

NTOMBENHLE MOYO

Versus

MAXWELL MOYO

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 30 & 31 OCTOBER 2014; 3, 4, 5 & 6 MARCH 2015;

26, 27, 28 & 29 MAY 2015 AND 22 OCTOBER 2015

Divorce Trial

J. Tshuma for plaintiff

Mrs N. Tachiona-Dube for defendant

KAMOCHA J: The parties in this matter were joined in matrimony on 12 July 1975 in Bulawayo in terms of the then Marriages Act [Chapter 37] and the marriage still subsists.

Some two months before they completed their 37th year in marriage the plaintiff sued the defendant for divorce on 10 May 2012 alleging that their marriage relationship had irretrievably broken down. She alleged that the reasons for the breakdown were inter alia that:-

- (1) defendant frequently assaulted her and used foul and abusive language towards her;
- (2) he displayed an aggressive and argumentative disposition;
- (3) he treated her without love, affection or consideration;
- (4) he falsely accused her of engaging in extra-marital affairs with other men;
- (5) defendant maliciously and falsely denied that he is the father of the parties' eldest daughter.

Consequently she was claiming an order for:-

- (a) A decree of divorce

- (b) An order that the matrimonial property be divided in terms of paragraph 7 of the summons which stipulated that:-
- (i) Defendant's half share of the right, title and interest in and to the matrimonial home at 519 Scone Drive, Killarney, Bulawayo be awarded to plaintiff so that she becomes the sole owner thereof.
 - (ii) Defendant take all necessary steps to take transfer of title of his half share in the said property, which is still registered in the name of the City of Bulawayo and simultaneously transfer same to plaintiff, failing which, the deputy sheriff be authorized in his place with authority to sign all appropriate documents to take transfer and effect transfer of title to plaintiff.
 - (iii) All costs and charges of any kind related to the above procedure to be borne by plaintiff
 - (iv) Plaintiff's half share in the farm described as sub-division K1 of Bletchingley Block situate in the district of Bubi registered under Deed of Transfer number 3330/86 be awarded to defendant and plaintiff at defendant's expense take all necessary steps to effect transfer of same to defendant, failing which, the deputy sheriff be substituted in her place.
 - (v) The household goods set out in annexure "A" to the summons be declared the sole and absolute property of plaintiff and if defendant is in possession thereof, that he takes all necessary steps to surrender same to plaintiff.
 - (vi) The household goods set out in annexure "B" to the summons be declared the sole and absolute property of defendant.
 - (vii) That plaintiff transfers ownership in the T35 Nissan truck to defendant
- (c) Costs of suit only in the event defendant contests proceedings.

In his counter claim the defendant claimed:-

- (a) A decree of divorce;

- (b) That the parties sell house number 519 Scone Drive Killarney and the farm and share the proceeds equally;
- (c) That the parties share their movables equally;
- (d) That the parties share their vehicles and other properties as follows:-

Plaintiff in reconvention**Defendant in reconvention**

- | | |
|---|---|
| <ul style="list-style-type: none"> (a) Prado ABC 4141 (b) Vannette ABP 6308 (c) Corolla SDX ABH 7717 (d) Mark II Sedan ABF 7080 (e) Fairmount College (1232 Nketa) | <ul style="list-style-type: none"> (a) Sunny AA 4458 (b) Honda AAJ 7481 (c) Honda ABL 9114 (d) Sunny ABI 3558 (e) School bus AAS 5105 (f) 106 Bamvel, Parirenyatwa St |
| <ul style="list-style-type: none"> (e) Defendant in reconvention pay costs of suit | |

A joint pre-trial conference minute was filed by the parties wherein it was agreed that the issues for the determination of the court were these:-

- (i) Should plaintiff be declared the sole owner of the matrimonial house being stand 519 Scone Drive, Killarney, Bulawayo, whilst defendant is declared the sole owner of the farm owned by the parties being K 1 of Bletchingley Block situate in the District of Bubi?
- (ii) Or, should the 2 properties be sold and the proceeds shared equally?
- (iii) Or, should the property be shared in any other equitable manner that the court may deem fit?
- (iv) How should the moveable assets, being household effects of the parties be shared? What items should be taken by each of the parties?
- (v) Does EATC Primary School and EATC Secondary School belong to plaintiff or are they owned by a company which is a separate legal persona? If owned by a

company is defendant entitled to a share in that company and if so what assets is defendant entitled to?

- (vi) Does plaintiff own any other business other than the schools, if so what are these businesses.
- (vii) What cars belong to the company and what cars belong to the parties? Should they be shared and if so, how should they be shared?

It was common ground right from the beginning of the trial that the marriage relationship between the parties had irretrievably broken down and the parties could no longer live together as husband and wife. They in fact have been on separation since 2012. In the result, it was prayed that a decree of divorce be granted.

I first deal with issues (v) and (vi) which relate to companies. Defendant had proposed that with regard to the Executive Assistants Training Centre (Pvt) Ltd – EATC that he should be given the Primary School while the plaintiff takes the Secondary School. He argued that he contributed financially, emotionally and gave advice and above all he considered the company as a family business. His claim was without foundation as the plaintiff gave clear and convincing evidence that he made no contribution whatsoever towards the company. He in fact was neither a director nor a shareholder of the company. He conceded that he did not know how the companies were formed and how much money they made. He also did not know how much the companies owed their creditors and their total liability. There was evidence that he did not even want to be associated with the company as he was neither a director nor shareholder. He belatedly conceded under cross-examination he was not entitled to a share in the companies.

Issue (vi) related to whether or not the plaintiff owns other businesses other than the schools. The plaintiff used to rent stand 1232 Nketa 8 Bulawayo when she wanted to open a college in the western suburbs but did not materialize. She did not own the stand. Similarly, she used to rent 106 Bamvel, Parirenyatwa Street, Bulawayo. She did not own it.

Due to the fact that defendant was not party to the plaintiff's business and did not know what was happening in her business he erroneously concluded that she owned the rented properties.

The plaintiff does not own these properties neither does she own any other business other than the schools.

The court was asked to establish what cars belong to the company and what cars belong to the parties in issue number (vii).

This court has already made a specific finding that defendant never contributed anything to the businesses, financially, physically or emotionally. The company is a private limited company, can sue and be sued in its own name. It has directors and shareholders. Plaintiff's testimony was that all the motor vehicles and farm implements were purchased using proceeds from the two companies run by her and the parties' children. Defendant is not entitled to any share in the vehicles of the company.

The Killarney house and the farm

The two properties *id est* stand number 519 Scone Drive, Killarney, Bulawayo and the farm known as sub-division K 1 of Bletchingley Block situate in the district of Bubi are jointly owned by the parties each one having a 50% share therein. The two properties have equal values. That is common ground. This court was called upon to decide on how the 50% share of each party would be achieved along these lines:-

- (a) Would it be fair and equitable to declare plaintiff the sole owner of the matrimonial house being stand 519 Scone Drive, Killarney, Bulawayo, whilst defendant is declared the sole owner of the farm owned by the parties being sub-division K 1 of Bletchingley Block situate in the District of Bubi?
- (b) Or, should the 2 properties be sold and the proceeds shared equally?

(c) Or, should the property be shared in any other equitable manner that the court may deem fit?

Each party gave reasons for its preferred option. The plaintiff's preference was option (a) for the following reasons:-

- (i) Whatever happens to the two of them after divorce they both should have a roof over their respective heads.
- (ii) She said in the light of the fact that she was 60 years and defendant was 70 years, if the properties were sold and proceeds shared equally it would be very difficult for each of them to get a bond from any building society to buy another property. In her case, in view of the fact that she was independently and single handedly paying university fees for the children, it would be difficult to make bond repayments.

As for the defendant who is no longer employed he would not be able to make any bond repayments. It was her evidence that since three of the children were still pursuing university studies, they need a house and accommodation during university vacation. If awarded the Killarney house, it will remain a house for all the children.

It was her testimony that if the house was awarded to the defendant he would not be able to look after it as he is unemployed and retired. The house does not generate any income instead there are water bills, electricity bills and rates to be paid. In her view the ideal situation would be the award of the farm to the defendant. That is so because the farm is a business with a four bed-roomed house, lounge, kitchen, fitted bathroom and a toilet with flushing water drainage system. There is a big building that was used as a general dealer store of which the licence can be renewed and the business revived. There is borehole water and irrigation system, pipes and reservoir, of which market garden can be carried out to produce vegetables to be sold at the market. The farm is very suitable for cattle ranching and defendant can do other projects like

chicken rearing and piggery. As a matter of fact the defendant is the one who at times runs and lives at the farm.

If awarded the house the plaintiff will, in addition to having a roof over her head, be able to run her businesses that she is running in town. She also stressed the point that she was the one who solely started building the house without defendant's involvement and solely purchased all the moveable property in the house without his contribution and as such the house, was of sentimental value to her.

The defendant's preference was that the two properties be sold and the net proceeds shared equally between the two of them. He testified that it would not be fair to distribute the two properties in the manner suggested by the plaintiff as he would not like to see his former wife bringing other men into the house to benefit from what he had built. He strongly felt that the parties should start afresh after the equal division of proceeds of the two properties.

He objected to being awarded the farm in that it would be difficult to sell it as the laws of the country were prohibitive of one selling a farm. Defendant had argued that the Killarney house was of more value than the farm. There was no truth in the argument as the two properties were of equal value. Defendant only conceded under cross-examination that the properties were of equal value.

Further he conceded under cross-examination that he did not intend to keep the house nor the farm. What he intended to do if awarded any of the two properties, was to sell it, so that he can downsize and live in a much smaller and modest house commensurate with his age.

After careful weighing and consideration of the above submissions of the parties in relation to how the two properties should be distributed, I was persuaded by the plaintiff's submissions which I accept. I find that her submissions meet the needs of both parties. That, in my view, is fair and equitable. Each party will still have a roof over his/her head and will live a life similar to what he/or she enjoyed this far.

The defendant's preference that the properties be sold and the net proceeds shared equally so that the parties start afresh is, in my view cumbersome and will adversely and drastically affect the life style the parties have enjoyed this far. It is not difficult to appreciate that the better scenario is that after divorce each party remains with a roof over him or her. I would in the result, reject the defendant's proposal.

The plaintiff filed of record receipts relating to the movable property showing that it was purchased by her using money generated by the companies. Defendant first fairly conceded the point but later sought to retract and said he used to give the plaintiff money to buy the property. His story was untenable because the property was bought after he had retired.

He further conceded that the motor vehicles belonged to the company and that the Nissan truck that he was using to run a transport business belonged to the plaintiff.

This court makes a specific finding in the light of the receipts produced by plaintiff and filed of record that most of the moveable assets including farm implements were bought by her through her business ventures without contributions from defendant. However, plaintiff was magnanimous and believed that some of the property should be awarded to defendant in order for him to live a comfortable life at the farm post divorce.

Before concluding the matter I think it is important to briefly comment on the conduct of the parties. The defendant strenuously denied that he ill treated plaintiff despite all documentary evidence which was produced and filed of record. He contended that all that was a fabrication of the plaintiff. He was clearly being untruthful. This court has no hesitation in rejecting his story. Plaintiff made reports of assault to the police, she sought binding orders to keep peace against defendant from the magistrates' court. As far back as 1985 her doctor wrote a letter confirming several treatments of injuries sustained by her after the assaults by defendant. A reading of all the documentary evidence filed of record confirms that plaintiff was ill treated by the defendant.

This court makes a specific finding that the plaintiff was ill treated during the subsistence of the marriage leading to the breakdown of the marriage.

This court must also touch on the demeanour of the parties in court. The plaintiff gave her testimony clearly supported by documentary evidence and receipts. The evidence reads well and was convincing. She was worth to be believed.

The same cannot be said about the defendant. He was not worth to be believed as he was untruthful in many respects claiming to even benefit where he was not entitled to. For instance he wanted to benefit in the companies in which he was not a shareholder or director and did not in fact want to be associated with the companies. He wanted to be awarded one of the schools when he knew he was not entitled to such an award. He attributed his lack of detail to what was happening in his home and family to forgetfulness. He faired very badly as a witness and cannot be relied upon. Where-ever his evidence conflicts with that of the plaintiff I prefer the well given evidence of the plaintiff.

Costs

Although the defendant was untruthful from start to finish I hold the view that he should not be ordered to meet the costs of suit. He is a man of straw who felt he should contest the distribution of the matrimonial property. It is fair and just for each party to pay its own costs.

In the light of the findings that I have made and the conclusions I have arrived at I would make the following order:-

- (a) A decree of divorce be and is hereby granted.
- (b) The matrimonial property be divided as follows:-
 - (i) The defendant's half share on the right, title and interest in and to the matrimonial home at 519 Scone Drive, Killarney, Bulawayo be awarded to plaintiff so that she becomes the sole owner thereof.

- (ii) Defendant take all necessary steps to take transfer of title of his half share in the said property which is still registered in the name of the City of Bulawayo and simultaneously transfer it to plaintiff, failing which, the deputy sheriff be authorized in his place with authority to sign all appropriate documents to take transfer and effect transfer of title to plaintiff.
- (iii) All costs and charges of any kind related to the above procedure to be borne by plaintiff.
- (iv) Plaintiff's half share in the farm described as sub-division K 1 of Bletchingley Block situate in the district of Bubi registered under Deed of Transfer number 3330/86 be awarded to defendant and plaintiff at defendant's expense take all necessary steps to effect transfer of same to defendant, failing which, the deputy sheriff be substituted in her place.
- (v) That the household goods be divided and the plaintiff is awarded the following:-

At Killarney house

- (i) 1 x black lounge suite with high back in the main lounge i.e. 2 x settees and 2 x 1 settees, glass centre table and 4 side table.
- (ii) 1 x black lounge suite in the main lounge – low back 2 x settees and 2 x 1 settees)
- (iii) 1 x white/glass room divider in the TV room
- (iv) 1 x Oak cupboard room divider in the main lounge
- (v) 1 x Oak dining room suite, 1 table & 8 chairs, side board, small cutlery cupboard in dining room)
- (vi) 2 x entrance settees (goldish colour)
- (vii) 1 glass telephone stand
- (viii) 1 x oak bedroom suite (main bedroom – base & mattress with maroon padded headboard & dressing table with high mirrors)
- (ix) 1 x lightwood bedroom suite (third bedroom – base & mattress, goldish padded headboard, dressing table, 2 x chest of drawers)

