

K (nee M)
versus
K

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 18, 19, 23, 25 October, 17, 21 November 2017,
15,16,17,18 and 19 January, 1 March 2018

Trial

B Diza, for the plaintiff
Ms N Chakufora, for the defendant

MUNANGATI-MANONGWA J: The parties herein are wife and husband and both concede they have lost love and affection for each other and want a divorce. The plaintiff issued summons out of this court claiming a decree of divorce, custody of the minor children, maintenance and a division of the matrimonial assets.

At the pre-trial conference held before a judge the parties agreed that the plaintiff would be responsible for what the parties termed “grooming” of the children, gas for cooking purposes or electricity whichever is applicable and entertainment.

The defendant would be responsible for the minor children’s tuition and all school requirements until they finish tertiary education. The defendant would buy clothing for the children twice a year, cover the medical aid and funeral cover and buy toys as and when the need arises.

The following issues were to be determined at trial and this is what this court will deal with and decide upon.

- i) The issue of custody of the minor children *X* and *Y*.
- ii) Access regime to be exercised by the non-custodial parent.
- iii) Whether or not the defendant contributed towards the construction of the matrimonial property if so, what is his entitlement to same?

The following facts are common cause. The parties married on 29 May 2009 in terms of the Marriage Act [Chapter 5:11] and were blessed with two children both boys namely *X*

(born in 2011) and Y (born in 2013). The plaintiff currently has custody of both the minor children and the defendant is enjoying access. The interim access arrangement is that the defendant is having the children every fortnight picking the children on Friday after school and spending the weekend with them, dropping them on Monday morning at school. Each party is to have the minor children on alternate public holidays and half of the school holidays. Also in place is an interim order for payment by the defendant of maintenance in the sum of \$50-00 per month per child with effect from 31 October 2017. Parties are also agreed that the defendant's interest in the matrimonial home only goes to the extent of the improvements of stand No *Home Residence Address* as the stand belongs to the plaintiff by way of inheritance from her father's estate. It is also common cause that the defendant has and is solely entitled to a town house he inherited from his father.

The plaintiff gave evidence that she is employed as an occupational therapist and also works part time. She is pursuing a doctorate by way of research and has to be at the University of Cape Town for 2 weeks once a year. She has custody at the moment. She drops the children at school every day, picks them up after school, drops them at home and joins them when she finishes work. She assists with their homework and tucks them in bed. She passionately and vividly described the children's characters, interests and demeanours showing that she knows them in and out. It was her evidence that the children have however suffered emotional abuse at the hands of the defendant and have had to receive counselling. The plaintiff gave evidence that the defendant has on several occasions taken the children to the Police Station to lay charges against the plaintiff pertaining to abuse. The defendant even went to the extent of going to the children's school in the company of the police with a view of securing the plaintiff's arrest. This had caused the children great emotional stress. The defendant did not deny taking the children to the police station nor visiting the children's school in the company of the police but seeks to explain the incidence as will be canvassed later in the judgment.

The plaintiff related to court how the defendant had gone into the two minor children's classes and taken the children out during lessons. This was done without the plaintiff's knowledge, he kept the children at his house and told the teachers not to ever let the plaintiff collect the children. Due to this conduct the school told the parties to take their children out from the school. For the sake of the children she let go to allow the children to continue attending school. She later got the children back after getting a court order through an urgent application. The plaintiff submitted that the attitude of the defendant and his conduct thereof

made him an unsuitable custodian and it would not be in the best interests of the children if he were to have custody.

The plaintiff gave evidence of how the defendant would 'examine' the children's bodies and take photos when he has access. He made a fuss and caused the plaintiff's arrest on baseless allegations of abuse of children when he noticed scratches at the back of one child's back. Accused was acquitted. Thus it was the plaintiff's evidence that the defendant has been trying to alienate the children from her but despite that the children have remained attached to her.

