



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY
FAMILY AND PROBATE DIVISION
MATRIMONIAL CAUSE NUMBER 26 OF 2024
(BEFORE JUSTICE J.R. KAYIRA)

BETWEEN:

PAUL KAZUNGUZA MASEKO.....PETITIONER

AND

SHARON JOAN KAZUNGUZA MASEKO.....RESPONDENT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA

Counsel Kamkwasi of Counsel for the Petitioner

Counsel Kandeya of Counsel for the Respondent

Ms. Kazembe Court Clerk and Official Interpreter

RULING

Kayira J

The Respondent applied without citing any law for an extension of time within which to file her response and skeleton arguments. This Court reserved its determination to today. I must state at the outset that in divorce matters, the applicable rules are the Matrimonial Causes Rules of 1950-1950 Rules. Under these rules, the law allows a party to litigate in person or through a Legal Practitioner. In the event that a party chooses to pursue a matter on their own, the law clearly stipulates what is required in order for service of documents to be deemed as effected on the party. The law requires that documents be served personally on a party who is litigating in person. In the event that a party engages services of a Legal Practitioner, then service of court processes is done on the Legal Practitioner. After hearing the Petitioner, Counsel for the Respondent made an application essentially seeking that the Court extends time to allow his client to exercise the right to be heard despite not filing any processes in this Court. It is Counsel's submission that at the time he entered into Court, he was not prepared for trial. However, he was able to cross examine the Petitioner and through that, he has demonstrated that there are issues of adultery and cruelty

which this Court will not be able to appreciate if it does not hear the Respondent. In order to deal with this issue, it is only proper and right to examine circumstances in this case.

In the present case, the Court record shows that at the time the Petitioner obtained a petition for divorce, the Respondent had not engaged services of any Legal Practitioner. As such, the service of the petition was supposed to be on the Respondent personally. Before the service was effected on the Respondent, the Petitioner received an email through his Counsel from Counsel Joseph Kandeya. It has to be put on the record that Counsel Kandeya has not disputed this email which states that Messrs Y.D. Attorneys have been engaged as Legal Practitioners for the Respondent in the case between Paul Maseko and Sharon Maseko Being Matrimonial Cause Number 26 of 2024. Subsequently, service of this petition was accepted by Y.D. Attorneys on behalf of the Respondent on 29th June, 2024.

It has to be appreciated that the Petitioner filed a petition for divorce on 31st May, 2024. Rule 3(1) of the Matrimonial Causes Rules of 1950 states that every matrimonial cause shall be commenced by filing a petition addressed to the High Court. This Court notes that Rule 6 of the Matrimonial Causes Rules of 1950 further requires that a petition for divorce must be accompanied by an Affidavit in support of the petition, a memorandum of appearance and a Form of acknowledgement of service. The petition which was filed by the Petitioner has the Affidavit in support of the petition, a memorandum of appearance and a Form of acknowledgement of service attached to the same. It is not disputed by Counsel Kandeya that the attachments were indeed there when the petition for divorce was served on them. In other words, in the present case, all the required documents in as far as the documents that accompany a petition for divorce are concerned were complied with by the Petitioner.

It is clear in the submissions of Counsel for the Respondent that having accepted the service of the petition, the Respondent's Counsel did not file any document expressing their decision as to whether they will contest the petition for divorce or they intend to enter an appearance. On 24th July, 2024, the same Y.D Attorneys accepted service of a notice of hearing. It is correct that the said notice has 6th August, 2024 but this date is cancelled and replaced with 2nd August, 2024. Counsel Kandeya laments that this notice of hearing is misleading because it contains conflicting information. As such, he had the impression that the matter is coming on 6th August, 2024. It is premised on this understanding that he intended to file all processes in this case by 6th August, 2024. This Court is at pains to agree with this lamentation more especially because Counsel should have known or ought to have known how to obtain clarification where he has concerns. The failure to make any inquiry precludes him from using this as a basis for his failure to obtain sufficient and correct information.

Counsel argued that the Respondent's response and defence was in draft form awaiting her signature, Once the signature is appended, Counsel will be at ready to file the documents. Rule 9(1) states that unless otherwise directed, service of the petition must be personal on the Respondent. The communication from Counsel Kandeya to Counsel for the Petitioner is very clear. The law firm was representing the Respondent. Although they did not file any notice of appointment, they created an impression that they are responsible for this case. That is the very reason why the notice of hearing was served on the said law firm. In his submissions, Counsel argued that a Legal Practitioner only takes fully responsibility once he or she files a notice of appointment as a legal practitioner in Court. On that basis, Counsel argued that they were technically appointed by the Respondent a day before the hearing. It is for this reason that their notice of appointment as Legal Practitioners were filed on the date of the hearing. It is therefore his argument that their responsibility starts when they filed the notice of appointment. This Court attentively listened to the arguments raised by Counsel Kandeya.

