



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**



MATRIMONIAL CAUSE NO. 37 OF 2010

BETWEEN:

KELVIN MKULICHI PETITIONER

-AND-

GRACE MKULICHI (nee LUPESYA) RESPONDENT

MURRAY HENDERSON CO-RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Malijani, of Counsel, for the Petitioner

Mr. Gondwe, of Counsel, for the Respondent

Mr. O. Chitatu, the Official Court Interpreter

JUDGEMENT

Kenyatta Nyirenda, J.

The Petitioner, Kelvin Mkulichi, by this petition, seeks dissolution of his marriage to the Respondent, Grace Mkulichi, nee Grace Lupesya, on the grounds that (a) the Respondent has deserted the matrimonial home and that (b) the marriage has irretrievably broken down. The parties contracted their marriage on 23rd November, 2001 at the office of the Registrar of Marriages in Blantyre. The parties have at all material times been domiciled in Malawi. I am thus satisfied that this Court has jurisdiction to hear this petition.



There is one very important question that has to be determined at the outset, namely, whether or not the applicable law in this case is the Marriage, Divorce and Family Relations Act or the law existing prior to the enactment of the said Act. Section 3 of the Marriage, Divorce and Family Relations Act is relevant and it is in the following terms:

“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 Marriage, Divorce and Family Relations Act came into operation on 3rd July 2015 [hereinafter referred to as the “commencement date”]: see Government Notice No. 20 of 2015, published in Government Gazette dated 31st July 2016.

Section 3 of the Marriage, Divorce and Family Relations Act is in my view clear and unambiguous. It states in plain language that the Marriage, Divorce and Family Relations Act applies to marriages entered into on or after the commencement date save for Part IX of the Marriage, Divorce and Family Relations Act which applies to all marriages regardless of the date they were celebrated: see **Hilliard James Cathcart Kay v. Norah Nikkie Cathcart Kay and Murray Henderson, HC/PR Matrimonial Cause No 11 of 2015, unreported.**

The marriage between the Petitioner and the Respondent was entered into on 23rd November 2001. This is well before the commencement date. In the premises, by reason of section 3 of the Marriage, Divorce and Family Relations Act, the marriage herein will still be governed by the law existing prior to the enactment of the Marriage, Divorce and Family Relations Act, save for, of course, matters falling within Part IX of the Marriage, Divorce and Family Relations Act.

The facts are refreshingly simple and not in dispute. They are set out in the Petitioner’s witness statement dated 1st November 2016 which statement the Petitioner adopted to constitute his evidence in chief. The Petitioner and the Respondent were married on 23rd November 2001 at the office of the Registrar General in Blantyre in that office’s capacity as Registrar of Marriages. The Petitioner and the Respondent are Malawian nationals and are resident in Malawi. On the basis of the foregoing, it is my finding that both the Petitioner and the Respondent are domiciled in Malawi. Accordingly, I am satisfied that I have jurisdiction in this case.

Immediately after the celebration of the marriage, the Respondent was diagnosed with a medical condition of ovarian cysts. She underwent several surgeries both in Malawi and South Africa. According to the Petitioner, her medical condition

would improve when she went to stay with her parents and would deteriorate whenever she went back to the matrimonial home. Sometime in 2008, the Petitioner and the Respondent agreed that the Respondent should leave Blantyre for Lilongwe to live with her parents until her health improved. Whilst in Lilongwe, her health improved considerably.

From 2009, the Petitioner has persistently asked the Respondent to return to the matrimonial home but she has flatly refused to do so but without giving any reason for her refusal. The Petitioner has also talked to the Respondent's father and uncle to let the Respondent return but they too have refused to let her return. There is no issue of the marriage.

I now wish to remind myself about the nature of these proceedings. It is trite that the burden of proof in divorce cases is on the party that alleges misconduct on the part of the other party, there being a presumption of innocence: see **Redpath v. Redpath and Milligan [1950] 1 ALL E.R. 600**. Though divorce cases are civil in nature, the standard of proof in such cases is slightly higher than in other ordinary civil cases in which it is only on the preponderance of probability, although not as high as in criminal cases in which it has to be beyond reasonable doubt: See **Yotamu v. Yotamu [1995] 2 MLR 702**, **Maclune v. Maclune 9 MLR 409** and **Kamlangira v. Kamlangira [1966-68] ALR Mal 301**.

