

KWENDATIYA DANIEL KAFESU
versus
RUDO MASIBHERA KAFESU (nee SAUROMBE)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 20 May 2016 and 11 May 2017

Divorce action

S. Mbetu for the plaintiff
T P Mateisanwa for the defendant

CHITAKUNYE J. This is a divorce action in which the plaintiff sued the defendant for divorce and other ancillary relief.

The plaintiff and the defendant were married in terms of the Marriage Act, [*Chapter 5:11*] on 20 December 1976. They had, however, started living together as husband and wife in terms of customary law in 1973.

The marriage was blessed with 5 children who are all now adults.

In the summons and declaration the plaintiff alleged that the marriage has irretrievably broken down in that:

1. The plaintiff has lost love and affection for the defendant
2. The parties have lived apart for the past 30 years and have denied each other conjugal rights and all privileges of a normal marriage for that period.

In the circumstances he prayed for a decree of divorce and an order that each party pays their own costs of suit.

The defendant, in her plea, confirmed the period of separation as stated by the plaintiff. She, in addition, filed a claim in reconvention. In the claim in reconvention, the defendant confirmed that the marriage has irretrievably broken down in that the plaintiff abandoned the defendant and the children.

On ancillary issues, the defendant alleged that during the subsistence of the marriage the parties acquired both movable and immovable properties. She proposed that each party retains the movable property in their possession. On the immovable property she suggested

that the immovable property, namely, Stand number 2212-8 Maturure Street, Dzivarasekwa 2, Harare, be awarded to the defendant whilst the plaintiff is awarded stand number 1126 Dzivarasekwa 3, Harare.

The defendant claimed for maintenance in the sum of US\$100-00 per month.

The plaintiff apparently did not replicate or plead to the claim in reconvention.

The parties proceeded to file pre-trial conference documents on the uncompleted pleadings.

On 24 September 2015 a pre-trial conference was held and issues for trial as noted down by the pre-trial conference judge were as follows:

1. Whether or not the marriage has irretrievably broken down?
2. Whether or not the plaintiff should pay post divorce spousal maintenance to the defendant? If so, the quantum thereof.
3. What constitutes the parties matrimonial assets and what would be a fair and equitable sharing ratio thereof.

On 28 September 2015 the legal practitioners filed a joint pre-trial conference minute in which they captured the first two issues as noted by the pre-trial conference judge, but altered the third issue to now read as follows:

“Whether or not the plaintiff owns a stand in Sanyati.”

On 18 May 2016, in preparation for the trial the legal practitioners filed another joint pre-trial conference minute in which the third issue was further altered to now read as follows:

“Whether or not the defendant should be awarded Stand No. 2212-8 Maturure Street, Dzivarasekwa.”

I have highlighted the changes effected by the legal practitioners to show the need for legal practitioners to adhere to what would have been decided upon in a pre-trial conference. Amendments should only be done when necessary and in a proper manner. In *casu*, upon inquiry the legal practitioners were not able to explain why there had been changes to issue number three from the one adopted during the pre-trial conference as noted down by the judge.

After hearing the evidence from the parties, it was clear to me that the third issue remained as captured by the judge and not as stated in the joint pre-trial conference minutes of 28 September 2015 and 18 May 2016. This is on the basis that whilst on 28 September 2015 the third issue pertained to whether or not the plaintiff owned a Stand in Sanyati, neither party had in their pleadings alleged that there was any stand owned by plaintiff in Sanyati. It

would appear it is defendant who later raised that issue. By raising the issue the defendant was not foregoing her allegations on the other two properties, yet the amended PTC minute refers to the Sanyati stand only.

Equally, the joint P.T.C Minute of 18 May 2016 left out the issue of the Sanyati property and the other stand number 1126 Dzivarasekwa 3 property that the defendant alleged plaintiff owned.

The proper issue as captured by the P.T.C judge should really have been to ascertain the immovable properties owned by the parties and to thereafter decide on a fair and equitable distribution thereof.

The issues referred to trial at the pre-trial conference are intended to guide the parties in their preparation for trial and during the trial. In *casu*, the parties were supposed to testify on the existence or non existence of all or any of the three immovable properties in dispute.

In determining this matter I will be guided by the Pre-trial conference issues as captured by the P.T.C Judge.

The plaintiff and the defendant gave evidence on the issues as noted by the PTC judge. Their evidence covered the availability or non availability of the immovable properties and issue of maintenance.

