

UNITY WENGA
versus
EDWIN WENGA

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 28 September 2023, 13 October 2023 & 5 June 2024

Family Court – Divorce Action

T Nyahuma, for the plaintiff
Defendant in person

WAMAMBO J: The parties were married on 17 October 2005 in terms of the Marriage Act [*Chapter 5:11*] now [*Chapter 5:17*]. Five children were born of the marriage. Two of them are now majors. The minor children are Chikomborero (born 8 September 2008) (male), Rutendo (born 20 August 2015) (female) and Grace (born 26 December 2016) (female).

The parties are agreed that the marriage has irretrievably broken down to such an extent that there are no reasonable prospects of a restoration of a normal marriage between them. Among other reasons the parties have been separated for over one year and lost love and affection for each other.

The issues referred for trial as per the joint Pre-Trial Conference minute are as follows:

- “1.2. **Custody of, and access to the minor children of the marriage**
 - 1.2.1 Whether custody of the parties’ minor children of the marriage namely Tinotenda Daniel Tichaona Wenga (born 28 July 2005) Chikomborero Edwin Wenga (born 8 September 2008), Rutendo Hope Elizabeth Wenga (born 20 August 2015) and Grace Talia Wenga (born 26 December 2016) ought to be awarded to defendant despite the children expressed preference to be in the custody of the plaintiff, per the presiding judge’s opinion upon interviewing two of the minor children namely Chikomborero Edwin Wenga and Grace Talia Wenga.
 - 1.2.2 What would be reasonable access rights to the minor children by the non-custodial parent?
- 1.3 **Maintenance of the minor children of the marriage**
 - 1.3.1 If custody of the minor children is awarded to defendant, how much should plaintiff contribute as maintenance for each child?
 - 1.3.2 In the event of custody of the minor children being awarded to the plaintiff, how much should defendant contribute as maintenance for each such child.
2. **The Parties Immovable Assets**

- 2.1.1 Whether the parties' jointly owned immovable properties being –
 - 2.1.1.1 Stand 4714 Prospect Township of Stand 2491 Prospect Township and;
 - 2.1.1.2 Stand 492 Bluff Hill Township 7 of Bluff Hill ought to be sold and the net proceeds thereof appropriated between the parties in equal shares.
- 2.1.2 Whether Wedgeland Farming (Private) Limited ought to be liquidated and the net proceeds thereof appropriated between the parties in equal shares.”

The issues though couched in various paragraphs and in long winding language are basically issues of custody, maintenance, access and the division of the parties' immovable property.

When the joint Pre-Trial Conference minute was signed by the parties Tinotenda Daniel Tichaona Wenga was still a minor which explains why his name appears on the joint Pre-Trial Conference minute as a minor. He has since attained the age of majority.

Either parent is desirous of being awarded custody of all the minor children. There are two immovable properties namely Stand 4714, Prospect Township of Stand 2491 Prospect Township (hereinafter referred to as the Prospect property) and Stand 492 Bluff Hill Township 7 of Bluff Hill (hereinafter referred to as the Bluff Hill property). The two immovable properties are registered in the joint names of the parties in equal shares.

Plaintiff proposes that she be awarded defendant's share in the Bluff Hill property. Further that defendant be awarded her share in the Prospect property. Essentially each party will own a separate and distinct property as their sole and exclusive property.

Defendant on the other hand had a different proposal. He proposed that the two immovable properties should be sold and the net proceeds shared between the parties in equal shares.

Another aspect to the distribution of property is the equipment bought for and in use at Wedgeland Farming Private Limited. Plaintiff proposed to relinquish and surrender all her shares in Wedgeland Farming Private Limited and then donate same to the parties' eldest daughter, Makanaka Wenga.

