LAWRENCE RUWO

versus

RUTH RUWO (NEE KUNYARIMWE)

HIGH COURT OF ZIMBABWE

CHITAKUNYE J

HARARE, September 2, 2011 and March 8, 2012

MATRIMONIAL ACTION

*L. Chimuriwo* for plaintiff

Defendant in person

CHITAKUNYE J: The plaintiff and the defendant were joined in holy matrimony on 8 December 1996 at Harare in terms of the Marriages Act [*Cap 5:11*] of the Laws of Zimbabwe. They had however commenced living together as husband and wife in terms of customary law in 1985. They were both born and bred in Zimbabwe. They have lived in Zimbabwe all their lives and consider it their country of domicile.

Their marriage was blessed with three children who are now all adults.

On 2 March 2010 the plaintiff instituted divorce proceedings against the defendant in this court alleging that the marriage has irretrievably broken down to an extent whereby there was no reasonable prospect of restoring a normal marriage relationship between them. He alleged that;-

1. both parties have lost all the love and affection for each other;
2. the parties have not shared conjugal rights for a period well in excess of one year; and
3. The defendant is violent, abusive and harbours suicidal tendencies.

During the subsistence of the marriage they acquired movable and immovable property. The immovable property, namely Stand Number 8816, Kuwadzana Phase 3, Harare, was acquired by the plaintiff through a co-operative called Ivainavo Housing Co-operative.

The plaintiff thus sought an order;-

1. granting a decree of divorce;
2. awarding the defendant all the movable property;
3. awarding him 80% share in Stand No. 8816 Kuwadzana Phase 3, Harare and the defendant 20% share thereof; and
4. evicting the defendant from House number 58 Area E, ZRP Tomlison Depot Harare.

The defendant in her plea contended that the marriage has not irretrievably broken down but is only going through some difficult times which difficulties can be resolved through counseling. She contended that she still loves the plaintiff. She denied being a violent and abusive person.

To safeguard her interests she made a counter-claim in which she prayed for a division of the property acquired during the subsistence of the marriage including a Motor vehicle and two immovable properties. The immovable property comprised-

1. Stand number 8816 Kuwadzana Phase 3 and
2. Plot number 13 Igava, Marondera

At a pre-trial conference issues referred for trial were:-

1. Whether or not the marriage relationship between the parties has irretrievably broken down.
2. Whether or not the Plaintiff is obliged to maintain the Defendant, if yes, how much maintenance should be paid?
3. How should the parties’ immovable property be distributed?
4. Whether or not the motor vehicle constitutes matrimonial property and, if yes, how should it be shared?

The plaintiff gave evidence in which he tendered some documentary evidence and called one witness. Thereafter the defendant gave evidence. The evidence led related mostly to the above issues.

1. **Whether or not the marriage relationship between the parties has irretrievably broken down**

The ground of irretrievable breakdown of a marriage is provided for in section 5 of the Matrimonial Causes Act, [*Cap 5:13*.]. Section 5 (1) thereof provides that:-

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

Subsection (2) thereof provides *inter alia* that-

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

1. the parties have not lived as husband and wife for a continuous period of at least twelve months immediately before the date of commencement of the divorce action; or
2. ………..
3. ………..
4. The defendant has, during the subsistence of the marriage-
   1. treated the plaintiff with such cruelty, mental or otherwise; or
   2. habitually subjected himself or herself, as the case maybe, to the influence of intoxicating liquor or drugs to such an extent;

as is incompatible with the continuation of a normal marriage relationship;

as proof of irretrievable break-down of the marriage.”

In the assessment of whether a marriage has irretrievably broken-down there are basically two characteristics namely-

1. the marriage relationship is not normal any more; and
2. there is no reasonable prospect of the restoration of a normal marriage relationship.

Once these characteristics have been met it would be folly to hold that the marriage has not irretrievably broken-down.

In *Kumirai v Kumirai* 2006 (1) ZLR 134 (H) at page 136 B-D MAKARAU J (as she then was) said 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 the trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the relationship since the promulgation of the Matrimonial Causes Act in 1985. So trite has the position become that one hardly finds authority for it.

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”.

Equally in *Murada v Murada* 2008(2) ZLR326 (H) at page 329E-F NDOU J said that: -

“….it is hardly possible for a court to find that there is a reasonable prospect of reconciliation between the parties when one of them is determined to bring the marriage to an end.”

In *casu* evidence led showed that plaintiff left the matrimonial home in about May or June 2009. In March 2010, which is a period of less than 12 months he instituted these divorce proceedings. The fact or circumstance of not having 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 would not apply. Neither part testified that they had stopped living together as husband and wife before plaintiff left home. The period from when plaintiff left home to when he instituted divorce proceedings is less than twelve months. The facts or circumstances available to plaintiff include that – the parties have lost love and affection for each other and that defendant is violent, abusive and harbors suicidal tendencies.

In their evidence neither party alluded to any efforts made towards reconciliation. Instead evidence was abound that plaintiff has not returned home since he left in 2009 and that he is still insistent that he no longer has any love and affection for the defendant. The plaintiff maintained his stance that defendant is violent, abusive and of suicidal tendencies. Such behavior is incompatible with a normal marriage relationship. He thus has lost all love and affection for plaintiff and insists on divorce.

The defendant on her part conceded that their marriage had some difficulties. She clearly did not deny the existence of violence in the marriage. Though she maintained that the problems could be resolved by reconciliation I did not hear her to say that ever since the inception of the divorce action any effort has been made towards reconciliation. Her situation was one of trying to cling onto a dysfunctional marriage.

This court is satisfied that the marriage has irretrievably broken down. For as long as plaintiff is determined to part ways and defendant is not taking any steps to reconcile they will continue to live apart and that is not normal in a normal marriage relationship. There is no reasonable prospect that a normal marriage relationship can be restored. A decree of divorce will therefore be granted.

1. **Whether or not the plaintiff is obliged to maintain the defendant. If so, how much** **maintenance should be paid**.

Section 7 (1) (b) of the Matrimonial Causes Act, [*Cap 5*:*13* ] state 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 of any child of the marriage.”

As in the case of division, apportionment or distribution of the assets of the spouses, in determining whether one or other of the spouses should be paid post divorce maintenance section 7(4) provides that court must consider all the circumstances of the case including factors outlined in subsection 4(a)-(g). The subsection states further that:-

“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 the children in the position they would have been in had a normal marriage relationship continued between the spouses.”

In *casu* it is common cause that there is in place a pre-divorce maintenance order granted by the maintenance court wherein the defendant is being paid USD 20 per month. The plaintiff argued that that maintenance order should not be varied. He wishes to continue paying USD 20 per month. He argued that there was no good cause shown to vary the order. The defendant on the other hand contended that she needed post divorce maintenance in the sum of USD 200 per month.

It is pertinent to point out that as stated in section 7(1) (a) of the Act cited above, in granting a decree of divorce court is enjoined to ensure as far as is reasonable and practicable that the spouses are placed in the position they would have been in had a normal marriage relationship continued between them. This necessarily means that neither spouse should be made to feel the agony of the divorce whilst the other continues to enjoy the standard of living they enjoyed as a couple. The circumstances of each spouse after the granting of the decree of divorce must be considered.

In *casu*, it is common cause that the spouses lived in accommodation provided by the plaintiff’s employer. At divorce such accommodation will not be available to defendant but the plaintiff can continue living in these quarters. The circumstances of defendant are such that she stands to lose all the benefits derived from the plaintiff’s employer. She must look for her own accommodation and other basic needs. The plaintiff’s argument that the defendant should go back to her parents home is without merit. For 27 years she lived with him as husband and wife and his ‘home’ is what she had come to know as her ‘home’. It is that ‘home’ that must be shared in such a way as to provide her with the basic needs she requires to maintain the same standard of living the couple enjoyed. It is my view that the USD 20 per month that the plaintiff persisted with is highly inadequate.

The defendant said she needed the amount of USD 200 to cater for- Rent for two rooms, currently at $50 per room per month, Food, Electricity, water, clothes and other basic needs.

The plaintiff on the other hand argued that he can not afford to pay USD 200 as he earns about USD 400 per month before tax. He has to maintain a minor child from another union and his mother which takes up USD120. He has to sustain himself in the sum of $200 per month.

