

RHODA JEMALI (NEE MUSANDU)
versus
CHITUWA JEMALI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 26 January 2017

Divorce Action

Z. Macharaga, for the plaintiff
T. Deme, for the defendant

CHITAKUNYE J: The plaintiff and the defendant contracted an unregistered customary law union in 1993.

On 19 September 2002, their marriage was solemnised in terms of the Marriage Act [Chapter 5:11] at Harare.

The parties' marriage was blessed with 3 children of whom two have attained majority status.

During the subsistence of the marriage the parties acquired various movable properties and three immovable properties.

The three immovable properties comprised:-

1. Stand no. 15072 Unit O, Seke, Chitungwiza (herein after referred to as the Chitungwiza property)
2. The remaining extent of Lot 12 Athlone Township, Green Grove, Harare (hereinafter referred to as the Green Grove property)
3. Stand No. 5965 Highfield, Harare (hereinafter referred to as the Highfield property)

On 29 November 2013 the plaintiff sued defendant for the dissolution of the marriage, custody of the minor child and a distribution of properties acquired during the subsistence of the marriage.

The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no prospects of restoration of a normal marriage relationship between the parties. The factors for the break down included that:-

1. the defendant has on a number of occasions chased plaintiff from the matrimonial home thus depriving plaintiff of accommodation at the matrimonial home. On the last such occasion plaintiff had to seek a protection order in order to return to the matrimonial home;
2. the defendant has consistently subjected the plaintiff to harassment and threats of killing her, conduct which is not consistent with a normal marriage relationship;
3. the parties have not shared conjugal rights for a period in excess of two years immediately preceding the issuance of the summons;
4. the defendant now lives with another woman as husband and wife; and
5. the parties have lost love and affection for each other.

In the circumstances plaintiff alleged that there are no prospects of restoration of a normal marriage relationship between the parties and so a decree of divorce should be granted.

The plaintiff asked to be awarded custody of the minor child with defendant exercising reasonable rights of access.

The plaintiff further proposed how the movable and immovable properties should be distributed between the parties. She proposed that she be awarded the Green Grove property whilst the defendant is awarded the Chitungwiza property.

On the Highfield property, the plaintiff proposed that it be shared equally or, in the alternative, that the party who gets the property with lesser value be compensated of the value of such lesser amount and the balance be shared equally

The defendant, in his plea, essentially admitted that the marriage has irretrievably broken down. He however placed the cause of the breakdown on the shoulders of the plaintiff.

The defendant also conceded that the plaintiff be awarded custody of the minor child. He, however, did not agree with the plaintiff's proposal on the distribution of the properties acquired during the subsistence of the marriage.

On the immovable properties, the defendant proposed that the Green Grove property be awarded to him whilst the Chitungwiza property is awarded to the plaintiff with the

Highfield property remaining in the names of the children in whose names it is currently registered.

On 5 February 2015 a pre-trial conference was held during which a number of the disputed issues were resolved. In that pre-trial conference the parties agreed that:-

1. The parties marriage has irretrievably broken down and a decree of divorce should be granted;
2. The plaintiff be granted custody of the minor child namely Eric Chituwa Jemali (born 8 February 2001);
3. The defendant shall have access to the aforesaid minor child for a week during school holidays subject to the child's school commitments;
4. The maintenance for the minor child and that of the plaintiff shall be governed by the order of the Maintenance Court under case No. M2199/11;
5. The plaintiff's 50 % (fifty per centum) shareholding in Jemali Frontiers (pvt) Ltd, be awarded to the defendant.
6. The following movable property be awarded to the plaintiff:
 - a) A freight liner horse registration number AAS 5605;
 - b) A homemade 30 tonne trailer registration number ABJ 9305;
 - c) A sparkle green double Cab Mazda B2500 of year 1999, registration number AAI 0022;
 - d) 3 beds
 - e) Pots, plates and cups
 - f) Chairs;
 - g) Fridge;
 - h) Black set of Sofas;
 - i) Room Divider;
 - j) Bedroom suite;
 - k) 21 inch Television set;
 - l) 2 Wardrobes
 - m) Dining suite;
7. The following movable property be awarded to the Defendant:-
 - a) Toyota Hilux registration number ABC 6053;
 - b) International Freight Horse registration number ABF 8001;

- c) 30 tonne trailer registration number AAS 8974;
- d) 30 tonne trailer registration number AAS 7629;
- e) 29 inch Television Set;
- f) Cream set of sofas.