Custody

Flowing from custody are the twin issues of access to the minor children and maintenance. Plaintiff in her testimony justified her proposal to be awarded custody of the three minor children as follows:

Two of the three minors, namely Rutendo and Grace are girls who, at the time of her testimony were 8 and 7 years respectively while Chikomborera the boy was 15 years old. She was

paying school fees for all the children. As a mother she takes care of the immediate needs of the children as well, including supervising their homework. Defendant on the other hand has not been paying utility bills, and stopped buying food and other household expenses. Two of the three children Grace and Chikomborero elected before the judge presiding over the Pre-Trial Conference to be under plaintiff's custody.

While firmly proposing to be awarded custody plaintiff fairly testified that defendant is a good father to the children. She proposed that defendant should contribute US\$50 per month per child for each minor child and that he should also contribute half of each minor child's school fees.

She proposed that defendant should exercise access rights to the minor children every alternate weekend and the first two weeks of every school holiday.

Defendant had a different story to tell on custody. He painted a picture of a defendant who came home late and brought a boyfriend home. He testified of his worry that a boyfriend of plaintiff or more of them exposed the minor children to abuse. Defendant also proposed that plaintiff should contribute US\$50 per month per child as maintenance and that she should pay half of the school fees for each child. Defendant proposed a broader access platform whereby the plaintiff could access the children whenever she wanted to. Such an arrangement has its own pitfalls. Without properly demarcated guidelines the arrangement can easily be abused by either party.

Two of the three minor children have already expressed their desire to be under the custodianship of plaintiff. It is an important consideration. Two of the minor children are very young and vulnerable girl children. I agree with plaintiff that the two young girls need close attention and supervision. The mother is already attending to the needs of the children. I did not hear defendant testifying about what measures he has in place to cater for the minor children. Family unit is of paramount importance and as far as possible in circumstances of divorce the minors should reside with one parent. The boy child at 15 can assist with supervision of his two sisters.

Defendant sought to cast aspersions on plaintiff by alleging that she gets visits from a boyfriend and also comes home late. These allegations were not clothed with supportive evidence. Defendant could have called his brother or any other witness. I say his brother because defendant gave testimony of his intervention on the issue of the alleged boyfriend. The evidence remained defendant's word against that of plaintiff.

On her part plaintiff disagreed that she brought a boyfriend home. To that end I find the issue to be neutral. In other words that the allegation does not sway me either way. To plaintiff's credit she characterised defendant as a good father to the children. In the circumstances I am cognisant that the minor children have been in the consistent custody of plaintiff. The issue of custody is an emotional issue with both parents such as in this case seeking to be awarded custody. There were allegations of plaintiff attempting to influence the children. The influence to me does not appear to have been substantial nor is it decisive in the adjudication of this issue. Defendant appears to have for the most part abandoned his obligations towards maintaining the children and paying their school fees.

In the circumstances I find that custody should be granted to the plaintiff. From my reading of their evidence the parties appear agreed that the non-custodial parent should contribute US\$50 per month per child until each child attains 18 years or becomes self-sufficient, whichever occurs earlier and the contributions of half of the children's fees. The evidence suggests that either parent can afford US\$50 per month per child and half of each child's school fees. I will thus encapsulate the parties' agreement as an order of court.

I have already mentioned that a broad access rights give rise to conflicts. To that end I will adopt the proposal by plaintiff that defendant should exercise his access rights every alternate weekend and during the first two weeks of every school holiday. I find that the best interests of the children are catered for by the custody, access and maintenance orders above and as will more fully appear in the order I will grant. In so deciding I am guided by the principles encapsulated in among other cases the case of *Phillipa Ann Coumbis v Ronald John Coumbis & Anor* SC 130/21 at p(p) 15 and 16.

On Wedgeland Farming (Private) Limited the parties are in agreement as to how the assets should be distributed. In different words the parties are agreed that the assets should be shared equally. Plaintiff offers the further suggestion that her share of the assets should be donated to Makanaka, the parties' oldest daughter. Defendant puts it this way:

“An order for the liquidation of Wedgeland Private Limited and the net proceeds thereof appropriated between parties in equal shares.”