It is convenient at this stage to mention that during the hearing of the case on 12th January 2017, Counsel Malijani informed the Court that the Petitioner had decided to abandon the first ground for divorce, that is, desertion, but would still pursue the second ground for divorce, that is, irretrievable breakdown of marriage. On his part, Counsel Gondwe informed the Court that the submissions filed by the Petitioner represented the correct legal position on the matter and, consequently, the Respondent would not file any submissions as the same would be superfluous.

Counsel Malijani restricted his submissions to the issue of irretrievable breakdown of marriage and the same read as follows:

"Whether or not the marriage herein can be dissolved on ground that it has irretrievably broken down

3.3.1 In **Bailey vs Bailey ([1952] ALR 715)** the High Court in England described irretrievable breakdown as "amounting to an intention to persist in a course of conduct with knowledge that it is completely inconsistent with the maintenance of the matrimonial relationship."

- 3.3.2 *In deciding whether the marriage has irretrievably broken down on account of on party to the marriage, the court looks at the facts and the circumstances of each case.*
- 3.3.3 *In Bain vs Bain (29 ALR 461 quoted in Lang v Lang [1954] 3 ALR 57) the court said that the test which has to be applied in these cases is one either of actual intention by a party to bring the matrimonial relationship to an end or an intention on the party to persist in a course of conduct which any reasonable person would regard as calculated to bring about a rupture in the matrimonial relationship.*

4. ANALYSIS

- 4.1 *My Lord, the evidence of the Petitioner is that the parties herein agreed that the Respondent should live with her parents until her medical condition improves.*
- 4.2 *The Petitioner has further shown that upon the Respondent's health conditioning improving he has, on many occasions approached both the Respondent and her relation (including father and uncle) to persuade the Respondent to return to the matrimonial home. This evidence has not been controverted by the Respondent.*
- 4.3 *In her witness statement (paragraph 18) the Respondent states that she was so psychologically affected when the Petitioner dropped her at her parent's home in Lilongwe but does not state when that happened and whether that was before or after the Petitioner had already approached her and her relations to persuade her to return home.*
- 4.4 *The Respondent further states (paragraph 23) that she has always been ready and willing to come back to the matrimonial home yet she does not say whether she actually went back and whether the Petitioner turned her away.*
- 4.5 *The Respondent has persisted in staying away from the matrimonial home despite the Petitioner's numerous efforts to persuade her to come back to the matrimonial home.*
- 4.6 *Any reasonable person would regard the Respondent's conduct as calculated at bringing about a rupture in the matrimonial relationship.*

5. SUBMISSION

It is respectfully submitted that the marriage has irretrievably broken down and should be dissolved."

The ground advanced by the Petitioner for seeking divorce and the submissions thereon by Counsel are misconceived and must be dismissed summarily. Section 5 of the Divorce Act outlines five grounds of divorce; namely, adultery, desertion, cruelty, insanity or that the husband has since the celebration of the marriage been guilty of rape, sodomy or bestiality. It may not be out of place to quote the relevant part of section 5 of the Divorce Act in full:

“A petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent –

- (a) has since the celebration of the marriage committed adultery; or*
- (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or*
- (c) has since the celebration of the marriage treated the petitioner with cruelty; or*
- (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition,*

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality...”

I have read and re-read section 5 of the Divorce Act and searched in vain for a provision therein to the effect that irretrievable breakdown of marriage constitutes a ground for divorce under the Divorce Act. In the absence of proof of any one or more of the grounds of divorce set out in section 5 of the Divorce Act, it would be legally inappropriate to grant the relief being sought by the Petitioner and his petition would, accordingly, be dismissed with costs.

Pronounced in Court this 2nd day of February 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE