

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No. 257 of 2022

BETWEEN:

KATONGO CHILUFYA ELLIOT

Appellant

AND

JONATHAN HUGH ELLIOT

Respondent



CORAM: Makungu, Sichinga and Sharpe-Phiri, JJA
on 14 August 2024 and 4 September 2024

For the Appellant: Messrs Mushota and Associates

For the Respondent: Messrs Howard and Marietta Legal Practitioners

J U D G M E N T

SHARPE-PHIRI, JA, delivered the judgment of the Court.

Legislation referred to:

1. The Rules of the Supreme Court of England (White Book) 1999 Edition
2. The English Matrimonial Causes Rules 1973
3. The High Court Rules, Chapter 27 of the Laws of Zambia
4. The Matrimonial Causes Act, No. 20 of 2007

Cases referred to:

1. B v B (1977) ZR 159
2. Antonio Ventriglia and Manuela Ventriglia V Eastern and Southern African Trade and Development Bank (2010) Vol. 1 ZR 426

1.0 **INTRODUCTION**

1.1 This is an appeal against a Ruling delivered by Malama, J of the High Court on 28 June 2022 in which she allowed an amendment to a Divorce Petition.

2.0 **BACKGROUND**

2.1 The brief history of the matter is that on 8 November 2019, Jonathan Hugh Elliot, now the Respondent, filed a petition for dissolution of his marriage to Katongo Elliot, the Appellant herein, asserting that their marriage had broken down irretrievably due to the Appellant's conduct, which made it unreasonable for him to continue cohabiting with her.

2.2 After filing of the Petition, which remains pending adjudication, the Respondent endeavoured to engage the Appellant in obtaining her consent to a decree nisi on the grounds that the parties had been living separately for a period of two years. However, this attempt did not come to fruition.

2.3 The Petition having remained unheard, and the parties having lived apart for over five years, subsequently prompted the Respondent to file an application before the High Court Judge seeking an amendment of the Petition for dissolution, based on five-year separation instead of relying on the fact of unreasonable behaviour.

3.0 **APPLICATION FOR AMENDMENT OF PETITION**

3.1 The application to amend the Petition for dissolution for marriage was brought by the Respondent before the trial Judge on 30 March 2022, by Summons pursuant to **Rule 17 of the Matrimonial Causes Rules 1973**.

3.2 It was supported by an affidavit sworn by the Respondent, in which the Respondent reiterated that the initial Petition for divorce was based on the Appellant's unreasonable behaviour, but on account of the fact that as of the date of the application, the parties had been living apart for five years, the Respondent sought to amend the petition before the High Court to base his claim on this five- year separation.

3.3 The Appellant opposed the application by affidavit of 19 April 2022, in which she refuted the Respondent's claim that he sought her consent for a two-year separation before they had been separated for one year, during which time she had outlined the conditions for her consent. The Appellant further stated that after two years of separation, she advised the Respondent to finalize the necessary documents and agree on terms for child maintenance. However, instead of following this course, the Respondent petitioned the High Court on the grounds of unreasonable behavior on her part. After reviewing her response to the petition, the Respondent approached the Appellant privately, seeking her consent to amend the petition based on two years separation, on the condition that he would cover the costs of the original petition, a proposal which the Respondent ultimately rejected.

3.4 The Appellant stated that the divorce proceedings have been prolonged due to various circumstances beyond her control. She further asserted that she does not oppose the divorce, acknowledging that more than five years have passed since the couple's separation, a fact that obviates the need for her consent for the divorce to be granted.

4.0 DECISION OF THE HIGH COURT

4.1 In rendering the Ruling on the Appellant's application to amend the Petition, the Judge made the following observations, as documented on page R8 of the Ruling and as noted on page 16 of the record of appeal:

"I have considered the summons for leave to amend petition, the affidavit and skeleton arguments in support as well as the affidavit and skeleton arguments in opposition. I wish to state from the outset that, at the scheduling of this application, this Court directed the Respondent to file his application to amend the petition in this matter followed by the Applicant's affidavit and skeleton arguments in opposition and the Respondent's reply, if any. However, at the time of writing this Ruling, no reply was filed by the Respondent."

4.2 The trial Court further determined, as documented on pages R9 to R10 of her Ruling and also appearing on pages 17 and 18 of the record of appeal, that:

"From the above cited provisions, it is clear that under the Order 18 Rule 1 of the High Court Rules, the Court is mandated to allow

amendment of proceedings at any stage of the proceedings for purposes of, inter alia, eliminating the delay of a fair trial in a matter and in order to determine the real question in controversy between the parties. Further, under Rule 17(2) of the Matrimonial Causes Rules, a petition for dissolution of marriage in response to which an answer has been filed, can only be amended with leave of Court.”

