petitioner relied on the contents of the petition, which alleges that the marriage has broken down irretrievably, as the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. She also gave viva voce evidence.

In her testimony the Petitioner testified that she married the Respondent on 21st April, 2014 at a farm in State Lodge in New Kasama, Lusaka. That the parties have one child together namely Maisha Mary Violet Maragia who was born on 31st January 2015, and that the Respondent has a child Melissa Maragia who currently resides with her mother in Kenya.

It was stated that there have not been any proceedings in any court in Zambia or elsewhere with regard to the marriage between the Petitioner and the Respondent, or with reference to any child or property of either of them.

The Petitioner's testimony was that she seeks to divorce the Respondent as he has behaved in such a way that she cannot reasonably be expected to live with him. She named the particulars of the unreasonable behavior as excessive alcohol consumption on his part, citing instances where the Respondent would not return home at all, as he would be out drinking. Other instances cited were one weekend when the Respondent left home on a Friday and did not

return home, and he stayed away without communicating with the Petitioner on his whereabouts.

He only showed up the next Saturday around 20:00 hours intoxicated, and only informed the Petitioner that he had been out doing something for the family. The Petitioner further testified that during one night he was taken home close to midnight by some friends, and he could not walk, and he fell and slept there for about seven hours, as the Petitioner was unable to rouse him. She stated that there were instances when the Respondent would black out in the vehicle, and the police would apprehend him.

With regard to the custody of the child of the family, the Petitioner's evidence was that she seeks custody of the said child as she is the primary care giver. On what efforts had been made to reconcile the parties in this matter, the Petitioner told the Court that when the problems escalated she had spoken with the Respondent's sister and her family over the matter, and discussions were had with the parties. Further that the Respondent had reached out to a priest who had given the parties recommendations on how to resolve the problem. However the Respondent's behaviour had not changed.

Her evidence was that the quality of life at home had deteriorated and the Petitioner was concerned about the environment in which they were raising their daughter. She prayed that the marriage be dissolved.

The Petitioner was not cross examined.

The Respondent did not file an answer but filled in the acknowledgment of service. On oath he acknowledged having received the petition and the accompanying documents, but stated that he did not wish to defend the petition. He told the court that the parties had agreed that each party would bear their own costs. He testified that he wanted to have joint custody of the child of the family, and he was agreeable to maintaining the child, but not monthly, as he works internationally, and is paid sporadically.

With regard to the property settlement, the Respondent stated that he would not like the property to be shared but that it should be left for the child of the family. In conclusion his testimony was that the divorce would be emotional for him, and he asked the parties be put of judicial separation so that the parties could explore the possibilities of reconciliation.

I have considered the evidence. Sections 8 and 9 of the Matrimonial Causes Act No 20 of 2007 provides that;

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

9. (1) For 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.

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;*
- (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;*
- (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or*
- (e) that the parties to the marriage have lived apart for continuous period of at least five years immediately preceding the presentation of the petition”.*

The petition in this matter is based on Section 9 1 (b) of the Act, which provides that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. The question that therefore arises for determination is whether the Petitioner has on a balance of probabilities proved this fact.

In the case of **MAHANDE V MAHANDE 1976 ZR 287** it was held that *“the phrase "cannot reasonably be expected to live with the respondent" necessarily poses an objective test and "the petitioner" means the particular petitioner in the case under*

consideration, bearing in mind the petitioner's faults and other attributes, good and bad, and having regard to her behaviour during the marriage”.

Bromley's Family Law at page 192 to 193 in respect of the objective test cited the **LIVINGSTONE STALLARD 1974 2 ALL ER 766** case and stated as follows;

“would any right thinking person come to the conclusion that this husband has behaved in such a way that his wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties”.

In this case the Petitioner alleges that the Respondent drinks excessively and he has therefore behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

In the **MAHANDE V MAHANDE** case reference was made to the case of **KATZ V KATZ 1972 3 ALL ER 219** where it was stated that *“behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a course of conduct and, in my view, it must have some reference to the marriage”.*

The Petitioner in this case testified that the Respondent would spend nights away from home on account of drinking, and also

black out when drunk, and that this has affected the quality of family life that the couple has. The parties married on 21st April 2014, and barely two years after the marriage the petition for divorce was filed. Drinking to an extent where a person fails to return to the matrimonial home, or where it causes the person to black out is in my view behavior that affects the other spouse.

I say so because the time spent together as a couple where such is prevailing diminishes the couple's ability to enjoy life together, and share in the joy of marriage, as well as the couple's involvement in raising of the children, as in this case. The Respondent did not dispute the allegations as he did not file an answer or indeed cross examine the Petitioner on the allegations levelled against him.

He also did not cross examine the Petitioner on her evidence that efforts to have him change have proved futile.

In the case of **ASH V ASH 1972 1 ALL ER 582** it was stated that ***“in order, therefore, to answer the question whether the petitioner can or cannot reasonably be expected to live with the respondent, in my judgment, I have to consider not only the behaviour of the respondent as alleged and established in evidence, but the character, personality, disposition and behaviour of the petitioner. The general question may be expanded thus: can this petitioner, with his or her character and personality, with his or her faults and other attributes,***

good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?"

The Petitioner's testimony as already seen is that the quality of life that the parties enjoy has been affected as the Respondent is either drunk or away from home on account of drinking, and for me that is evidence that she has been deprived of the enjoyment of the marriage. Therefore taking into account this fact, and the fact that the Respondent has not alleged any attributes towards her that I should consider in establishing the unreasonable behavior on his part, I find that the Petitioner has proved that the Respondent has behaved in such a way that she cannot reasonably be expected to live with him.

The Respondent in his testimony stated that the parties should be placed on judicial separation in order that they explore the possibilities of resolving the problem. He did not cross examine the Petitioner on her assertion that efforts made to change his drinking habits have proved futile, and moreover he did not file an answer or cross petition for judicial separation. Not having done so I find that he has failed to establish that the parties should be put on judicial separation.

The Petitioner has however on a balance of probabilities proved that the Respondent has behaved in such a way that she cannot

reasonably be expected to live with him. I accordingly grant a decree nisi, which shall become absolute after six weeks. The issue of custody of the child of the family if it is not settled by consent, shall be settled before me at chambers, by either party making an application.

Any applications with regard to property settlement and maintenance shall be made to the Deputy Registrar. Each party shall bear their own costs of the proceedings.

DATED THE 30th DAY OF JANUARY, 2017

Saunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**