

CONSTANCIA NYANHONGO (NEE FUMAI)
versus
GEDION TAFADZWA NYANHONGO

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 28 March and 23 June 2022

Opposed Matter, Special Plea

T Nyamucherera, for the plaintiff
M.C Mukome, for the defendant

MUCHAWA J: The plaintiff issued summons in which she is seeking for a decree of divorce, an order for the distribution of matrimonial property and that each party bears its own costs. The defendant took a plea in abatement, that the plaintiff's claim is now *res judicata* as it was heard and determined by the Superior Court of the State of Arizona in and for the County of Maricopa in the United States of America and that the court has no jurisdiction to determine this matter. (Hereinafter referred to as the USA). It is prayed that the plaintiff's claim be dismissed with costs on a higher scale as it is an abuse of court process.

The plaintiff and the defendant were married on 27 September 1997 in terms of the Marriage Act, [*Chapter 5:11*], at Harare, Zimbabwe though they had entered into an unregistered customary law union on 12 December 1992. Two children were born to the parties who are now both majors. The parties are currently residing in the USA. I heard the parties on the special plea raised by the defendant and reserved my judgment. This is it.

Whether the matter is *res judicata*

Mr *Mukome* for the defendant argued that the plaintiff's action is *res judicata* and that the doctrine of estoppel is applicable. It was submitted that this action is based on dissolution of marriage and sharing of matrimonial property which issues were also before the court in the USA under case number FN2019-054524 and were determined and disposed of after the court had satisfied itself that it had the requisite jurisdiction. It was argued therefore that *res judicata* is a

form of estoppel and it means that where a final and definitive judgment is delivered by a court of competent jurisdiction, the parties to that judgment are not permitted to dispute its correctness. The court was referred to the cases of *Banda &ORS v ZISCO* 1999 (1) ZLR 340 (SC) and *Wolfenden v Jackson* 1985 (2) ZLR 313(S).

Mr *Mukome* related that the plaintiff was called upon to attend court on 6 January 2020 but she opted not to attend and a default judgment was given which was a final and definitive judgment on the issues of divorce and division of matrimonial property. The court order is said to have stated that it was a final appealable decree which plaintiff elected not to appeal against. She also did not apply for rescission of the same judgment. The plaintiff is alleged to be estopped from disputing issues based on the same cause of action already decided by a court of competent jurisdiction.

Upon filing her heads of argument, the plaintiff conceded that the defendant had indeed obtained a decree of divorce in the USA but maintained that the issue of distribution of the property in Zimbabwe remained unresolved.

Mr *Nyamucherera* pointed out that the divorce order obtained by the defendant only distributes the property held in community of property by the parties in the USA and there is no reference to the matrimonial property in Zimbabwe. The law of the two countries was said to be substantially different as in terms of s 2 (1) of the Married Persons Property Act [*Chapter 5:12*] parties who marry in Zimbabwe are married out of community of property. The decree from the USA is alleged not to have settled the issue of the distribution of property in Zimbabwe which is the subject of the current action. The plaintiff seeks an equitable distribution of the matrimonial property in Zimbabwe in terms of s 7 (1) of the Matrimonial Causes Act. It was contended that there is therefore no duplication of actions as seven immovable properties were never dealt with, four motor vehicles, a long list of household goods and effects, livestock and shares in Gedion Galleries Limited Liability Company, amongst others.

A perusal of the defendant's pleadings shows that he totally left out the Zimbabwean matrimonial property. The extent of his pleadings was this;

- “9. The parties have acquired certain joint, common and community properties as well as certain community obligations
10. The parties have sole and separate property and petitioner requests the court to award to each party their respective sole and separate property.”

In its decree, the USA court made the following proprietary order:

“C. Each party is awarded those items of personal property, including vehicles currently in their possession, free from any claims by the other party.

D. Each party is awarded any and all retirement accounts, bank accounts and life insurance policies in their names, free and clear from any and all claims by the other party.”

