



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NUMBER 30 OF 2015

BETWEEN:

J [REDACTED] S [REDACTED].....PETITIONER

AND

T [REDACTED] S [REDACTED].....RESPONDENT

CORAM: THE HONOURABLE JUSTICE MR. S.A. KALEMBERA

Mr Kalanda, of Counsel for the Petitioner

Miss Chimang'anga, Official Interpreter

JUDGMENT

Kalembera J

INTRODUCTION

This is the Petitioner's petition for divorce. The Petitioner, J [REDACTED] S [REDACTED], prays for the dissolution of his marriage with the Respondent, T [REDACTED] S [REDACTED], on the ground that the Respondent has since the celebration of their marriage committed adultery and the Petitioner finds it intolerable to live with her. And consequently, that his marriage has irretrievably broken down due to the Respondent's adultery. The Respondent, despite being served with the

petition and all the necessary documents, did not enter an appearance. Thus, the petition was heard in her absence.

JURISDICTION

The parties were married on [REDACTED] of December 2008, at the Registrar General's office. After the celebration of the marriage they have been resident in the United Kingdom. Section 3 of the Marriage, Divorce and Family Relations Act, 2015(hereinafter referred to as "the Act") provides as follows:

"This Act shall apply to marriages entered into on or after the day it comes into operation; but Part IX shall apply to all marriages regardless of the date they were celebrated."

The parties' marriage does not therefore fall under this Act.

And section 114(1) of the said Marriage, Divorce and Family Relations Act, 2015 provides as follows:

"The Marriage Act, the African Marriage (Christian Rites) Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act are hereby repealed."

If the parties' marriage does not follow under this new Act, and the Divorce Act and these other Acts have been repealed, where does that leave the parties' herein?

However section 114(6) of the said Act provides as follows:

"Any proceedings taken with reference to –

- (a) a marriage celebrated or entered into;*
- (b) a register book kept; or*
- (c) any warrant issued,*

under an enactment repealed by this Act, shall have effect as if taken with reference to the corresponding provisions of this Act."

Thus one can safely conclude that the parties marriage, more so this Petition shall have effect as taken with reference to the corresponding provisions of this Act. And section 60 of the said Act provides as follows:

“(1)Nothing in this Act shall authorize –

(a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented; or

(b) the making of any decree of nullity of marriage unless –

(i)the petitioner is domiciled in Malawi at the time when the petition is presented; or

(ii)the marriage was celebrated in Malawi.”

In the matter at hand, though the parties are resident in the United Kingdom, their domicile has remained Malawi. And the petitioner was present when this petition was presented, hence domiciled in Malawi. Thus, the requirements under section 60 of the said Act have been satisfied. This court has jurisdiction to hear this petition for divorce.

EVIDENCE

The petitioner was the only witness who testified, and he adopted his witness statement. It was his evidence that he married the respondent, then known as T [REDACTED] on [REDACTED] December 2008, at the Registrar General’s Office. They have one issue of the marriage named [REDACTED] S [REDACTED] born on [REDACTED] 2010. During their marriage they have cohabited at diverse places in Blantyre before moving to the United Kingdom. Currently the parties are residing at the following addresses:

Petitioner –

[REDACTED]

Respondent –

[REDACTED]

Further that both the petitioner and respondent are domiciled in Malawi though currently working in the United Kingdom. It was further the petitioner’s testimony

that that the respondent has since the celebration of their marriage committed adultery and the petitioner finds it intolerable to live with her. That in or around October 2013, the respondent tested positive for a sexually transmitted disease known as HIV whilst both the petitioner and the parties' child tested negative. And that he has in no way been accessory to or connived at or condoned the said adultery.

It was further the petitioner's testimony that as a family they used to share everything for the child. After separation he pays child maintenance to the tune of £260/month to cater for the necessities of life for the child. He does not pay for the child's school fees because she has a British passport and therefore entitled to British support. In response to the court, he told the court that the respondent has never complained that the support he provides is insufficient. Hence he prays for the dissolution of his marriage.