Unfortunately for the plaintiff he could not produce proof of his income or expenditure to confirm his inability to pay more than USD 20. To merely say that he needs USD 200 to sustain himself per month without proof that such expense is a necessity is highly inadequate. If anything it tends to confirm his assertion that he is simply not comfortable with the idea of paying maintenance for the defendant. It was with this in mind that he insisted defendant should go back to her parents’ home. It is my view that to even suggest that one’s spouse for about 27 years should go back to her parents’ home in this day and age is ill-conceived. After such a long time of marriage the parties must realize that when they part ways they will have to provide for each other. Each must go out with a lifestyle they had been enjoying together.

In as far as plaintiff has not provided defendant with alternative accommodation, he must provide adequate maintenance for defendant to secure her own accommodation and be able to set herself up as soon as is practicable. I am of the view that a sum of 120 per month would enable defendant to find accommodation and other basic needs.

The next question is: for how long should such maintenance be paid?

Section 8 of the Act provides that a maintenance order in respect of a spouse is terminated by death or remarriage.

It is however important to note that the period of payment of post divorce maintenance must be justified such that marriage is not taken as a life time food ticket even after divorce. In *Kangai v Kangai* HH 51/07 at page 5 of the cyclostyled judgment GOWORA J, in agreeing with *Chiomba v Chiomba* 1992(2) ZLR 197, said that:-

“A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before the marriage, and is thus in a position to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short time to allow her time to get back on her feet. Where the divorced woman is middle aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand elderly women who cannot be trained or remarried are entitled to permanent maintenance.”

In *casu* the defendant is about 43 years old. She was apparently not employed at the time of marriage. For the 27 years of marriage she was never employed. It would appear she has no formal training in any profession or undertaking. For the duration of the marriage she was a full time housewife. She virtually has no means of her own and that seemed to have been the accepted situation in their marriage. No suggestion was made that she is sufficiently educated to be trained in any profession. She was not shown to have shunned efforts at improving herself such that she becomes employable or trainable in entrepreneurship. I got the impression that as husband and wife they preferred she remained as she is. They must therefore accept her inevitable inability to sufficiently provide for herself on her own The defendant said that she at times does some piece jobs, such as doing laundry for others from which she earns very little. Such piece jobs are however not available on a regular basis. She also indicated that she is of ill health and so cannot expect to be regularly employed.

It is apparently upon learning about this that plaintiff was heard to say defendant is employed and in that employment she can earn about USD 200 per month. Unfortunately that is not what the defendant said and plaintiff had no proof that the defendant is employed. I therefore accept that the defendant is not employed.

Though the defendant may be said to be middle aged, I am of the view that her circumstances are such that she may not be trainable in any worthwhile profession or undertaking so as to be able to earn sufficiently to sustain herself at the same standard of living as during the marriage or anywhere near that. In the circumstances she needs maintenance till she dies or remarries whichever occurs first.

1. **How should the parties’ immovable property be distributed**

In his declaration the plaintiff disclosed that, the plaintiff, through a co-operative acquired an immovable property namely Stand Number 8816, Kuwadzana Phase 3, Harare. The property has no title deeds and is on hire purchase. That it is just and equitable that the parties’ proprietary rights be determined as follows:-

a) that the defendant be awarded all the movable property to be her sole and exclusive property

b) It would be just and equitable for the plaintiff to get 80% share Stand Number 8816 Kuwadzana Phase 3, Harare whilst the Defendant gets 20% share of same. The plaintiff should be given the first option to buy out defendant’s share within a period of 12 months from the date of judgment failing which the property shall be sold on the open market and the proceeds shall be distributed between the parties in the proposed ratio.

The plaintiff was allocated House Number 58 Area E, ZRP Tomlison Depot by his employer s part of his employment benefits.

In her plea and counter- claim defendant confirmed the existence of the two immovable properties.

It was clear from the pleading that House Number 58 Area E, ZRP Tomlison Depot was not available for distribution as it is not an asset of the spouses. The parties had not invested anything in that property. It was availed for use by the plaintiff’s employer and nothing else.

In their pleadings the parties believed that Stand Number 8816 Kuwadzadna 3, Harare was available for apportionment and distribution. It was only during his evidence in court that plaintiff sought to say that the Stand still belonged to the Co-operative and so the spouses did not own any immovable property that can be apportioned or distributed between the parties. In support of that version he called the secretary for Ivainavo Housing Co-operative, one Charles Mhondoro. Mr. Mhondoro confirmed that the Co-operative was started by plaintiff and his work colleagues in 1996. The Stands or houses have not yet been officially allocated to members and so no member can dispose any of the Stands. The Stands are still in the Co-operative’s name. He however confirmed that plaintiff had paid up the subscriptions. What members were now required to do is to pay outstanding rates to the City of Harare. This evidence was intended to remove the Stand in question from being considered in the apportionment and distribution of the assets of the spouses. In this regard the plaintiff argued that this court can only grant an order for distribution of property that belongs to the parties. Since the Immovable property was still in the name of Ivainavo Housing Co-operative court can not distribute it to the parties.

