

BEAUTY KONDO (nee Khumalo)

Versus

JOHN KONDO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 25 & 31 OCTOBER AND 15 DECEMBER 2005

G Nyathi for the plaintiff
Advocate P Dube for the defendant

Trial Cause

NDOU J: The plaintiff seeks a decree of divorce and ancillary relief. In brief the parties married each other in terms of the Marriage Act [Chapter 5:11] and the marriage still subsist. The marriage relationship between the parties was blessed with one minor child a boy going by the name Gayne Tinashe Kondo born on 5 June 1995. It is common cause that the marriage relationship between the two parties has irretrievably broken down to such an extent that each has entered into some adulterous arrangement. The parties have lived apart since April 2002. Currently the parties are living almost one thousand(1000) kilometres apart and in different countries. During the subsistence of the marriage the parties acquired certain immovable property known as plot number 6508 Zimre Park Ruwa, Harare. The memorandum of agreement of sale through which this property was acquired from Zimre Corporation reflects the parties and their minor son as the purchasers. By virtue of a deed of transfer dated 23 May 2002 the

said property was registered in the sole name of the parties' minor son Tinashe. The issue is whether this transfer was done with the

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plaintiff's consent. The transfer was achieved through a document addressed to the conveyancers dated 8 April 2002. This document purports to have been signed by both parties. The plaintiff disputes the signature thereon as hers. She in short alleges that the signature purporting to be hers is forged as she knows nothing about this document. As far as the movable assets are concerned, by and large these were distributed by consent. What is outstanding is the room divider and the radio. The plaintiff has the radio in her possession whereas the defendant has the room divider.

The plaintiff also claims value of her clothes left in matrimonial home when she left. The defendant disputes this claim on the basis that the plaintiff's property with all the clothing items of value and everything left behind was handed over to her sister as per her arrangement. The last issue is one of custody of the parties' minor child. When the parties separated the defendant remained with the son. The defendant has had such custody from 2002 to date. The child has attended school under the care of the defendant in Bulawayo. The plaintiff has always been away in South Africa where she is now resident and the only time she has spent with the child being limited to visits during school holidays. It is common cause that the boy is staying in an affluent low density suburb of Bulawayo known as Fortunes Gate with the defendant. He

is attending one of the good private schools in Bulawayo. It is beyond dispute that he is doing well at school. Beside the defendant, the child lives with a step sister and has friend and relatives

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(both paternal and maternal) in Bulawayo. The boy is very active in sports at school. Having articulated the issues I propose to consider the evidence in turn.

Beauty Kondo alias Pretty Khumalo

She confirmed that she is currently working and resident in South Africa. Although she was adamant that her stay in South Africa is lawful she was unable to give a coherent explanation on how she acquired the South African citizenship and how she would be able to do so for their minor son. She said that she is concerned about the circumstances under which the defendant is bringing up the boy. She said that, from her discussion with the boy, she discerned that he was aware of the father's multiple partners and was used to foul language. In the end she conceded that her main concern was the impending marriage of the defendant to another woman. She does not want her son to be brought up by a step mother. Her stated intention was to take the child to South Africa. She however, conceded that she did not make any meaningful investigations on the effect the move to a school in Johannesburg. She merely made some insignificant enquiries from a friend who is teaching at a school in Johannesburg who also brought her own child

from Zimbabwe. On the basis of such perfunctory investigations and arrangements the plaintiff seeks to move the boy from a school of known quality to a dubious one. She has not shown how such a move will be in the best interest of the minor. In such matters of custody, the court has to act perspicaciously. The court has to avoid subjecting the boy to perturbation in his academic and social life to satisfy the mother's

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claims. It is the welfare of the child that is paramount – *W v W* 1981 ZLR 243; *Short v Naisby* 1953(3) SA 572(D); *Kuperman v Posen* 2000(1) ZLR 208; *Makumbe v Chikwenhere* HB-42-03 and *De Montille v De Montille* HB-20-03. It is clear that even if I accept her testimony on the question of custody, she has failed to show why the status quo is detrimental to the welfare of the minor. Her inarticulate enquiry on the impact of the transfer has revealed that her claims for custody are inadequate. Her uncertain residence status further compounds her case. She has not shown any impropriety created by the minor staying with the father and a step mother. This finding is not intended to be an opprobrium of the plaintiff as a mother but to look at the circumstances presented by her as simply not being to the best interest of her son. From the evidence, the parties are not pugnacious parents and as such they will be able to pick up any abuse of the minor by the step mother and act in a manner which best serves the interests of their son. There is no need for the plaintiff to pre-empt or pre-conceive abuse

by a future step mother. Because the finding I make is based on the inadequate enquiries on the educational side and the doubtful resident status of the plaintiff I did not call the minor to interview him myself. These issues cannot be resolved by the testimony of a ten(10) year old. It is unnecessary to hear him as the plaintiff has not laid a sound basis for her claim for custody. The court cannot authorise removal of a minor from its jurisdiction to a destination characterised by uncertainty. For the record, her going to South Africa does not render her an unsuitable mother per se. It is not an indication that she was not exercising her custodial or guardianship rights

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properly. It seems that she did so under harsh and strained economic situation. It shows that she was concerned for the minor and gave away the custody until she surmounted her problems. This should not be held against her - *W v W supra* at 248B; *Makumbe v Chikwenhere, supra* and *Jones v Raimondi* HB-9-05. It is the cumulative effect of her residence status in South Africa and failure to enquire adequately on whether such a mover would not prejudice his education that works against her. Coming to her clothes, she has failed to clearly show what exactly she is claiming. For the court to make the award sought it has to be satisfied that there were indeed clothing items that were left in the defendant's possession and which clothes were not accounted for. The plaintiff gave a generalised description of the clothes she left in the

defendant's possession. She described the clothes as all the clothes she used to wear when going to work. How does a court arrive at the value of such clothes? It is common cause that the handover/takeover used by the plaintiff's sister and the defendant had inherent loopholes. Coming to the movable assets it is clear that she does not intend to use the radio and the room divider but sell them. Her claim will, however, be balanced with that of the defendant. She concedes that, by mutual agreement she has already received the bulk of the assets. Most of the said assets are of significant value. She does not seem to advance any strong reasons for being allocated these additional items. On the issue of the immovable property she stated that she did sign the document alluded to above. I will not go into detail on this issue on account of the order I am going to make in connection with it.

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He said that he resides with parties' minor son and a daughter from another relationship. He said he is a General Manager of C B Richards Estates Agents and also holds directorship in other companies. He said his daughter is two years older than the parties' minor child. He also stays with his brother and employs a full time maid. His above mentioned children have bonded very well and he is trying to bring them as brother and sister. He personally drives the minor son to school but when he is not there a driver from his workplace does so. He said that the boy is doing exceptionally well

at school. The boy has friends from the school who visit him at home and he also visits them. He is very active in sport at school i.e. tennis, swimming, cross country (running) and a bit of rugby. He has introduced the boy to golf. He said that he has had a steady relationship for two and half years which relationship his children are aware of. He has deliberately introduced his children to the direction of his life in this regard. The parties' minor son accepts the relationship. He opined that at this juncture the boy needs steady education. He said that he is claiming the room divider for sentimental purposes. He said it was one of the two items that the parties bought from the proceeds of their two wedding receptions. The plaintiff has the other item i.e. the gas stove and he claims the other i.e. room divider. As far as the radio he said that he is the one who chose it because he liked it. It is on account of his attachment that he claims it. On the question of the immovable property he said that the property was properly transferred into the names of the minor with full

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agreement of the plaintiff who signed the above mentioned document to signify her agreement to transfer.

I am satisfied that the defendant's claim for custody is based on the best interest of the son. Looking at the above evidence I am satisfied that as far as the custody is concerned the status quo is in the best interests of the boy. As far as the immovable property is concerned it is registered in the names of the minor. Such

registration is proof of ownership Silberberg and Schoeman's *The Law of Property* (3rd Ed) at 243-4. Such registration in deeds registry is a matter of substance and not mere form - *Takapfuma v Takapfuma* 1994 (2) ZLR 105 (5) at 105H-106A and *Charamba v Charamba* HB-31-05.

The law requires that the Master be cited as there are proprietary interests of the minor. The Master was not cited here. This means that the issue cannot be determined before the Master is cited and served.

Accordingly, I make the following order:

It is ordered that

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child of marriage Gayne Tinashe Kondo, born 5 June 1995 be granted to the defendant with plaintiff being granted reasonable access during school holiday and weekends.
3. The determination of the issue whether or not the immovable property known as house number 6508 Zimre Park, Ruwa is matrimonial property be and is hereby deferred until the minor, as

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represented by the Master of the High Court of Zimbabwe is properly cited and served with process.

4. The movable matrimonial property be shared as follows:

4.1 For the plaintiff

1 x centre table

1 x kitchen unit

1 x gas stove

1 x fridge

3 x punch sets

All kitchen utensils plus all cups and water glasses

6 x dinner sets

All curtains, including lace curtains

2 x artificial flower pots

2 x artificial display dogs

1 x gold cutlery set

1 x fall bed

4.2 For the defendant

1 x room divider

1 x television set

1 x video recorder

1 x electric kettle

1 x radio

Sansole & Senda, plaintiff's legal practitioners
Coghlan & Welsh, defendant's legal practitioners