ISSUES FOR DETERMINATION

The main issue for determination is whether the marriage between the petitioner and the respondent be dissolved.

LAW AND ANALYSIS

Section 61(1) of the Act provides as follows:

“(1)The court may, upon satisfying itself that a marriage has irretrievably broken down –

- (a) grant a decree of judicial separation to provide for the separation of parties to a marriage; or*
- (b) grant a decree of divorce to dissolve the marriage.”*

A marriage is said to have irretrievably broken down when a situation arises when either or both spouses are no longer able to live with each other, thereby destroying their husband and wife relationship with no hope of resumption of spousal duties. In other words, when the relationship between the husband and wife has broken down beyond repair. Unfortunately in this matter, the respondent decided not to make an appearance. Hence this court does not have

the benefit of her own version of events. The testimony of the petitioner is thus, unchallenged. The petitioner believes that the respondent has since the celebration of their marriage committed adultery. The petitioner is fortified in this view because sometime in 2014, after the respondent had been refusing to have sex with the petitioner, the petitioner, at the plodding of the respondent, through her aunt, went for HIV testing with the respondent. The petitioner tested negative whereby the respondent tested positive. The respondent and the petitioner then decided to have their daughter tested as well. Fortunately she tested negative.

The petitioner didn't move out of the matrimonial home immediately, out of their daughter's concern, as well as the respondent's concern since she was utterly devastated. The results confused the respondent since before the birth of their daughter the respondent had tested HIV negative. Hence he was convinced that she might have contracted HIV after the birth of their daughter, thus, he was further convinced that she had been cheating on him. On 24th November 2014, things came to a head, when the respondent falsely accused him of trying to leave her for another woman, before her work place's welfare office, such that he was forced to move out of the matrimonial house the same day.

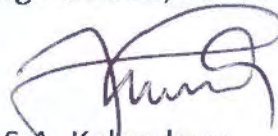
If a husband or wife is proved to have contracted a venereal disease (not from the wife or husband) during marriage that is sufficient evidence of adultery –see **Gleen v Gleen** (1900) 17 T.L.R. 62; **Pettit v Lilley** [1946] 1 ALLER 593; **Browning v Browning** [1911] P. 161. In the matter at hand, in the absence of contrary testimony, this court is inclined to believe the petitioner's version that the respondent contracted HIV through adultery. And the petitioner believes that due to this situation his relationship with the respondent has broken down beyond repair such that they cannot continue as husband and wife. It has further been held that the Court can find that the marriage has broken down irretrievably where the petitioner satisfies the Court that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent – see **Katz v Katz** [1972] 3 ALLER 219; **Pheasant v Pheasant** [1972] 1 ALLER 1073. And persistent refusal of sexual intercourse without explanation over a long period of time may justify the other spouse leaving –**Sheldon v Sheldon** [1966] P.62.

In the matter at hand, the respondent had been denying the petitioner sex for over one year without any reasonable explanation. They had been quarrelling over many issues and all attempts to settle their differences privately between themselves proved futile. To sum it all, the respondent tested positive for HIV, whereas the petitioner and their daughter tested negative. That led the petitioner to the sad conclusion that the respondent contracted HIV through adultery. Hence the petitioner feels that their marriage has irretrievably broken down, to wit, that it has broken down beyond repair. In the circumstances, the petitioner cannot be faulted for reaching such a conclusion. The conduct of the respondent by denying the petitioner sex for over a year, and contracting HIV from someone else other than the petitioner, has rendered the marriage between them irretrievably broken down. The petitioner has, rightly in my view, reached a point of no return. I am therefore satisfied that the petitioner has established on a balance of probabilities that his marriage to the respondent has irretrievably broken down.

CONCLUSION

All in all I am satisfied that the petitioner has established that a situation has arisen in their marriage which makes it impossible for the parties to stay married to each other. The parties' marriage has indeed irretrievably broken down. I therefore dissolve his marriage to the respondent and consequently grant him a *decree nisi*. Costs are for the petitioner.

PRONOUNCED this 15th day of August 2016, at the Principal Registry, Blantyre.



S.A. Kalembere

JUDGE