It may also be noted that whilst in her plea and counter claim the defendant had conceded that the marriage had irretrievably broken down, she reneged on this in her evidence hence the issue of whether or not the marriage has irretrievably broken down will be determined.

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

The plaintiff's evidence was to the effect that he no longer has any love and affection for the defendant and that the parties have been on separation for the past 30 years. He currently stays in Sanyati whilst the defendant stays at his communal home in Kafesu village, Nyazura. During those thirty years of separation they have only met twice when he went to his communal home in Kafesu village upon the death of his parents. Other than for those visits he has not been to that village due to the defendant's presence there. He would thus like court to also order that she vacates that village so that he can return to his parents' home.

The plaintiff stated that the reason for their separation was that the defendant fell pregnant at a time he was unwell and they had disagreements on the paternity of that child. When the defendant obtained the birth certificate of the child with the assistance of his cousin

brother, that confirmed to him that the cousin must be the father of that child hence he chased the defendant from the matrimonial home in Dzivarasekwa. This occurred in 1985.

The defendant, on the other hand, testified that she still loves the plaintiff despite his violent conduct towards her; she was willing to forgive him and accept him back as her husband. This love and desire to remain as husband and wife was despite her acknowledgment that they have not enjoyed conjugal rights for a period of over 30 years.

Section 5(2) of the Matrimonial Causes Act, [*Chapter 5:13*], herein after referred to as the Act, states that:

“(2) Subject to subsection (1), and without prejudice to any other facts or circumstances which may show the irretrievable breakdown of a marriage, an appropriate court may have regard to the fact that-

- (a) The parties have not lived together as husband and wife for a continuous period of at least twelve months immediately before the date of commencement of the divorce action; or
- (b)
- (c)
- (d)

as proof of irretrievable break-down of the marriage”

In this case parties have not lived together as husband and wife for over thirty years immediately before the commencement of this action and so this is a factor court is expected to consider in determining the status of the marriage.

Where, as in this case, the defendant contended that the marriage has not irretrievably broken down despite the period of separation and that she still loves the plaintiff, court has to consider whether any steps are being taken to normalise the relationship. Where such steps are underway court may give the parties that avenue in terms of section 5(3) of the Act. That section provides that:

“(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.”

I am of the view that the intention of the legislature in enacting s 5 (3) was to enable courts to postpone cases for purposes of giving parties opportunities to save their marriage. This court can only exercise this avenue in deserving cases, where as stated above, parties are making efforts at reconciling. Court must be satisfied that there are reasonable possibilities of reconciliation.

For reconciliation to be reasonably possible both parties must be willing to engage each other or attend counselling sessions to sort out their marital problems.

Where, however, only one party maintains that they still love the other, but do not take steps towards reconciliation or amending their relations; it cannot be held that there are any possibilities of reconciliation. The defendant's stance in this matter seems to be to wait for the plaintiff to come back onto her lap without her taking any positive steps to entice him back. In other words, she simply hopes that one day the sun will shine on the plaintiff and, on seeing the light, he will come back home. That, in my view, is not the scenario intended in terms of s 5 (3) of the Act.

The plaintiff's stance was that he no longer has any love and affection for the defendant and so a decree of divorce should be granted. From the issuance of summons to the stage of trial he has maintained that stance. He thus has no intention of reconciling with the defendant. Where one of the parties maintains that the marriage has broken down and persists in that manner even on the trial date, court cannot deny him the relief and force him to continue in a marriage that is not working. The other party's desire to continue in the marriage would not sway court to deny the relief sought especially, as in this case, where no positive steps are being taken or are intended to be taken to salvage the marriage.

In *Kumirai v Kumirai* 2006 (1) ZLR 134 (H) at p 136B-D MAKARAU J (as she then was) opined that:

“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 filing 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.”

In *casu*, not only have the parties been on separation for over thirty years, but during that period no effort seems to have been made towards reconciliation. As they prepared for trial no effort was made either. In the circumstance I find that the marriage has indeed irretrievably broken down.

2. Whether or not the plaintiff should pay post divorce spousal maintenance to the defendant? If so, the quantum thereof.

The next issue pertains to post divorce maintenance for the defendant. In her claim in reconvention, the defendant claimed a sum of US\$ 100-00 per month as maintenance. However, in her viva voce evidence in court she now claimed US\$200-00 per month as maintenance. No explanation was given for the change.

