

IN THE HIGH COURT OF ZAMBIA

2024/HPF/D. 133

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Divorce Jurisdiction)

BETWEEN:



SIBESO MARGARET KAMUWANGA SIKAONGA

PETITIONER

AND

ANDREW NJAVWA SIKAONGA

RESPONDENT

Before the Hon. Mrs. Justice T.S. Musonda

For the Petitioner : Mrs. M.S. Tembo of Messrs. Malambo &
Company

For the Respondent : Mr. D. Mtonga of Messrs. Paul Norah
Advocates

JUDGMENT

Legislation referred to:

- (1) The Marriage Act, Chapter 50 of the Laws of Zambia
- (2) The Matrimonial Causes Act, No. 20 of 2007
- (3) Statutory Instrument No. 72 of 2018, The High Court (Amendment) Rules, Chapter 27 of the Laws of Zambia

Cases referred to:

- (1) *Katz v. Katz*, (1972) 3 ALL ER 219
- (2) *Livingstone-Stallard v. Livingstone-Stallard*, (1974) 2 ALL ER 766

(3) **Welfare v. Welfare, (FD 12 Oct 1977)**

(4) **Gollins v. Gollins, (1963) 2 All ER 966 (HL)**

(5) **Sangeetha v. Jitendra Bhandari, Civil Miscellaneous Appeal Nos. 168 and 169 of 2012**

1. INTRODUCTION

- 1.1 This is a Petition filed by **Sibeso Margaret Kamuwanga- Sikaonga (“Petitioner”)** on 28th February 2024, seeking the dissolution of her marriage to the Respondent, **Andrew Njavwa Sikaonga**, on the ground that it has irretrievably broken down.
- 1.2 The Petitioner alleges that the Respondent behaved in such a way that she cannot reasonably be expected to continue living with him.
- 1.3 The Petitioner seeks the following reliefs:
 - (i) The said marriage be dissolved;
 - (ii) That the Petitioner be granted custody of the child of the family;
 - (iii) That there be an order for property settlement;
 - (iv) That the Respondent be responsible for the maintenance of the child of the family;
 - (v) That each party shall bear their own legal costs; and
 - (vi) Any other relief the court will deem fit.
- 1.4 The Respondent did not file an Answer to the Petition.
- 1.5 It is undisputed that the parties, both domiciled in Zambia married on 16th December 2017, at the Bethel Chapel, in Chingola, Zambia.
- 1.6 They were issued with a Marriage Certificate, exhibit **“P1”**, pursuant to the **Marriage Act**, Chapter 50 of the Laws of Zambia. The couple had one child, L.W.N, born on 21st March 2019.

- 1.7 Pursuant to **Section 4(3)** of the Matrimonial Causes Act, No. 20 of 2007 (“MCA 2007”), I had jurisdiction to hear this matter, as both the Petitioner and Respondent are domiciled in Zambia.
- 1.8 Jurisdiction over these proceedings was further established by the fact that the parties entered a valid statutory marriage under the Marriage Act.
- 1.9 At the hearing, both parties were in attendance virtually.
- 1.10 The Respondent, through Counsel, indicated that he did not intend to contest the Petition. Accordingly, the Court proceeded to hear the Petitioner.
- 1.11 The Petitioner gave sworn testimony and did not call any further witnesses.

2. SUMMARY OF THE EVIDENCE

The Petitioner’s case

- 2.1 The Petitioner asserts that the marriage has broken down irretrievably for the following reasons.
- 2.2 She alleges that the Respondent has been engaged in a longstanding affair with a named woman, which she discovered through numerous text messages. These messages revealed that the Respondent and the woman would meet and discuss intimate matters, including the woman’s pregnancy.
- 2.3 Upon discovering the messages, the Petitioner confronted the Respondent. He, however, insisted on continuing the relationship. The Petitioner sought the intervention of family members, who undertook to assist in resolving the matter, but no action was taken.
- 2.4 In addition, the Respondent acquired several properties without the Petitioner’s knowledge. He also made a declaration under the Diversity Visa Program of the United States of America (“DV Program”), stating that he was single and had no children.

- 2.5 The Petitioner indicated that the text messages, details of the property acquisitions, and the visa application were in the Notice to Produce.
- 2.6 In view of the foregoing, she reiterated her prayer for the dissolution of the marriage, custody, and maintenance of the child of the family, and a settlement of property.

3. ISSUES FOR DETERMINATION

- 3.1 The main issues for determination in this Petition are:
- (i) Whether the Petitioner has proved that the Respondent behaved in such a way that she cannot reasonably be expected to live with him; and
 - (ii) Whether the Petitioner is entitled to the reliefs sought.

4. THE LAW

- 4.1 **Section 8** of the MCA 2007 provides the sole ground for the dissolution of a marriage in the following terms:

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.

- 4.2 The Petitioner must satisfy the Court on one or more facts set out in **Section 9 (1)** to establish the ground for dissolution of marriage. The Petitioner's case is anchored on **Section 9 (1) (b)**, which states:

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:

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

4.3 **Section 9(2)** of the **MCA 2007** imposes a duty on the Court to inquire, so far as it reasonably can, into the facts alleged by the Petitioner and any facts alleged by the Respondent during the hearing of a petition.

4.4 In **Katz v. Katz (1)**, the Court articulated the elements that constitute “behaviour” in matrimonial proceedings. It was held that:

Behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either 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.

4.5 These elements are self-explanatory. For the purposes of **Section 9(1)(b)** of the **MCA 2007**, the applicable test was set out by Dunn J in **Livingstone-Stallard v. Livingstone-Stallard (2)**:

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

4.6 Distilling from the above, the Court must assess whether the effect of the Respondent’s behaviour has rendered it unreasonable for the Petitioner to continue living with him. The behaviour must go beyond the usual ups and downs and misunderstandings that typically occur during a marriage.

4.7 Furthermore, the Court must consider the entirety of the matrimonial history and any explanation or justification offered by the Respondent. The key inquiry is whether the conduct was such that the Petitioner ought not reasonably be expected to endure it (See **Welfare v. Welfare (3)**).

- 4.8 In the present case, the burden lies with the Petitioner to prove, on a balance of probabilities, that the Respondent behaved in such a way that she could not reasonably be expected to live with him.

5. ANALYSIS AND DETERMINATION

- 5.1 Before delving into the analysis, I stand guided by Lord Reid's sentiments in **Gollins v. Gollins (4)**:

In matrimonial affairs we are not dealing with objective standards; it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.

- 5.2 Similarly, the Court's observation in **Sangeetha v. Jitendra Bhandari (5)** at paragraph 14 reinforces this perspective, that courts are not tasked with adjudicating the conduct of ideal husbands or ideal wives but must deal with the specific couple before them. Indeed, an ideal couple would never need the intervention of a matrimonial court.
- 5.3 Additionally, I remain guided by the authority in **Welfare v. Welfare**, which requires that the Court evaluate the entire matrimonial history and take into account any explanation or justification offered by the Respondent. The essential test is whether the conduct was such that the Petitioner ought not reasonably be expected to endure it.

Issue 1: Whether the Petitioner has proved that the Respondent behaved in such a way that she cannot reasonably be expected to live with him

- 5.4 The Petitioner alleges that the Respondent engaged in the following behaviour:
- (i) An ongoing extra-marital affair with a named woman.
 - (ii) Acquisition of property without her knowledge.

(iii) Declaration that he was single in a VISA application form.

5.6 It is trite that the standard of proof in matrimonial proceedings is on a balance of probabilities. The absence of a defence or rebuttal from the Respondent does not automatically entitle the Petitioner to judgment; the burden remains on her to establish the truth of her allegations through credible evidence.

5.7 I shall now proceed to determine whether the Petitioner has proved the allegations on a balance of probabilities.

The Respondent's alleged extra-marital affair with a named woman

5.8 The Petitioner alleges that the Respondent has been engaged in an ongoing relationship with a named woman. She asserts that she discovered the existence of this relationship through text messages contained in the Notice to Produce.

5.9 I have carefully examined the said text messages, which appear on pages 12 to 30 of the Notice to Produce. The content of the messages, which remain unchallenged by the Respondent, reveals a pattern of communication that, on a balance of probabilities, establishes the existence of an inappropriate relationship between the Respondent and the named woman. The allegation is accordingly proved.

The Respondent's acquisition of property without the Petitioner's knowledge

5.10 The Petitioner alleged that the Respondent has been acquiring property without her knowledge. In support of this claim, she relied on a copy of a White Book appearing at page 11 of the Notice to Produce, which reflects a vehicle registered in the Respondent's name. The Respondent did not file any response or offer evidence to rebut this assertion.

5.11 In the absence of any challenge or contrary explanation, and having considered the documentary evidence tendered, I am satisfied that the Respondent acquired the said property without the Petitioner's

knowledge. The allegation is accordingly proved on a balance of probabilities.

The Respondent's declaration that he was single and had no children in a DV Program

- 5.12 The Petitioner alleged that the Respondent applied for the DV Program of the United States of America, wherein he declared that he was single and had no children. This declaration was clearly inconsistent with the subsisting marital relationship and the fact that the parties have a child.
- 5.13 I have examined the documents at pages 1 to 4 of the Notice to Produce. The Respondent's declaration therein, indicating that he was unmarried and childless, is corroborated by the Petitioner's testimony and remains unchallenged. In the absence of any rebuttal, and considering the documentary evidence tendered, I am satisfied that the Respondent made a false declaration regarding his marital and parental status. The allegation is accordingly proved on a balance of probabilities.

Is it reasonable to expect the Petitioner to continue living with the Respondent, considering his established conduct during the subsistence of the marriage?

- 5.14 The Respondent, by electing not to participate in these proceedings, offered no explanation for his conduct.
- 5.15 In my view, the Respondent's cumulative conduct, namely, the extra-marital affair, acquisition of property without disclosure, and misrepresentation of marital status, makes it unreasonable to expect the Petitioner to continue living with him. Her decision to file this Petition demonstrates that she can no longer endure the Respondent's conduct.
- 5.6 I find that the Respondent's behaviour falls within the scope of **Section 9(1)(b)** of the MCA 2007.

5.7 In the final analysis, I find that the Petitioner has proved that the marriage has broken down irretrievably because the Respondent behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

Issue 2: Whether the Petitioner is entitled to the reliefs sought

5.21 Despite the finding that the marriage has irretrievably broken down, **Section 9(4)** of the **MCA 2007** mandates that the Court must not grant a decree of dissolution if there is a reasonable likelihood of the parties resuming cohabitation.

5.22 It is evident from the Respondent's decision not to defend the Petition that there are no prospects of the parties resuming normal married life.

5.23 Further, under **Section 20** of the **MCA 2007**, the Court retains discretion to deny a decree where collusion is evident in the filing or prosecution of the petition. Upon careful review of the testimony, I find no evidence of collusion between the parties.

5.24 I therefore find that the Petitioner is entitled to her prayer for the dissolution of the marriage.

5.25 Regarding the other ancillary reliefs sought, the parties are at liberty to formally agree on custody, maintenance and property settlement. Should they fail to agree, either party will be at liberty to file a formal application for ancillary relief. Upon such application, the application shall be referred to mediation pursuant to **Rule 4 (4)** of Statutory Instrument No. 72 of 2018, The High Court (Amendment) Rules, Cap 27 of the Laws of Zambia.

6 CONCLUSION

6.6 In light of the above, it is hereby ordered that:

- (i) **A Decree Nisi for the dissolution of the parties' marriage, celebrated on 16th December 2017, at the Bethel Chapel, in Chingola, Zambia, is hereby issued pursuant to Sections 9 (3) and 41 of the MCA 2007.**

- (ii) The Decree Nisi is a conditional order, which shall become absolute, pursuant to Section 43 (1) of the MCA 2007, upon the expiration of a period of six weeks from today, 5th September 2025, unless cause be shown to the Court within six weeks from the making of this Decree, why such Decree should not be made absolute.
- (iii) Ancillary matters namely custody, maintenance and property settlement shall be referred to mediation, in default of agreement upon application by either party.
- (iv) This being a family matter, each party shall bear their own costs.

DATED THIS 5TH DAY OF SEPTEMBER 2025


T.S. MUSONDA
JUDGE