As alluded above, Counsel for the Respondent argued that a legal practitioner can only be held accountable from the time he or she files a notice of appointment as a legal practitioner. This Court has no issues with Counsel filing notice of appointment at the beginning of the proceedings. Although Counsel made that argument, he did not cite the legal basis under which this mandatory requirement is explicitly provided for. This being the case, this Court considered Order 33 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017-CPR which states as follows:

“(1) A party who is represented by a legal practitioner in a proceeding may change his legal practitioner without an order of the Court.

(2) The party or his legal practitioner shall file with the Court a notice of the change and shall serve the notice on each party to the proceeding.

(3) The party or his legal practitioner shall file with the Court a notice of appointment without an order of the Court and shall serve the notice on each party to the proceeding and on his former legal practitioner, if any.”

Further, this Court took into account Order 5 rule 3 (a) of the CPR which states that a summons shall be signed by the claimant or the claimant's legal practitioner. A closer reading of these two provisions leads this Court to a conclusion that a Legal Practitioner is under legal obligation to file notice of appointment at the beginning of a proceeding.

The question that needs to be settled is whether service of the petition for divorce on 29th June, 2024 is compliant with Rule 11 (c) of the 1950 Rules. The answer is in the affirmative. Rule 10 of the 1950 Rules states that unless otherwise directed, and except where the provisions of Rule 9 (4) have been complied

with, a petition shall not proceed to trial unless the respondent and every co-respondent thereto and every person named therein –

- (a) has entered an appearance, or
- (b) is shown by affidavit in accordance with Form II (which shall be filed) to have been served with the petition personally or in accordance with an order for substituted service; or
- (c) has returned to the solicitor for the petitioner, or to the petitioner if he is acting in person, an acknowledgement of service in accordance with Form 4, which shall be lodged with a registrar.

By virtue of a directive from the Respondent that Y.D. Attorneys is her legal practitioner, then service of documents should be on that Legal practitioner. Whether the contract between the legal practitioner and the Respondent was valid or not is an in-house issue between themselves. It is not a cause for concern for the Petitioner. Secondly, the continued acceptance of the documents by the law firm created an impression in the affirmative that the law firm was her lawyer responsible for this case. If indeed they had not accepted to provide legal services to the Respondent in this matter, then they should have refused service of the notice of hearing on 24th July, 2024. By virtue of the communication and subsequent conduct by the Legal Practitioners who posed as legal representatives of the Respondent, this Court is compelled to hold that the Respondent's legal practitioners are estopped from denying responsibility on the basis that they had not formally filed a notice of their appointment.

Having made the above finding this Court does not lose sight that the petition for divorce was accepted by the law firm on behalf of the Respondent on 29th June, 2024. This service was regular. This means that the Respondent had time to file an appearance and a defence which time expired on 15th July, 2024. After expired of the time period within which the Respondent had to file responses, the Registrar proceeded to issue a certificate so that the matter is trial ready. It is after that when this Court set down the matter for trial on 2nd August, 2024. Rule 20 (1) of the 1950 Rules states that no pleading shall be filed out of time without leave after the registrar's certificate has been granted under Rule 30. In this case, the Respondent required to seek leave from the Court before filing any process. This Court holds the firm view that procedural requirements are part of the administration of substantive justice. As such, procedural requirements cannot be ignored on the pretext of promoting substantive justice.

Rule 19 of the 1950 Rules states that **after entering an appearance**, a respondent, co-respondent, or party cited in an answer may, without filing an answer, be heard in respect of any question as to costs or damages and a respondent spouse may, without filing an answer, be heard as to any question of custody of or access to any children of the marriage:

Provided that-

- (a) without leave, a co-respondent or party cited in an answer shall not be heard in respect of any question as to damages unless he has entered an appearance before the registrar's certificate has been granted under Rule 30;
- (b) no bill of costs not directly referable to a decree nisi or decree absolute or other final decree shall be taxed against a party who has appeared (other than a spouse against whom a decree has been pronounced), unless notice has been given to such party of the intention to apply for an order that the costs should be costs in the cause; and
- (c) such party as aforesaid (whether he has appeared or not) may, before the expiration of the period mentioned in the order for payment of the costs by him after taxation, apply to a judge to discharge the order making the costs in the cause, so however that a party who has not appeared shall first enter an appearance for the purpose.