Defendant is however concerned with his share of livestock which was given to him through inheritance. These cattle were not enumerated in number or description and it becomes

difficult to make an order for cattle that are unnumbered or separately identified. I decline to make such an order. The evidence on record is that the parties are equal parties to Wedgeland Farming (Private) Limited.

Plaintiff's evidence that she injected US\$70 000 to the Wedgeland was not rejected by the defendant. Her further evidence that the US\$70 000 has still not been paid back by Wedgeland (Private) Limited to a large extent buttresses the position that the assets as a whole should be shared equally between the parties. If plaintiff then intends to donate her share to the daughter, it is but her choice.

I move now to the two immovable properties. For starters the parties are joint registered owners of both properties. Plaintiff proposes that she should be awarded defendant's share in the Bluff Hill property while defendant should be awarded her share in the Prospect property. Plaintiff is interested in the Bluff Hill property because of its familiarity to both herself and the children.

She is now being granted custody and her proposal that it is in the best interests of the children to continue residing at the Bluff Hill property is a reasonable position.

The defendant proposes the sale of the properties and the sharing of the proceeds from the sale. I do not agree. The sale of the properties is not an overnight process. The sale will uproot either party from familiar surroundings. The minor children will be the most affected as possibly new schools, new friendships have to be forged. The immovable properties as they stand appear to have catered for the needs of the parties and indeed the children thus far.

The sale of the properties will be a major change in the lives of the parties when maintaining the *status quo* will be far less cumbersome or disruptive. Section 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] enumerates some of the circumstances to be considered in the division of the assets of the parties. In reaching the conclusion I have reached I have considered the provisions of s 7(4) in full. I pay particular attention to para(s) (a), (b), (c), (d) and (g) of s 7(4) of the Matrimonial Causes Act.

I am cognisant that my discretion is narrow having been assisted by the fact that the parties are in agreement that they should benefit in equal shares to the two immovable properties.

In this regard I embrace the words of TSANGA J in *Margaret Chau (nee Kumbemba) v Douglas Chau* HH 11/23 at p 4 where the learned judge said:

“As a starting point therefore, the defendant is undoubtedly entitled to his half share just as the plaintiff is to her half share in that property. This position is only to be further altered where justice and equity in a case further demand it.”

In the circumstances I order as follows:

- 1) A decree of divorce be and is hereby granted.
- 2) Custody of the minor children namely Chikomborero Wenga (born on 8 September 2008), Rutendo Wenga (born on 20 August 2015) and Grace Wenga (born on 26 December 2016) be and is hereby awarded to the plaintiff.
- 3) Defendant shall pay US\$50 or its equivalent in Zig dollars on the (Interbank rate) per month per child until each child attains 18 years or becomes self-sufficient, whichever occurs earlier.
- 4) Defendant shall exercise his right of access to all the said minor children during every alternate weekend and the first two weeks of every school holiday.
- 5) Plaintiff’s half share in Stand 4714 Prospect Township of Stand 2491 Prospect Township be and is hereby awarded to the defendant.
- 6) Defendant’s half share in Stand 492 Bluff Hill Township 7 of Bluff Hill be and is hereby awarded to the plaintiff.
- 7) Defendant’s half share in Stand 492 Bluff Hill Township 7 of Bluff Hill shall be conveyed to plaintiff by a conveyancer nominated by plaintiff and the costs thereof shall be borne by the plaintiff.
- 8) Plaintiff’s half share in Stand 4714 Prospect Township of Stand 2491 Prospect Township shall be conveyed to defendant by a conveyancer nominated by defendant and the costs thereof shall be borne by the defendant.
- 9) The assets of Wedgeland Farming (Private) Limited shall be shared between the parties in equal shares.
- 10) Each party shall bear his/her own costs.

Nyahuma’s Law, plaintiff’s legal practitioners
Defendant, in person