



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MATRIMONIAL CAUSE NUMBER 10 OF 2017

NANCY RUTH PEREIRA PETITIONER

AND

CARLOS MIGUEL DA MOTA PEREIRA RESPONDENT

CORAM : HON. JUSTICE F.A. MWALE.
: Chijere, of Counsel for the Petitioner
: Respondent present, unrepresented
: Mpandaguta, Court Interpreter

Mwale, J.

JUDGMENT

Introduction

1. The marriage I am tasked to dissolve was entered into on 7th November 2014 at the office of the Registrar General in Blantyre. There is one issue of the marriage a boy born in August 2016 who is currently living with his mother, the petitioner.
2. Dissolution of the marriage is sought on the following grounds:
 - (a) By living away from the matrimonial home, the respondent has denied the petitioner her conjugal rights and has thus treated her with cruelty.
 - (b) The respondent has treated the petitioner with a total lack respect and affection in front of her friends and she cannot be reasonably expected to live with him.
3. The respondent does not oppose the petition and although he appeared having traveled all the way from Mozambique where he is currently residing, he has never filed any process in this matter.

Court's reasoned determination

4. Only one of the grounds for divorce filed in this matter is permissible under section 5

of the Divorce Act and that is the ground of cruelty. I recently had occasion to revisit the definition of cruelty in the case of **Almeida v Almeida, Matrimonial Cause No. 8 of 2016 LL HC (unreported)** and concluded that:

conduct complained of as cruelty must be intentional conduct by the respondent of such a nature as to make continued cohabitation and exercise of conjugal duties unbearable or impossible. Such conduct must be of such a serious nature as to go beyond mere incompatibility. In assessing the conduct, the particular attributes of the petitioner that make him or her susceptible to intolerance of the conduct complained of must be considered.

By voluntarily moving out of the jurisdiction and failing to return, let alone to maintain contact with his son, the respondent has demonstrated intentional conduct that makes continued cohabitation and exercise of conjugal rights impossible. By his own testimony he has no desire to continue with the marriage and it is his desire that the parties permanently separate. The matter speaks for itself.

5. The fact that the Petition is not contested however raises the possibility that the petition may have been prosecuted in collusion. Section 7 of the Divorce Act expressly prohibits the prosecution of petitions in such a manner as follows:

(1) 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 and where there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter-charge which is made against the petitioner. (2) If the Court is satisfied on the evidence that—

- (a) the case for the petitioner has been proved; and
- (b) where the ground for the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and
- (c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the Court shall pronounce a decree nisi of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

The respondent was available in Court and I examined him for the possibility of collusion having occurred and was satisfied that it has not. There has been very limited contact between the parties and both parties have testified under oath that they did not

collude.

6. In view of the foregoing, I hereby grant a decree of divorce.
7. Although the petitioner has also prayed for any other reliefs as may be just, owing to the intricate nature of matrimonial proceedings, any reliefs sought must be particularized and argued. I therefore make no ancillary order to the grant of divorce.
8. Each party is to pay their own costs.

I so order.

MADE in open court this **23rd** day of **May 2019**.

Fiona Atupele Mwale
JUDGE