

REWARD KANGAI
versus
JOSEPHINE RHODA KANGAI

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 14 May and 20 June 2007

Civil Trial

I E G Musimbe for the plaintiff
T Magwaliba for the defendant

GOWORA J: The plaintiff instituted proceedings against the defendant wherein he claimed the following:- a decree of divorce, and as ancillary relief thereto, custody of the two minor children of the union and an equitable distribution of the assets which constituted the matrimonial estate. When the matter was brought before a judge in chambers for a pre-trial conference the parties made some accommodation on some of the contentious issues to the dispute. The question of the custody of the minor children and their upkeep was resolved between the parties. They also shared out the matrimonial estate which consisted of both movable and immovable properties. The matter was then referred to trial on three issues tabulated as follows:

- i) whether or not the marriage between the parties had irretrievably broken down to such an extent that a normal relationship could not be restored;
- ii) whether the plaintiff was obliged to pay maintenance for the defendant and if so in what amount; and
- iii) whether the plaintiff was obliged to maintain one of the vehicles awarded to the defendant namely a Mazda 626.

The parties were married at Harare on 5 March 1983 under the then Marriage Act [*Chapter 37*]. The union was blessed with three children all of whom at the time of the trial had become majors, even though the youngest was still in High School. By the time of the trial the parties had been living under different roofs for a period in excess of nine months. They had however been living in separate rooms under the same roof for about two years prior to the plaintiff moving out of the matrimonial home. It is under this background that I must determine whether or not the marriage has broken down irretrievably to such an extent that there are no reasonable prospects of the parties reconciling and thereafter living a normal married life.

There is no dispute between the parties that the marriage has been in trouble from as far back as 1992. The plaintiff stated in his evidence that during that year he had approached a lawyer and sought advice on the possibilities of obtaining a divorce from the defendant but that when the process of obtaining one and the attendant difficulties that would follow the divorce as it related to the family were spelt out to him, he decided to abandon the divorce and make efforts to make the marriage work. The plaintiff's main complaint is that he and the defendant do not communicate, and that when he tries to speak to her she becomes difficult and refuses to listen. He told the court that the defendant would create arguments over trivial matters and that there is on her part, a disinclination to communicate. He went as far as writing her letters but she would just brush them aside. His evidence was that he approached her relatives, including her mother in an effort to find a solution to their difficulties but that his efforts were in vain as even the defendant's relatives gave up on helping the couple with the problems besetting the relationship. He was asked if he still loved her and said that although he used to love her at present he did not. He was convinced therefore that the marriage had broken down irretrievably. It was put to him that the defendant felt that the marriage could be saved if the parties went for counseling but he felt that that stage had long passed and that efforts to have the problems resolved through their relatives had been unsuccessful. He denied suggestions that he was blowing their problems out of proportion and said that if she did

not understand the magnitude of their problems then this failure highlighted the extent of the same.

The defendant accepts that the problems date back to 1992. She however stated that the plaintiff approached her relatives, not in an effort to resolve their problems but to lodge complaints against her. She believes that the plaintiff has not really given the relationship a chance and has made no effort at resolving their difficulties. Although she accepts that the plaintiff states that he no longer loves her, she believes that they were married under Christian rites and as far as she is concerned they are husband and wife until death parts or separates them. She told the court that the problems they have are not insurmountable and can be resolved if they approach counselors. She was also of the conviction that the plaintiff, through counseling could ask God to be taught how to love. She stated that she did not respect the plaintiff's choice not to love her because he was by doing so, choosing to kill her.

In terms of s 5 (1) of the Matrimonial Causes Act [*Chapter 5:13*] an appropriate court may grant a decree of divorce on the grounds of irretrievable breakdown if it is satisfied that the marriage between the parties has broken down to such an extent that there are no prospects of a reconciliation. The discretion whether or not to do so is that of the court hearing the divorce. The court is guided by the personal circumstances of the parties, the period of time that the marriage has endured, the respective ages of the parties to the marriage and any other considerations that they may pertain to the parties themselves. See *Chiviya v Chiviya*¹.

Although the defendant stated that she is guided by Christian beliefs in relation to her marriage, the plaintiff did not express any views on those beliefs. In presiding over this trial, I am not myself doing so as a religious court but rather as a court of law. The plaintiff's evidence shows that for a period in excess of five years the parties have not had a normal marriage relationship. They were in separate bedrooms for about two years before the plaintiff moved out of the matrimonial home at least nine months ago. The defendant

¹ 1995 (1) ZLR 210

conceded in her evidence that the parties had not been intimate since February 2005. The plaintiff stated simply that since moving out he has nothing but peace and quiet. The ages of the parties have not been revealed but they appear relatively young. Both are professional in that they have academic qualifications that enable them to obtain reasonable employment. The plaintiff no longer has any love and affection for the defendant and it is not practicable in my view to send him for counseling to be taught how to love the defendant. I am convinced that the circumstances pertaining to this matter are mute testimony of the extent to which the marriage has broken down. It does not, in my view, appear as if the parties are capable of reconciling and thereafter living a normal married life. It is in order therefore that the plaintiff be granted a decree of divorce.

The defendant has claimed maintenance for herself in the sum of \$10 million per month. In support thereof she tendered to the court her list of monthly expenses in respect of grocery items. It is common cause between the parties that the plaintiff pays for the utility expenses which explains why the maintenance is only in respect of food items. It is common cause that the plaintiff has been giving the defendant money for groceries. The defendant contended that the amount he has been affording her groceries is not enough to meet her needs and those of the youngest child Wadzanayi when she is at home. She stated further that she has been receiving assistance from her three sisters abroad and her son who is now in employment.

The plaintiff has offered to pay the defendant in respect of this claim, an amount of \$500 000.00 for a period of a year, within which he expects the defendant to have obtained employment. It was also his evidence that he would increase this sum proportionately with any increase he might receive when his salary is reviewed. He has produced to the court a salary slip which shows that he is in receipt of a net amount of \$2 278 351.80 per month. He is responsible for the school fees of all the children of the union although the eldest is now self supporting. One of the children is studying in Canada and the plaintiff explained that he would be afforded a loan by his employer with which to obtain the necessary foreign currency and would pay the same thereafter. In respect of the youngest child, the

company would pay the school fees on his behalf as part of his remuneration package. Once she goes to University however, he would have to pay for her tertiary fees and other requirements. He explained that apart from his salary he only had an amount just in excess of \$1 million which he received as rent from his Alexandra Park house. He denied that he had other sources of income or that he was attempting to hide his real income. A set of bank statements in respect of his accounts with Barclays and Standard Chartered Banks revealed no additional income. The statements were in the custody of the defendant and were handed over to the plaintiff on the morning that he gave evidence specifically to deal with those statements. Taking into account the manner of their production I am of the view that they have little if any probative value in this inquiry.

A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before the marriage, and is thus in a position to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short time to allow her time to get back on her feet. Where the divorced woman is middle aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand elderly women who cannot be trained or remarried are entitled to permanent maintenance. See *Chiomba v Chiomba*.²

The plaintiff is fifty. The age of the defendant has not been indicated but in his evidence the plaintiff said she was relatively young which evidence was not challenged. I will accept that she is in the same age bracket as him which will make her middle aged. Whilst the plaintiff is an engineer, the defendant has a degree in mathematics. When she worked for the Government she was employed as a statistician. According to the defendant she left work to look after the family and to pursue her work with charity. She has told the court that she has applied to rejoin the government and is waiting for the Public Service Commission to give its approval for her re-engagement. Although she expressed doubts

² 1992 (2) ZLR 197

about the absolute certainty of her being able to be re-engaged it was not my impression that she felt that she was unemployable. I believe that going by her qualifications she is able to obtain employment which would be sufficiently suitable to enable her to sustain herself. The year within which the plaintiff has offered to look after her needs is in my view a reasonable period after which she can then manage on her own.

The income that was established as the plaintiff's monthly income is about \$3, 2 million. Of this sum it was accepted that the plaintiff was spending or proposing to spend a total sum of \$1,6 million on the defendant. It is also obvious that whatever he needs to spends on Wadzanayi will come from the \$1,6 million left to him. In my view, proportionately the defendant will end up better than the plaintiff. The sum of \$500 000.00 that he has offered to pay her, which sum will be increased proportionate to the increase in his salary is more than reasonable.

With the offer of maintenance for a year also comes an offer to maintain and service the Mazda 626 vehicle that has been awarded to the defendant, this also for the period of one year.

A lot of other issues had been agreed at the pre-trial conference and will be incorporated in the final order that I issue. In the premises I make the following order

IT IS ORDERED AS FOLLOWS:

1. The plaintiff be and is hereby granted a decree of divorce.
2. The plaintiff be and is hereby awarded as his sole and exclusive property the immovable property known as 10 Dan Judson Avenue, Milton Park.
3. The defendant be and is hereby awarded as her sole and exclusive property the immovable property known as No 3 Thames Road, Vainona, Harare. The property shall be transferred to the defendant by conveyancers nominated by her and the plaintiff shall pay the costs attendant upon such transfer.

4. The defendant shall retain as her sole and exclusive property all the movable and household goods situated at No 3 Thames Avenue, Vainona, Harare.
5. The defendant shall retain as her sole and exclusive property the Mazda 626 motor vehicle and the Nissan Sunny motor vehicle
6. The plaintiff shall retain as his sole and exclusive property the Mercedes Benz motor vehicle, registration number 758 921N
7. The plaintiff shall retain as his sole and exclusive property the farm in Chivhu allocated to him under the government's land redistribution program.
8. The plaintiff shall pay maintenance for the defendant in the sum of \$500 000.00 per month for a period of 12 months reckoned with effect from 1 July 2007 which amount will be increased as and when the plaintiff is awarded an increase in his salary, with the increase in the maintenance being proportionate to the increase in the plaintiff's salary.
9. The defendant shall maintain and service the Mazda 626 vehicle referred to in paragraph 5 above for a period of 12 months reckoned from 1 July 2007.
10. The plaintiff shall retain the defendant and the parties' younger daughter Wadzanayi on his medical aid scheme.
11. There will be no order as to costs.

Musimbe and Associates, legal practitioners for the plaintiff

Magwaliba, Matutu & Kwirira, legal practitioners for the defendant