

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

**2024/HPF/D131**

**BETWEEN:**

**YANG YE**

**AND**

**TINA MUCHINDA**



**PETITIONER**

**RESPONDENT**

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

***For the Petitioner:*** Mr. B. Mulungushi – Milner & Paul Legal Practitioners.

***For the Respondent:*** Ms. Tina Muchinda – (In person).

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## **JUDGMENT**

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LEGISLATION REFERRED TO:

- 1. The Matrimonial Causes Act, No. 20 of 2007 of the Laws of Zambia.***
- 2. The High Court (Amendment) Rules 2020, Chapter 27 of the Laws of Zambia.***
- 3. The Matrimonial Causes Rules of England of 1973.***
- 4. Family Proceedings Rules 1991 of England.***

CASES REFERRED TO:

- 1. Pounds V. Pounds (1994) 1 F.L.R. 775.***
- 2. Fuller V Fuller (1973) 2 ALL ER 650.***

**YANG YE** (the Petitioner) filed his amended Petition for dissolution of marriage on 28<sup>th</sup> February, 2024 seeking to dissolve his marriage to **TINA MUCHINDA** (the Respondent).

The Petition was brought pursuant to **Section 8 and Section 9(1)(d) of the Matrimonial Causes Act No. 20 of 2007.**

It was deposed that the Petitioner was married to the Respondent on 3<sup>rd</sup> March, 2018, at the Office of the Registrar of Marriages at Lusaka Civic Center in the City and Province of Lusaka of the Republic of Zambia; that both parties are domiciled in Zambia; that immediately after the marriage the Petitioner and the Respondent lived together as husband and wife in Parklands, Kitwe on the Copperbelt Province of the Republic of Zambia; that the Petitioner is a Businessman and currently resides at House # 5 Moses Musuwa Close, Nyumba Yanga, Lusaka while the Respondent is a Housewife and still resides at the same residence.

It was also averred that there is one child of the family, now living, namely Sofia Yang born on 11<sup>th</sup> February, 2019.

There are or have been no previous proceedings in Zambia or elsewhere with reference to the said marriage or between the Petitioner and the Respondent with reference to any property of either or both of them; there are no proceedings continuing in any country outside Zambia with respect to the marriage capable of affecting its validity or subsistence.

It was further averred that there was an arrangement between the parties for the support of the Respondent in the event that a decree nisi is granted.

The Petitioner alleges the irretrievable breakdown of the marriage on the ground that the parties have since January, 2021 lived apart for a continuous period of at least two (2) years immediately preceding the

presentation of the Petition and that the Respondent consents to a Decree *Nisi* being granted.

The Petitioner prays;

- i. *That the marriage be dissolved.*
- ii. *That the Respondent be given full custody of the child of the family with reasonable access to the Petitioner during weekends and holidays;*
- iii. *That there be no order for property settlement; and*
- iv. *Any other relief that the Court may deem fit.*

The Respondent filed Consent to Dissolution of Marriage on 20<sup>th</sup> November, 2023. She confirmed that her marriage with the Petitioner has broken down irretrievably and that they have lived apart for a continuous period in excess of two (2) years preceding the presentation of this Petition and she consents to the dissolution of the marriage with the Petitioner.

It is common cause that the Petitioner and the Respondent live under the same roof at House No. 5 Moses Masuwa Close, Nyumba Yanga, Lusaka. Living apart under the same roof had been difficult to satisfy the test of irretrievable breakdown, until the case of **FULLER V FULLER (2)** 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. The Section provides for a form of divorce by consent of the parties. Spouses may lawfully agree to a separation with a view to divorce.

On the basis of the Court of Appeal decision in **FULLER V FULLER (2)** I find that although the Petitioner and the Respondent live under the same roof at House No. 5 Moses Masuwa Close, Nyumba Yanga, Lusaka they do not live as husband and wife. That is, they do not live with each

other as husband and wife. In the original Petition for Dissolution of Marriage filed on 28<sup>th</sup> February, 2024 at particular No. XI of paragraph 12 the Petitioner stated that:

***“This resulted in countless arguments which caused the Petitioner and the Respondent to live in separate bedrooms for three (3) years from 2021 up to now.”***

After considering the state of mind of the parties it is clear that they treat the marriage as not subsisting. They both treat the marriage as being at an end. The Petitioner having petitioned for a divorce on the ground of living apart for two years, the Respondent was only too willing to recognize this. She signed the form of Consent to a Decree Nisi being granted.

I find that the Petitioner has sufficiently proved the contents of his Petition and is entitled to a *Decree Nisi* particularly that the Respondent is not contesting the divorce. I will therefore deal with the Petition in the way that Petitions in the Special Procedure List are dealt with.

The Special Procedure was introduced in 1973 in England and Wales for undefended divorces based on the fact of two years' separation plus consent, although only where the couple did not have children.

This procedure allowed a divorce to be granted on the basis of Affidavit evidence alone. In 1977 it was extended to all undefended divorces, and the “Special Procedure” became the norm-see the ***Family Proceedings Rules 1991 (Statutory Instrument 1991/1247) Rule 2. 36***. The Procedure was summarized by Waite L.J in the case of **POUNDS V POUNDS (1)**.

Whilst the **English Family Proceedings Rules 1991** do not apply to Zambia, I am of the firm view that undefended divorces based on the fact of two years' separation plus consent should be dealt with using the Special Procedure i.e on the basis of Affidavit evidence alone without the need for the parties to attend Court for their case to be heard. I am of the considered view that the Court is empowered to determine such a divorce on the documents before it pursuant to **Order 30 Rule 6A of the High Court Rules, Chapter 27 of the Laws of Zambia** as amended by the **High Court (Amendment) Rules 2020. Rule 6 A of Order 30** provides as follows:

**“6A. (1) Where the Court is satisfied that the application can be disposed of on the basis of the documents before it, the Court may determine the matter without the attendance of the parties or their advocates and shall issue a notice of the date of delivery.**

**(2) This Rule shall apply to –**

**(a) An interlocutory application;**

**(b) An application under 11(a);**

**(c) An application for determination on questions of law or construction of documents; or**

**(d) Any other application as may be directed by the Court.”**

I have considered the evidence of the Petitioner and noted that the Respondent has given her consent to dissolution of the marriage.

I am therefore satisfied that the marriage solemnized between **YANG YE** and **TINA MUCHINDA** on 3<sup>rd</sup> March, 2018, at the Office of the Registrar of Marriages at Lusaka Civic Center 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)(d) 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 hereby invoke the provisions of **Section 41 of the Matrimonial Causes Act, No. 20 of 2007** and grant the *Decree Nisi* and I make the following Orders.

1. The Order of *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 Respondent is given full custody of the child of the family with reasonable access to the Petitioner over weekends and school holidays;
3. The Parties shall both maintain the child of the family.
4. No order relating to property settlement has been made; and
5. Each party is to bear their own legal costs of this action.

**DELIVERED AT LUSAKA THIS 18<sup>TH</sup> DAY OF JUNE, 2024.**



**WILLIAM S. MWEEMBA  
HIGH COURT JUDGE**