4.3 The trial Court further noted that the primary issue to be resolved in the main matter was whether the marriage had irretrievably broken down. In the Petition filed on 8 November 2019, the Respondent cited unreasonable behavior on the part of the Appellant, providing detailed particulars of such behaviour. The trial Court recognized that it was undisputed that the parties had been living separately since March 2017, after the Respondent left the matrimonial home. Consequently, the application to amend the Petition for dissolution of marriage was granted.

5.0 GROUND OF APPEAL

5.1 Dissatisfied with the Ruling rendered by the learned High Court Judge, the Appellant filed an appeal to this Court, articulating two primary grounds of appeal and reserving the right to submit additional grounds as deemed necessary at a later stage. The grounds of appeal are:

- (i) **The learned Judge in the Court below erred in law and in fact when she held that Order 18 Rule 1 of the High Court Rules, Order III Rule 2 of the High Court Rules both of Chapter 27 of**

the Laws of Zambia and Rule 17(2) of the Matrimonial Causes Rules 1973 allow the Court to grant leave to amend a petition for dissolution of marriage to *that the parties have lived apart for a period of at least 5 years immediately preceding presentation of the petition* when the parties had not lived apart for at least 5 years at the time the petition was presented.

- (ii) The Judge in the Court below erred in law and in fact when she held that it directed the Respondent to file his application to amend the petition followed by the Appellant's affidavit and skeleton arguments in opposition and the Respondent's reply if any, and that, at the time of writing the Ruling, no reply was filed by the Respondent (the Appellant herein), when not so.

6.0 HEARING OF THE APPEAL

- 6.1 The appeal was heard before us on 14 August 2024. Counsel for both the Appellant and the Respondent were not present at the hearing as the Appellant's counsel had filed a notice of non-appearance. The Appellant and the Respondent filed their heads of arguments on 30 November 2022, 3 February 2023, and 10 February 2023 respectively. The arguments of the parties will not be recast here but referenced in the subsequent analysis section, where necessary.

7.0 **DECISION ON THE APPEAL**

- 7.1 We have conducted a thorough review of the record of appeal before us, the impugned Ruling, and the respective arguments of both parties.
- 7.2 In the first ground of appeal, the Appellant contends that the learned Judge in the lower Court erred in law and fact by ruling that **Order 18 Rule 1 of the High Court Rules, Order III Rule 2 of the High Court Rules**, both under Chapter 27 of the Laws of Zambia, and **Rule 17(2) of the Matrimonial Causes Rules 1977**, permit the Court to grant leave to amend a petition for the dissolution of marriage to state that *'the parties have lived apart for a period of at least 5 years immediately preceding presentation of the petition,'* despite the fact that the parties had not in fact lived apart for the required minimum of 5 years at the time the petition was filed.
- 7.3 The Appellant's main argument in this ground focuses on the interpretation of the phrase *'the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition'*. The Appellant asserts that the Court is required to ascertain whether the parties have indeed lived apart for the stipulated continuous period immediately before the petition's filing, as established in the case of **B v B**.¹ The Appellant contends that, contrary to this requirement, the parties did not live apart for a continuous five-year period immediately prior to the petition's presentation.

7.4 The Respondent's argument on this matter was that the amendment to the petition specifically addressed the period during which the parties had lived apart, from March 2017 to 2022. Although the Respondent conceded that explanatory note **20/8/2 to Order 20 Rule 8 of the Rules of the Supreme Court 1965**, cited by the Appellant, states that an amendment takes effect from the date of the original document it amends, the explanatory note further clarifies that:

“Where, however, the amendment sought to be made relates to matters going to the remedy claimed rather than introducing a new cause of action, the Court will grant leave to amend the original pleadings in order to allege facts arising subsequent to the date of the writ or counterclaim...”

7.5 The Respondent contended that the High Court allowed the amendment to the petition even though the five-year period of separation accrued after the petition's presentation. This allowance was justified on the basis that the amendment related to the remedy sought rather than introducing a new cause of action.

7.6 The issue for this Court to determine is whether the learned Judge in the lower court erred in interpreting and applying **Order 18 Rule 1** and **Order III Rule 2 of the High Court Rules (both under Chapter 27 of the Laws of Zambia)** and **Rule 17(2) of the Matrimonial Causes**. Specifically, the appellate Court must assess whether these provisions lawfully allow a court to grant leave to amend a petition for the dissolution of marriage to reflect that the parties have lived apart for at least five years

immediately preceding the petition's presentation, even though the required five-year period had not elapsed at the time the petition was originally filed.

