

MOSES MAGAYA
versus
MARY MAGAYA (NEE MVUNDURA).

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 28, 29 November 3, 10, 14, 20 December 2012
and 7 March 2013.

Miss B. K. Mupawaenda, for the Plaintiff.
N. Chikono, for the Defendant

UCHENA J: The plaintiff and the defendant were customarily married to each other in 1976. They on 5 February 1993, upgraded their marriage to a civil one in terms of the Marriage Act (Chapter 37), now Chapter 5.11. Their marriage was blessed with 6 children who have all attained the age of majority. The plaintiff left the matrimonial home on 11 January 2009 to go and live with a girlfriend in Masvingo. He later issued summons suing the defendant for a decree of divorce and ancillary orders.

The defendant opposed the plaintiff's claim, arguing that there was still hope for their marriage and disagreed with the plaintiff's distribution of their matrimonial property. They attended a pretrial conference at which they settled on other issues and agreed to refer the following issues to trial.

1. How should the matrimonial home be apportioned
2. What are the movable property of the parties and how should they be shared
3. Who should bear the costs of suit?

At the pretrial conference the defendant who had in her plea disputed the breakdown of their marriage, conceded that it had irretrievably breakdown. The parties further agreed that;

1. The current maintenance order in M 163/09 should remain in place subject to variation depending on circumstances.
2. That the custody of the then minor child be awarded to the defendant, subject to the plaintiff's reasonable rights of access.

The parties' then minor child has since attained the age of majority. The issue of custody and maintenance in respect of the then minor child therefore fell away.

The disputes between the parties were narrowed down during the trial. They agreed on the identity of their movable property and how it was to be distributed. Issues on the Manyame residential stands registered in the names of their two sons were resolved. The parties agreed that they become the property of their sons in whose names they are registered. The parties agreed that the communal home and the movables in it, be awarded to the plaintiff.

Irretrievable breakdown of marriage

In spite of this issue having been settled at the pretrial conference the defendant tried to revive it at various stages of the trial. She in her evidence and under cross examination said a decree of divorce should not be granted because she believes her husband may come back to her. It is however common cause that the plaintiff left the matrimonial home in January 2009. He since that departure did not come back to the matrimonial home nor did he communicate with the defendant. He over the four year period leading to the hearing of this case has consistently refused to pick the defendant's calls whenever she sought to communicate with him by phone. They as expected met at family gatherings and funerals, but the plaintiff showed her no love or signs of acceptance. He would always be in the company of his new love the girlfriend he left the defendant for. She conceded that the plaintiff has not shown any indications that he might want to reconcile with her. It is inconceivable that the defendant in these circumstances hopes to win back the plaintiff's love. It seems to me that the plaintiff has irretrievably lost love and affection for the defendant. The circumstances indicates irretrievable breakdown of marriage.

There is no doubt in my mind that the defendant still loves the plaintiff. She said she is willing to welcome him back any time he decides to come back to her. This would if there was reasonable hope of a reconciliation taking place, have justified a postponement in terms of section 5 (3) of the Matrimonial Causes Act (Chapter 5;13). Section 5 (3) provides as follows;

“(3) If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or

reflection, the court may postpone the proceedings to enable the parties to attempt a reconciliation.”

The intention of the legislature in enacting section 5 (3) was clearly to enable courts to postpone cases for purposes of giving parties opportunities to save their marriage. The courts should therefore utilize that provision in deserving cases.. The use of the words “reasonable possibility” limits such postponements to cases where there is a real chance of parties reconciling. The provision can not be used in cases where one of the spouses is refusing to accept the reality of the state of his or her marriage to a spouse who is resolutely seeking a decree of divorce. There must be a real or reasonable chance that the marriage can be saved.

Love can not blossom if it is not reciprocated. Reconciliation can only be possible if both parties are willing to engage each other to sort out their marital problems. The courts can not sustain a marriage without the co operation of the other spouse. Irretrievable breakdown of marriage can therefore take place even when one of the spouses still loves the other. In spite of the defendant’s confessions of love for the plaintiff there is nothing to indicate to this court that there is a reasonable possibility that the parties may become reconciled. There was therefore no justification for a postponement for that purpose. In the case of *Kumirai v Kumirai* **2006(1) ZLR 134 (H)** at p 136 B-D MAKARAU J (as she then was) said;

“In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably where the plaintiff insists on the day of trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the relationship since the promulgation of the Matrimonial Causes Act in 1985 So trite has the position become that one hardly finds authority for it ***To satisfy the court that the marriage still has some life in it, one has to adduce evidence to the effect that after the filling of the summons, the parties have reconciled and are living after the manner of husband and wife*** In my view evidence that on one occasion after the service of summons, the parties took a holiday together and afforded each other conjugal rights, as was led in this trial, is insufficient on its

own to show that the marriage has prospects of mending. If anything, it goes to show that despite attempts to rekindle the fires, the parties failed to reconcile.” *(emphasis added.)*

In this case there is evidence from the defendant that the plaintiff turned his back on her with resolve for a continuous period of four years. He did not only leave her, but he never came back to her or the matrimonial home. He refused to even pick her calls and talk to her on the phone. In spite of the defendant’s continuing love for the plaintiff there is no basis for refusing to grant a decree of divorce. She tried to win back his love, for four years without success. The irretrievable breakdown of their marriage has been established. A decree of divorce has to be granted because the plaintiff has resolved to end an unhappy marriage he said he endured for many years for the sake of their then minor children.