Section 7(1) (b) of the Act states that:-

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to – the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or child of the marriage.”

It was in respect of this provision that the defendant claimed for post divorce maintenance. It is, however, pertinent to note that this court has in a number of cases pointed out that maintenance is not just there at the asking. Maintenance must be justified. A spouse that needs maintenance post divorce must show that they are unable to sustain themselves post divorce hence they require the other spouse’s support. The position was noted in *Chiomba v Chiomba* 1992 (2) ZLR 197 at 197F-198B wherein it was stated that:-

“- Marriage can no longer be seen as providing a woman a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.

- Young women who worked before marriage and are able to work and support themselves after divorce will not be awarded maintenance if they have no young children. If a young woman has given up work she will be awarded short term maintenance to tide her over until she finds a new job.

- Middle aged women who have devoted themselves for years to the management of the household and care of the children should be given “rehabilitative” maintenance for a period long enough to enable them to be trained or retrained for a job or profession.

- Elderly women who have been married for a long time and are too old to now go out and earn a living and are unlikely to remarry will require permanent maintenance.”

In *casu*, the defendant is in the category of elderly women who would ordinarily be expected to be maintained permanently. However, the circumstances of this case are such that she still has to justify the maintenance.

It is common cause that for over 30 years she has been fending for herself without any support from the plaintiff. During that period she did not deem it fit to approach the courts for assistance. It is clear that she has been able to sustain herself and she can continue. The defendant’s assertion that she did not sue for maintenance during the past 30 years because she feared the plaintiff’s violence tendency is, in my view, a lame excuse. This is why she

could not explain how that violent tendency inhibited her from launching a complaint at the maintenance court. The plaintiff was in Sanyati, far away from where the defendant resided and so she could easily have applied for maintenance and only met the plaintiff at court. She did not apply for maintenance because she was able to sustain herself.

Another feature of this case that militates against a grant of maintenance is the plaintiff's ability to pay. The plaintiff testified that he was not in receipt of any income from which to pay maintenance and has been dependant on his son who is based in South Africa for financial support. He denied that he was in receipt of a pension sum or that he runs a tuck-shop. The defendant on her part could not prove that the plaintiff earns the income she alleged as pension or from a tuck-shop.

It is my view that taking into account that these are parties who have been apart for more than 30 years, the probability is that the defendant does not know of any income the plaintiff may be getting. She did not assert that she has been to plaintiff's residence in Sanyati to see for herself how he earns a living. Clearly there was no evidence of plaintiff's income or even that he has any income.

In fact the evidence by both the plaintiff and the defendant shows that they have been dependant on their children. The plaintiff has been dependent on his son who is in South Africa whilst the defendant was dependant on the couple's five children. This is why at one point the plaintiff asked court to ask the defendant to tell their children to also support him.

A further aspect militating against an award of maintenance is inadequate evidence on the needs of the defendant. Besides stating in the pleadings that she required US\$100-00 per month and stating in her evidence in court that she required US\$200-00 per month, the defendant did not itemise her needs. These were just figures plucked from the air. In a maintenance claim a claimant is expected to indicate the particular items for which she requires the money. Those needs must be necessary and be within the means of the responsible person. In *Matongo v Matongo* HH 14/12 at p 7 of the cyclostyled judgment I stated that:

“It is imperative to point out that in claims for maintenance it is always important for the claimant to lay bare her or his expected expenditure and the basis thereof. If one's claim is based on the standard of living they used to enjoy as a couple that must be made clear by showing that what she/he intends to use the money for and quantity thereof is what they used to enjoy as a couple; it had thus become a necessity which she/he should not be deprived now as the other party can still afford it. Where the claim is based on new expenditure one has to show that such expenditure in its nature and quantum is necessary and the other party can afford to pay for it.”

In *casu*, the defendant was not able to establish her specific needs as her claim was a bold claim without any list of the intended expenditure items and establishing that such expenses are necessary and that the plaintiff can afford the sums involved. On this basis as well the claim for maintenance would fail.

3. What constitutes the parties' matrimonial assets and what would be a fair and equitable sharing ratio thereof.

The plaintiff's evidence was to the effect that he only owned one immovable property; namely, Stand 2212-8 Maturure Street, Dzivarasekwa 2. He denied owning or being the holder of registered rights in Stand 1126 Dzivarasekwa 3 and the Sanyati home where he is currently residing. He thus suggested that he be awarded an 80% share in stand number 2212-8 Maturure Street Dzivarasekwa 2 whilst the defendant is awarded a 20% share in the said property.

