

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

2022/HPF/D232

BETWEEN:

CYNTHIA MOMPWA MPIKWA



PETITIONER

AND

JAMES JAMU KONI

RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE W. S. MWEEMBA AT LUSAKA.

For the Petitioner: Mr. B. Mwanza- Messrs Nsapato & Co. Advocates.

For the Respondent: Mr. P. Chomba and Mr. O. Hasalama both of Messrs Mulenga Mundashi Legal Practitioners

REVIEW OF JUDGMENT DATED 29TH DECEMBER, 2023

On 29th December, 2023 I delivered my Judgment in the Petition for Dissolution of Marriage pursuant to **Section 8 and Section 9(1)(d) of the Matrimonial Causes Act No. 20 of 2007** on the ground that the parties had since 1st March, 2020 lived apart for a continuous period of at least two (2) years immediately preceding the presentation of the Petition and that the Respondent consented to a *Decree Nisi* being granted.

After considering the evidence of the Petitioner and having noted that the Respondent had given his consent to dissolution of the marriage I was satisfied that the marriage solemnized between **JAMES JAMU KONI** and **CYNTHIA MOMPWA MPIKWA** on 18th July, 1998 at the Lusaka Baptist Church, in the District and Province of Lusaka of the

Republic of Zambia has broken down irretrievably in terms of **Section 8 and Section 9(1)(d) of the Matrimonial Causes Act No. 2 of 2007 of the Laws of Zambia.**

I invoked the provisions of **Section 41 of the Matrimonial Causes Act, No. 20 of 2007**, dissolved the marriage and granted the *Decree Nisi* to the Petitioner.

I granted custody of the children of the family namely **Mupasha Koni, Lushomo Catherine Koni** and **Chipeko Grace Koni** to the Petitioner with reasonable access to the Respondent.

I granted custody of the children of the family to the Petitioner because she prayed that she be granted custody and the Respondent did not oppose the application for custody.

The Record shows that on 6th September, 2022 the Respondent filed an Ex-parte Summons for an Order of Matrimonial Injunction or Restraining Order together with an Affidavit in Support and Skeleton Arguments. In the Affidavit in Support the Respondent alleges inter alia that:

1. The children of the family currently reside with him at Plot No. 6608 Mberere Road Olympia Extension Lusaka and he has full responsibility of their well-being including educational requirements.
2. In an effort to get away from the physical and mental abuse that he and the children of the family had been experiencing as a result of the Petitioner's conduct, on or around 31st July, 2022, the children of the family and he planned to travel out of the country on holiday. However, shortly before proceeding on holiday, he

discovered that the Petitioner had gone into *Mupasha Koni's* bedroom and got his passport and hid it without his knowledge or approval. This caused further stress for him and anger which resulted in a lot of animosity and potential physical conflict until the passport was handed back to him by the Petitioner. That the Petitioner only handed over the passport for *Mupasha Koni* after an altercation between his son and the Petitioner.

After considering the Affidavit sworn by the Respondent, I on 13th September, 2022 granted the Ex-parte Order of Matrimonial Injunction or Restraining Order, Ordering the Petitioner from entering or remaining in the matrimonial home or from using or occupying any place where the Respondent and the children of the family shall reside from time to time.

In view of the allegations made by the Respondent regarding the relationship between the Petitioner and the children of the family I decided to have the children of the family come before me so that their views on whom they wish to live with could be sought.

I interviewed all the three (3) children of the family separately in the absence of the Petitioner and the Respondent but in the presence of the parties respective Legal Counsel on 9th January, 2024. After the interviews that I had with the children of the family it has become necessary that I vary my Judgment with respect to custody. This is so because all three (3) children of the family prefer that the Respondent be given custody with liberal and reasonable access to the Petitioner. They all said that a joint custody order would not be appropriate.

As a matter of general principle, once an Order or Judgment had been made, the Court is functus officio and no longer had jurisdiction over the matter in controversy. This is to ensure that there is finality of litigation. In this respect Patrick Matibini J in ***Zambian Civil Procedure: Commentary and Cases, Volume 2, Lexis Nexis at page 1143*** states that:

“if it were otherwise, there would be no finality to litigation, no person could rest assured that a Court decision would not be varied or altogether revoked and Court adjudication would provide no certainty of rights or rest from controversy. To the general principle adumbrated above, there are however exceptional circumstances where the court may alter its original judgment or order. These exceptions fall broadly into two categories, namely the review of a judgment or order and correction of errors.”

In **RE BLENHEIM LEISURE RESTAURANTS LIMITED NO. 3 (1999) THE TIMES 9 NOVEMBER**, Neuberger J, gave examples of circumstances in which the Court might justifiably exercise its jurisdiction to reconsider and amend or vary its judgment or order, namely: -

- (a) Where there was a plain mistake on the part of the Court;
- (b) Where there was a failure of the parties to draw to the Courts attention a fact or point of law that was plainly relevant;
- (c) Where there was discovery of new facts subsequent to the judgment or order being given; or
- (d) Where a party could argue that he was taken by surprise by a particular application from which the Court ruled adversely to him and which he did not have a fair opportunity to consider.

Dr. Justice Matibini SC points out that while no one would challenge the importance of the principle of finality of litigation, a rigid application of

the rule that a Court can never vary a judgment or order could engender unnecessary expense and delay concluding litigation. Both the common law and rules of Court provide the Court with the necessary power to revoke or vary Judgments or orders in order to correct mistakes. **Order 39 of the High Court Rules, Chapter 27 of the Laws of Zambia** gives a Judge the power to review a judgment or order upon such grounds as he may consider sufficient. The review may be undertaken on an application by any party to an action or on the Court's own motion. Upon such review, the Court is at liberty to open and re-hear a matter and to take fresh evidence. Ultimately, the Court has power on review to reverse, vary or confirm its previous judgment or order.

In the case of **WALUSIKU LISULO V PATRICIA LISULO (1998) ZR 75** the Supreme Court laid down the following propositions regarding the power of the Court to rescind or vary judgments or orders:

- (a) The power to review judgments or orders is discretionary and there must be sufficient grounds to exercise the discretion.
- (b) The power is not designed for parties to have a second bite at the cherry.
- (c) Litigation must come to an end, and successful parties must be given the opportunity to enjoy the fruits of their judgment.

In the case of **LACKSON MWABI MWANZA V KANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (2012) VOL 1 ZR 144** Matibini J, summed up the power to rescind or vary judgments or orders in the following terms:

“Thus...the Court has power to review its rulings, orders and decisions. The power to review enables the Court to put matters right. However, the power to review, does not exist to afford a dissatisfied litigant the chance to argue for an

alteration to bring about a result considered more acceptable...

In casu it is in the best interests of all three (3) children of the family that their views are taken into account in deciding the parent who should have care and control of the children of the family. I consider that the children of the family will be happier living with the Respondent than the Petitioner.

I accordingly reverse the custody order that I made on 29th December, 2023 and vary it.

The Respondent shall have Custody, Care and Control of the children of the family namely: ***Mupasha Koni, Lushomo Catherine Koni*** and ***Chipeko Grace Koni*** with liberal and reasonable access to the Petitioner.

The Ex-parte Order of Matrimonial Injunction or Restraining Order that I granted the Respondent on 13th September, 2022 is hereby discharged.

I make no order as to costs.

DATED AT LUSAKA THIS 7TH DAY OF FEBRUARY, 2024.

07 FEB 2024



**WILLIAM S. MWEEMBA
HIGH COURT JUDGE**