

LILIAN MUKARAKATE
Versus
JONAH MUKARAKATE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 4 September 2002 and 17 September 2003

Mr Munjaji, for the plaintiff
Mr Chapwanya, for the defendant

HUNGWE J: Plaintiff issued summons against the defendant, her husband seeking:-

- a) a decree of divorce
- b) an order granting her custody of the two minor children of the marriage;
- c) maintenance for herself and the two minor children
- d) an order dividing the assets of the parties in terms of section 7 of the Matrimonial Causes Act, 1985
- e) costs of suit

The parties met in 1981 and by 1982 their marriage was solemnised. Three children were born to them. At the time of the marriage the defendant was a major in the Zimbabwe National Army. She was not employed. In 1984 defendant was posted to Romania as a military attaché. They lived in Romania together as a family. Back home he purchased a house in Mabelreign and paid it off in 1984. When they were in Romania, he was able to buy a Mercedes Benz and a Ford Escort for both of them. He considered the Mercedes Benz his own, and the Ford his wife's.

On their return, it was decided to sell the Mercedes Benz and buy a plot. They kept the Ford Escort. Defendant then bought lot 22A of Pleasant Valley Road, Tynwald Harare.

She says they embarked on a horticulture project which she ran when he was at work. At one stage they had 4 000 birds at this plot. She also knitted jerseys for sale.

The Mabelreign home was rented as they stayed at the plot. Problems began in 1996 when they ran into huge debts as a result of a disaster which left nearly 4 000 birds dead. Various creditors threatened to sue. Defendant chased her way from the home. She became destitute and had to settle for three roomed quarters for her residence in Kuwadzana. She did odd jobs to keep going and filed for maintenance. She left everything on being chased away including the children. He would not allow her to see them. As they grew, the children would steal a visit to their mother. The children complained of ill treatment. They would go without food or proper clothing. They were neglected.

Defendant denies allegations of cruelty leveled against him by his wife. He accused her of causing the break-up in their marriage. He maintained that he looks after his children well. He points out that there is no need to move the minor children from the present familiar and better environment to confine them in the over crowdedness associated with high-density homes.

He points out that plaintiff had never worked during their stay together as husband and wife. He disputed any claims that she contributed to the welfare of the matrimonial estate. He explained that as a result of the 1996 disaster, he was compelled to sell the Mabelreign home. He could not say for how much it was sold and what happened to the proceeds. It must be taken that he used the same to settle the debts.

From the evidence led by both parties, the following is common cause; the parties separated and lived apart from 1996. She did not take away any of the assets of the estate. The defendant has looked after the children single handedly since 1996. The Mabelreign house has since been sold. The remaining property Lot 22A of Pleasant Valley Road Tynwald is part of the matrimonial estate.

The court must decide to who custody of the minor children should be awarded and what maintenance should be paid by the non-custodial parent. It should also decide what constitute a fair division and distribution of the matrimonial estate.

With the consent of the parties, the court interviewed Linda Mukarakate in order to get the minor's own views on the question of custody. The other minor Shingirai appears to have eloped with a boyfriend by the time this matter came for trial.

In deciding who amongst the parents of minors is the better custodian, a court is always guided by what is in the best interest of the children. The ability of a parent to provide materially is only one of the factors which the court will take into account. Other factors include the physiological and psychological needs of the minor as well as the usual consideration of the sociological factors that a court usually takes into account.

Linda was preparing to sit for her "O" Level examinations. She needs the guidance of a mother both in terms of her physical and psychological needs. This the defendant cannot provide. At the end of the trial I gave an order granting custody of Linda to the plaintiff.

As Shingirai is now over 18 years there is no need to make an order for custody relating to her.

In deciding what constitutes a fair division of a matrimonial estate in terms of section 7 of the Matrimonial Causes Act 1985, the court is entitled among other things, to consider non-monetary conditions made by either party, to that estate; as well as duration of the marriage.

Plaintiff seeks an award of not less than 50% of the value of the estate. The defendant offered 10%.

In *Sithole v Sithole* HB 14/94 the court held that even if a wife has made only indirect contributions, she cannot leave empty handed merely because she did not contribute financially. It was held that she was entitled to 40%. In *Chapeyama v Matende and Another* 1999(1) ZLR 534 CHINHENGO J awarded the wife in an unregistered customary law marriage, 40% share but remarked that where quantifications of a wife's contributions was difficult, the parties should each be awarded a 50% share that decision was confirmed on appeal.

In *Jengwa v Jengwa* 1992(2) ZLR 121 the wife was awarded 30%. See also *Muchaga v Mukumirwa* HH 214/ 2000.

In the present case the parties lived together as husband and wife for close to 14 years. She was a housewife. She ran income-generating projects from home for their joint benefit. She was chased away and took nothing. The house is registered in the defendant's name.

In all the circumstances she is entitled to 40% of the matrimonial estate.

The defendant does not dispute his obligation to maintain the minor children. He disputes the quantum of maintenance. He

disputes the obligation to maintain the plaintiff on the basis that she is gainfully employed. She denies this. The liability of a husband to maintain his estranged wife has not been doubted. I am satisfied in the present case that the plaintiff is not gainfully employed. She has been engaged in odd jobs to eke out a living.

The defendant says he is unemployed and lives off a pension which cannot meet the demands of the plaintiff. Where a husband has so ceased formal employment there is little point in ordering regular maintenance payment. The principle of a clean break becomes more attractive to apply.

In the circumstances it is appropriate to make an order. A one off payment of maintenance.

There will therefore be the following order.

1. A decree of divorce be and is hereby granted
2. Custody of Linda Mukarakate is awarded to the plaintiff.
3. Plaintiff is awarded 40% of the net value of the immovable property known as Lot 22A Pleasant Valley Road, Tynwald, Harare.
4. Should the parties fail to agree on the value of Lot 22A Pleasant Valley Road Tynwald, (thereafter referred to as the property) within 14 days of this order, they shall appoint a valuator to do so.
5. If the parties cannot within 14 days agree on a valuator, the registrar shall appoint a valuator.
6. The valuator shall, as soon as possible, value the property and, if there are any attending obligations, shall indicate the net value thereof.
7. The cost of the valuator shall be paid by the defendant
8. The defendant shall pay plaintiff before 31 December 2003 40% the net value of the property less cost of valuation

9. If the defendant fails to comply with paragraph 8 property shall be sold and the defendant shall pay 46% of the net proceeds less the cost of valuations.
10. Defendant is to pay \$1 million to plaintiff as maintenance for herself and the minor child Linda on or before 31 December 2003.
11. Defendant is to pay costs of suit.

Gallop & Blank, legal practitioners for the plaintiff

Directorate of legal Services, legal practitioners for the defendant