

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

2021/HPF/D178

BETWEEN:

MERCY ELIZABETH KHOZI MWILA
AND
SIMON MWILA



PETITIONER

RESPONDENT

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

For the Petitioner: Ms. S. Chifita, Advocate- National Legal Aid Clinic for Women.

For the Respondent: Mr. S. Mwila (In Person).

J U D G M E N T

LEGISLATION REFERRED TO:

- 1. The Matrimonial Causes Act, No. 20 of 2007 of the Laws of Zambia.**
- 2. The High Court Rules, Chapter 27 of the Law of Zambia.**

CASES REFERRED TO:

- 1. Hyde V. Hyde (1866) LR 1P & D 130.**
- 2. Mahande V. Mahande (1976) ZR 287.**
- 3. Thurlow V. Thurlow (1975) 2 ALL E.R. 979.**
- 4. Fuller V Fuller (1973) 2 ALL ER 650.**
- 5. Stevens V. Stevens (1979) 1 WLR 885.**

WORKS REFERRED TO:

- 1. Mckenna, Breakdown of Marriage, Modern Law Review, Vol 30 No. 2 (1967).**
- 2. Passingham, Law and Practice in Matrimonial Causes (3rd Ed), London: Butterworths (1979).**

Mercy Elizabeth Khozi Mwila (the Petitioner) filed the Petition for Dissolution of Marriage on 12th April, 2021 seeking to dissolve her marriage to **Simon Mwila** (the Respondent).

The Petition was launched pursuant to **Section 8 and Section 9 (1) (b) of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia.**

The Petition reveals that the Petitioner was married to the Respondent on 9th September, 2005 at the Office of the Registrar of Marriages, Civic Centre in the City and Province of Lusaka of the Republic of Zambia; that both parties are domiciled in Zambia; that the Petitioner and the Respondent live together at Plot No. 2351, PHI, Bennie Mwiinga Housing Estates, Lusaka aforesaid; that the Petitioner is a Communication Analyst at UNDP while the Respondent is a Businessman.

The Petition further reveals that there are two children of the family now living and having been born between the Petitioner and Respondent during the subsistence of the marriage. Their names and dates of birth are:

1. **Andrew Khozi Mwila** – 6th May, 2007.
2. **Kafula Khwezi Mwila** – 3rd June, 2014.

The Petition also reveals that there have been no previous proceedings in any Court in Zambia with reference to the said marriage between the Petitioner and the Respondent or with reference to any property of either or both of them.

There are no proceedings continuing in any Court or Country outside Zambia which are, in respect of the marriage capable of affecting its validity or subsistence. No agreement or arrangement has been made, or is proposed to be made between the parties for the support of the children or either party.

The Petitioner alleges the irretrievable breakdown of the marriage on the ground that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. The Petitioner cited the particulars of the unreasonable behaviour of the Respondent as:

- i. Infidelity on the part of the Respondent and his inability to support and be part of their family.
- ii. That the Petitioner and Respondent have drifted apart and this has negatively affected their relationship as husband and wife.

The Petitioner prays for the following;

- i. That the marriage be dissolved;*
- ii. That the Petitioner be granted custody of the two children of the family.*
- iii. That there be an order for property settlement.*
- iv. That each party bears their own costs.*

There is an Acknowledgment of Service filed by the Respondent dated 18th August, 2022 in which he stated that he did not intend to defend the case.

At the hearing of the matter on 8th January, 2024, the Petitioner told the Court in Chief that the Respondent has committed infidelity

without any remorse such that on or about 2021 he went overboard when he was elusive to the extent that he would not be seen all day and as a result the matrimonial home became more like a bed and breakfast as the Respondent no longer participated in parenting the children. Further, that the Respondent did not consider himself to be married as he made lone decisions such as regarding the disposal of property without the Petitioner's knowledge.

It was further averred that the Respondent's infidelity had caused an emotional detachment as they have not been able to have normal conjugal rights and as such the Petitioner left their matrimonial home around April, 2022 and only returned in August, 2022 because they could not agree on simple things. Moreover, that the Respondent's drinking became so bad that he would require assistance to return home.