The only outstanding issue upon which the parties could not agree pertained to the three immovable properties. The issue for trial was couched as follows:-

How should the following immovable properties be shared?

- a) The remaining extent of lot 12 Athlone Township of Green Grove;
- b) Stand No. 15072 Unit O, Seke, Chitungwiza;
- c) Stand No. 5965 Highfield, Harare.

The plaintiff gave evidence after which the defendant gave his evidence. From the evidence adduced it was common cause that the parties have had matrimonial problems leading to the plaintiff being chased from or leaving the matrimonial home on a number of times. As a result of this she obtained a protection order allowing her to go back to the matrimonial home.

It is also common cause that the parties have not been sharing bed as husband and wife for a period exceeding two years. It was further common cause that defendant has been living with another woman as man and wife despite the subsistence of a monogamous marriage to the plaintiff.

As a result of the problems that beset the marriage both parties have lost love and affection for each other. In the circumstances I am satisfied that the marriage has indeed irretrievably broken down and so a decree of divorce should be granted.

The parties confirmed the ancillary matters upon which consensus was reached as comprising the issues of custody, access, maintenance and movable property. These shall be dealt with as agreed to by the parties.

It is a further common cause that the three immovable properties were acquired during the subsistence of the marriage relationship between the parties. The properties were acquired mostly from the proceeds of the defendant's sculpture business. The defendant is a renowned sculptor with international clients.

It is also common cause that the Green Grove property was acquired using a loan advanced by one of the defendant' international clients, a Dr. Robert Cavette Scott. Dr.

Scott's name was endorsed on the title deeds as co-owner as a means of securing the loan he had advanced to the defendant. That property is thus registered in the names of the plaintiff, defendant and Dr. Scott. Dr. Scott died in 2009 and his rights in the property were not made part of his estate as it appears acknowledged that the loan has since been paid up.

The Chitungwiza property was bought in 1997 and the agreement of sale shows the defendant as the purchaser. The defendant's counsel in his closing submissions indicated that this property is registered in the names of the two parties. This is an aspect not clear from the evidence adduced.

The Highfield property was acquired in about 1999 or 2000 and is registered in the names of the defendant and some of the children namely Anika Tafadzwa Jemali, Lissa Jemali, Linda Jemali, Chituwa Junior Eric Jemali and Ali Ryan Jemali.

The plaintiff's claim was for the Green Grove property and a half share in the Highfield property irrespective of the number of persons in whose names the property is registered.

In her evidence the plaintiff did not insist on a distribution of the immovable property as per her claim in the summons. She now suggested an equal share in all the three properties.

That is to say, for the Chitungwiza property she asked for a 50% share thereof.

The defendant, on the other hand, seemed to suggest that the plaintiff be awarded the Chitungwiza property whilst he retained the Green Grove property. He later changed and accepted a 50:50 sharing of the Chitungwiza property.

The plaintiff sought a 50 % share in the Green Grove property despite it being registered in the names of three people. Her argument was that the late Dr. Scott's name was included as security for the loan and since the loan had been paid in full and the late Scott's estate did not include the property in question it means that the property is effectively owned by the two spouses. It therefore must be distributed between the plaintiff and the defendant as joint owners. In this respect she referred to communication from the executor of the Estate of the late Dr. Scott's estate to the effect that the late Dr. Scott had acknowledged being paid in full and thus no longer had any interest in the property.

The defendant, on the other hand, maintained that Dr. Scott's interest must still be recognised and the late Dr. Scott's share be awarded to him.

On the Highfield property the plaintiff testified that though the property is in the names of the defendant and the children, the defendant is the only beneficiary and had only registered the children's names as a sham. She should therefore be awarded a 50 % share.

The defendant, on the other hand, contended that the rights of the children should be recognised. He however did not dispute that he has been the one collecting all the income from that property. His only contention was that he was using part of that income to cater for the children's school needs and so, in that way the children benefitted as well.

It is pertinent to note that the parties concentrated mostly on the aspect of contributions to the purchase of the properties as the basis for seeking the sharing ratio each contended.

The issue of the apportionment, division and distribution of properties of married parties at the dissolution of a marriage is provided for in s 7 of the Matrimonial Causes Act, [Chapter 5:13]. Section 7 (4) states:-

"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 any 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 thus apparent that in considering the issue of distribution of properties acquired by the parties, court is empowered to consider all the circumstances of the case and not just the direct contribution towards the purchase price.

This court has on a number of occasions pointed out that indirect contribution must also be considered in considering contributions by the spouses. Equally the needs and expectations of the parties as they move out of the marriage should be considered as well as the duration of the marriage.

In *Usayi v Usayi* 2003(1) ZLR 684 (S), the Supreme Court upheld a High Court decision to award a 50% share to a housewife of 35 years standing who had made no direct financial contribution. See also *Matongo v Matongo* HH 14/12.

Where a property is registered in terms of the Deeds Registries Act [*Chapter 20:05*] in the joint names of two or more persons, such registration is not a sham but conveys real rights to the persons in whose names it is so registered.

In *Takafuma v Takafuma* 1994(2) ZLR 103(S) at p 105H, McNALLY JA aptly stated that:-

“The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.”

In *Ncube v Ncube* S-6/93 the wife was registered as joint owner but had not made any direct contribution to the acquisition of the immovable property in issue. At p 11 of the cyclostyled judgment KORSAH JA had this to say on the effect of registration in her name:-

“It is incorrect to say that appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money’s worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property. The proper approach is to accord her share of that property and then taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered, in the exercise of its discretion, to order that any asset be transferred from one spouse to the other.”

In casu, the claim by plaintiff and the defence by the defendant must be considered in the light of the above legal positions.

The defendant contended that the plaintiff is not entitled to an equal share in the immovable properties because she did not make any direct contribution to their purchase. According to defendant’s initial stance, the plaintiff was just a house wife.

The initial stance that the plaintiff was just a housewife who made no meaningful contribution to the needs of the family lost credence when evidence led from the plaintiff and from the defendant showed that the plaintiff was not just a housewife. She participated in income generating activities for the family.

In her evidence the plaintiff indicated that she assisted her husband in his sculpture work, in advertising the sculpture and talking to clients when they came to their place to view the sculptures. At times the defendant would be outside the country exhibiting his sculpture work and she would remain manning the business. She also sold batik articles and small sculptures.

She would also cook for the tourists who would have come to view the sculptures. At some point she went out of the country with the defendant to exhibit his work.

Besides her work in small sculptures and batiks, she also operated a shop, dealing in electrical gadgets. She also operated a hair-salon and a beer outlet at the Highfield property. All these ventures she engaged in brought income that she used for the day to day needs of the family whilst the defendant's income was used to purchase the immovable properties. The defendant in his evidence whilst still seeking to downplay the plaintiff's contribution found himself having to concede that the plaintiff made some contribution.

For instance, when asked if plaintiff made any contribution towards the purchase of the Chitungwiza property the defendant said that: 'no she was just a housewife'. A few sentences later he was heard to concede that plaintiff would sell small sculptures whilst he concentrated on bigger sculptures.

He also said that he did not advertise his work on the internet and that the plaintiff did not advertise his work on the internet. Later he conceded under cross examination that the plaintiff was computer literate and she would go to town to send e-mails. He further conceded that his clients would converse with plaintiff and leave them business cards on which were endorsed e – mail addresses for the clients. He could not with certainty deny that those are the e-mail addresses the plaintiff would use to send pictures and other advertisement for the sculptures to his clients and her clients.

As regards the plaintiff's other business ventures the defendant conceded that the plaintiff had her own business of selling electrical gadgets such as television sets and radios. She also ran a hair-salon at the Highfield property. He further admitted that in his absence the plaintiff would oversee his bottle store business.

On sculpture business he would concentrate on bigger sculptures whilst the plaintiff did the small sculptures.

When asked under cross examination whether the plaintiff involved herself in his sculpture work the defendant admitted so in stating that: 'as my wife I wanted her to be involved'

This exchange during cross examination of the defendant puts this point beyond doubt:

- "Q. It is correct that the plaintiff involved herself in your sculpture work/business
- A. Yes
- Q. It is correct that even when tourists frequented your workshop the plaintiff would be there taking keen interest on what was going on
- A. Yes she would be present."

Having confirmed that the plaintiff would interact with tourists who came to his workshop, the defendant sought to limit the plaintiff's interaction to her small sculptures only, even when he was abroad exhibiting his wares whilst plaintiff remained alone at the workshop. It is highly unlikely that the plaintiff would ignore any interest by a client on her husband's works simply because he was not there. Clearly the defendant's stance is highly unlikely. This had become a family business with the wife specialising in small sculptures whilst the defendant specialised in bigger sculptures. The probability is that adverts for one would involve adverts for the other as a family promoting its business. The plaintiff's version that in advertising her works she would also include the defendant's work is more probable. She is the one who was computer literate and able to communicate with clients via e-mails and she surely did this on behalf of the family sculpture business as a whole.

I am of the view that even on the question of contributions to the needs of the family the plaintiff made significant contributions. This is a scenario where a 50:50 sharing ratio would be most appropriate.

The sharing ratio for the Chitungwiza property appears well settled. Each party will get a half share.

On the Green Grove property the plaintiff asked for a 50:50 sharing ratio whilst the defendant offered plaintiff a 35 % share whilst he retained a 65 % share which he said would include Dr. Scott's share.

As the defendant eventually conceded under cross examination the loan obtained from Dr. Scott was fully paid and so, in effect, the executor of the Estate of the Late Dr. Scott's cannot lay claim to this property. It was not denied that the executor has in fact laid no claim to a share in the said property. It is in this light that the defendant wanted to be awarded that share as his exclusive share. That cannot be just and equitable in the circumstances. This is a property owned by the two spouses as evident from the registration of title and no good cause has been shown why the plaintiff should not retain her 50% share in the property now that the debt has been paid in full. As noted in the *Takafuma v Takafuma (supra)* and *Ncube v Ncube (supra)* the registrations of title is not to simply confound creditors but in effect grants real rights to those in whose names it is so registered. As the property is registered in both their names, each party is entitled to a half share in the property unless there is a solid foundation for departing from this ratio. See *Lafontant v Kennedy* 2000 (2) ZLR 280.

In casu, I found no solid basis upon which to deny the plaintiff her half share in the Green Grove property as a joint owner.

Both parties asked to be given the option to buy out the other on this property. The plaintiff indicated that she needed the property as it is the matrimonial house where she has resided with the children since 2002. It is a property in close proximity to the schools the children are attending. It would thus not be in the best interests of the minor child for the child to be uprooted from this property and for the family to move to the Chitungwiza property which is a high density area. It is in these circumstances that the plaintiff said the needs and expectations of the parties favour the granting of first option to the plaintiff.

The defendant on the other hand asked for the option to buy out the plaintiff as he needed the property as that is where his workshop is based. He thus has no intention of residing there but to only use the grounds as his workshop.

From the rationale provided by both parties I am of the view that the plaintiff has a more compelling reason for seeking to be granted the option to buy out the other. The defendant can surely find another ground from which to conduct his sculpture work. The plaintiff and the children, on the other hand, would find it difficult to relocate as they are likely to move further away from the educational institutions the children are attending. They will also be uprooted from an environment they have been used to since 2002.

The Highfield property is in terms of the law owned by the defendant and the children named on the title deeds. The plaintiff has known since the acquisition of this property that the property is registered in the names of the defendant and the children. She did not take corrective measures to ensure her interests are also included. She appeared to have been content with that situation.

As has already been alluded to above, the registration of title in terms of the Deeds Registry Act in the names of the defendant and the children was not a mere formality to confound creditors but conveyed real rights to those in whose names it is so registered. The children are thus owners of that property together with the defendant. Their ownership cannot be said to be a sham.

The plaintiff's contention that the registration of title in the names of the children is a sham is not sustainable. That title is real. The children are holders of real rights in that property. The fact that the defendant has been the one receiving rentals or benefits from the property does not take away the real rights held by the children. The children or any of them can seek to enjoy their real rights in the property at any time and the defendant would have no legal defence for as long as the property is registered in the names of these children. That registration bestowed real rights in the property on the children as co-owners.