In *Wolfenden v Jackson* 1985 (2) ZLR 313(S), it was held that

“-----the requirements for the *exceptio rei judicatae*, which is a form of estoppel, are that the previous proceedings relied on must have been between the same parties or their privies and that the same question must arise. The additional requirement mentioned in Voet 44.2.3, that there must also be the same cause of action, means that the parties are estopped from disputing any issue necessarily decided by the court in reaching its judgment in the previous proceedings.”

It is clear from the pleadings that the issue of the matrimonial property held out of community of property in Zimbabwe was never before the USA court. The exception *rei judicatae* cannot be sustained therefore. The applicable law would also be different as the USA property was held in community of property and distributed from that premise. The plea in abatement of *res judicata* has nothing to stand on.

Whether the Court has jurisdiction to deal with this matter

Furthermore, Mr *Mukome* argued that this court has no jurisdiction to deal with this matter as the plaintiff is now a citizen of America since 2019 and she has not renounced her Zimbabwean citizenship and she should follow the jurisdiction of her country of choice and not that of her country of birth. It was averred that the plaintiff has not been staying in Zimbabwe for a period of twelve years from the time the parties migrated to the USA and that the claim does not comply with s 3 (1) (b) and (c) of the Matrimonial Causes Act as plaintiff is no longer a citizen of Zimbabwe and has not been resident in Zimbabwe for the past two years prior to 23 March 2020 when she issued out summons in this court. It was contended that by operation of law, the plaintiff is estopped from instituting this action and her recourse lies in approaching the USA court as it is now the only court with jurisdiction over the parties' matrimonial issues.

Mr *Nyamucherera* contended that this court has jurisdiction to deal with this matter on the basis of s 13 of the High Court Act which gives this court full original civil jurisdiction over all persons and all matters within Zimbabwe as read with s 171 (1) (a) of the Constitution of Zimbabwe, 2013.

It was submitted that the plaintiff was deserted by the defendant when he moved to the USA as she was subjected to physical abuse when she followed him leading to her moving out of the matrimonial home for her safety. Mr *Nyamucherera* argued that the court has additional jurisdiction in terms of s 3 of the Matrimonial Causes Act which allows the court to entertain a claim by a deserted wife.

In addition the court was pointed to s 12 of the Matrimonial Causes Act which requires that an order or decree of divorce, judicial separation or nullity of marriage made in any country in any case in which the husband was not domiciled in that country can be validated with this court if it is satisfied that the law of that country contains provisions which correspond substantially to the relevant provisions of s 3. A good starting point is the Constitution of Zimbabwe, 2013. It provides as follows;

“171 Jurisdiction of High Court

(1) The High Court—

(a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;”

This is bolstered by the High Court Act Chapter 7:06 which provides as follows

“Original civil jurisdiction

Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.”

On the face of it, this court has jurisdiction over all civil matters within Zimbabwe. It is given particular jurisdiction by the Matrimonial Causes Act to divide matrimonial assets upon the granting of a decree of divorce or at any time thereafter as shown below;

“7. Division of assets and maintenance orders

(1) 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—

(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;”

Though the defendant tried to latch onto the fact that the plaintiff has become a citizen of the USA and cannot be taken to be domiciled here, that cannot be supported. The case of *De Jager v De Jager* 1998 (2) ZLR 419 (HC) defined domicile as follows;

“THE MEANING OF DOMICILE

A person is said to be domiciled in that country which the law regards as his permanent home. This is frequently also the country in which he in fact lives permanently, though it may also be a country in which he has never dwelt or which he has never heard of. The latter possibility arises with domiciles of origin and of dependence: The Law of Persons and the Family supra at p 63.

It is important to stress that domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country. Domicile is the place which is or which the law considers to be the permanent home of a person. Two principles flow from this: every person must have a domicile and no person can have more than one domicile at a particular time, although a person may be homeless or have more than one residence: Spiro Law of Parent and Child 4 ed pp 131-132.

THE MEANING OF RESIDENCE

Residence means a "man's home for the time being": *Robinson v Commissioner of Taxes* 1917 TPD 542 at 548. Unlike a domicile of choice, a new residence may be acquired without the intention of staying in the new home permanently, in the sense of a stay of indefinite duration.”

