

J. JERE

IN THE HIGH COURT OF MALAWI



CIVIL CAUSE NO. 671 OF 1979

BETWEEN

MOSES HARRY NAMATE PETITIONER

and

ANNA IVY NAMATE RESPONDENT

and

MICHAEL BAZUKA MHANGO CO-RESPONDENT

Coram: Villiera J.

For the Petitioner: Mbalame, Chief Legal Aid Advocate

For the Respondent: Chizumila of Counsel

Co-respondent present in person

Official Interpreter: Sonani

JUDGMENT

The petitioner Moses Harry Namate prays for the dissolution of his marriage to the respondent Anna Ivy Namate on the ground of her adultery with the co-respondent Michael Bazuka Mhango. He claims damages from the co-respondent in the sum of K3,000 and prays further that the co-respondent be ordered to pay the petitioner's costs in these proceedings. The petitioner finally prays that he may be awarded custody of Jenifa Namate, a child of the marriage.

The respondent denies the charge of adultery and claims that at the time of her alleged marriage the petitioner was already married to another woman under customary law and that such earlier marriage was still subsisting. She contends therefore that her alleged marriage to the petitioner was a nullity. She prays accordingly that the marriage in fact celebrated between herself and the petitioner may be declared null and void. The co-respondent in his answer adopts the averments put forward by the respondent and accordingly prays that he be dismissed from the suit with costs.

The petitioner in his reply admits that he was previously married to the woman mentioned in the respondent's answer but denies in general terms the subsistence of that earlier marriage at the time he married the respondent.

The petitioner told the court that he was married to the respondent at the office of the Registrar of Marriages at Blantyre on the 26th May 1973 and that thereafter they lived at Chilomoni in the city of Blantyre up to August 1975 when he was convicted of an offence and was sentenced to serve a period of six years' imprisonment with hard labour. The petitioner then produced a marriage certificate, Exhibit 1, in proof of that marriage. He said however that while he was in prison the respondent wrote him a letter,

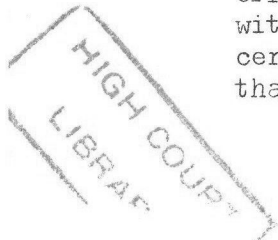


Exhibit 2, saying that she had two children, one born in 1976 and the other in 1978, by another man and that the petitioner should no longer therefore consider her as his wife. After the petitioner's release from prison, the respondent revealed in the presence of Party officials that the father of the two children was the co-respondent in this court. The co-respondent has not denied paternity of the two children. The petitioner admitted that he had previously been married to one Catherine Mitondo, a woman from his own village, but alleged that the marriage was dissolved by Soche Traditional Court. He explained that he did not obtain a divorce certificate at the time because he did not think it was necessary. When pressed as to why he had made no efforts to obtain one for the purpose of these proceedings, the petitioner said he thought the records would not be available. At any rate, the petitioner called his brother Luciano Namate who informed the court that he was the petitioner's advocate in the earlier marriage and that the marriage was effectively dissolved at Soche Traditional Court in the presence of the parties and their advocates. In cross-examination, this witness explicitly stated that the marriage was not dissolved at the village. He said that what was discussed at the village was ancillary relief, such as the maintenance and education of the children. The village headman, Peter Henry Mchere, confirmed that after the marriage was dissolved at Soche Traditional Court a letter was received by his late uncle, who was then the village headman. Mr. Mchere said that the court asked the village headman to settle ancillary relief with the parties and that this was eventually done.

At the close of the case for the petitioner I was asked to deal with the question of nullity first. I declined to do so because the validity of the petitioner's marriage to the respondent depended on whether his earlier marriage to Catherine Mitondo had effectively been dissolved. It was for the petitioner to prove that his earlier marriage was no longer subsisting at the time he married the respondent. Where however there is evidence of a ceremony of marriage having been gone through followed by cohabitation of the parties, the validity of the marriage will be presumed in the absence of decisive evidence to the contrary - see Latey on Divorce, Fourteenth Edition at paragraphs 74 and 825. The petitioner in these proceedings had shown that he had gone through a ceremony of marriage with the respondent and had lived with her for over two years resulting in the birth of their child Jenifa. He had gone further and shown that his earlier marriage had been dissolved by a traditional court in 1963. It has to be noted also that there was no provision for the issue of divorce certificates by traditional courts in 1963. The procedure for issuing these certificates is now provided for in Rule 39 of the Traditional Courts (Procedure) Rules. Even then, traditional courts are not obliged to issue divorce certificates. It could not be said, as was submitted by the respondent's counsel, that the petitioner's failure to produce a divorce certificate was fatal. At the close of the petitioner's case, he had satisfactorily discharged the burden lying on him of proving the dissolution of his earlier marriage. It was then up to the respondent to prove by decisive evidence that in spite of outward appearances her alleged marriage was invalid because the petitioner's earlier marriage had not effectively been dissolved.

The respondent attempted to do this by calling Catherine Mitondo, the petitioner's former wife, and her brother Kenneth Mitondo who was her advocate in that marriage. The evidence of these two witnesses was unsatisfactory from the respondent's point of view. They said at first that the marriage was dissolved at Soche Traditional Court. Both of them changed that story in the course of their evidence and said the marriage was dissolved by village headman Mchere at home. These witnesses do not seem to know whether the

petitioner's marriage to Catherine Mitondo was dissolved, or, if they do, they are quite ignorant of where the dissolution took place. I do not propose to rely on their evidence.

This brings me to a submission put forward by both the respondent and the co-respondent to the effect that a customary law marriage can only be dissolved by a traditional court. I do not think that sections 8 and 11 of the Traditional Courts Act confer exclusive jurisdiction for divorce of customary law marriages on traditional courts. It is competent in my view for village elders or tribunals effectively to dissolve a marriage under customary law if the parties submit to such authority. It is clear from the provisions of subrule (2) of Rule 39 of the Traditional Courts (Procedure) Rules that traditional courts have no exclusive jurisdiction for the dissolution of customary law marriages. As Rigby Ag. C.J. said in Rex v. Karonga, 1 ALR(M) at page 210:-

"One can well imagine conditions existing in a village where an old man or woman, respected and trusted by all villagers, is constantly being asked to settle small differences and disputes between villagers by these villagers themselves and his or her decision is willingly accepted by the parties concerned."

If there had been evidence of an effective dissolution of the petitioner's earlier marriage at the village, I should be quite willing to consider such evidence. The petitioner and his witnesses however insist that the marriage was dissolved at Soche Traditional Court. The co-respondent was determined to and did show that, contrary to what the petitioner had informed the court, his previous marriage was never dissolved at Soche Traditional Court, as alleged. He produced Exhibits 3 and 4 which are respectively the Complaint Book and Civil Case Record Book for Soche Traditional Court for the year 1965. There is recorded in Exhibit 3 Complaint No. 427 of 1965 on 1st April 1965 in which one Catherine Mitondo complains that her husband neglects to maintain her and the children. The complaint according to Exhibit 4 was heard on the 21st of April 1965. The parties are said to be Catherine Mitondo and Harry Namate. It is obvious from the entries that Soche Traditional Court did not find any sufficient reasons for a declaration that the marriage between Catherine Mitondo and Harry Namate was dissolved according to customary law. The court in fact advised the parties to go back home as man and wife and particularly warned the husband to continue to maintain the wife.

The petitioner has not disputed any of the relevant entries in Exhibits 3 and 4. He is a reasonably educated and intelligent man. It is surprising therefore that he should have sworn to the fact of his earlier marriage having been dissolved by Soche Traditional Court. It has been suggested that the petitioner and his witnesses conspired to commit perjury before this court. It has I think to be realized that he and the other witnesses were trying to recall events that took place in 1965 and it is possible that they probably forgot what the court decided.

I find as a fact that the petitioner's marriage to Catherine Mitondo was never dissolved at Soche Traditional Court. There is no satisfactory evidence that it was dissolved by some other tribunal. It is not sufficient even for parties to a customary marriage to walk out on each other and thence to consider themselves free of the marriage bond. I come to the conclusion that when the petitioner went through a form of marriage with the respondent on the 26th of May 1973 his earlier marriage to Catherine Mitondo was still subsisting. In terms of section 34(1) of the Marriage Act (Cap.

25:01) I declare the marriage in fact celebrated between the petitioner and the respondent at the office of the Registrar of Marriages at Blantyre on the 26th of May 1973 to be null and void on the ground that the petitioner's earlier marriage to Catherine Mitondo under customary law was still subsisting.

The petitioner's prayers are dismissed with costs.

Pronounced in open court this 15th day of March, 1980, at Blantyre.


J.B. VILLIERA
JUDGE