Section 7(1) (a) of the Matrimonial Causes Act provides 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 division, apportionment of the assets of the spouses, including an order that any asset be transferred from one spouse to the other:”

Subsection (4) of the said section goes on to provide 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-

* 1. the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
  2. the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
  3. the standard of living of the family, including the manner in which any child was educated or trained or expected to be educated or trained;
  4. the age and physical and mental condition of each spouse and child;
  5. 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;
  6. 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;
  7. 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.”

The consideration of all the circumstances of the case would in my view include considering investments made by the spouses in any asset or venture. The evidence led showed that the plaintiff by joining the co-operative has in fact invested in an immovable property. Though it was said no formal allocation has been made it is clear to me that the investment can be tied to the value of the Stand allocated to him albeit not formally. It is because of this allocation that for all intents and purposes the plaintiff and defendant believed they had acquired Stand number 8816 as per their pleadings.

Whilst the Stand may not be available for sharing or disposal, the investment in that stand should surely be considered. It is an asset that plaintiff is likely to have in the foreseeable future because, according t the evidence adduced, all that remains is payment of outstanding rates to the council by the Co-operative. The members themselves made their required payments in full. This is an asset the plaintiff is likely to benefit from soon and his investment in that asset must be thus considered.

The defendant by virtue of being a wife taking care of the family and performing other domestic duties has indirectly contributed to that investment. She provided services that the plaintiff would have been required to pay for and which then enabled plaintiff to comfortably invest with the co-operative. The defendant alluded to direct contribution she also made in the investment in the sum of Z$4000.00. That can not be ignored.

The investment the parties made can be assessed by valuing Stand 8816. That is the asset the plaintiff stands to gain once the rates have been paid in full.

I am of the view that taking into account all the circumstances of the case including such factors as the duration of the marriage, the defendant’s direct and indirect contributions, the defendants expectations and needs, the defendant is entitled to an award of 35% of the value of Stand 8816 Kuwadzana Phase 3, Harare.

**Farm in Marondera**

It is common cause that the immovable property namely Plot No. 13 Igava Marondera is State Land and can thus not be apportioned or distributed. The plaintiff was offered the property as lessee. An aspect that may be considered is that it is available to the plaintiff as a resource which should enable him to provide his family with some basic needs unlike defendant who will not have such a resource.

**Ford Mustang Motor vehicle**

Though the defendant had contended that this vehicle was matrimonial property, evidence adduced showed that it is registered in the name of a third party. The defendant had nothing of substance to refute that evidence. I therefore determine that the motor vehicle should is not part of the matrimonial property and as such should not be considered in the apportionment and distribution of the assets of the spouses.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted
2. The plaintiff shall pay maintenance to the defendant in the sum of one hundred and twenty United State Dollars ($120) per month till the defendant dies or remarries whichever is earlier.
3. The defendant is awarded all the movable property of the marriage as her sole and exclusive property.
4. The defendant is awarded 35% in value of the immovable property namely Stand Number 8816 Kuwadzana Phase 3, Harare.
5. The parties shall, within 14 days of this order, appoint a mutually agreed evaluator to evaluate the said immovable property with all its improvements.

Should the parties fail to agree on an evaluator, the Registrar of the High Court is hereby directed to appoint an evaluator from his list of independent evaluators.

The cost for evaluation shall be paid by the plaintiff.

1. The plaintiff shall pay the defendant the 35% of the value as determined by the evaluator within 12 months from the date of receipt of the evaluation report.

Should the plaintiff fail to pay in full within the period stipulated, the defendant shall be entitled to execute this order as in any other enforcement of a civil judgment.

1. The defendant shall vacate House Number 58 Area E, ZRP Tomlison Depot, Harare within 30 days of the date of this order.
2. Each party shall bear their own costs of suit.

*Gonese Jessie Majome and Company*, plaintiff’s legal practitioner

*Defendant ,* self actor