

JULIET CHIKWENENGERE
versus
GEORGE CHIKWENENGERE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 9 and 30 November 2005

Civil Trial

Mr *Warara*, for plaintiff
Mr *Muchadehama*, for defendant

MAKARAU J: The parties were married at Hwange on 12 January 1990. The marriage still subsists. There are two minor children of the marriage, namely Ngoni Rutendo, a daughter aged thirteen, and Kudzaishe Anesu, a son, aged 10. Certain differences have crept into the relationship between the plaintiff and the defendant, resulting in the plaintiff instructing her legal practitioners to issue summons out of this court, claiming a decree of divorce, an order granting her custody of Ngoni and Kudzaishe, maintenance for the minor children and an award of the assets of the matrimony under section 7 of the Matrimonial Causes Act [*Chapter 5:13*].

The plaintiff's claim was resisted by the defendant who counter-claimed for a decree of divorce, custody of the children in his favour and a different distribution of the matrimonial estate together with an order that the plaintiff contributes towards his costs. At the pre-trial conference of this matter, the plaintiff was not in attendance as she is currently working and residing in the United Kingdom.

At the call out of the matter on Monday 7 November 2005, the plaintiff was again not in attendance. This was amid allegations by the defendant that she was illegally residing in the United Kingdom and was afraid that if she came to Zimbabwe for the trial, she would not be allowed back into that country. I stood the matter down to Wednesday 9 November 2005 to enable Mr *Warara* to take instructions from his client as to whether she would appear for trial and if so, when she hoped to do so. On the resumption of the hearing, the plaintiff was not in attendance and Mr *Warara* withdrew her claim and tendered costs.

The defendant gave evidence in support of his counter-claim for divorce. It was during his testimony that the issue of jurisdiction of this court arose. The relevant evidence led from the defendant in this regard is as follows:

He is a Zimbabwean citizen by birth. He is currently working and studying in the United Kingdom. He entered that country in 2002, together with the minor children of the marriage. He was following the plaintiff who had entered the United Kingdom in 2001. He has a visa allowing him to work in the United Kingdom. The current visa is valid up to 2007. Even though his visa is valid up to 2007, he can apply for indefinite leave to remain in the United Kingdom. It is the law in the United Kingdom that after establishing a presence in that country for a period of 47 months, a resident can apply for citizenship. He has already filed such an application with the relevant authorities. If granted custody of the children, he will be able to look after them and it is not his intention to remove them to Zimbabwe in the near future. He has purchased an immovable property in the United Kingdom where he is employed at a salary of 4 000-00 pounds per month. This is his second purchase and it is larger than the first. His elder son from another union aged 20 is also in the United Kingdom and can assist him in looking after the minor children if granted custody.

On the basis of the above evidence, I entertained some misgivings as to whether I have jurisdiction in the matter and requested the parties' legal practitioners to file Heads of argument on the issue by the 13 November 2005. Mr *Muchadehama* has since done that for which I commend him. Mr *Warara*, up to the date of drafting this judgment, had not filed his despite reminders to that effect by the Registrar.

It is trite that this court has jurisdiction to grant divorce in matters where, at the time of the institution of the action, the husband is domiciled in Zimbabwe.¹

The divorce summons in this matter was issued on 15 February 2005. From the plaintiff's declaration, it is evident that the defendant was by then residing in the United Kingdom as his address on the summons is given as 54 Thorn Hill, Northampton NN4

¹ See *Chivhiya v Chivhiya* 1995 (1) ZLR 210 (H); *Howard v Howard* 1966 RLR 182 (G); *De Jagger v De Jagger* 1998 (2) ZLR 419 (H).

85N England. The issue that falls for determination then is whether at the time, the defendant was domiciled in England or in Zimbabwe.

As correctly submitted by Mr *Muchadehama* in his heads, domicile is a question of fact. GARWE J discussed the meaning of domicile in *De Jagger v De Jagger* (supra) at page 421D in the following terms:

“A person is 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 in the case domiciles of origin and of dependence.”

He proceeds to observe that:

“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.”

The acquisition of a domicile of choice is proved on a balance of probabilities². It is not subjectively tested and while the averments by the parties as to what they regard as the husband’s permanent home are to be taken into account, they are not the sole determining factor. Even clear expressions of intention cannot prevail against conduct inconsistent therewith and leading to an opposite inference.³

The law relating to the change of domicile holds that to acquire a new domicile, it is essential to show that the person concerned has abandoned his former domicile *animo et facto*. The state of mind that is required is one that does not require an absolute intention to reside permanently in the country of chosen domicile but evinces at least, an intention to stay there for an indefinite period.⁴

That the defendant before me is ordinarily resident in the United Kingdom is not in dispute. It is his intention in taking up that residence that I must determine from the evidence that has been placed before me.

Firstly, the defendant has testified that although his current work permit is valid up to the year 2007, he is eligible to renew it and apply for indefinite leave to stay in the

² *Howard v Howard* (supra).

³ See *Re Liddell-Grainger’s Will Trusts* 1936 (3) AER 173.

⁴ See *Smith v Smith* 1962 (1) SA 930.

United Kingdom. If he is granted custody of the children, he will perforce have to apply to extend his stay indefinitely in the United Kingdom. This in my view evinces an intention to remain in the United Kingdom for an indefinite time as stipulated in *Smith v Smith* (supra).

Secondly, the defendant has testified that he is now eligible to apply for citizenship in the United Kingdom and has already put in his application. Again in my view, this is yet further evidence of an intention to remain in the United Kingdom for an indefinite period. A man does not, in my view, apply to take up the citizenship of a country that he has not decided to settle in especially in view of the fact that by taking up that citizenship, he will automatically lose his citizenship of birth in Zimbabwe.

Thirdly, the defendant testified that he does not intend to disrupt the educational environment of the children and will keep them in school in the United Kingdom if granted custody, unlike the plaintiff, their mother, who is in England illegally and is liable to deportation, thereby disrupting the education of the children. The younger child is aged 10 and has at least 8 more years of pre- university schooling. It therefore goes without saying that the defendant is of necessity contemplating remaining in the United Kingdom for an indefinite period to cater for an indefinite period to cater for the education of the children.

Fourthly, the defendant testified that he purchased a bigger house in the United Kingdom that will be sufficient for his and the minor children's accommodation. In my view, the purchasing of a piece of immovable property to reside in evinces an intention to settle for some time, for an indefinite period, and is not an investment made by one simply on study sojourn or fleetingly in a country. It connotes some degree of permanence that is consistent with an intention to settle for an indefinite period.

Mr *Muchadehama* has submitted that the defendant has not expressed any intention to acquire domicile in the United Kingdom. I am not persuaded by this submission. On a balance of probabilities, the factors that I have enumerated above, taken singly and collectively are in my view conduct on the part of the defendant leading to the inference that he has left Zimbabwe with the intention of settling in the United Kingdom

for an indefinite period. I am therefore of the view that I do not have jurisdiction in the matter.

In coming to the above conclusion, I am aware that this court guards its jurisdiction jealously and will afford access to its justice to all persons approaching it for relief unless to do so will fly in the face of an established position at law. I am of the further view that to hold that I have jurisdiction in this matter simply for the purposes of expediency and convenience to the parties will fly in the face of an established position at law, that of granting jurisdiction to the country where the husband of the marriage is domiciled at the time the divorce proceedings are brought. The defendant, whilst a citizen of this country by birth, was domiciled in the United Kingdom in February 2005 when the plaintiff issued summons commencing this action. The courts of the United Kingdom have jurisdiction to divorce the parties and to grant them any necessary ancillary relief. While not a consideration in declining jurisdiction in this matter, it appears to me eminently proper that the courts in the United Kingdom determine the issue of the custody of the children of the marriage as such children are within their jurisdiction and they can mount a proper inquiry into the best interests of the children, including an inquiry into their living conditions and domestic arrangements, issues that I am ill-equipped to deal with due to the absence of the children from the jurisdiction.

In the result, I make the following order:

1. The defendant's counter-claim is dismissed for want of jurisdiction.
2. Each party shall bear its own costs.

Warara & Associates, plaintiff's legal practitioners.

Mbidzo Muchadehama & Makoni, defendant's legal practitioners.