Ditribution of the movables.

In his evidence in chief the plaintiff agreed to give the Mazda B2200 to the defendant, and take the Nissan Sentra for himself as had been suggested by the defendant. He also agreed to sale the Toyota Hiace and share the proceeds equally as suggested by the defendant. He said they have three herd of cattle which he suggested be shared equally after giving one to the person who is looking after them.

The defendant in her plea suggested that the plaintiff be awarded all the movable property at their rural home plus two herds of cattle. The defendant also said the plaintiff should be awarded the following from their Budiro matrimonial home.

1. 1x Deep Freezer
2. 1x 24 inch Telefunken
3. 1 x DBVD Player
4. 1 x Double Bed
5. 1 x wardrobe
6. 1 x Decorder.

She said the rest of the movable property at their Budiro matrimonial home should be awarded to her. In her evidence she agreed with plaintiff’s distribution in paragraph 9.5 of his declaration. She said she had no interest in the three herd of cattle, which she said should be awarded to the plaintiff. She told the court that she sold all the goats and

used the proceeds to sustain the family. The concessions are reasonable in view of her admission under cross examination that the plaintiff bought all the movables. The only remaining dispute is on the water pump the defendant said the plaintiff took away and the wardrobe the defendant said she has given to one of their children. The plaintiff admitted that he took the water pump and gave it to his son from a previous marriage. The court will solve that dispute by removing the water pump and wardrobe from the list of property to be distributed. The parties have demonstrated that they have no problem with their assets being given to their children. They agreed to let their two sons have the Manyame stands. It seems to me that there would be no justification for recovering these less valuable properties from the children they have been given to by the respective parents.

The Matrimonial Home.

The parties disputed over the sharing of the matrimonial home. The plaintiff initially wanted 70% of the matrimonial home, but during his evidence finally settled for 50% percent for him and 50% for the defendant.

In her plea the defendant wanted a 50% share of the matrimonial home as she was a joint owner. She at one stage wanted the house to be given to their two youngest children. She later firmed up on the matrimonial home being awarded to her because the plaintiff had left with US\$40 000-00, when he left the matrimonial home in January 2009. She alleged that the plaintiff used that money to buy a house in Masvingo. She argued that entitled her to an award of the matrimonial home. The plaintiff vehemently denied ever having such an amount of money.

The defendant's evidence on the existence of a Masvingo property is not convincing. She said the plaintiff gave her US\$40 000-00 to keep which he on leaving the matrimonial home took on the pretext that he was going to deposit it in a Bank Account in South Africa. She said she went to Masvingo where she inquired from people whose identity she did not disclose, about a house which was built by a haulage truck driver in a very short time and was shown a certain house. She did not go into that house to confirm that it was her husband who had built it and was staying there. Her husband is not the

only Haulage truck driver. She did not seek written confirmation from the local authority that the house in question belonged to the plaintiff. She further speculated that the house could have been registered in plaintiff's girlfriend's name. If that was her speculation how did she hope to have that house if it exists distributed between her and the plaintiff without joining the alleged registered owner into these proceedings. The defendant's evidence on the alleged Masvingo house is neither convincing nor conclusive.

The plaintiff denied ever having had US\$ 40 000-00, which he gave to the defendant for safe keeping. He said if he had such money they would have completed the construction of their Budiro house which he left uncompleted. I find the plaintiff's denial stronger than the defendant's unsubstantiated allegation which comes in the middle of several options she gave for the distribution of the matrimonial home. The giving of several options some of which are not consistent with the plaintiff having left with US\$40 000-00 betrayed her lack of confidence in her own story. One wonders if the plaintiff had left with US\$ 40 000-00 why the defendant would start by claiming her 50% share of the jointly owned matrimonial home. It seems to me this allegation is motivated by her desire to be awarded the matrimonial home. The plaintiff's concession to equally share the matrimonial home is fair. It is justified by his having bought the stand on his own and having contributed more in the construction of the matrimonial home.

I accept that the defendant supervised the construction and contributed through income from her poultry sawing and peanut butter projects. The plaintiff admitted that she made some direct contributions from income she raised from those projects. The defendant at one stage tried to mislead the court that she contributed 70% towards the construction of the matrimonial home. This was however a lie as she had earlier on told the court that the plaintiff bought the stand on his own and that she had contributed half of what the plaintiff contributed towards the construction expenses. The defendant had the following exchange with the plaintiff's counsel;

“Q Income you were raising?

A Can not recall but was raising a lot of money.

Q Compared to plaintiff's earnings?

A I was raising about 50% of plaintiff's earnings.

Q So raised half of plaintiff's earnings?.

A Yes correct. Most times he found I would have materials and promised to

refund me but did not do so.

Q Towards development saying contributed half of what plaintiff contributed?

A That is correct.”

This means her contributions are less than half of the purchase price of and construction expenses of the matrimonial home. The plaintiff also made generous concessions and agreed to let the defendant have most of their movable assets from the matrimonial home even though he purchased them without any contributions from the defendant. There is no justification for awarding the defendant more than 50% of the value of the matrimonial home,

It is apparent the defendant needs the matrimonial home more than the plaintiff who has not been staying in it for four years. He is staying with a girlfriend in Masvingo. It is unlikely that he may relocate to Harare. In the circumstances it will be fair and just to allow the defendant to buy his share of the matrimonial home. The defendant is involved in three projects which can help her raise money to buy out the plaintiff's share. I am aware she said she is no longer running those projects since last year because of the operation she had when she gave birth to their last two children. That sounds untruthful. How could the operations incapacitate her now when they had not done so for over 17 to 18 years after the birth of those children. The defendant did not produce any medical reports about her alleged incapacity. I am satisfied she said so to persuade the court to grant her the cost of suit she wanted from the plaintiff. She will therefore be able to buy the plaintiff's share if she is given a reasonable opportunity to do so. In my view a period of 18 months is a reasonable period within which she can buy out the plaintiff's share. .

COSTS.

The defendant prayed for an order of costs against the plaintiff. She claimed inability to raise her own costs of suit. Under cross examination she bared her heart and said the plaintiff should pay the costs of suit because he is the one who wants the divorce which she is resisting. I have already found against her alleged inability to raise money for costs of suit. She however seems to be on stronger ground when she said he should fund the divorce he seeks because he left her for another woman. In the case of *Marimba vs Marimba* 1999 (1) ZLR 87 at p 94 D GILLESPIE J said;

“The final issue to which fault might be relevant is that of costs. The relevance is obvious.”

While I agree that fault can in deserving cases justify an order of costs against the party guilty of marital misconduct, care must be taken to avoid penalizing a party who is escaping an unhappy marriage. In this case the plaintiff admits that he left the matrimonial home to go and live with a girlfriend in Masvingo. It is highly probable that he left the defendant for the girlfriend and sought a decree of divorce to achieve that goal. He must in my view pay the defendant’s costs.

In the result it is ordered that;

1. A decree of divorce be and is hereby granted
2. That the parties movable property be and is hereby distributed as follows;

FOR THE PLAINTIFF

1x Deep Freezer
1x 24 inch Telefunken television
1 x DBVD Player
1 x Double Bed
1 x Decoder.
3herd of cattle

All the movables at the Wedza rural home

FOR THE DEFENDANT

2x 3 plate stove
3x2 door fridge
1x kitchen unit
1x 4 chair kitchen table
1x4 piece of sofas
all kitchen utensils

1x coffee table

1x Room divider

2x Display cabinets

1x decoder

1x Radio

1x Fan

2x Decoders

1x DVD player

1xRadio

1x bed roomed suits

3x double beds

1x6 chair dining table

1 x DVD player

- 2.1 The Toyota Hiace 16 seater kombi be sold and the proceeds be shared equally between the parties.
- 2.2 The plaintiff shall retain the Nissan Sentra as his sole and exclusive property whilst the defendant is awarded the Mazda B2200 pickup.
3. The plaintiff is hereby awarded the rural homestead in Wedza as his sole and exclusive property
4. The plaintiff and the defendant are each awarded a 50% share of the immovable property known as **stand number 9406 Budiriro Township of stand 11265 Budiriro Township.**
 - 4.1 The parties shall agree on and appoint a valuer within 14 days from the date of this order to value the property, failing which the Registrar of The High Court shall within 14 days of such failure appoint a Valuer. from the Master's list of Valuers
 - 4.2 The valuer shall evaluate the property within 14 days of his appointment.
 - 4.3 The parties shall equally share the cost of evaluation.
 - 4.4 The defendant shall pay the plaintiff the value of his half share of the property within eighteen months from the date of receipt of the valuation report.
 - 4.5 Should the defendant fail to pay off the plaintiff within eighteen months the parties, shall within 14 days of the defendant's failure appoint an Estate Agent, who shall sale the property to best advantage failing which the Registrar of the High Court shall within 14 days of such failure appoint the Estate Agent,

- 4.6 The parties shall equally contribute towards the Estate Agent's commission.
- 4.7 The parties shall equally share the net proceeds thereof as per their respective shares in the property.
5. The 2 Manyame stands shall remain in the names of their 2 adult children as if donated by the spouses to the children.
6. The plaintiff shall pay the defendant's costs of suit.

Messers Mabuye Zvarevashe, Plaintiff's Legal Practitioners
Messers Mhiribidi Ngarava & Moyo, Defendant's Legal Practitioners.

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