The defendant, on the other hand, testified that the plaintiff owns Stand number 2212-8 Maturure Street, Dzivarasekwa 2, Stand number 1126 Dzivarasekwa 3 and the rural home in Sanyati where he is currently residing. She thus suggested that she be awarded Stand number 2212-8 Maturure Street, Dzivarasekwa 2 as her sole and exclusive property whilst the plaintiff is awarded stand number 1126 Dzivarasekwa 3 and the Sanyati rural property on which she said the plaintiff built a 7 roomed house, as his sole and exclusive properties.

It is trite that he who alleges must prove. In *casu*, the onus was on the defendant to prove that the other two immovable properties were owned by the plaintiff.

The defendant tendered no tangible evidence to prove the existence of these other properties. As regards Stand 1126 Dzivarasekwa 3, a letter dated 2 September 2015 from the City of Harare was admitted into evidence. That letter, addressed to the plaintiff's legal practitioners, stated that stand number 1126 belongs to some other people and not to the plaintiff. In the face of such correspondence from the responsible authority it was incumbent upon the defendant to adduce such evidence as would rebut the assertion in that communication. This, the defendant did not do. Other than her word of mouth, defendant had nothing to substantiate her claim that the plaintiff owned the stand. The bare assertion that the property was acquired by the plaintiff is inadequate for her cause.

In the case of the Sanyati property, the defendant again had no evidence that there is such property in the name of the plaintiff. She again made bare assertions without substance. The onus was upon the defendant to establish the existence of such a property in the name of

the plaintiff. The defendant could not rebut the plaintiff's stance that the Sanyati rural home he is residing at is not his. As the defendant appears not to have been to the Sanyati rural home, it would appear she was merely making assumptions on the basis that the plaintiff has been resident in the home for about 30 years and by virtue of that it must be his. She would have done herself good had she undertaken an investigation on the rural home in question and the plaintiff's tenancy there at and that such property is available for consideration in the distribution of assets in terms of the Matrimonial Causes Act.

I thus conclude that the defendant has lamentably failed to establish that Stand 1126 Dzivarasekwa 3 and the Sanyati property are owned by the plaintiff and thus subject for consideration in terms of the Act.

It is my view that the only immovable property available for distribution in terms of the Matrimonial Cause Act, is stand number 2212-8 Dzivarasekwa 2.

The division apportionment and distribution of assets of the spouse at the dissolution of a marriage is governed by s 7 of the Matrimonial Cause Act. Section 7 (1) of that Act states that:-

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to –
(a) division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other. ..”

The assets to be considered in the distribution are assets owned by either of the spouses or jointly by the spouses. These may have been acquired before, during the marriage or whilst on separation.

In determining a just and equitable distribution, court is endowed with wide discretion. In the exercise of such discretion court is guided by provisions of section 7(4) of the Act. That section provides that:

“In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following—

- (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child ;
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and other domestic duties;

- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
- (g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

It is apparent that the first four factors address the needs of the parties and the children, the fifth addresses the parties’ contributions both directly and indirectly and the last two considerations pertain to what the parties stand to lose as a result of the dissolution of the marriage and the need to ameliorate such loss. These are but some of the considerations otherwise court is enjoined to consider all the circumstances of each case.

In *Usayi v Usayi* 2003 (1) ZLR 684 (S) ZIYAMBI JA, in confirming a distribution order by the High Court, reiterated the importance of indirect contribution by looking after the home and caring for the family in a case where the husband had been contesting the decision on the basis of lack of direct financial contribution by the wife. In that case the wife had been awarded a 50% share in the matrimonial house. The duration of the marriage was also an important factor considered as the marriage had lasted for about 39 years. In dismissing the argument that the defendant, having made no financial contribution to the acquisition of the house, was not entitled to an award of 50% share of the house, at 688A-D the honourable Judge stated that:

“Having regard to the provisions of s 7(4) of the Act, this submission is unsound. The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and the creation of an atmosphere therein from which both husband and children can function to the best of their ability? In the light of these many and various duties, how can one say, as is often remarked: “throughout the marriage she was a housewife. She never worked”? In my judgement, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the “direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties.”

The recognition of indirect contributions is now legendary.

