



IN THE HIGH COURT OF ESWATINI
RULING

CASE NO. 231/19

HELD AT MBABANE

In the matter between:

THEMBINKOSI LUNGILE MUTALE (Nee Dlamini) PLAINTIFF

And

CHRISTOPHER KALUBA MUTALE DEFENDANT

Neutral Citation: *Thembinkosi Lungile Mutale (nee Dlamini) vs Christopher Kaluba Mutale [231/19] [2020] SZHC 81 (30 April, 2020)*

Coram: M. LANGWENYA J

Heard: 28 April 2020

Delivered: 30 April 2020

Summary: *Husband and wife-divorce proceedings-adultery by both spouses-plaintiff's application for condonation granted-*

divorce not contested-settlement agreement signed by both parties and made an order of Court-Decree of divorce granted.

RULING

- [1] In February 2019 and through combined summons, the plaintiff instituted divorce proceedings against the defendant. On 12 March 2019, the defendant, through his attorneys filed a notice of intention to defend the proceeding. In July 2019, the defendant filed his plea. The plaintiff filed her replication in September 2019. On 11 March 2020 both parties signed an agreement of settlement. Defendant stated he was no longer opposing the matter.

- [2] The plaintiff and the defendant were married to each other on 24 February 2010 in community of property at Siteki Apostolic Church. Two minor children were born out of the marriage.

- [3] In her combined summons of February 2019 plaintiff cited adultery as the ground for divorce. In November 2018, the plaintiff discovered that the defendant was in an intimate and sexual relationship with Shanai Adams. Shanai Adams often called the plaintiff with a view to let her know that she was in an intimate and sexual relationship with the defendant. The plaintiff

confronted the defendant about the issue. Defendant conceded that he was in an intimate relationship with Shanai Adams.

[4] The plaintiff also got involved in an intimate and sexual relationship with Celucolo Shongwe. She applied for condonation of her adultery. The defendant did not object to applicant's application for condonation. The Court granted the application.

[5] On 28 April 2020 the plaintiff gave oral evidence in the now unopposed action for divorce. The plaintiff stated that after she was in Court secure a decree of divorce from her husband. The reason for her application, she stated was that during the subsistence of her marriage to the defendant, the latter became violent and abusive towards her. That the last straw was when the defendant got involved in sexual and intimate relationships with two women- Khosi Dlamini and Shanai Adams. Shanai Adams texted the plaintiff about the intimate relationship she had with the defendant.

[6] The plaintiff confronted the defendant about the relationships with the two women. The defendant denied any intimate and sexual relationship with Khosi Dlamini but admitted to be in a sexual relationship with Shanai.

[7] The parties subsequently entered into an agreement to end their marriage. They signed a settlement agreement on 11 March 2020 and it was marked

‘TLM2’. The plaintiff also handed into Court the marriage certificate which was marked ‘TLM1’.

[8] The agreement of settlement states as follow:

Made by and between

Thembinkosi Lungile Mutale (born Dlamini)

(Hereinafter referred to as the Plaintiff)

And

Christopher Kaluba Mutale

(Hereinafter referred to as the Defendant)

WHEREAS: The above parties were married to each other by civil rites and in community of property on or about 24 February 2010 and two (2) children by the names of Sheena Mwaba Mutale and Audrey Mukuka Mutale.

AND WHEREAS: The Plaintiff has instituted divorce proceedings against the Defendant in the above honourable Court claiming a final decree of divorce and certain ancillary relief.

AND WHEREAS: The parties acknowledge that there are no prospects of rescuscitating their marriage relationship.

NOW THEREFORE: The Plaintiff and the Defendant agree that, in the event of their marriage being dissolved by divorce, the following terms and conditions shall apply.

CUSTODY OF THE CHILDREN/VISITATION RIGHTS

1.1 *The parties agree that custody of the minor children shall be awarded to the Plaintiff.*

1.2 *The parties agree that the Defendant shall enjoy and be granted equal access to the minor children and shall, on prior notification to the Plaintiff, enjoy such visitation rights and access to the minor children.*

1.2.1 *Notwithstanding the aforesaid the Defendant shall be granted a minimum day time visitation with the minor children for two (2) weekends within a month and one (1) week during school holidays and or vacation period.*

1.3 MAINTENANCE

The defendant shall contribute the sum of E2,000.00 (Two Thousand Emalangeni) per month as general maintenance for the upkeep of the minor children.

1.4 *The defendant shall contribute half of the school fees and school related expenses including transport for the children whenever the same falls due.*

PROPERTY

Each party shall keep the property in each party's possession.

DIVORCE

3.1 *Immediately after signature of this agreement by both parties the pending legal proceedings for divorce instituted by the plaintiff shall be prosecuted to the conclusion within thirty (30) days from the date of final signature of the agreement.*

3.2 *The defendant will no longer defend such proceedings and he records that he has no intention of restoring conjugal rights to the plaintiff.*

3.3 *Upon the granting of the final decree of divorce and with the leave of Court, the settlement agreement shall be made an order of Court.*

3.4 *The parties shall be responsible for payment of their own legal costs and fees attended to the divorce proceedings.*

4. WHOLE AGREEMENT

This agreement constitutes a full and final settlement of the issues contained herein. No amendment or addition of this agreement shall be of any force and effect unless recorded in writing and signed by both parties.

Dated at Mbabane on 11 March 2020

Signed by Defendant and a witness

Signed by Plaintiff and two witnesses

All pages of the agreement were initialed by both parties.

The plaintiff prayed for judgment against the defendant in the following terms:

- a) Condonation of plaintiff's adultery
- b) A final decree of divorce on the ground of adultery.
- c) Custody of the parties' minor children.
- d) Maintenance of the minor children at the rate of E2,000 (Two Thousand Emalangen) per month until the children reach the age of majority or become self-supportive with a ten (10) percent increase on such amount on each anniversary.
- e) The defendant to contribute towards school fees and all school related expenses of his minor children whenever they fall due until the children finish tertiary education or become self-supportive whichever comes first.

[9] During the subsistence of the marriage, the plaintiff states that the parties had acquired immovable property at Timbutini with the intention to set up their matrimonial home. According to the agreement of settlement, the parties have agreed that each party shall retain property in each party's possession. Such a provision of the settlement agreement should not, in my view be interpreted to mean a change of the common law position regarding division of the joint estate. I have not made a specific forfeiture order for the division of the parties' joint estate. Be that as it may, the common law position is clear in this regard-where the parties are married in community of property and upon dissolution of the marriage the divorce order does not contain a forfeiture order or a specific order for division of the joint estate, the law itself divides the parties' joint estate in half.

[10] I am satisfied that the plaintiff has proved adultery by the defendant. The Court accordingly rules that the plaintiff is entitled to a final decree of divorce on the ground of adultery.

Consequently the following order is made:

1. The plaintiff is granted a final decree of divorce.
2. The settlement agreement between the parties as a whole and in particular regarding the custody of the minor children; access to the minor children and maintenance of the minor children is hereby made an order of Court.
3. The plaintiff's adultery is condoned.
4. Each party shall bear their own costs.



M. LANGWENYA J.

For Plaintiff: Mr. N. Ginindza

For Defendant: Mr. F. Tengbeh