

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

2022/HPF/D423

BETWEEN:

EVERISTO MUMBA

AND

ANNIE MUWOWO MUMBA



PETITIONER

RESPONDENT

*Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 3rd December, 2024.*

For the Applicant: In Person
For the Respondent: In Person

J U D G M E N T

Legislation and Other Works Referred To:

1. *The matrimonial causes act no. 20 of 2007.*
2. *Rayden and Jackson on Divorce and Family Matters 16th Edition, Butterworths.*
3. *Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts' &*
4. *Magistrates' Courts, 11th Edition, London, Butterworths.*
5. *Supreme court of England and Wales (1999 Edition) Vol. 1 ('the White Book')*
6. *Bryan A Garner (2009) (11thEdn) Blacks' Law Dictionary. West Publishing Company*
7. *J.H.C Morris titled Conflict of Laws, Second Edition*
8. *Halsebury's laws of England/ Confidence and Information Privacy Conflict of Laws (Vol. 19) (2011). Lexis Nexis*

Cases Referred To:

1. *H vs. H 2007 CILR 129*
2. *Lord v. Colvin (1859), 28 L.J. Ch. 361; 7 W.R. 250*
3. *Gulbenkian v. Gulbenkian (4) ([1937] 4 All E.R. at 627*
4. *Udny v Udny (1869), LR. 1 Sc. &C Div. 441⁴*
5. *Anuradha vs. Divyanshu Gautam CS No.564/2015.*
6. *Axiz Pty Limited v. Cloudtech Zambia Limited and Another Appeal No. 221 of 2020.*

1.0 INTRODUCTION

1.1 This is a Petition for dissolution of marriage which was filed on 22nd August 2022, ***pursuant to the provisions of section 8 and 9 (1) (b) of the Matrimonial Causes Act No. 20 of 2007*** on the ground that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

Sections 8 and 9 (1) (b) of the Matrimonial Causes Act provides that:

“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.

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...”

1.2 Further, **Section 9(2) of the Matrimonial Causes Act** provides that:

“On a petition for divorce it shall be the duty of the Court to inquire so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.” (Court’s emphasis)

2.0 BACKGROUND

2.1 The Petition indicates that the Petitioner is namely ***Everisto Mumba***, who was lawfully married the Respondent, ***Annie Muwowo Mumba***, on the 17th February 1995 before the Registrar of Marriages at Lusaka Civic Centre, in the City and Province of Lusaka of the Republic of Zambia.

- 2.2 After the celebration of marriage, the Parties lived as husband and wife at University Teaching Hospital Hostels and later moved to South Africa from October 1996 to March 2004.
- 2.3 Both the Petitioner and Respondent are domiciled in the Republic of Scotland.
- 2.4 Both the Petitioner and the Respondent resides at 2 Burnett Park Troon Ayrshire KA10 7FT in Scotland.
- 2.5 The Petitioner is a Medical Doctor at University Teaching Hospital Cross house NHS Ayrshire & Arran Area Laboratories Cross house KA2 OBE Kilmarnock United Kingdom.
- 2.6 The Respondent is a nurse by profession at Hairmyres Hospital in Scotland.
- 2.7 There are Two (02) children of the family namely;
- i Mwanza Mumba a boy born on 11th June 1995 he is 29 years old and currently working and living on his own.*
 - ii Mwizha Chiti Mumba a boy born on 22nd February 2004. He is 20 years old.*

- 2.8 There are no other children born to either the Respondent or the Petitioner before or after their marriage.
- 2.9 There have been no previous proceedings in any Court in Zambia or elsewhere, with reference to the marriage that are capable of affecting its validity or substance.
- 2.10 There are no proceedings continuing in any country outside Zambia which are in respect of the marriage or are capable of affecting its validity or subsistence.
- 2.11 No agreement or arrangement has been made or proposed to be made between the parties in relation to maintenance, custody or property settlement.
- 2.12 The said marriage has broken down irretrievably. The Petitioner has alleged that Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

3.0 THE PETITIONER'S CASE

- 3.1 The Petitioner alleges that the marriage has broken down irretrievably as the Respondent has behaved in

such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

3.2 The Petitioner has relied on **Section 8 and 9 (1) (b) of Matrimonial Causes Act**, which provides that irretrievable breakdown maybe proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner, or vice visa in the case of cross petition, cannot live with the Respondent.