Being a citizen means one is a legally recognized subject or national of a state or commonwealth.

The court proceeds in *De Jager supra* to state as follows:

“Whether a litigant is domiciled in Zimbabwe is a question of fact. Accordingly, all the relevant facts must be placed before the court so that the court can determine whether or not a litigant is so domiciled. The fact that a litigant stays in Zimbabwe does not necessarily mean he is domiciled in Zimbabwe.”

In *casu*, the plaintiff and defendant may be legally recognized in the USA as a nationals. They may be resident there for the time being. That is however different from a domicile of choice which is the place which one chooses as their permanent home. This is evident from the extent of the immovable and movable property held by the parties in Zimbabwe. They clearly regard Zimbabwe as their permanent home.

De Jager supra proceeds as follows;

“The jurisdiction of this court in divorce matters is regulated by both the common law and statute.

THE COMMON LAW

The common law position is that the jurisdiction of this court in matters of divorce depends upon the domicile of the husband at the time when the action is instituted - *Howard v Howard* 1966 RLR 182 (G); 1966 (2) SA 718 (R); *Sinclair (formerly Steinbock) v Sinclair (formerly Steinbock)* [1967] 1 All ER 905 (P); Boberg The Law of Persons and the Family pp 57-58.

THE MATRIMONIAL CAUSES ACT [Chapter 5:13].

Section 3 of the Matrimonial Causes Act gives additional jurisdiction to the High Court in cases where the wife is the plaintiff or applicant. That section provides:

"3 Additional Jurisdiction

(1) Without prejudice to any other basis of jurisdiction which the High Court has, the High Court shall have jurisdiction to entertain an action for divorce, judicial separation or nullity of marriage, where the wife is the plaintiff or applicant -

(a) if the wife has been deserted by her husband and immediately before the desertion, the husband was domiciled in Zimbabwe, notwithstanding that the husband has changed his domicile since the desertion; or

(b) if the marriage was celebrated in Zimbabwe and the wife has resided in Zimbabwe for a period of at least two years immediately before the date of commencement of the action and is still so residing, A notwithstanding that the husband has never been domiciled in Zimbabwe; or

(c) if at the date of commencement of the action the wife is a citizen of Zimbabwe and, immediately before that date, she has been ordinarily resident in Zimbabwe for a period of not less than two years and is still so residing."

The question of jurisdiction of this court cannot have been seriously raised by the defendant considering that, as submitted by his counsel, he wishes to use s 12 of the Matrimonial Causes Act for the validation and registration of the USA divorce decree and he needs to be domiciled in this country in order to do that. See below;

“12. Recognition of certain decrees and orders

(1) An appropriate court may recognize the validity of any decree or order of divorce, judicial separation or nullity of marriage made in any country in any case in which the husband was not domiciled in that country if—

(a) it is satisfied that the law of that country contains provisions which correspond substantially to the relevant provisions of section *three*;

It is therefore my finding that this court has jurisdiction to deal with this matter on the basis of the defendant’s domicile, the marriage having been solemnized in this country and the court having unlimited jurisdiction on all civil matters. Additionally, the plaintiff has alleged that she was deserted by the defendant who, though not resident here, he was and/or is domiciled here.

Though the court has jurisdiction, such jurisdiction cannot be exercised before the decree of divorce is registered and validated by this court in terms of section 12 of the Matrimonial Causes Act. In *Lafontant v Kennedy* 2000 (2) ZLR 280 (SC), it was held as follows;

“The relief is ancillary to the decree of divorce and may be granted by an appropriate Zimbabwean court either when it grants the decree or at any time after it has granted that decree. By the same reasoning one may say that "thereafter" in the context means "after it has granted the decree".

There may be need to have this matter removed from the roll pending the recognition of the decree from the USA since the parties are agreed that the marriage has irretrievably broken down and the decree of divorce was properly entered.

In the circumstances, I order as follows:

The plea in abatement is set aside and the defendant is ordered to plead to the merits in terms of the Rules.

Lawman Law Chambers, Plaintiff's Legal Practitioners
M C Mukome, Defendant's Legal Practitioners.