The defendant conceded under cross examination that on his share in the Highfield property, the plaintiff can have a part thereof. It is in respect of the defendant's 1/6th share in the Highfield property that the plaintiff will be awarded a half share thereof.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted
2. The plaintiff be and is hereby awarded custody of the minor child namely Eric Chituwa Jemali (born 8 February 2001)
3. The defendant is hereby granted reasonable rights of access to be exercised for one week during school holidays subject to the child's school commitments.
4. The issue of maintenance for the minor child and the plaintiff shall be governed by the order of the Maintenance Court under case Number M2199/11
5. The plaintiff's 50 % (fifty per centum) shareholding in Jemali Frontiers be and is hereby awarded to the defendant.
6. The plaintiff be and is hereby awarded the following movable properties:-
 - a) A Freightliner Horse registration number AAS 5605;
 - b) A homemade 30 tonne trailer registration number ABJ 9305;
 - c) A sparkle green Double Cab Mazda B 2500 of year 1999, registration number AAI 0022
 - d) 3 Beds
 - e) Pots, plates and cups;
 - f) Chairs;
 - g) Fridge;
 - h) Black set of Sofas;
 - i) Room Divider;
 - j) Bedroom suite
 - k) 21 inch television set;
 - l) 2 Wardrobes;
 - m) Dining room suite.
7. The defendant be and is awarded the following movable properties:-
 - a) Toyota Hilux registration number ABC 6053;
 - b) International Freight Horse registration number ABF 8001;
 - c) 30 Tonne Trailer registration number AAS 8974;
 - d) 30 Tonne Trailer registration number AAS 7629;

- e) 29 inch television set;
 - f) Cream set of Sofas.
8. On immovable properties ;
- a) The plaintiff be and is hereby awarded the following:
 - i) A 50% (per centum) share in the Remaining extent of Lot 12 Athlone Township of Green Grove registered under Deed of Transfer no. 13245/2002.
 - ii) A 50 %(fifty per centum) share in Stand number 15072 Unit O, Seke, Chitungwiza.
 - iii) A 50% (fifty per centum) share of defendant's one sixth share in Stand number 5965 Highfield Township, Harare held under Deed of Transfer 11199/2005 registered in the names of Chituwa Jemali, Anika Tafadzwa Jemali, Lissa Margret Jemali, Linda Jemali, Chituwa Junior Eric Jemali and Ali Ryan Jemali.
 - b) The defendant be and is awarded the following:-
 - i) A 50% (fifty per centum) share in the remaining extent of Lot 12 Athlone Township of Green Gove registered under Deed of Transfer No. 13245/2002.
 - ii) A 50 % (fifty per centum) share in Stand 15072 Unit O, Seke, Chtungwiza.
 - iii) A 50% (fifty per centum) share of his one sixth share in Stand number 5965 Highfield Township, Harare, held under Deed of Transfer 11199/2005 as stated above.
9. The parties shall, within 30 days of this order, appoint a mutually agreed valuator to value the immovable properties. Failing such agreement the registrar of the High Court be and is hereby directed to appoint a valuator from his list of independent valuators within 30 days from the date of such request from the parties.
10. The cost of valuation of the remaining extent of Lot 12 of Athlone Township, Green Grove and Stand number 15072 Unit O, Seke, Chitungwiza, shall be met by the parties in equal shares.
11. The cost of valuation of the Highfield property, in order to determine defendant's share and, hence the plaintiff's half share, shall be met by the defendant
12. The plaintiff is hereby granted the option to buy out the defendant's share in the Remaining extent of Lot 12 Athlone Township, Green Grove within a period of 18

months from the date of receipt of the valuation report or such longer time as the parties may agree.

13. The defendant is hereby granted the first option to buy out the plaintiff's share in Stand number 15072 Unit O, Seke, Chitungwiza within a period of 18 months from the date of receipt of the valuation report or such longer time as the parties may agree.
14. Should both or either party fail to buy out the other, within the above stated period or such longer period as the parties may agree, in respect of the property they have been granted such option, the property concerned shall be sold to best advantage by an estate agent mutually agreed by the parties. Failing such agreement, by an estate agent appointed by the registrar from a list of independent estate agents. The net proceeds shall be distributed in terms of their respective shares in the properties.
15. The defendant shall be given the first option to buy out plaintiff's share in Stand number 5965, Highfield Township, Harare within six months from the date of receipt of the valuation report. Should the defendant fail to pay, the plaintiff may buy defendant's remaining share in the property within six months from such failure, unless parties agree, in writing, on how the plaintiff will realise her share from that property
16. Each party shall bear their own costs of suit.

Mugiya & Macharaga Law Chambers, plaintiff's legal practitioners
Chibune & Associates, defendant's legal practitioners