- (x) 1 x Capri deep freeze in dining room
- (xi) 1 x LG refrigerator in main kitchen
- (xii) 1 x Kelvinator deluxe 4 plate stove in small kitchen
- (xiii) 1 x washing machine in pantry
- (xiv) 1 x Sinotech TV and JVC decoder and dual decoder in the TV room
- (xv) 1 x Phillips TV in main lounge
- (xvi) 1 x bookshelf & book in main bedroom
- (xvii) 1 x gym bicycle in main bedroom
- (xviii) 1 x gym health walker in main bedroom
- (xix) 1 x corner table in main bedroom
- (xx) 3 x Persian carpets, 1 red in TV room, 1 brown in min lounge, 1 green in dining room
- (xxi) All curtains
- (xxii) All kitchen utensils in dining room cupboard and kitchen
- (xxiii) All wall pictures & mirrors
- (xxiv) All chandeliers
- (xxv) 1 x oval table & mirror
- (xxvi) 8 x 2 in one blankets (gift from Killarney Women Association)
- (xxvii) 4 x continental pillows in main bedroom
- (xxviii) 6 x small pillows in main bedroom
- (xxix) 3 x sets of double sheets in main bedroom (2 white, 1 green)
- (xxx) 4 x bedcovers in main bedroom (1 red floral, 1 maroon, 1 gold)
- (xxxi) All artificial flowers and pots in and outside house
- (xxxii) 1 x corner display cupboard with ornaments in main lounge
- (xxxiii) 1 x new bread maker in dining room
- (xxxiv) 1 x oak cupboard in dining room
- (xxxv) 1 x black coffee maker, juice extractor, Russell kettle and round chicken grill in main kitchen (presents from her brother)
- (xxxvi) 1 x gym treddle

- (xxxvii) 2 x single beds and headboards in children's bedroom
- (xxxviii) 1 x occasional chair in main bedroom
- (xxxix) 1 x gas stove in main kitchen
- (xl) 2 x black Rottweiler dogs
- (xli) Catering equipment (burn maries, spoons, pots and plates)
- (xlii) 2 x school white boards in garage
- (xliii) Honda blue station wagon registration number AAJ 7481
- (xliv) Prado registration number ABL 4141

That defendant be awarded the following:

At Killarney house

- (i) 1 gold/yellowish striped lounge suite (2 x 2 settees, 2 x 1 single settees)
- (ii) 1 x oak centre table & side table
- (iii) 1 x oak dining room table in garage
- (iv) 1 x bedroom suite (base & mattress with white headboard & white dressing table in first bedroom)
- (v) 1 x Sorbaire deep freeze in pantry
- (vi) 1 x big new Capri refrigerator in main kitchen
- (vii) 1 x 4 plate Nuches stove in pantry
- (viii) 1 x Phillips TV in main bedroom
- (ix) 1 x Wiztec decoder in main bedroom
- (x) 1 x LG black TV in main bedroom
- (xi) 1 x corner display cupboard without ornaments in dining room
- (xii) 1 x headboard in study, new base and mattress belongs to daughter
- (xiii) 1 x book shelf in study
- (xiv) 2 x blankets and sheets on bed in first bedroom
- (xv) 6 x sets of light yellow double sheets in first bedroom

- (xvi) 1 x oak verandah table and chairs

At farm

- (i) Green high back lounge suite (1 x 2 settee and 2 x single settees)
- (ii) 1 x glass centre table & 4 glass side tables in lounge
- (iii) 1 x oak dining room suite in lounge
- (iv) 1 x oak sideboard cupboard in kitchen
- (v) 1 x oak bedroom suite (base and mattress) with headboard, dressing table with high mirrors in main bedroom
- (vi) 1 x oak wardrobe in main bedroom
- (vii) All blankets, sheets and pillows in main bedroom
- (viii) All curtains in farm house
- (ix) 2 x water engine pumps
- (x) Numerous irrigation pipes
- (xi) Numerous farm implements
- (xii) The storeroom and all miscellaneous equipment inside (huge store building with 6 back rooms)
- (xiii) 1 x big unfitted cast iron bath tub
- (xiv) Tractor
- (xv) Planter
- (xvi) Plough
- (xvii) 2 x water pumps
- (xviii) Irrigation pipes

- (xix) Farm implements
- (xx) Cattles
- (xxi) Bed covers, blankets, sheets & pillows
- (xxii) 3 tonne Nissan Atlas
- (xxiii) Mazda B1800 registration number 8106
- (vi) That each party shall meet its own costs.

Webb, Low & Barry incorporating Ben Baron & Partners, plaintiff's legal practitioners
Dube-Tachiona & Tsvangirai, defendant's legal practitioners