The Petitioner further testified that she only returned to their matrimonial home because the rentals in Silverest were too high and that she had proposed that the Respondent moves to the Silverest house as it was suitable for him as a retiree to enable her live in their house in PHI which she had bought before they got married.

In addition, the Petitioner testified that the Respondent was not remorseful about his behaviour and that his family members turned her complaints about him into gossip. Further, the Respondent sold a house in Kasama which he had purchased upon retirement without the Petitioner's consent or knowledge. She also testified that the Respondent was not transparent and honest with her as she had

discovered he had other children before and during their marriage which he did not inform her about.

During cross-examination, the Petitioner testified that before they got married the Respondent introduced her to his six children and some members of his family and that he did not have any children after they got married. Furthermore, that the Petitioner obtained Plot No. 235, HPI, Bennie Mwiinga Housing Estates, Lusaka through the Respondent in whose name the letter of offer was registered but that she paid the total purchase price of K87, 000,000.00 which she paid in instalments. That the said house was improved by demolishing it and building a new 3 bedroomed house to which the Respondent only contributed towards its completion and that the Title Deeds were in a Trust for the children of the family.

The Petitioner added that she did not contribute towards their house in Silverest but only rendered support before it was purchased in 2013 and that when she lived in Silver-rest, it was in a rented house. Further, that there was a reconciliation meeting that was held on or about May, 2022 but that it did not deal with the issue of infidelity and the 3 children he had not introduced her to. She finally averred that she had a good relationship with the children he had introduced her to.

This marked the end of the Petitioner's case.

The Petitioner also filed written submissions into Court on 7th February, 2024 which I have considered.

The Respondent did not file an Answer and he did not testify in his defence.

On the test to apply on whether the Respondent's behaviour was unreasonable in relation to the Petitioner, I am guided by the following authority;

Section 9 (1) (b) of The Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia provides that:

“Irretrievable breakdown may be proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent, or vice versa in the case of a Cross-Petition.”

Having been guided by the above authority, it is clear in my view that the behaviour required to be proved must be to the point where it is evident that parties cannot reasonably be expected to live with each other.

I am also guided by the case of **HYDE V HYDE (1)** where the Court defined marriage as the:-

“Voluntary union for life of one man and one woman to the exclusion of all others.”

I have carefully considered all the evidence before me, the issue to be determined is whether the marriage has broken down irretrievably due to the fact that the Respondent has behaved unreasonably such that the Petitioner cannot be expected to live with the Respondent.

According to Sir B. McKenna, in his discourse on the Breakdown of Marriage, irretrievable breakdown of marriage is a marriage which stands no chance because the parties to the marriage have ceased co-habiting and one of the parties (or both) intends not to resume cohabitation.

In this case, the fact being relied upon by the Petitioner is that of *unreasonable behaviour*. Passingham in Law and Practice in Matrimonial Causes states as follows:

“the Courts have refrained from any attempt at an exhaustive definition of behaviour...Each case raises a question of fact and degree which may depend on the personalities of the parties...the phrase “cannot reasonably be expected to live with the Respondent,” poses an objective test...But the words “the Petitioner” and “the Respondent” do not refer to ordinary reasonable spouses who are placed in that position, but to the actual persons concerned in the case.”

In the case of **MAHANDE V MAHANDE (2)**, Cullinan, AJS extending this argument further with specific reference to the question, whether the Petitioner can or cannot reasonably be expected to live with the Respondent, stated as follows:

“I have to consider not only the behaviours of the Respondent as alleged...but the character, personality, disposition and the 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?"

In the case of **THURLOW V. THURLOW (3)**, the Court in deciding the question of "unreasonable behaviour" held that: -

"In order to establish that a Respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with the Respondent, it was not sufficient merely to establish that the marriage was dead and that it was impossible for the Petitioner to cohabit with the Respondent. It had to be shown that it was the Respondent's behaviour which justified a conclusion by the Court that the Petitioner could not reasonably be expected to endure cohabitation."