3.3 **The Petitioner avers the particulars of unreasonable behavior herein are as follows;**

- i) *the Respondent is very abusive to the Petitioner verbally to an extent of saying she hates him with a passion and this has resulted in him being impacted with negative emotions.*
- ii) *the Respondent and the Petitioner have been living in separate rooms within the same house.*
- iii) *the Respondent does not respect and trust the Petitioner in any way.*
- iv) *the Respondent shows serious dishonest sentiments where she is buying property in Zambia without informing the Petitioner.*

- v) *no affection towards the Petitioner and thereby depriving him conjugal rights.*
- vi) *the none affection from the Respondent has made the Petitioner believe she has other men and has since grown cold towards him.*
- vii) *efforts to resolve these marital problems have been met with futility as the Respondent refused to under go marriage counselling even after the Petitioner pays for the services of a counsellor. The Petitioner therefore fears for his life as one day he may react negatively.*

3.4 The Petitioner therefore prays that;

- i the said marriage be dissolved.*
- ii the Court makes an order for property settlement*
- iii that the costs of these proceedings be borne by each party.*
- iv Any other relief the court will deem fit.*

4.0 ANSWER

4.1 The Respondent admits that she did not file an answer to the Petition and no reason has been given but she acknowledged the service and indicated that she was not going to defend the petition.

5.0 HEARING

- 5.1 At the hearing of the matter on the 8th July 2024 the Petitioner augmented his Petition by testifying on oath that the marriage has broken down irretrievably on the basis of unreasonable behavior by the Respondent as stated in the Petition.
- 5.2 The Petitioner testified on oath in his own respect and did not call any witness. Further, he largely recited his averments in his Petition. For avoidance of repetition, I shall only highlight issues he did not aver in the Petition.
- 5.3 The Petitioner informed the Court that problems started in the 2020 when the Respondent moved out of the bedroom and started sleeping in different rooms within the same house
- 5.4 The Petitioner further told the Court that the Respondent has verbally abusing the Petitioner and this started way back in 2019. The Respondent is Rude and uses nasty language.

- 5.5 After the child was born the Petitioner tried to have a conversation with her and tries to understand why the two couldn't talk or have friendship.
- 5.6 The Petitioner stated that the Respondent had later in the year 2022 told the Petitioner that she had lost love for him, the Respondent further said that she had lost interest in the Petitioner.
- 5.7 The Respondent stopped going to church together with the Respondent and yet they married as a Christian Couple.
- 5.8 The Petitioner further alluded that even when he is trying to advise the children on something the Respondent will always say the opposite things, she would say all the opposite as if it was just planned.
- 5.9 During Covid 19 lock down, the Respondent told the Petitioner that she had lost interest in the relationship and she would ask the Petitioner who would go out of the house, the Respondent did not respond and she went to tell him to have a open relationship, which means where two people who are married can have

affairs outside of the marriage but the Petitioner did not accept that.

5.10 The Respondent would move out without informing the Petitioner, the Petitioner wouldn't know when she moves out and when she's in. The Petitioner would not know when she's working and when she is not. The Respondent bought a piece of land in Luanshya without telling the Petitioner.

6.0 SUBMISSIONS

6.1 There were no submissions from both parties filed at the time of this judgment.

7.0 CONSIDERATIONS AND DECISION

7.1 I have considered the Petitioners' pleadings and the oral testimony by the Petitioner and the Respondent's cross examination herein.

7.2 Firstly, I take cognizance of the fact that the parties celebrated their civil marriage in the Republic of Zambia as evidenced by the marriage certificate exhibited in the Petition. I therefore make a finding of fact that the parties' marriage was celebrated in compliance with the

Marriage Act, Chapter 50 of the Laws of Zambia. I

am satisfied that the parties were properly married in compliance with the laws of the Republic of Zambia.

7.3 It is the presence of the marriage certificate which forms the basis of my jurisdiction over the petition as the same shows that their marriage is not customary but statutory.

7.4 I have also taken cognizance of the position that the Petitioner and the Respondent are both resident and domiciled in Scotland and for purposes of ***Section 4(3) of the Matrimonial Causes Act***, which bestows jurisdiction on the High Court, to entertain a petition for dissolution of a statutory marriage, based on the residence or domicile of one or both parties to the marriage. The provision states as follows;

“The Court shall have jurisdiction in proceedings for divorce or for a decree of nullity of marriage if either party to the marriage...”

(a) is domiciled in Zambia at the date of the commencement of the proceedings; or

(b) is resident in Zambia at the date of the commencement of the proceedings, and has been ordinarily so resident for a period of not less than twelve months immediately preceding that date.

7.5 It is trite that the private legal status of a person is determined by the law of the country or place in which such a person is domiciled. This is known as the *lex domicilii*.

7.6 The *lex domicilii* is of paramount importance as it determines which legal rules and Courts have authority over one's legal matters, ensuring fairness and orders, in situations involving multiple legal systems.

7.7 In this jurisdiction, the jurisdiction of the High Court to grant an order of divorce or nullity as per section 4(3) (a) is based on the fact that either party to a marriage is domiciled in Zambia at the date of the commencement of the proceedings. Therefore, a party must prove that

he or she was at the date of commencement of the proceedings domiciled in Zambia.

7.8 ***What then is Domicile?*** According to the **Blacks' Law Dictionary 11th Edition at Page 614**, the term 'Domicile' is defined as:

"The Place at which a person has been physically present and that the person regards as home; a person's true fixed, principal and permanent home, to which that person intends to return and remain even though currently residing elsewhere"

7.9 Further, the **Halsebury's Laws of England/Conflict of Laws (Vol 19) (2011) at page 234** in explaining the Function and Meaning of Domicile states as follows as:

"The primary purpose of defining domicile is to identify this personal law by considering factors which connect the person to a territory with a distinctive legal system. Domicile defines the legal relationship between an individual and that

legal system which is invoked as his personal law...”

7.10 The authors go on to state that:

“A person is domiciled in that country in which he either has or is domiciled or is deemed by law to have his permanent home. Every individual is regarded as belonging, at every stage in his life to some community consisting of all persons domiciled a particular country; the legal rules as to domicile are such his legal idea may not correspond to social reality. Although a person may have more than one home but he can have only one domicile for any one purpose”

7.11 The meaning of the word ‘Domicile’ was also given in the case of *H vs. H 2007 CILR 129*¹ wherein the court stated that:

“The domicile of a person is in general the place or country which is in fact his

permanent home, or is so deemed by operation of law, and it is not necessarily determined by his nationality. It is the place or country in which a person is resident *animo manendi*. The law of the country of a man's domicile applies to him. Every person is deemed to have a domicile. However, no one has more than one domicile at one time”

7.12 In describing domicile, the **Halsebury's laws of England at page 235** distinguished the types of domicile by stating that:

“The law attributes to everyone at birth a domicile which is called a domicile of origin. This domicile may be changed and a new domicile which is called a domicile of choice acquired. The two kinds of domicile differ in the following respects:

- i. *The domicile of origin is received by operation of law at birth while domicile of choice is acquired by an individual actually moving to another country and intending to remain there indefinitely;*
- ii. *The domicile of origin is retained until the acquisition of a domicile of choice; it cannot be divested, although it remains in abeyance during the continuance of a domicile of choice; the domicile of choice is lost by abandonment whereupon the domicile of origin will revive unless some other domicile is acquired. The domicile of choice is destroyed once it is lost but may be acquired anew by fulfilling the same conditions as are required in the first instance*

iii. Domicile of Origin is more durable than that of choice, in the sense that the domicile is more difficult to establish a change of domicile

7.13 As can clearly be seen from the above, domicile of a person is a place where he has made his permanent home. Further it is clear that domicile may be acquired either by origin or by choice. While domicile of origin is determined at the time of ones' birth, domicile by choice is acquired by a person residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely.

7.14 The definition for domicile was also espoused in the English case of **Lord v. Colvin (1859), 28 L.J. Ch. 361; 7 W.R. 250²**, Kindersley, V.-C. said at p366:

"I would venture to suggest that the definition of an acquired domicile might stand thus: 'That place is properly the domicile of a person, in which he has voluntarily fixed the habitation of himself

and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or uncertain) shall occur to induce him to adopt some other permanent home.” (emphasis added)

7.15 According to Halsebury’s Laws, the two tests for acquiring domicile by choice are **‘residence’** and the **‘intention to remain’**. In terms of residence, in order to have acquired a domicile of choice in a country, the individual must have actually resided there. It is not sufficient that that he intended to reside there in the future nor that he actually set out on a journey to the new country, only to die on the way there.

