IN THE HIGH COURT OF ZAMBIA **2017/HPF/D111**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Family Jurisdiction)

VITIMA MULENGA LONGWE **PETITIONER**

AND

MARK MULENGA **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 22nd DAY OF AUGUST, 2017

For the Petitioner : *Mr Frank Lungu, Andrew and Partners*

For the Respondent : *No appearance*

JUDGMENT

LEGISLATION REFERRED TO:

1. ***The Matrimonial Causes Act No 20 of 2007***

The petition for dissolution of marriage before me was filed on 4th May, 2017, pursuant to Section 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 8th February, 2005 at the office of the Registrar of Marriages, at the Kitwe Civic Centre. That the parties last lived as husband and wife at 4863 Kariba Road in Riverside, Kitwe.

It is also stated in the petition that the Petitioner currently resides at 13016 Roselle Avenue, Apartment 32, Hawthorne Ca 90250 California, USA, while the Respondent resides in South Africa.

The Petitioner avers that she is nurse assistant, while the Respondent is self- employed. That there are two children of the family now living, namely Chipasha Chileshe Mulenga a female, born on 14th January, 1995, and attends college in California USA, and Chilufya Mulenga also female born on 8th November, 1996, and also attends college in California. It is also stated that there is a child named Kampinda Mulenga also female born on 10th July, 1990 to the Respondent before the marriage, so far as is known to the Petitioner.

The petition states that there are no proceedings in any court in Zambia or elsewhere with respect to the said marriage that are capable of affecting its validity or substance. It is the Petitioner's assertion that the marriage has broken down irretrievably as the parties have lived apart for a continuous period of eleven (11) years, immediately preceding the presentation of the petition, and the Respondent consents to a decree being granted.

She therefore prays that the marriage be dissolved, and that each party bears their own costs.

The Respondent did not file an answer or complete the acknowledgement of service form despite having being served the process by way of substituted service, and he did not attend the hearing of the petition.

In her testimony the Petitioner confirmed that she was married to the Respondent on 2nd February, 2005 in Kitwe, and that they have two children together, the first child having been born on 14th January, 1995 and that the second child was born on 8th November, 1996. She also confirmed having filed the petition before court stating that the two had lived apart for a continuous period of more than eleven years, as they

last cohabited as husband and wife on 12th December, 2005. That this was due to the fact that they had irreconcilable differences, as the Respondent was unfaithful. She added that the Respondent has moved on as he is with another woman, with whom he has two children.

I have considered the petition. It has been brought pursuant to Section 9 (1) (d) of the Matrimonial Causes Act No 20 of 2007. Section 8 of the said Act provides for the ground for divorce. It states that;

> ***"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".***

In order to prove that a marriage has broken down irretrievably one or more of the facts stated in Section 9 of the Act have to be proved. The said Section 9 provides that;

> ***"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 Petitioner relies on Section 9 (1) (d) of the Act which is that the parties have lived apart for a continuous period of two years, and the Respondent consents to the decree being granted. The Petitioner in her evidence testified that the parties last lived as husband and wife on 12th December, 2005, which is a period of eleven years and eight months. Clearly they have lived apart for a continuous period of more than two years.

Section 9 (1) (d) of the Act requires that the Respondent should consent to the decree being granted where two years separation is relied on. A perusal of the record shows that no such consent has been filed, and it cannot therefore be said that the Respondent has consented to the dissolution of the marriage. However Section 9 (1) (e) of the Act provides that a decree may be granted where the parties have lived apart for a continuous period of five years.

This provision does not require the consent of the Respondent to be given in order that the marriage can be dissolved. The only restriction in granting divorce under that provision is where the Respondent alleges grave financial or other hardship if the divorce were to be granted as provided in Section 18 of the Act which states that;

"(1) The respondent to a petition for divorce in which the petitioner alleges five years separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage.

The Respondent has not alleged any hardship, and this largely because the Petitioner did not rely on five separation as a fact establishing the irretrievable breakdown of the marriage. Be that as it may, while the Petitioner did not rely on Section 9 (1) (e) of the Act, she has proved that she has lived apart from the Respondent for a continuous period of over five years, and in the interests of doing justice between the parties, I will grant the decree nisi for divorce based on the provisions of Section 9 (1) (e) of the Act, which decree shall become absolute after a period of six weeks.

Any issues of custody of the children shall be settled by myself on application by either party if not agreed, but issues of property settlement and maintenance are referred to the learned Registrar for determination. I make no order as to costs.

DATED THE 22nd DAY OF AUGUST, 2017

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S. KAUNDA NEWA
HIGH COURT JUDGE