I have analysed the evidence adduced before me. The Petitioner testified that the Respondent has had children during their marriage some of whom she did not know about. That his unremorseful and perpetual infidelity, had affected their conjugal rights and caused an emotional detachment between them. The matrimonial history shows that the Respondent had been engaging in extra marital affairs, an act which the Petitioner stated in her evidence she can no longer tolerate. The evidence also indicated that the Respondent did not provide support for the family and was not really a part of the family due to his absence from them although he lives under the same roof. During cross examination the Respondent confirmed that he left home for some time without communication with the Petitioner and this ^{caused} the Petitioner to send the Respondent's friend and it was him who

convinced the Respondent to go back home. He was away in Chinsali from January 2020 to April, 2021.

Furthermore, I have found that this marriage has broken down and stands no chance because there is clearly no more love and affection between the parties herein and as a matter of fact the Respondent has not disputed having engaged in extra-marital affairs nor having had other children outside their marriage. In concluding that this marriage has broken down irretrievably I find solace in the English case of **STEVENS V STEVENS (5)** in which it was held that the Court should consider the totality of the evidence of the matrimonial history and cumulative conduct of the Respondent.

It is also common cause that the parties are still living under the same roof at House No. 2351 PHI, Bennie Mwiinga Housing Estate Lusaka. Living apart under the same roof had been difficult to satisfy the test of irretrievable breakdown, until the case of **FULLER V FULLER (4)** where Lord Denning propounded the law.

Lord Denning on appeal stated inter alia that:

“This case raises the meaning of the words “living apart” in the new Divorce Reform Act of 1969. Section 2(1)(e) says that a marriage is to be held to have broken down irretrievably if “the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.” Section 2(5) says: “For the purposes of this Act a husband and wife shall be treated as living apart unless they are living with each other in the same household.”

...in Santos V Santos this Court stressed the need, under the new Act, to consider the state of mind of the parties and, in particular, whether they treated the marriage as subsisting or not. Clearly they treated it in this case as at an end.

In this case we have to consider the physical relationship of the parties... I think the words "with each other" means "living with each other as husband and wife." In this case the parties were not living with each other in that sense."

Stamp L.J agreed with Lord Denning and said that:

"Living with each other" connotes to my mind something more than living in the same household: indeed, the words "with each other" would otherwise be redundant."

This provision is a functional recognition that marriage is a contract from which the parties should be freed if the substratum of the relationship, that is, mutual love and understating disappear.

On the basis of the Court of Appeal decision in **FULLER V FULLER (4)** I find that although the Petitioner and the Respondent live under the same roof at House No. 2351 PHI, Bennie Mwiinga Housing Estate, Lusaka they do not live as husband and wife.

In the circumstances, I am satisfied that the Petitioner has sufficiently proved the contents of her Petition and is entitled to a *Decree Nisi* particularly that the Respondent is not contesting the divorce which is evidence that the parties do not wish to continue being married.

On the totality of all the evidence adduced herein, I am satisfied that the marriage solemnized between **MERCY ELIZABETH KHOZI MWILA**

and **SIMON MWILA** on 5th September, 2005 at the Office of the Registrar of Marriage, Civic Centre in the City and Province of Lusaka of the Republic of Zambia has broken down irretrievably in terms of **Section 8 and Section 9(1)(b) of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia**. I am further satisfied that granting a Decree Nisi will not cause grave financial or other hardship to the Respondent.

I accordingly Decree that the said marriage be dissolved and a *Decree Nisi* is hereby pronounced dissolving the marriage and I make the following Orders: -

1. The *Decree Nisi* shall become Absolute six (6) weeks from the date hereof unless cause be shown why the same cannot be made Absolute.
2. The Petitioner shall have custody of the children of the family with reasonable access being granted to the Respondent.
3. I refer the issue of property settlement to mediation pursuant to **Order 31 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia**.
4. Each party is to bear their own costs of this action.

DELIVERED AT LUSAKA THIS 29TH DAY OF JUNE, 2024.



**WILLIAM S. MWEEMBA
HIGH COURT JUDGE**