- 7.7 We thus begin by recasting the provisions of **Order 18 Rule 1 and Order III Rule 2 of the High Court Rules** which provides that:

“The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just.”

- 7.8 Furthermore, **Rule 17(2) of the Matrimonial Causes Rules 1973** permits the amendment of a Divorce Petition with the Court's leave after it has been served on the other party. Additionally, **Order III Rule 2 of the High Court Rules** grants a Judge the authority to make any interlocutory order deemed just and necessary.

- 7.9 Although it is undisputed that the trial Judge possessed the jurisdiction to grant an order for amendment, it is necessary to assess whether the order was issued within the legal boundaries. The Appellant argues that granting

such an amendment would render the Petition academic, as an amendment is effective not from the date the amendment is granted, but from the date of the original documents being amended. **Order 20 Rule 8(2) of the Rules of the Supreme Court 1999 Edition (White Book)** explicitly provides that an amendment takes effect from the date of the original document.

- 7.10 Additionally, **Order 20/8/2 of the Rules of Supreme Court of England**, stipulates that a party cannot amend their pleadings to include a new cause of action. The provision is outlined as follows:

“Similarly in the pleadings, once pleadings are amended, what stood before the amendment is no longer material before the Court and no longer defines the issues to be tried... The rule as to the effect of an amendment is the reason why a plaintiff may not amend his writ by adding a cause of action which has accrued to him since the issue of the writ.”

- 7.11 Although it is evident that the trial Judge possessed inherent jurisdiction to grant amendments, such authority does not extend to amendments that introduce or substitute a new cause of action that accrued to a party after the issuance of the court process. Therefore, it is necessary to examine the nature of the amendment sought in the case before the lower Court below. In the affidavit supporting the application for amendment, as detailed on pages 24 to 50 of the record of appeal, the Respondent sought to amend the factors of the irretrievable breakdown of marriage from unreasonable behavior to that of five-year of separation.

- 7.12 It is important to note that the Petition for dissolution of marriage is based on **Section 8 of the Matrimonial Causes Act**, which stipulates 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'*. This constitutes the sole basis for the Petition for dissolution of the marriage and forms the cause of action of the divorce petition.
- 7.13 Additionally, **Section 9(1)** provides further guidance on the evidence required to establish the irretrievable breakdown of the marriage. This includes, among other factors, proof of unreasonable behavior by the Respondent or evidence that the parties have lived apart for a continuous period of five years immediately preceding the presentation of the petition.
- 7.14 In the present case, both the original and amended petitions were founded on **Section 8 of the Matrimonial Causes Act**. The Respondent's application to amend the petition sought merely to revise the factual basis for the claim for irretrievable breakdown of marriage, thereby assisting the Court in adjudicating the substantive issue before it. Consequently, we find no basis to fault the trial Judge's decision to grant the application to amend the Petition for divorce. Therefore, this ground of appeal is dismissed.
- 7.15 In the second ground of appeal, the Appellant contends that the trial Judge erred in law and fact by inaccurately stating that the Court had directed the Respondent to file his application to amend the petition, followed by the Appellant's affidavit and skeleton arguments in opposition, and any


reply from the Respondent. The Appellant argues that, at the time of delivering the Ruling, no reply had been filed by the Respondent (the Appellant herein) and asserts that this claim by the Judge is incorrect.

7.16 The crux of the Appellant's argument under this ground is that the trial Court erroneously mischaracterized the roles of the parties concerning the application. Specifically, the Court incorrectly referred to the Appellant as the applicant for the summons to amend, while designating the Respondent, who was actually the applicant, as the Respondent. This misrepresentation is factually incorrect and undermines the proper consideration of the application.

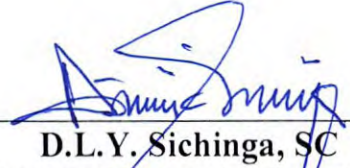
7.17 Upon reviewing the Ruling and the associated orders and directives, we concur with the Respondent's position that the trial Judge's error or omission regarding the roles of the parties does not impact the validity of the decision to grant the amendment of the petition. Consequently, this ground of appeal lacks merit and is hereby dismissed.

8.0 **CONCLUSION**

8.1 Given the failure of the appeal in its entirety, we order that the costs of this appeal be borne by the Appellant, to be taxed in default of agreement.



C.K. Makungu
COURT OF APPEAL JUDGE



D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE