

File 6025

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL No 141/2017

BETWEEN:

CHRISTOPHER MWAMBA

Appellant

AND

CLARA MBULO MWAMBA

1st Respondent

PATRICK NGANDWE

2nd Respondent



Coram: **Mchenga, DJP, Mulongoti and Lengalenga, JJA**
on 24th April, 2018 and 21st September, 2018

For the Appellant: Mr. Kalokoni – Messrs Kalokoni & Co

For the 1st & 2nd Respondents: Mrs. Mwenya-Marebesa – Legal Aid Counsel

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court

Cases referred to:

- 1. WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT LTD
(1982) ZR 172**

- 2. VINCENT MULEVU MUSUKUMA & KAINDU M. MULEVU v MAJOR BAXTER C. CHIBANDA & 2 ORS – SCZ Judgment Nº 33 of 2014**
- 3. KHALID MOHAMED v THE ATTORNEY GENERAL (1982) ZR 49**

Legislation referred to:

- 1. The Matrimonial Causes Act, Nº 20 of 2007.**
- 2. The Matrimonial Causes Rules 1977 SI 1977/344**

This is an appeal by the appellant against the judgment of the High Court delivered on 9th August, 2017, which was in the appellant's favour.

The brief background of this case is that on 12th June, 2017, the appellant as the petitioner, filed a petition for dissolution of marriage in the High Court, directed at the 1st and 2nd respondents. The petition for dissolution of marriage was brought pursuant to sections 8 and 9(b) of the Matrimonial Causes Act, Nº 20 of 2007. The said petition was based on the ground that the marriage between the petitioner and the 1st respondent had broken down irretrievably as a result of the 1st respondent's unreasonable behaviour such that the petitioner could not reasonably be expected to live with her. The petitioner further alleged that the 1st respondent had committed adultery and that he found it intolerable to live with her. He gave particulars of said unreasonable behaviour and alleged adultery at paragraph 11(i) to (xv) of the said petition.

The petitioner prayed for the following:

- (a) dissolution of the said marriage**
- (b) damages by way of compensation from the co-respondent for committing adultery with his wife**
- (c) full custody of the three children of the family**
- (d) an order that a DNA test be conducted to establish the paternity of the child born to the respondent and that the co-respondent be made to bear the costs thereof**
- (e) an order that the semi-finished house in Masala Chinese Complex in Ndola be held in trust for the three children of the family until the youngest reaches the age of 18 years**
- (f) an order that the respondent and co-respondent bear the costs of and incidental to the petition**
- (g) any other relief that the Court may deem fit.**

The petition was not contested by the respondent and co-respondent.

When the petition came up for hearing on 28th July, 2017, both the respondent and co-respondent were not present. However, Mrs. M. Marabesa-Mwenya, Legal Aid Counsel who was representing them, was present. A perusal of the said proceedings also indicates that the learned

trial judge in the court below dispensed with the trial of the petition after Legal Aid Counsel informed the court that her clients, the respondents, did not intend to defend the action.

Thereafter, the learned trial judge adjourned the matter for judgment. On 9th August, 2017 she delivered her judgment in which found that the petitioner's evidence, confirmed the facts stated in the petition, that the marriage had broken down irretrievably. The learned trial judge proceeded to grant the petitioner a *decree nisi* that would be made absolute after six weeks from date of judgment. She also stated that the question of the custody would be determined upon the application of the parties, while the question of property settlement would be determined by the Deputy Registrar upon application.

The learned trial judge did not make any pronouncement on the petitioner's prayer for damages by way of compensation from the co-respondent for committing adultery with his wife and for an order that a DNA test be conducted to establish the paternity of the child born to the respondent and that the co-respondent be made to bear the costs thereof. It is the said judgment that is now the subject of this appeal.

The appellant advanced only one ground of appeal which states as follows:

"The lower court misdirected itself both in law and fact by failing to adjudicate on each and every issue that was raised before it thus giving rise to a miscarriage of justice in totality."

Mr. Kalokoni, appellant's Counsel referred the Court to the reliefs sought by the appellant in the court below and he argued that trial judge should have adjudicated upon all legal issues raised before her, but she did not do so. He referred to a number of authorities contained in the appellant's heads of arguments and the case of **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT LTD**¹ the Supreme Court gave guidance on the issue of the courts' duty of adjudication of issues when it held as follows:

"The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality."

The same position was reaffirmed in the more recent case of **VINCENT MULEVU MUSUKUMA & KAINDU M. MULEVU v MAJOR BAXTER C. CHIBANDA & 2 ORS**².

However, upon being asked by this Court whether there was a trial in the court below where evidence was led to prove that the appellant's marriage to the 1st respondent had broken down irretrievably and whether the reliefs prayed for had been proved, learned Counsel for the petitioner

conceded that no trial took place as indicated by the proceedings in the court below.

Rule 37 of the Matrimonial Causes Rules of 1977 provides as follows:

"Subject to the provisions of rules 39, 40 and 48 of the Civil Evidence Act 1968 and any other enactment, any fact required to be proved by the evidence of a witness at the trial of a cause begun by petition shall be proved by examination of the witnesses orally and in open court."

It follows, that other than in cases where the court has ordered that evidence be led by affidavit, under **Rule 39 of the Matrimonial Causes Rules** or where leave has been granted to dispose of the petition through the special procedure list, under **Rule 48 of the Matrimonial Causes Rules**, witnesses, including the petitioner, must give oral evidence. This is the case even where the petition is undefended.

Where a petition is undefended, the practice is that the petitioner is still sworn in like any other witness. The petitioner is then led through the petition, setting out the grounds upon which the petition is anchored. At the end of such testimony, the petitioner sets out the reliefs being sought.

The grievance in the appellant's sole ground of appeal is that the court below failed to adjudicate on each and every aspect of the claim and that, therefore, there was a miscarriage of justice.

We accept appellant's Counsel's arguments as being valid. The reliefs claimed were based on allegations that needed to be proved by adducing evidence. It is settled law that the plaintiff must prove his case even where there is no defence and the Supreme Court decision in the case of **KHALID MOHAMED v THE ATTORNEY GENERAL**³ is instructive on the principle. In delivering the judgment of the Court, Ngulube, DCJ as he then was, observed as follows at page 51:


"... A plaintiff must prove his case, and if fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence."

On the strength of the authorities and provisions of the law cited, we find the appeal to be meritorious and we allow it. The learned trial judge erred when she dispensed with the trial and proceeded to write a judgement in which she referred to evidence adduced before her. Having dispensed


with the trial and not heard the petitioner, no evidence was led before her to make the findings that she made.

The net effect is that this appeal succeeds and the High Court judgment dated 9th August 2017 is set aside. We send the matter back to the High Court for trial before the same judge. We direct the honourable Judge follow the procedure we have set out and adjudicate upon each and every aspect of the petition.

Each party to bear his or her own costs.


C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT


J. Z. Mulongoti
COURT OF APPEAL JUDGE


F. M. Lengalenga
COURT OF APPEAL JUDGE