In *casu*, the parties married in terms of customary law in 1973 and started living together in the manner of husband and wife then. In 1976 their marriage was solemnised in terms of the Marriage Act, [*Chapter 37*, and now 5:11]. The immovable property in question

was acquired before their separation in 1986. The plaintiff alleged that he caused the defendant to leave the matrimonial home in 1985. The defendant on the other hand stated that she was made to leave in 1986. Nothing much turns on the exact year the defendant left as it is common cause she was pushed out by the plaintiff and since that time the two have not shared conjugal rights. They thus stayed together for slightly over 10 years. During that 10 year period the defendant bore 5 children. It is thus my view that during that period the defendant contributed in the manner stated in the *Usayi v Usayi (supra)*.

After the 10 years the separation was forced on the defendant by the plaintiff as they had a misunderstanding on the paternity of the last born child. The defendant went and lived at the plaintiff's rural home where his parents were and has been resident there since.

The plaintiff, on his part, stated that he left the matrimonial home in 1994 when he was transferred by his then employer and he, apparently, has not returned to live in the house even after retirement. He seems to have settled well in Sanyati.

I am of the view that the circumstances of this case call for the consideration of the duration of the marriage and the attendant needs of the parties. The fact that the plaintiff acquired the property on his own as an employee of his former employer would not disadvantage the defendant. This is a marriage that lasted from 1973 to now, a period in excess of 40 years.

In considering how fairly and equitably to distribute the property regard should be had to the expectation of the parties as well. The plaintiff in his evidence alluded to the fact that once a decree of divorce has been granted he would want the defendant to vacate his rural home so that he takes his place in his late parents' home. Thus from the plaintiff's own words, he will have that rural home to stay, in addition to the home he has been staying in Sanyati. The defendant on the other hand has no home of her own to go to. She will thus be prejudiced by the dissolution of the marriage. The plaintiff's assertion that she can go to her parents' home is in my view untenable. The defendant has been married to plaintiff for a very long time and has been residing in plaintiff's rural home for a long time such that that is the place she has come to know as her home. I would have been inclined to say that the defendant should remain resident in the Kafesu village, but for the fact that after the dissolution of the marriage the defendant may not feel comfortable to so remain. I will however not grant a directive for her to vacate as desired by the plaintiff. In my view the defendant has to make her own choice. If she is comfortable to remain in that village and enjoy the fruits of her so many years of labour why should she be ordered to leave?

Upon a consideration of all the circumstances of the case as enumerated above , I am of the view that a just and equitable distribution of the immovable property is an order that grants each party an equal share in stand 2212-8 Dzivarasekwa 2, Harare. This will guarantee that each has realistic chance to acquire another property should they wish to for their own residence and are thus not left homeless by the dissolution of the marriage.

The fact that the defendant may be forced out of Kafesu village by the plaintiff entails that she will be the one in dire need of shelter. She will thus be accorded the 1st option to buy out the plaintiff's share.

Should she fail to do so, the plaintiff will be allowed to buy her share. Should both fail to buy each other out, the property will be sold to best advantage and the net proceeds shared equally.

In the circumstances it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. Each party shall retain the movable property in their possession as their sole and exclusive property.
3. The plaintiff is hereby awarded a 50% share in the immovable property namely Stand number 2212-8 Maturure Street, Dzivarasekwa 2, Harare with the defendant being awarded the other 50% thereof.
4. The parties shall appoint a mutually agreed valuator within 30 days of the date of this order failing which the Registrar of the High Court be and is hereby directed to appoint an independent valuator from his list of valutors to evaluate the aforementioned immovable property.
5. The plaintiff shall bear the cost of evaluation.
6. The defendant is hereby granted the option to buy out plaintiff's 50% share within 6 months from the date of receipt of the valuation report, or within such longer period as the parties may agree.
7. Should the defendant fail to buy out plaintiff's share in terms of clause (6) above, the plaintiff shall be granted the option to buy out defendant's share within 4 months of defendant's failure.
8. Should the parties fail to exercise the options granted in clauses (6) and (8) above, the property shall be sold to best advantage by an estate agent mutually appointed by the parties, failing such agreement, by an estate agent appointed by the Registrar of the High Court from his list of independent estate agents. The net proceeds shall be distributed in equal shares between the plaintiff and the defendant.
9. Each party shall bear their own costs of suit.

Govere Law Chambers, plaintiff's legal practitioners
Legal Aid Directorate, defendant's legal practitioners.