IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO104/2010**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

ALICE MPUNDU BWALYA NKONDE **Appellant**

And

SUNDAY BWALYA NKONDE **Respondent**

Coram : Mwanamwambwa , JS, Lengalenga and Hamaundu, AJS

On the 11th July, 2013 and 16th January, 2015

For the Appellant : Mrs. L. Mushota, Messrs Mushota & Associates

For the Respondent : Messrs Okware & Associates

JUDGMENT

Hamaundu AJS, delivered the Judgment of the Court:

Cases referred to:

1. **Warr v Warr (1975) 1 All E.R 85**
2. **Wise v Hervey Limited [1985] ZR 179**

Legislation referred to

1. **Matrimonial Causes Act No 20 of 2007**
2. **Rules of the Supreme Court (White Book) 1999 Edition**
3. **Odgers on Pleadings, 1996 edition**

This is an appeal against a decision of the High Court at Kabwe dismissing the appellant's application to strike out the respondent's petition.

The background to this appeal is as follows: In 2009, the respondent filed a petition for dissolution of marriage pursuant to **Section 9 (1) (d)** and **(e)** of the **Matrimonial Causes Act No. 20 of 2007.** The ground relied upon was that his marriage to the appellant had broken down irretrievably. The respondent relied on two facts to support that ground. The first fact was that the parties had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. The second fact was that the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and that the appellant consented to a *decree nisi* being granted. Upon being served with the petition, the appellant responded by filing three interlocutory applications. The first application was to strike out the petition on the ground that the facts that the respondent had relied upon to support the alleged break down of the marriage were not true. The second application was for maintenance. The third application was for the transfer of the matter from the District Registry at Kabwe to the Principal Registry at Lusaka. The respondent opposed all the three applications. The three applications were set for hearing on the

same date. The respondent, subsequently, filed a notice to raise preliminary issues, challenging the application to strike out the petition and the application to transfer the cause on the ground that they were bad in law. At the hearing, only the application to strike out the petition was heard.

In her affidavit in support of that application, the appellant had stated that infact the couple had been living together as late as November 2007 and that she had never consented to a decree nisi being granted.

In his affidavit in opposition, the respondent had conceded that the appellant had not consented to a *decree nisi* being granted but maintained that the couple had lived apart for a period of five years and that the decision to dissolve the marriage was cemented at a meeting held between November and December, 2007.

Before the court below, Mrs. Mushota, counsel for the appellant pointed to the respondent's admission that the appellant had not consented to the divorce and to the absence of a date when the separation was alleged to have commenced. She argued that, in those circumstances, the entire petition was a sham and could not succeed under **Section 9** of the **Matrimonial Causes Act No 20 of**

2007. Counsel relied on **Order 18 Rule 19** of the **Rules** of the **Supreme Court (White Book)** and works entitled **Odgers on Pleadings, 1996 edition,** to urge the court to dismiss the petition on the ground that it had disclosed no reasonable cause of action. Counsel insisted that the basis of the application was not that it was frivolous or vexatious but that it disclosed no cause of action.

In response, Mr. Okware, counsel for the respondent, submitted that the two parties had given two conflicting positions regarding the time when they started living apart. He argued that the two positions could only be resolved at trial and that it would be premature at that stage to use the appellant's version as a basis for striking out the petition. Counsel argued that **Section 9** of the **Matrimonial Causes Act** under which the application had been made did not provide for such application. Counsel suggested that **Section 103** of the same **Act** which provided for frivolous and vexatious applications would have been more appropriate.

The court below held that the parties had advanced opposing views which needed further inquiry and that it would be wrong for the court to take one view as the real position at the expense of the

other without trial. For that reason, the court dismissed the application.

The appellant has appealed against that ruling. She has advanced only one ground of appeal. The ground is that the court below erred in law and fact when it held that the fact of five years separation and the fact of two years separation with the appellant's consent to a *decree nisi* being granted could not be determined without trial and yet the respondent had neither given particulars nor exhibited any documents to support the facts that he was relying on.

The appellant filed heads of argument.

In the heads of argument, the appellant argued that the court has a duty to enquire into the alleged facts, but that there must be certainty as to the fact to be looked into. For example, an enquiry into the allegation of two years separation with consent as a ground for divorce must establish the dates when the parties went on separation, as well as the consent. Equally an inquiry into the allegation of five years separation must establish dates when the parties went on separation. The appellant relied on the case of **Warr v Warr**[1] among others.

The respondent did not file any heads of argument.

At the hearing, no one appeared on behalf of the respondent. Upon proof that the respondent was served with the appeal and the notice of hearing, we decided to proceed to hear the appeal.

Mrs. Mushota, learned counsel for the appellant relied entirely on the heads of argument filed by the appellant.

We have considered the grounds of appeal and the arguments advanced in the heads of argument. The gist of his appeal is, really, whether or not the respondents petition raises a cause of action against the appellant. In the case of **Wise V Hervey Limited**[2], we held:

> *"(ii) A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."*

We wish to state that raising a cause of action is not the same as proving that action. Therefore, the factual situation which is disclosed need not be such as to prove the action. It will suffice if the factual situation raises a *prima facie* case requiring the other person to refute that factual situation. In this case, the respondent

stated in his petition that he and the appellant had lived apart for a continuous period of at least five years before the presentation of the petition. He also stated that the respondent consents to a *decree nisi* being granted on the ground that the couple had lived apart for a continuous period of at least two years before the presentation of the petition. The two factual situations are sufficient to enable the appellant to defend the petition and state, for example, that the couple has never lived apart at all or that they have never lived apart continuously. The appellant may state that she does not consent to a *decree nisi* being granted. It will be up to the respondent to prove what he alleges at the trial. For the purposes of raising a cause of action, it is sufficient that he has stated facts which the appellant is able to contest.

Therefore, the learned judge in the High Court was on firm ground when he held that he could not decide whether or not the respondent had proved what he alleges in the petition at that stage. The appeal has, therefore, no merits and is dismissed with costs to the respondent.

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M. S. Mwanamwambwa

ACTING DEPUTY CHIEF JUSTICE

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E. M. Hamaundu,

ACTING SUPREME COURT JUDGE

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F. Lengalenga

ACTING SUPREME COURT JUDGE