The application herein is made after the Registrar already issued Certificate confirming that the matter is ready for trial. This Court finds that the Respondent did not make a correct application before this Court. What he was supposed to apply for was not an extension of time within which to file his response. He was supposed to file an application for leave to file his reply. In short, the present application is not properly anchored by any legal basis. If the Respondent entered an appearance, then he could be heard as regards other orders and not the petition for divorce as is the case here. This Court holds that the application is not legally supported by the 1950 Rules because the same is not provided for. What is provided for is an application for the Court's leave to first enter an appearance, thereafter to file pleadings.

Rule 3 (2) states that a petition shall not be filed if there is before the court another petition by the same petitioner which has not been dismissed or otherwise disposed of by a final order. This Court paid keen interest to the responses proffered by the Petitioner on the case that is before the First Grade Magistrate Court in Mbulumbuzi court. The issues relate to protection and tenancy orders. The same was due to the fact that the Respondent was refusing to leave the matrimonial house as they tried to resolve their differences. Seeing that the Respondent's continued stay in the matrimonial house posed more

challenges in his life, the Petitioner applied for the orders in the lower Court. Counsel for the Respondent argued that there is a case at Mbulumbudzi Magistrate Court. That it is only fair that this Court examines the file of the lower court. Counsel further submitted that he is aware that both parties reside in the Republic of South Africa and that travelling to Malawi to attend to the trial is expensive. As such, he prayed that the Court grants them audience virtually for purposes of defence hearing. Counsel then prayed for a specific date of hearing once the Court allows them to file their documentation within a week from that day. In response, the Petitioner through Counsel argued that the Respondent had a month within which to file their documentation. However, they did not do so. As such, they cannot argue that they have not been granted an opportunity to be heard. The prayer to extend time is vexatious, frivolous and an abuse of the Court process.

Although the 1950 Rules explicitly provide for the procedure required in order to redeem the current situation, this Court finds that rigid application of the same without subjecting it to Section 41 of the Constitution on the right to access justice would mean that the Respondent will not be heard on the substantive issue of divorce. She can only be heard on the ancillary issues of costs, damages, property distribution and #/ or child custody as well as maintenance. Section 41 (3) of the Constitution provides that a litigant has a right to an effective remedy. It is the firm view of this Court that such is only attainable if the Respondent despite not complying strictly with the rules can be granted an audience to adduce evidence on the issue raised during cross examination. The granting of audience to the Respondent will in no way prejudice the Petitioner because he will have an opportunity to test the veracity and credibility of the evidence through cross examination. It is on that premise that this Court considers that fairness should be for the Respondent to be granted a right to be heard. Therefore, this Court grants leave to file pleadings after the Registrar's Certificate was issued under Rule 30 of the 1950 Rules. The Court further directs that:

1. The Respondent entered an appearance within 2 days from today which is by Friday 9th August, 2024;
2. The Respondent files a response or defence to the petitions within 7 days from today which is by Wednesday 14th August, 2024;
3. The Respondent files a cross-petition, if any, within 2 days from 14th which is by 16th August, 2024;
4. The Petitioner responds to the cross petition, if any, within 7 days which is by 23rd August, 2024;
5. The parties file witness statements within 14 days which is by 6th September, 2024;
6. If the Petitioner intends to re-open the case and parade additional witnesses, that will be allowed

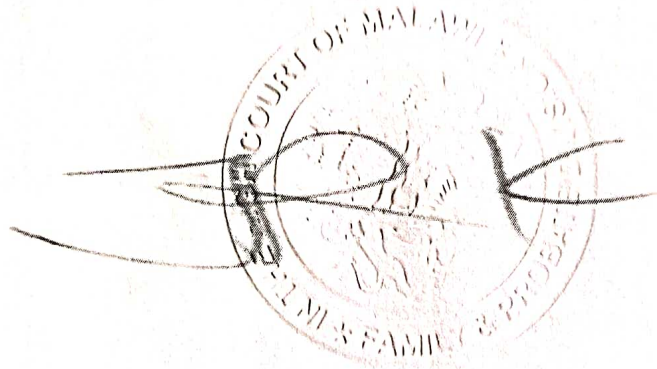
to ensure fairness and that decision must be communicated to the Court in writing and a copy of the communication must be served on the Respondent;

7. The witness statements of the said additional witnesses must be filed and served on the Respondent;
8. The Respondent must file and serve all witness statements by 6th September, 2024.
9. The matter will resume for trial purposes on 19th September, 2024 @9am virtually through zoom platform.

This Court is aware that costs are in the discretion of the Court. Considering the circumstances in this case, costs are for the Petitioner.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 5th AUGUST, 2024 @7:30AM.



HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE