

NYARAI NYAMBUYA (NEE BAKASA)
versus
HURBERT FUNGAI NYAMBUYA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 29 January, 2015

Divorce Action

T. D. Muskwe, for plaintiff
C. Nhemwa, for defendant

CHITAKUNYE J: The plaintiff and defendant married each other in terms of customary law in 1997. On 14 April 2007 their marriage was solemnised in terms of the Marriages Act 5:11. The marriage still subsists. Their marriage was blessed with three children who are still minors.

On 8 March 2012 the plaintiff issued summons out of this court seeking a decree of divorce and other ancillary relief.

In her declaration plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that there are no reasonable prospects for its restoration to a normal marriage. The grounds advanced for the breakdown included that: -

- (1) The parties are no longer compatible as the defendant constantly verbally abuses the plaintiff;
- (2) As a result of the abuse, the plaintiff has moved out of the matrimonial home and is staying with her uncle in Chitungwiza;
- (3) The defendant has failed to treat the plaintiff with the love and affection that is expected between husband and wife.
- (4) Due to the foregoing the plaintiff has lost all love and affection for the defendant and thus seeks a decree of divorce.

The plaintiff claimed custody of the three children, maintenance for the children, a share of assets of the spouses in terms of paras 9 and 10 of her declaration and an order that each party pays their own costs of suit.

The defendant's plea was to the effect that the marriage had not irretrievably broken down. He still loved his wife. He went on to say the plaintiff was facing psychological challenges which if resolved would result in the marriage relationship normalising. He therefore asked for the claim for divorce to be dismissed. In the event that court granted the decree of divorce, the defendant's plea was to the effect that he be awarded custody of the minor children and that the immovable property be awarded to him as he is the one who acquired the property before he met the plaintiff.

At a pre-trial conference the parties agreed on some of the contentious issues. The pre-trial conference minute shows that the parties agreed that:- the marriage has irretrievably broken down; that the plaintiff will have full household goods proved to be available on a list to be filed by the defendant on 11 March 2013; except for the motor vehicles which are subject to issue number A. 4.

The contentious issues referred to trial comprised:-

1. Whether it is in the best interest of the minor children of the marriage for their custody to be awarded to either the plaintiff or the defendant.
2. What amount of maintenance would be reasonable and payable by the non-custodian parent for the minor children of the marriage?
3. What access rights should the non-custodian parent have to the minor children of the marriage?
4. What would be just and equitable distribution of the matrimonial property of both movable and immovable; including motor vehicles as listed in the paragraph (9) of plaintiff's declaration with the amendment of the Toyota Rustler to read Mazda Rustler and as listed in paragraph (15) of the defendant's plea and the immovable properties as listed in paragraph (8) of the plaintiff's declaration and as listed in paragraph (12) and (12.1) of defendant's plea?
5. Whether the plaintiff is entitled to post-divorce maintenance as a lump sum maintenance payment?

On the trial date the parties submitted a Deed of Settlement on further issues. That Deed of Settlement provided that:-

1. IMMOVABLES

1.1 Stand 2477 Glen Lorne Township (7 Gaydon Crescent, Greystone Park. Harare)

The plaintiff shall obtain 50% of the net proceeds of the sale of the property in execution subject to the agreement of the judgment creditor in HC 1291/12; or

Alternatively, the Defendant shall pay the Plaintiff US\$ 90 000-00 on or before the 31st July 2014.

1.2 Stand 622 Ruwa Township of Stand 2016 Ruwa Township

The plaintiff shall subject to the writ of execution in HC1292/12 and any mortgage bond thereof be entitled to 100% ownership of the property.

1.3 Stand 2439 Chikanga Phase 2, Mutare

The Defendant shall on or before 31st July 2014 pay the Plaintiff 50% of the value of the property provided that the valuation shall be done by a valuer appointed by the Registrar of the High Court from his panel of Valuers. The cost of valuation shall be met by the Defendant.

2. Custody

2.1 Plaintiff shall have custody of the two minor children namely:

- a) Y (born 27 March 2004)
- b) U (born 26 February 2010)

Provided that the Defendant shall have access to the two minor children every last weekend of the month from Fridays at 17:00 hrs to Sunday at 14:00 hrs.

2.2 Defendant shall have custody of the minor child X (born 1 March 1998) provided that she shall be free to visit Plaintiff by making her own prior arrangements with the Plaintiff.

2.3 The Defendant shall pay all the school fees for the three minor children of the marriage and all related educational costs including uniforms, sports attire and equipment up to tertiary level.

The issues that remained for determination comprised:-

1. Whether or not the parties' marriage has irretrievably broken down?
2. Whether or not Defendant must compensate Plaintiff for the movable property sold in execution of a court judgment?
3. Whether or not the Plaintiff is entitled to the motor vehicles as per paragraph 10 of her declaration?
4. What maintenance must Defendant pay for the two minor children in Plaintiff's custody and plaintiff?
5. Whether the Plaintiff is entitled to post divorce maintenance as a lump sum maintenance payment?

1. Whether or not the marriage has irretrievably broken down.

Section 5 (1) of the Matrimonial Causes Act, [*Cap 5:13*] provides that:-

“An appropriate court may grant a decree of divorce on the grounds of irretrievable break-down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them”.

There are basically two characteristics that court considers in ascertaining whether a marriage has irretrievably down or not include

- a) That the marriage relationship is no longer in its normal state.
- b) That there is no reasonable prospect of restoration of the normal marriage relationship between the parties.

From the evidence adduced in court it is common cause that the marriage relationship between the parties is no longer normal. In this regard both parties admitted that due to some problems in their marriage they have been on separation since February 2012. There has not been any meaningful communication, if any, between them during this time. Even as they came for trial they could not exchange greetings. Clearly that is not the normal relationship in a marriage.

The next point to consider is whether there is a reasonable prospect of the parties reconciling and living a normal marriage relationship. The plaintiff's evidence was to the effect that there is no prospect of the restoration of a normal marriage relationship. She was

insistent throughout her evidence that she has lost all love and affection for defendant. She alluded to the fact that they have been on separation for 31 months and during that period they hardly communicated. She also alluded to the fact that for those 31 months the defendant has done nothing to show reformation or that he was genuine in his purported desire for reunion. If anything the defendant's action in financially starving defendant and children in her custody has only served to confirm that they cannot restore a normal marriage relationship.

The defendant on the other hand contended that the marriage can be rehabilitated if the parties go for counselling and the plaintiff's problem of a spiritual attack is attended to. The defendant could however not state what steps, if any, he has taken to restore normal marriage relationship.

In *Kumirai v Kumirai* 2006(1) ZLR 134(H) at page 136 A-E, MAKARAU J (as she then was) had occasion to deal with a similar scenario and aptly put the legal position as:-

“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 the 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”.

The learned judge went on to say that the defendant if he must succeed in his assertion that the marriage has not broken down irretrievably must adduce evidence of such life in the marriage. It is for the defendant to satisfy court that the marriage has still has some life in it. In order to do this the defendant must adduce evidence showing that after the issuance of the summons the parties have found each other and are now living in the manner of husband and wife. A sheer hope that if both parties receive counselling the marriage could be resuscitated is not enough. In *casu*, the defendant has harboured this hope ever since the summons was issued but he has not taken any positive steps for the realisation of that hope. It is clear to me that defendant is not serious in his contention that the marriage can be revived. Clearly he just won't accept the reality of a marriage that has broken down irretrievably

On this issue therefore I find that the marriage has irretrievably broken down and a decree of divorce must be granted.

2. Whether or not Defendant must compensate Plaintiff for the movable property.

In para 10 of her declaration plaintiff outlined the list of movable property she wished to be awarded. The movable property includes household goods and motor vehicles. The defendant's response was to the effect that plaintiff can have the household goods. He however objected to plaintiff being awarded all the motor vehicles. He said plaintiff can have the Toyota Prado to keep as a family vehicle

As misfortune would have it the household goods the defendant had conceded the plaintiff could have were later on attached by the Sherriff and disposed off to meet a judgement debt in the case *Brent Oil Africa (Proprietary) Limited v Hughber Petroleum (Private) Ltd and Hubert Nyambuya* HC1292/12.

It is common cause that Hughber Petroleum (Pvt) Ltd. was a family business in which both the plaintiff and defendant were shareholders. According to the defendant the initial shareholding was 70% for defendant and 30% for plaintiff. Later that was changed and plaintiff was left with 10%. Other persons joined the company.

The plaintiff argued that she had nothing to do with the debt incurred by the company and so she should be compensated in respect of the sold property. From the parties pleadings the household goods the defendant had conceded the plaintiff could have comprised: - 3 double beds, 1 bedroom suite, 15 blankets 2x32 inch television sets, 1 flat screen television set, 1 gold 4 piece lounge suite, 1 mushroom 10 piece dining room suite, kitchen utensils, 1 microwave, 1 deep freezer, 1 upright fridge, 1 galas room divider and a washing machine. The goods attached and sold by the Sheriff comprised: 1 x 10 piece dining room suite; 1 x double door and freezer; maroon lounge suite; 1 x TV set; 1 x headboard;

Unfortunately not all items sold are legible from the notice of seizure and attachment filed as part of the defendant's bundle of documents.

It is in respect of those items that the defendant had conceded that she may take but which were subsequently sold that the plaintiff wanted to be compensated a sum of \$ 20 000-00. No values were attached for each individual item. It was thus not clear how the plaintiff arrived at a globular sum of \$20 000. It is my view that where one is seeking compensation, it

is incumbent upon them to justify/prove the quantum being claimed. Court must be satisfied as to how such a sum was arrived at. Even if court were to come to a lesser figure such must be based on the evidence adduced on how such a sum can be arrived at.

In his closing submissions counsel for the plaintiff submitted that the issue of compensation for property sold in the sale in execution was no longer contentious as the defendant had made material concession that he was willing to compensate the plaintiff for the movable property that was sold in execution pursuant. The defendant's counsel on the other hand contended that this should not be ordered. As already alluded to above, the value of the exact property sold in execution was never proved. The defendant's concession alluded to by the plaintiff's Counsel was to the effect that if I had the money I would compensate. He did not say he would pay \$ 20 000-00 as compensation or that he agreed with the plaintiff's global value.

Whilst it is true court has wide discretion to ascertain what would be reasonable value, I am of the view that such discretion can only be exercised where adequate evidence has been placed before court. Even a robust approach would not do justice as the approximate value of the individual goods was never stated. The condition of the goods was equally not disclosed and so it will be a dangerous guessing game for court to try to give value to the items when the parties themselves did not do so. I thus find that the plaintiff has not proved the value of compensation in respect of the goods the defendant had said she could have.

It may also be argued that the assets court is enjoined to distribute are assets of the spouses as at the time of distribution. In this case the goods in question were sold in execution of a court judgement. This is unlike a situation where it can be said the defendant fraudulently incurred the debt so as to deprive plaintiff her dues.

If as is common cause the objective of distribution is to place the spouses in the position they would have been in had a normal marriage relationship continued between them, it follows the spouses would not have the goods in question. Any offer to compensate would thus be out of sheer goodwill and not out of a legal obligation. Clearly the circumstances obtaining are such that it would not be appropriate to order defendant to compensate plaintiff in this regard.

3. Whether or not plaintiff is entitled to the motor vehicles as per paragraph 10 of her declaration.

In para 10 of her declaration, the plaintiff asked to be awarded the following motor vehicles- Toyota Prado, Toyota Hilux vehicle, Volvo motor vehicle, Toyota Camry Motor vehicle. In his plea the defendant stated that the plaintiff can have the Toyota Prado as it is a family vehicle, the Toyota Hilux truck belongs to the farm and so she cannot have it, the Volvo Motor vehicle is a company vehicle used by the Commercial director, the defendant uses the Toyota Camry as his personal car.

The evidence led in court showed that the plaintiff had sold the Toyota Prado for her benefit and so it is no longer in issue. The defendant now stated that the Toyota Hilux was now for his personal use, the Toyota Camry which he had originally said was his personal car for use was now said to have been allocated to a company employee on a vehicle purchase scheme. The Volvo and VW Polo vehicles were still allocated to company employees. A Mazda Rustler was said to be a family car.

It was common cause from the evidence that all the motor vehicles including those plaintiff said defendant could retain were registered in defendant's name and not in the company's name. The defendant said that this was because he had a contract to import vehicles with Kheng Keng Auto Company of Singapore. The vehicles were thus imported in his name. It is important to note that whilst he may have such a contract, I did not hear it argued that the contract forbade him from changing the vehicles into the names of the company once imported. A couple of years have passed since the vehicles were imported but the vehicles are still in the defendant's name. It is clear to me that defendant was not being truthful on the ownership of the motor vehicles. Yes the company may have paid for the purchase of the vehicles but they were meant for the defendant. This is why for instance defendant was able to turn the farm vehicle Toyota Hilux for his personal use and the Toyota Camry which had been for his use to an employee. He was in a position to do as he pleased with the motor vehicles because they were in his name.

I am of the view that in order to do justice in the distribution of the assets of the spouses, the motor vehicles must be views as the defendant's. If the vehicles belonged to a third party nothing would have stopped that party from claiming such ownership. Indeed the defendant could easily have called those he said were the owners to come and testify. It is

defendant who contended that though the vehicles were registered in his name they were not his and so it was upon him to call the entity or persons he claimed owned the vehicles.

I thus conclude that plaintiff is entitled to a distribution of the vehicles as per her claim. Should the vehicles not be available at the time of this order the defendant must provide similar vehicles or their value as assessed by a motor vehicle dealer mutually agreed to by the parties or one appointed by the registrar of the High Court.

4. What maintenance must defendant pay for the two minor children in plaintiff's custody and plaintiff?

The plaintiff's claim as per summons and declaration was for \$3000-00 for the maintenance of the three minor children per month and school fees for the three children as and when required by the school until the last child attains the age of 18 years or becomes self supporting whichever occurs first. A perusal of the pleadings shows that there was no amendment to the pleadings to incorporate a maintenance claim for the plaintiff.

The two Court Orders by this Court which were referred to during the trial, pertain to issues to do with the children.

For instance the order by consent dated 21 December 2012 in HC14277/12 by GUVAVA J states, in paragraphs 4 and 5, that-

“The respondent shall provide applicant with necessary fuel to assist in driving the children to school; the respondent shall deposit \$150-00 per week into the Applicant's Bank Account for groceries and daily needs of the minor children”.

The order by MAWADZE J dated 9th July 2013 in HC 5381/13 again pertains to the children. It is in fact on the outstanding school fees for U and third term fees.

It is only a maintenance order by a maintenance court at Harare Magistrates Court which states that the respondent was to pay \$500-00 per month to the applicant and to also pay her university tuition fees with effect from December 30, 2012 until varied or until plaintiff is divorced or remarries. It was clearly an order to operate pending divorce and not post divorce.

At a pre-trial conference held on 4 March 2013, the absence of a claim for post divorce maintenance seems to have been noted hence under admissions para 9 indicates that the defendant has given his consent to the filing of an amendment by the plaintiff for the

pleadings to accommodate issue number A.5 and the parties were to thereafter file further summaries of evidence to cater for the envisaged amendment. Issue number A.5 referred to reads as follows: ‘whether the plaintiff is entitled to post-divorce maintenance as a lump sum maintenance payment?’

The proposed amendment was duly filed but on the trial date counsel for the plaintiff indicated that they were no longer seeking the amendment. The proposed amendment had now incorporated other aspects beyond what pertained to issue A.5. As a result of the non pursuance of the amendment it means that before this court there is no claim for post-divorce maintenance by plaintiff. The maintenance claim before me pertains to the two children in plaintiff’s custody.

I have raised the above points because Counsel in leading evidence and in their closing submissions seemed oblivious to the fact that the amendment that would have brought in a claim for maintenance for plaintiff had not been made. It is trite law that a party should stand or fall by their pleadings. In such a situation a party may only get what the other party is gratuitously offering.

The maintenance claim properly before me pertains to the two minor children in plaintiff’s custody, namely U (born 27th March 2004) and Y (born 26th February 2010).

Section 7(1) (b) of the Matrimonial Causes Act provides that:-

“In granting decree of divorce or at anytime thereafter, an appropriate court may make an order with regard to the payment of maintenance, whether by way of lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage”.

In *casu* the principle of the defendant paying maintenance is accepted. The only issue is on the quantum. In determining the quantum of maintenance to be paid court is enjoined to consider the living standard of the responsible person. Where, as in this case, parties were in a marriage, court considers the standard of living that the family enjoyed prior to separation. The ability of the responsible person must be considered.

From the evidence adduced it is common cause that plaintiff and defendant enjoyed a high standard of living. Their children were used to that lifestyle. This was when things were going on well for the family business. However, with the disintegration of the marriage, so

came the collapse of the family business. It was not clear as to which came first, what is certain is that the family business has hit hard times resulting in the failure to meet its legal obligations. The consequences were the sale in execution of family assets including attachment of immovable properties. In such circumstances it is not wise to use the high standard of living during the good times to assess defendant's ability.

I am of the view that in as far as the defendant will continue meeting the children's educational requirements a sum of \$2000-00 per month for the 2 children is beyond his means. The defendant's means have plummeted. He indicated that he now relies on rentals from his brother's house in Gweru and limited income from consultancy jobs he gets here and there. It was in that light that he offered \$300-00 for the two minor children in addition to meeting their educational requirements

His offer of \$300-00 per month for the two minor children is inadequate. I am of the view that a sum of \$200-00 per child per month should be adequate for the basic needs of the children in addition to defendant paying for the children's educational needs. The plaintiff must also contribute in her own way to the children's upkeep.

5. Whether the plaintiff is entitled to post divorce maintenance as lump sum maintenance payment.

In view of the finding that there is in fact no proper claim for maintenance by the plaintiff before me it follows that lump sum payment cannot be ordered in respect of plaintiff's claim. The plaintiff argued that the lump sum payment will enable her to start a business venture and be weaned off the defendant. The sum she seeks is thus a sum to kick start a business. I am of the view that the lump sum payment must be within the defendant's ability. There is thus need to show the defendant's ability to raise such a sum outside the payments he has already offered in settlement of the parties proprietary interests. In *casu*, no such evidence was led serve to argue that because he made offers to pay \$90 000-00 in lieu of plaintiff's proprietary interests in the parties' Gaydon Crescent immovable property he is therefore able to raise \$20 000-00 for the lump sum payment. In as far as this lump sum payment was in respect of maintenance for plaintiff I have already found that no proper claim was before me and so such a claim cannot succeed.

Accordingly it is ordered that:-

1. A decree of divorce be and is hereby granted.
2. The claim for compensation in respect of movable property sold in execution is hereby dismissed.
- 3.1 The plaintiff is hereby awarded the following motor vehicles or their equivalent value as shall be assessed by a mutually agreed motor vehicle dealer/car sales agent or, failing such agreement, one appointed by the registrar of the High Court:-
 - i. Toyota Prado(which she already took and disposed off);
 - ii. Toyota Hilux Truck;
 - iii. Volvo Motor vehicle;
 - iv. Toyota Camry Motor vehicle.
- 3.2 Should the motor vehicles not be available at the time of this order, the defendant shall provide similar vehicles or their value as assessed in clause 3.1 above within a period of 30 days from the date of receipt of the assessment/valuation report.
4. The defendant be and is hereby ordered to pay maintenance in respect of the two minor children in plaintiff's custody in the sum of \$200-00 per month per child until each child attains the age of 18 years or becomes self-supporting which ever is first. This shall be in addition to providing educational requirements as per this court's order of 17 September 2014 attached hereto.
5. Other matters as between the parties shall be governed in terms of this court's order granted on the 17th September 2014 with the consent of the parties, which order is hereby incorporated as part of this order.
6. Each party shall bear their own cost of suit.