7.16 That residence in this context means no more than personal presence in a country other than casually or as a traveler.

7.17 Regarding the test of intention to remain, **Halsebury Laws** states that the individual must have had a certain

state of mind he must have formed the intention of making his sole or principal home in a country of residence. In an instructive judgment, Langton, J. put the point very clearly in ***Gulbenkian v. Gulbenkian* (4)** ([1937] 4 All E.R. at 627³):

“The intention must be a present intention to reside permanently, but it does not mean that such intention must necessarily be irrevocable. It must be an intention unlimited in period, but not irrevocable in character.”

7.18 In the case of **H vs. H**, the test for intention to remain was expressed in the following terms:

“There must be a definite purpose to transfer one’s permanent home to another country and that there must be a residence in that country. In other words, a new domicile is acquired when there is an intention that has been carried out, for example, by actual residence there. A

**residence in pursuance of the intention,
however short, will establish a domicile....”**

7.19 The question whether or not a person has acquired a domicile of choice is not a question of law but of fact and has to be decided by the evidence in each particular case sufficient to satisfy the conscience of the Court.

7.20 The court in **H and H** considered factors that may evidence intention to change domicile. At pages **129-130**, the Court stated inter alia that:

“Proof of intention to change domicile is very important and must be strong. The intention to change domicile may be evidenced in many ways. Although no general rules can be laid down as to the method of proof, there are several factors that can be looked at; There may be a declaration of intention, or supposed change of domicile in documents such as wills, letters, emails, etc.; or in the case of a man or woman who has a residence in

the United Kingdom, the fact that he or she now lives elsewhere and has not gone back to England except for a short period of time, and has applied for work permits elsewhere continuously; or where the employer has applied to Immigration for a permit to say that he is a key employee and should not be sent back under the immigration “roll over” policy; or where parties have purchased a grave in a country, or a home in the country; or parties have very few ties abroad and have lived elsewhere continuously for a period of five years... (*Emphasis added*)

7.21 In this case, the husband petitioned for divorce on the ground that the marriage had irretrievably broken down. The husband, who was born in Kenya and educated in England, married the wife in London in 2001. The same year, they visited the Cayman Islands on a vacation and decided to live there. After the

breakdown of the marriage, the husband filed for divorce in Ceyman Islands, claiming to be “domiciled in the Islands” within the meaning of the Matrimonial Causes Law (2005 Revision), section 5. The wife applied to have the Petition struck out on the ground that the Court had no jurisdiction since the husband was not resident in the Cayman Islands but in the United Kingdom.

7.22 In dismissing the application, the Court held that the husband was “domiciled in the Islands” within the meaning of the Matrimonial Causes Law, section 5, and the Court had jurisdiction to hear the Petition. His six-year residence in Ceyman Islands, his links with the local community, his relationship with his employer and his declarations to witnesses, when taken together, provided persuasive evidence of a genuine intention to reside there permanently. These factors, together with his acquisition of a home there, were sufficient to establish residence...”

7.23 Turning now to the present case, whilst I acknowledge that the law under section 4(3) of the Matrimonial Causes Act, draws a distinction between the terms 'domicile' and 'residence', in determining whether or not domicile of choice has been acquired, residence of a person in a particular country, especially if it is continued for a long period of time, is evidence of intention to remain there and in the absence of other evidence, residence may support the inference that domicile of choice has been acquired.

7.24 Residence coupled with an intention to remain is what determines whether or not a party has acquired a domicile of choice.

7.25 A careful perusal of the evidence on record reveals the following facts: Under paragraph 3 to 6 of the Petition states as follows:

3) The Petitioner and Respondent are domiciled in Scotland.