Evidence was also placed before the court of plaintiff's participation at the children's school events and activities. A probation officer's report was produced by the plaintiff where the findings ruled out abuse of the children by the plaintiff and stated that the defendant had gone to great length to discredit the plaintiff. The plaintiff disputed allegations of suffering from psychological disorientation levelled against her by the defendant. On the issue of access the plaintiff gave evidence that the current regime could be maintained where the defendant has children fortnightly and alternative public holidays and half the school holidays.

The plaintiff claims \$250-00 per month per child. The amount as per her evidence would cover transport, groceries, stationery, milk at school, clothing, a maid, entertainment and school uniforms. She stated that whilst the defendant buys uniforms he never avails same to her despite him having the children only 4 (four) days *per* month. The same applies to the children's clothing. If the court were to grant US\$250-00 per child she would see to everything else including medical aid. She earns \$1500-00 per month. She indicated that she is still paying for the loan she took during construction of the house. She also buys clothes for the children, groceries, pays utility bills and has equally contributed to the sustenance of the family.

On the issue of improvements to the immovable property, the plaintiff gave evidence that she contributed to the construction of the matrimonial home to a great extent. She acquired loans to effect improvements and the evidence of the loans was placed before the court. She indicated that she got money from her siblings and \$2400-00 advance from defendant's uncle Mr T and his wife which she is still to pay off in full. Receipts for purchase of building materials and accessories like solar panels, batteries etc, were provided. It was the plaintiff's evidence that the defendant only bought a bath tub, two sinks and a toilet all worth at most \$1000-00. She denied that defendant contributed more either directly or indirectly as his medical practice was not doing well. She had to maintain 3 jobs in 2014 so as to look after the family and continue construction. Her work prowess and enterprising traits were not challenged.

The plaintiff gave her evidence well, she was unshaken during cross-examination. Documentary evidence on loans acquired and purchase of items were availed. She conceded contribution by the defendant by way of payment of rentals when parties resided in Monavale. She did not call any witnesses.

The defendant is a medical doctor and is duly employed as such. He testified that the marriage had broken down. He wanted the court to grant him custody of the minor children as the plaintiff is not a "suitable custodian". The defendant raised the issue that the plaintiff has three jobs, is emotionally unstable and abusive in nature. It was the defendant's evidence that the plaintiff works 12 hours a day 6 days a week hence she had no time for the children. The plaintiff puts her career ahead of the children's interests getting home at 8:00pm. He testified that he suffered physical, emotional, verbal, and psychological abuse at the hands of the wife. It was his evidence that the wife could go for 12 hours shouting at him and at one time she beat him, continuously in front of the children. At times she would hit the children.

It was his evidence that he relates well to the children and had bought then 47 children's books and understood their characters well. He is in a position to provide a comfortable and secure home for the children than the matrimonial home which has no running water, relies on solar power and a pit latrine. He has a relative who is committed to look after the children for the rest of her life. It is due to these reasons that he believes it is in the best interests of the children for him to be granted custody.

On access the parties are agreed that the current interim regime may be continued.

Regarding the issue of maintenance the defendant maintained that he wants to continue to pay \$50-00 per months per child as he does not have a fixed pay date, no regular and reliable payment and he is paid once every 2 to 3 months. He testified that he pays \$1000-00 per month for the rates at his inherited property where he is residing and has a telephone bill of \$1000-00 which was incurred by the plaintiff when she was telephoning her clients. He owes National Social Security Authority (NSSA) \$1000-00 for employees' pensions contribution. He further pays for the children's funeral assurance at \$25-00 per month and medical aid for the 2 minor children at \$140-00 *per* month. He conceded under cross-examination that he buys toys to the tune of \$1 500-00 *per* year for the children.

On the issue of the defendant's claim to improvements on the matrimonial house the defendant indicated that his contribution amounted to \$35 000-00 despite the market value of the improvements being valued at \$20 000-00 by a valuer he contracted. The essence, he explained was because he created employment for the plaintiff and assumed the debt at the

inherited property. The plaintiff's share of the outstanding rates is \$35 000-00 hence that is the defendant's contribution. Further he was catering for the children's expenses, rent, food and fees which freed financial resources for the plaintiff to build. Suffice to state that whilst there is no defined counter-claim the defendant in his plea indicated that he is claiming 50% of the improvements. It was the defendant's evidence that he contributed \$1 000-00 that was borrowed from *MT* his uncle to assist in roofing the matrimonial home.

The defendant conceded under cross examination that he had indeed taken the children to the police on two occasions for investigation. He had also taken the children out of school without the plaintiff's knowledge and the plaintiff had to apply to the High Court to get custody. The defendant conceded that he took the children out of school for a week when he went to Bulawayo for a conference and this was out of love for the children as the mother was also going to Kwekwe for a conference and the maid was new so he could not leave the children with the maid. It was the defendant's evidence that he is *prepared to die* for his children. The defendant produced a photograph of his son's naked back showing scratches and he stated that this was a result of abuse. Further the plaintiff was unable to look after the children hence they suffered from ailments such as scabies which is a sign of poor hygiene. He thus felt obliged to take the children.

The defendant called a witness one *MT* his uncle who is an engineer by profession. He indicated that he and his wife had advanced an amount of \$2400-00 to the parties to help them build the matrimonial home. He personally gave the defendant \$1000-00 whilst his wife handed \$2400-00 to the plaintiff which he believes all went towards construction of the house. He confirmed that the loan was still outstanding to the tune of \$1600-00. He confirmed that at one time the plaintiff went to stay with the defendant's mother as the bail conditions stated that she had to move. It was at that time that the defendant approached him requesting him to speak to his mother so that the defendant could see the children. The witness indicated that the defendant knew within a week that the children were at his mother's place. This witness' evidence was straight forward and to the point.

The defendant's second witness was *SK* his sister who is 27 years old. She indicated that she had committed herself to taking care of the children but was not aware whether it is in the children's best interests. She is currently staying with the defendant and says she has no intention to start her own family. She had seen the scars on one of the children and the ringworms having been brought to her attention by the defendant. This was a simple girl whose evidence was colourless *viz* the issues before the court.

The defendant called *DM* who purported to work for the defendant. He indicated that he had worked well with the defendant. The plaintiff who shared offices with the defendant was abusive towards staff. He indicated that the defendant was responsible for paying staff salaries, electricity bills for City of Harare and pension contributions whilst the plaintiff contributed nothing. He indicated that City of Harare was owed between \$90 000 to \$100 000-00 and a notice to disconnect water had been received.

Lastly the defendant called one *TD* a part-time accountant who stated that he had worked for the defendant since 2011 and did his books till 2013. He repeated the evidence that the plaintiff and the defendant shared some offices and the plaintiff made no contribution. He indicated that the plaintiff owed the defendant \$35 554-00. He was adamant that the defendant should be considered to have contributed to the building of the matrimonial home as the plaintiff owed him \$35 554-00, being a 50% of the total bill owed to City of Harare. This witness had difficulty in answering questions during cross examination.

In deciding the issue of custody or any matter concerning a child every court is obliged to take into account the best interests of the child. This is enshrined in the Constitution of Zimbabwe Amendment (No 20) Act 2013. Section 81 (2) subsection 3 thereof states that it is the duty of the courts particularly the High Court as the upper guardian of children to adequately protect minor children. In *casu*, the two minor children have gone through a lot at the hands of the defendant. The defendant admitted to taking the children to the police to make reports against the plaintiff, he had one of them photographed and taken to doctors for scratches after suffering from measles. He had reported the plaintiff for child abuse wherein she was acquitted. He took the children mid classes, threatened school authorities with legal action during a meeting, let children miss class for a week as he took them to Bulawayo on a working trip rather than leave them with a relative or maid.

The children have been to social workers and the plaintiff gave evidence that the youngest child had to state that he was not abused more than 9 (nine) times and he ended up crying. As the probation officer noted, the defendant went to “great” length to discredit his wife as a suitable guardian to the children. He found that the allegations of abuse were not substantiated. Whilst the defendant dismissed the reports by a doctor consulted by the plaintiff, an affidavit by a doctor engaged by the probation officer indicated that the marks on the child were not a result of physical blows as had been indicated by the defendant’s doctor. Suffice to state that when one of the children was infected with ringworms the defendant went to the police to report and evidence was led that he was pushing to have plaintiff charged for

neglecting the children. Further he had gone to report to the police that children were neglected when he saw them playing outside the plaintiff's practice when the mother had stopped by to pick something and the receptionist watched them.

The above chronicled events point to the fact that the defendant is obsessed with the children and would go to any extent to have the children. This is supported by his own statement in court that he is prepared to "die for his children." Apart from such a statement being shocking it is worrisome. What then exercises the court's mind is whether this is love for the children or simply a strong desire to get at the plaintiff. If at all the defendant is driven by love for the children as he claims, then, in the court's view, what defendant has for the children is irrational unbridled love which is dangerous. Such conduct ceases to be love for the children but a dangerous obsession. It cannot be in the best interests of the minor children to be examined inch by inch like pieces of meat and have photographs taken whenever their father has access let alone being taken to doctors when not particularly ill. The defendant requires urgent help by professionals such as clinical psychologists as he may be a danger to the children.

It is not denied that he spoils the minor children with toys and purports to buy toys worth \$1500-00 per year and they have, *per* his evidence hundreds of toy cars. He bought them 47 reading books. However, the belief by the defendant that because he has more resources makes him a better custodian is misplaced. The Supreme court case of *Hackim v Hackim* 1988 (2) ZLR 61 at 66B-C laid out the facts for consideration in deciding on the best interests of a child when deciding the issue of custody and these are: the sex, age of the child, educational and religious needs of the child coupled with the social and financial position of each parent, each parent's character and temperament as well as their past behaviour towards the children. If the child has reached the age of discretion his or her personal preferences. As DUMBUTSHENA CJ put it in that case;

"The question in each case is which of the spouses would best care not only for the physical well being of the child but for its moral, cultural and religious development. See Hahlo *op cit* pp453-454"

The character and behaviour of the defendant towards the children militates against his quest to be granted custody of the children. The court had occasion to interview the children and they categorically stated that they did not like their father's habit of being rude to their mother and wished they could live peacefully as a family. The younger child X even indicated that the practice by father of going to the police was not good. The defendant even tells children their mother will rot in jail.

In dismissing criminal charges of child abuse and neglect raised by the defendant against the plaintiff the trial Magistrate commented thus:

“As it stands these allegations seem as though the complainant is trying to play dirty by dragging their children onto what appears a messy divorce and the court is registering its displeasure as not only is it a waste of the state’s resources but a failure to act in the best interests of the children.”

Equally this court finds that the defendant has not been acting in the best interests of the children and the incidents already outlined exposes his character as not being good at all. The raising of abuse allegations at every twist and turn does not augur well for the children who have had to go to numerous doctors when not particularly ill, been to social workers, probation officers, get undressed and their bodies scrutinised by their father for any signs of abuse and get stressed when told their mother is going to jail. The defendant did not deny or challenge the evidence that at one time he deserted the family and at one point he held on to the matrimonial home and refused to move out whilst accommodating his brother’s family when his family had to be accommodated by the plaintiff’s step mother. It was only during the course of trial that he agreed to move out of the matrimonial property to allow the plaintiff and the children to move in and I granted the order to that effect. This does not speak of a caring parent who has the interests of his children at heart.

On the other hand the character of plaintiff is exactly the opposite of that of defendant. Pertinent are the following comments by the plaintiff in her evidence wherein she stated that:

“Our children are still very young, 4 years and 6 years old, they need to be bathed and be taught to bath themselves need hugs and to be shown love, to be taught about God, morals, to be disciplined to look after themselves and the environment and that is my role. This does not mean I am denying him access or his fatherly role.”

This speaks of a caring and loving parent who at one time decided to let go in a fight when the defendant grabbed the children and she had to seek legal recourse. This accords with the probation officer’s report that the plaintiff is a responsible individual and shows love and concern for her children.

It is the court’s considered view that the children’s best interests will best be served by custody being awarded to the plaintiff. After an acrimonious divorce the children need an environment which is conducive to them getting accustomed to the new dispensation and require the love and care which the plaintiff can offer. Whilst the defendant has secured a maid, it is in the best interests of the children that the plaintiff retains custody and continues to give the care and attention she has demonstrated she is able to render to the minor children regard being made to their tender ages.

On maintenance payable for the children, the needs of the children have to be balanced against the means of the person responsible for payment of maintenance. It is however the obligation of both parents to maintain their children each according to their means and at the same time trying to ensure that the children enjoy the quality of life they were accustomed to before the divorce. The defendant is a doctor who has indicated that he earns a gross salary of \$3600-00 and a net salary of \$2500-00. No payslip or proof of earnings was produced. It is common cause that he is staying in his own house and his expenses that he outlined in court came to about \$700-\$800-00 per month.

The defendant is currently paying \$50-00 *per* month per child which was meant to cushion the children. On his own evidence he indicated that he buys toys worth \$1500-00 *per* year and substantial receipts were produced. It makes no economic sense that children benefit more from toys yet lack necessities of life. Current maintenance comes to \$1200-00 *per* year. The plaintiff indicated that she can buy school uniforms if she is awarded \$250-00 *per* month *per* child as the defendant never avails uniforms or clothes despite having the children only 4 days *per* month. Further given the acrimony that characterised this divorce it would be ideal and prudent to minimise potentially contentious engagements between the parties. The plaintiff should be able to buy clothes and uniforms as she is staying with the children. If the formula in *Gwachiwa v Gwachiwa* SC134/86 were to be implemented with each party getting two shares and one share for each child, each child would receive \$666-66 out of the total earnings of the parties of \$4000-00 and each parent \$1333-00. However the defendant still has to pay fees of \$420-00 per term for the two children. As for the outstanding rates for City of Harare the defendant conceded that he is not paying the \$1000-00 every month as he initially indicated and in any event there was no proof of such payment.

It is therefore just and equitable and in the interests of the minor children that the defendant pays the claimed amount of \$250-00 *per* month *per* child as maintenance and the plaintiff sees to the children's clothes and uniforms. The defendant is capable of paying this amount given his earnings as weighed against his expenses as balanced with the needs of the children to sustain the way of life they are accustomed to. Further the amount is way below the indications arising from the above calculations using the *Gwachiwa* formula.

The defendant has not filed a counter claim regarding the claim on the value of developments of the matrimonial property. That he has a stake in the improvements can only be gleaned in his amendment plea to the plaintiff's declaration wherein he states in para 5 that he made direct and indirect contributions to the improvements on the stand. It is only in the

summary of evidence that the defendant makes it clear that he would seek a 50% share of the improvements as per his contribution. This is not the way to place a claim before the court. A counter-claim has to be specifically pleaded which defendant failed to do.

It is common cause that at the pre-trial conference the parties then identified as one of the issues “whether the defendant contributed towards construction of the matrimonial property if so, his entitlement.” This should never have been an issue as the defendant had not properly claimed same and hence there was no prayer formally placed before the court.

Even if it were to be taken that the defendant is entitled to a share it was incumbent upon him to establish his claim by way of evidence. His direct contribution is undisputed *viz* purchase of a bath tub, two sinks and a toilet set which as per evidence is contested to be between \$500-00-\$1000-00. It is not denied that he paid the parties’ rental before the parties moved into their matrimonial home. In his evidence the defendant indicated that he was claiming \$35000-00 as his share of improvements. The defendant however did not support his claim for \$35 000-00 which he broke down as \$10 000-00 direct contribution (as half of the price set by valuation as the value of improvements) and \$25 000-00 which he alleges is owed by the plaintiff as her share of rates. In fact the defendant got mixed up and could not explain how his contribution could amount to \$35 000-00 when the value of improvements is only to the tune of \$18 000-00 or \$20 000-00 as per the two valuation reports put before the court by the parties. It is apparent from the record that the defendant did not file a counter claim, neither did he in his plea indicate that he seeks 50% of the value of the improvements. To just state so in the summary of evidence is not sufficient neither is it acceptable. His failure to justify the claim for \$35000-00 makes it impossible for the court to grant him anything beyond what plaintiff has offered. To do otherwise would in my view, compromise the court’s integrity as the court should not make up cases for litigants. This however does not mean he did not contribute. Given the fact that the plaintiff offered 5% of the value of improvements it would be just and equitable to award him that. Taking the average of the two valuations of \$19 000-00, 5% thereof would amount to \$950-00.

Section 7 (1) of the Matrimonial Causes Act [*Chapter 5:13*] gives the Court the discretion to distribute the parties assets in the granting of divorce among other things. In exercising that power s 7(4) states that the court shall have regard to all the circumstances of the case which include;

- (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 common cause that the plaintiff only has a cottage which is the matrimonial home and it has no running water, no electricity and is incomplete as per the defendant's evidence. Defendant has a four bedroomed town house which is currently vacant. The asset at his disposal is not only far bigger than that of plaintiff but it is capable of generating income for him. Meanwhile, the plaintiff has the burden of housing the children and requires this property and should not be burdened further financially. Moreso, when she has outstanding rates which the defendant failed to pay when he was holding on to the property and outstanding loans. It is common cause that she earns less than the defendant yet she has pressing financial needs, obligations and responsibilities to attend to. She still has a long way to go in terms of finishing construction of the basic structure the parties have been staying in. These factors convince me that the defendant should not get anything more than what was offered to him. If plaintiff had not offered the defendant a share of the improvements the court would still not have had any issues with that given that the balance of convenience favoured the retention of the improvements by plaintiff regard being made to her needs and circumstances when considering factors outlined above in s 7(4).

Accordingly the following order be and is hereby made

It is ordered that

1. Custody of the minor children X (born on 31 January 2011) and Y (born on 18 March 2013) be and is hereby granted to the plaintiff.
 - 2.1 The defendant shall enjoy access once every fortnight during school term collecting the children from school on a Friday and dropping them at school on a Monday.
 - 2.2 The defendant shall during school holidays continue to enjoy custody on alternate weekends being Saturdays and Sundays on condition the defendant

attends post-divorce counselling by a registered clinical psychologist for a minimum period of 6 months with a minimum of 4 sessions a month, with the last 2(two) final sessions being attended together with the two minor children.

2.3 The Clinical psychologist shall be appointed by the Allied Health Practitioners Council of Zimbabwe.

2.4 The Registrar of the High Court shall within 7 days of this order write to the Registrar/ Chairperson of the Allied Health Practitioners Council of Zimbabwe to effect such an appointment.

2.5 The Clinical Psychologist so appointed shall render his or her report to the court stated in clause 2.6 below should defendant apply for variation of the access terms. The Clinical psychologist's fees are to be borne by the defendant.

2.6 The defendant may approach this court or the children's court for a variation of the access terms after successfully going through the aforementioned counselling.

3.1 The defendant shall pay the sum of \$250-00 *per* month as maintenance per child for each of the two minor children to cover their daily requirements, clothes and uniforms until each children reaches the age of 18 years or becomes self-sustaining whichever occurs first.

3.2 The defendant shall continue to pay all school fees for each of the minor children, medical aid and funeral cover until they finish tertiary education or become self-supporting whichever occurs earlier.

4. The defendant is awarded 5% of \$19000-00 the accepted value of the improvements to stand *Home Residence Address Township Harare* to be paid by the plaintiff within 3 months of the granting of this order.

5. The defendant shall pay costs of suits.

Machaya and Associates, plaintiff's legal practitioners
Mhishi Nkomo Legal Practice, plaintiff's legal practitioners