

MALVAS NYAMUNETSA  
versus  
JOYCE NYAMUNETSA (nee MUNGATE)

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 21 March and 17 October 2011

FAMILY LAW COURT

**Trial Cause**

*M Baera*, for the plaintiff  
The defendant, in person

MAWADZE J: The plaintiff and the defendant married each other on 6 December 2003 in terms of the Marriage Act [*Cap 5:11*]. The marriage was blessed with two children now aged about six years and two years respectively.

The plaintiff issued summons out of this court on 7 May 2009 seeking a decree of divorce; an order awarding him three motor vehicles, a Mazda 323, a Toyota Corolla and a Toyota Dyna and also awarding him immovable property number 22625 Unit G Seke, Chitungwiza and costs of suit.

The defendant filed her plea and also counterclaimed seeking a decree of divorce, custody of the two minor children division of matrimonial estate as per para 5 of her plea and costs of suit.

At the pre-trial conference the following issue were referred to trial for determination:

1. Whether the marriage has irretrievably broken down;
2. Whether or not stand number 26651 Unit B Seke Chitungwiza is matrimonial property and if so how it should be distributed.
3. How house number 22625 Unit G Seke Chitungwiza should be distributed;
4. What sort of access rights is the plaintiff to enjoy;
5. Whether or not the eight head of cattle are matrimonial property;
6. How the following motor vehicles should be distributed – Toyota Corolla, Mazda B series pick-up, Toyota Dyna and Mazda 323; and

7. How much the plaintiff should pay as maintenance for the defendant and the two minor children.

At the commencement of the trial the parties confirmed that the issues of custody of the two minor children and the sharing of immovable properties except the eight herd of cattle had been resolved between the parties. The parties agreed that the custody of the two minor children should be awarded to the defendant. As regards the movable property the parties agreed that they have already shared the property hence each party is to retain into his or her custody the property in his or her possession. I now turn to the contentious issues referred to trial.

#### 1. BREAKDOWN OF MARRIAGE

In terms of s 5 (1) of the Matrimonial Causes Act [*Cap 5:13*] a decree of divorce may be granted on the grounds of irretrievable breakdown of the marriage if the court is satisfied on the evidence adduced that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties. Further, s 5(2)(a) to (d) of the Matrimonial Causes Act [*Cap 5:13*] outlines the circumstances which may show breakdown of the marriage. The list so provided is however not exhaustive.

The plaintiff in his evidence told the court that the marriage relationship between the defendant and himself can no longer be salvaged. He gave a number of reasons as to why the parties now find themselves incompatible. According to the plaintiff they always argue on virtually all issues and have failed to live harmoniously. He said due to these problems the parties have not share conjugal rights since May 2009. The plaintiff said the matter is complicated further by the fact that they share different religious beliefs and alleged that the defendant is intolerant to his religious beliefs. The plaintiff attends the Johanne Masowe Church whereas the defendant attends the AFM Church. The plaintiff said the defendant has on occasions they have quarrelled physically and verbally abused him. The plaintiff said the defendant does not even relate well with the plaintiff's relatives and his close relationship with his sisters has been met with disdain by the defendant. Counselling sessions did not resolve the problem and as a result the plaintiff moved out of the matrimonial home two years ago. Under cross examination by the defendant the plaintiff remained steadfast that his marriage relationship with the defendant has broken down and is beyond any salvation.

When the defendant gave evidence she virtually accepted that the marriage relationship between her and the plaintiff has irretrievably broken down. Although the defendant preferred that the parties remained on separation for an indefinite period hoping that they would find love again – the plaintiff dismissed that as unacceptable.

I am satisfied on the evidence led that the marriage relationship between the parties has irretrievably broken down. It is clear to me that the parties have lost love and affection for each other. They have long ceased to enjoy the sacred conjugal rights. Consequently, a decree of divorce should be granted.

## 2. ACCESS RIGHTS

As already stated there is meeting of the minds between the parties in relation to the fact that custody of the two minor children should be awarded to the defendant. The plaintiff initially in his evidence in chief indicated that he should be allowed access to the minor children once a month during the weekends. The plaintiff who works in Beitbridge said he would take the children to his parents' home in Harare every time he would be in Harare once a month. The defendant on the other hand was not opposed to this arrangement but indicated that she was more comfortable in granting the defendant access to the children only during day time over weekends. I find this arrangement to be reasonable on account of the children's tender age. Access to the two minor children shall therefore be granted to the plaintiff once every month during weekends and during day time. This order can be varied from time to time on reasonable grounds.

## 3. MAINTENANCE

The plaintiff now resides at House Number 2564 Unit B Seke Chitungiza and is employed in Beitbridge as a vehicle inspector in the Ministry of Transport. As per the government salary advice payslips he produced for the month of September, October and December 2010 he earns a net salary of US\$196-61. It is common cause that the plaintiff is currently paying contributory maintenance for the minor children as per an order granted by the Magistrates' court in the sum of US\$100-00 per month. In essence therefore his disposable income as at now is a paltry US\$96-61. According to the plaintiff he still has to meet expenses relating to the water bill (US\$20 per month), electricity bill (US\$25-00 per month) and food requirements. It is on this basis that the plaintiff argued that he is unable not

only to provide spousal maintenance for the defendant after divorce but even to vary upwards the current maintenance order in relation to the two minor children.

Under cross examination the plaintiff was unable to refute that the defendant has to meet electricity and water bills now currently at US\$300-00 per month. Although he conceded that he is a trained motor mechanic the plaintiff said he does not realise much income from whatever part time jobs he may do as he is at work most of the time.

On the other hand the defendant testified that the current maintenance order in relation to the children should be varied from US\$100-00 to US\$150-00 per month. This if granted would leave the plaintiff with disposable income of US\$46-61 per month.

The defendant remained in the matrimonial house number 22625 unit G Seke Chitungwiza with the minor children. She is not employed although previously she engaged in cross border trading before she was forced to abandon the trade in order to look after the young minor child. She possesses a certificate in management but is still to obtain a Diploma in management which would enhance her employment opportunities. At the moment she told the court that she is unable to fund her education and therefore is a house wife on full time basis as it were. According to the defendant she would require about US\$100-00 per month as maintenance from the plaintiff.

While I fairly appreciate the needs of both the defendant and the two minor children I am not satisfied on the evidence led that the plaintiff has the requisite means to meet the maintenance order of US\$150-00 for the children per month and US\$100 for the defendant per month (a total of US\$250-00 per month). The total amount payable would be US\$250-00 per month well above the plaintiff's net income of US\$196-61. In my view it is only fair and just for the current maintenance order in respect of the two minor children to remain in force at US\$100-00 per month. The plaintiff is unable, using the means test to pay any spousal maintenance in respect of the defendant. There is therefore no objective basis on the facts before the court to interfere with the current maintenance order as the plaintiff's salary at the material time had not changed from the time the maintenance order was granted. The simple fact is that the plaintiff cannot afford to pay more without being rendered destitute.

#### 4. MOVABLE PROPERTY

As already stated the parties have already shared between themselves all other movable property except the eight herd of cattle and four motor vehicles.

In respect of the eight herd of cattle the plaintiff testified that the parties have never owned any cattle and that the cattle at his rural home belong to his father. The defendant while cross examining the plaintiff on this issue indicated that she was withdrawing her claim in respect of the eight herd of cattle. This decision in my view was wise as it was informed by total lack of evidence to support such claim. The only contentious issue in relation to the movable property remained as in relation to the four motor vehicles namely, Mazda 323, Mazda pick up truck, Toyota Corolla and Toyota Dyna.

The plaintiff testified that he purchased the Mazda 323 hatch back registration number 494-548 B in 2005 and is registered in his name. The defendant however said she contributed financially in the purchase of the Mazda 323 in issue as she paid half of the purchase price. At the material time she said she was gainfully employed at OK and that the motor vehicle was only registered in the plaintiff's name on account of the fact that he signed the agreement of sale.

The plaintiff testified that thereafter he bought a Mazda pick up truck whose registration number is not given in the pleadings. The plaintiff said he used his own resources to purchase this motor vehicle. This was refuted by the defendant who indicated that the Mazda pick up truck was bought in 2005 for 3,5 million Zimbabwe dollars and that she contributed half of that purchase price as she was engaged in the cross border trade which was very viable at the material time. This motor vehicle is registered in the defendant's name.

The plaintiff testified that he bought the Toyota Corolla Registration number AA4 4323 and the Toyota Dyna Registration number ABA 9225 in Durban South Africa using his own resources. He said the defendant did not contribute anything and that she first saw the two vehicles after the plaintiff have already brought them into Zimbabwe. The plaintiff said it was only after separation that the defendant forcibly took from him the Toyota Corolla. According to the plaintiff three motor vehicles the Mazda pick up, Toyota Corolla and Toyota Dyna should be awarded to him and the plaintiff awarded the Mazda 323.

On the other hand the defendant stated that the Toyota Corolla was bought in 2007 or 2008 for US\$ 500-00 and that she contributed half of the purchase price. This motor vehicle is registered in the defendant's name. The defendant said the Toyota Dyna was bought for US\$8 500-00 and that she contributed US\$5 000-00. It is registered in her name. According to the defendant she should be awarded the Toyota Corolla and Toyota Dyna which she can use to raise money to fend for the children and herself. She said the plaintiff should be awarded the Mazda 323 which is a non runner and the Mazda pick up truck.

Under cross-examination the plaintiff admitted that save for the Mazda 323 vehicle all other vehicles are registered in the defendant's name. According to the plaintiff he registered the vehicles in the defendant's name although he had single handedly bought them as he wanted to secure the vehicles for his wife the defendant from greedy family relatives in case he died intestate. This was dismissed as senseless by the defendant who said even if the vehicles were registered in the plaintiff's names she still had a claim in respect of the vehicles if the plaintiff had died as she would be a surviving spouse. The plaintiff conceded under cross examination that the defendant gave him her passport to use when he bought the Toyota Corolla and Toyota Dyna in South Africa. The defendant was adamant that the three vehicles were registered in her name because she directly contributed financially and indirectly by using her passport. I shall revert to this issue later after dealing with the immovable property.

#### IMMOVABLE PROPERTY

There are two immovable properties in issue which are house number 22625 Unit G Seke Chitungwiza and house number 26651 Unit B Seke Chitungwiza. The defendant and the children are currently staying at house number 22625 Unit G Seke Chitungwiza which is a complete house with a dura wall. The other property house number 26651 Unit B Seke Chitungwiza is still and incomplete house as it has only been built up to roof level and there is no water or electricity connected.

It is common cause that the defendant is the one who applied for stand number 26651 Unit B Seke Chitungwiza before she married the plaintiff. The stand is registered in the defendant's name. It is also common cause that all the developments done on stand number 26651 Unit B Seke were done after the defendant had married the plaintiff. There is therefore no doubt that this is matrimonial property, albeit registered in the defendant's name. The other property house number 22625 Unit G Seke Chitungwiza was acquired after the parties were married and is being used as the matrimonial house.

Section 7(1) of the Matrimonial Causes Act [*Cap 5:13*] deals with the division, apportionment or distribution of assets of the spouses upon the dissolution of the marriage. Section 74 (a) to (g) of the Matrimonial Causes Act [*Cap 5:13*] outlines the factors which the court should consider in the exercise of its wide discretion in order to make equitable distribution of the matrimonial estate. See *Hatendi v Hatendi* 2001 (2) ZLR 530 (S); *Shenje v Shenje* 2001 (2) ZLR 160 (H).

Commenting on the guidelines provided for in s 7 of the Matrimonial Causes Act [*Cap 5:13*] KORSAH JA in the case of *Nucbe v Nucbe* 1993 (1) ZLR 39 (S) at 40 H – 41 A had this to say:

“The above provisions, to my mind, do more than furnish broad guidelines for deciding what is a fair order in all circumstances, adjusting property rights if need be, under the wide powers bestowed on the court. The determination of strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money, is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion”.

When the parties gave evidence in relation to the sharing of the four motor vehicles and the two houses in Seke Chitungwiza I got the impression that each party laboured under the impression that the contributions made by each party either directly or indirectly in the acquisition of such property is the paramount determining factor. That approach in my view should be wrong and I totally associate myself with the views expressed by GILLESPIE J in the case of *Shenje v Shenje supra* at pp 163 H – 164 A. On how the court should assess the factors listed in s 7 (4) of the Matrimonial Causes Act [*Cap 5:13*]:

“The factors listed in this subsection deserve fresh comment. One might form the impression from decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of the seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognise that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties’ needs are met rather than that their contributions are recouped.”

As regards the motor vehicles both parties have agreed that they each require the service of a motor vehicle or motor vehicles. I find no good cause to award a non-runner Mazda 323 to the defendant when she has custody of the minor children and unemployed. The plaintiff is a mechanic and employed hence has the means to attend to such a vehicle. In view of the plaintiff’s inability to contribute meaningfully in financial terms to the needs of the children it is only prudent for the court to award the Toyota Dyna motor vehicle to the defendant to enable her to use it to raise requisite resources for the benefit of the minor children. The defendant would use the smaller Toyota Corolla for her and the children’s day to day transport needs. The Mazda pick-up truck and the Mazda 323 should be awarded to the plaintiff.

I now turn to the two immovable properties registered each in the other party’s name. As I have already pointed out each of the parties was keen to emphasize on each party’s

contributions to the acquisition of the two properties. I find no need to recite the evidence of the parties in that record. Suffice to state that it is clear that each party did contribute in a substantial way directly and indirectly in the acquisition of the properties. The contributions may not be on an equal basis as it were but to my mind that is besides the point. I am more inclined to consider the needs of the parties.

The custody of the minor children has been awarded to the defendant. The defendant and the two minor children are currently residing at number 22625 Unit G Seke Chitungwiza which is a complete house registered in the plaintiff's name. In my view it is only fair and just to award this house to the defendant who has custody of the children and ensure the children and the defendant herself are provided for with shelter. It would be grossly unreasonable to award house number 2665 Unit B Seke Chitungwiza to the defendant although it is in her name when that house is incomplete. Where would she stay with the minor children? The plaintiff is unable to provide any further financial contributions other than the current maintenance order of US\$100-00 per month. Further the defendant who is unemployed and of no means may find it extremely difficult to complete the developments of house number 26651 Unit B Seke, Chitungwiza. In my view the plaintiff is in better position to develop the incomplete house. In any case the plaintiff spends most of his time at his work place in Beitbridge. It is therefore just and equitable that the plaintiff be awarded the incomplete house number 26651 Unit B Seke Chitungwiza as his sole and exclusive property and the defendant the complete house number 22625 Unit G Seke Chitungwiza as her sole and exclusive property. The only burden on the parties relates to transfer costs and I believe each party should be able to meet the transfer fees within a reasonable time.

Accordingly, it is ordered as follows:

1. A decree of divorce is hereby granted.
2. Custody of the two minor children Mitchel Nyamunetsa and Nokutenda Nyamunetsa (whose dates of birth are unclear) is hereby awarded to the defendant.
3. The plaintiff is awarded reasonable access of the said minor children which shall be exercised for a period of a day once a month during the weekend, taking the children at 07 00 hours and returning them in the evening by 19 00 hours. The access shall be exercised in consultation with the defendant.

4. The maintenance order granted by the magistrates' court in the sum of US100-00 per month in respect of the two minor children against the plaintiff shall remain in force until it is varied by the same magistrates court.
5. Each party is awarded as his or her sole exclusive property the movable property in his or her possession as agreed between the parties.
6. The plaintiff is awarded stand number 26651 Unit B Seke Chitungwiza registered in the defendant's name as his sole and exclusive property. The plaintiff is to pay all the transfer costs of the property and the defendant shall sign all the relevant papers to affect transfer within 30 days of being notified by the plaintiff, failure of which the Deputy Sheriff is authorised to sign all the relevant papers to effect transfer.
7. The defendant is awarded stand number 22625 Unit G Seke Chitungwiza registered in the plaintiff's name as her sole and exclusive property. The defendant is to pay all the transfer costs of the property and the plaintiff shall sign all the relevant papers to effect transfer within a month of being notified by the defendant, failure of which the Deputy Sheriff is authorised to sign all the relevant papers to effect transfer.
8. Each party shall bear its own costs.

*Baera & Company*, plaintiff's legal practitioners