4) The Petitioner and the Respondent reside at 2 Burnett Park Troon Ayrshire KA107FT in Scotland

**5) The Petitioner is a medical Doctor at University
Hospital Crosshouse NHS Ayrshire & Arran Area
Laboratories Crosshouse KA2 OBE Kilmarnock
United Kingdom.**

**6) The Respondent is a nurse by profession at
Hairmyres Hospital in Scotland**

7.26 The above statements are the averments by the Petitioner and have not been disputed by the Respondent, are in my view strong and persuasive of the fact that the Petitioner and the Respondent herein are both resident and domiciled in Scotland. I am guided by the following description of domicile of choice by Lord Westbury in ***Udny v Udny (1869), LR. 1 Sc. &C Div. 441***⁴: 'Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time...**It must be a residence not for limited period or particular**

purpose, but general and indefinite in its future contemplation. "

7.27 The Petitioner's continued residence in Scotland, the employment of the Petitioner and Respondent in Scotland including having their matrimony house in the same country are all sufficient to establish that the Petitioner and Respondent have intended to make Scotland their permanent home.

7.28 Having established that the Petitioner and Respondent are resident and domiciled in Scotland, I find that the Petitioner and the Respondent were not at the time of commencement of these proceedings domiciled in Zambia. Therefore, section 4(3) (a) of the Matrimonial Causes Act do not apply to the Petitioner and the Respondent.

7.29 Furthermore, I am of the view that it would be imperative in determining the jurisdiction of this Court to hear the Petitioner's proceedings to also consider the doctrine of '***forum non conveniens***'.

7.30 The **Black's Law Dictionary** defines the doctrine of *forum non conveniens* as:

“The doctrine that an appropriate forum even though competent under the law may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.”

7.31 In deciding on the choice of the appropriate forum, the Court generally gives preference to the Court where the matter was first instituted. Therefore, of principal consideration also is whether, looking at the facts and circumstances of the case, such as the location of the matrimonial home, interests of children to the marriage, permanent residence of the parties and their domicile, the other forum is more appropriate.

7.32 In ***Anuradha v. Divyanshu Gautam***⁵ an Indian case, which I cite for its persuasive value, the parties were

working and residing in Melbourne, Australia, where the divorce proceedings had been allegedly instituted by defendant. The Court in India had to consider whether the Indian Courts could be treated as an appropriate forum on the basis of principle of forum conveniens.

The Court thus stated that;

“The choice of appropriate forum is to be made on the basis of factors designed to ensure, if possible, that action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage of one of the litigants at the expense of other in a jurisdiction that is otherwise inappropriate. While deciding which forum would be the appropriate forum to decide the action, it is necessary to see where the justice can be done at substantially less in convenience and expense and where the action had most real and substantial

connection such as availability of witnesses and the law governing the relevant transaction and the places where the parties respectively reside or carry on business. And unless the balance is strongly in favour of party seeking injunction, the choice of forum of opponent party should rarely be disturbed”

7.33 The Court of Appeal re-echoed these factors that fell for consideration under the doctrine of forum non conveniens in the case of ***Axiz Pty Limited v. Cloudtech Zambia Limited and Another***⁶ when it held that;

“There must be consideration as to whether there is another forum which is more appropriate in which the action has the most real and substantial connection such as convenience or expense.”

7.34 In my consideration of whether there is another forum more appropriate in this case, I have had regard to the

fact that both the Petitioner and the Respondent are resident Scotland.

7.35 The parties also work in Scotland wherein they have their matrimonial home that may be subject to property settlement upon the dissolution of the Marriage between the Petitioner and the Respondent.

7.36 Considering these facts, I have no difficulty in arriving at the conclusion that the parties have the most real and substantial connection to the Court in Scotland and not just to secure a juridical advantage for either of the parties.

7.37 In view of the doctrine of *forum non conveniens*, I find that the Scottish Court is a more appropriate forum to exercise jurisdiction over this matter.

8.0 Conclusion

8.1 In view of all that has been said above and for the avoidance of doubt, I find that this Court lacks the requisite jurisdiction to hear and determine the

Petitioner's process filed before this Court on 22nd August, 2022 for the reasons stipulated above below:

- i) *That the Petitioner and Respondent were not at the time of commencement of these proceedings domiciled in the Republic of Zambia to warrant the invocation of this court's jurisdiction under section 4(3)(a) of the Matrimonial Causes Act;*
- ii) *On the basis of the doctrine of forum non conveniens, the forum with the closest and most real substantial connection to the matter and the parties in this case is the Scottish Court and not the Zambian Court;*

b. The Petitioner's action is accordingly set aside for want of Jurisdiction.

9.0 Costs are in the cause.

Dated at Lusaka this 3rd December 2024.


M.M. Bah-Matandala
HIGH COURT JUDGE

