

ALPHEUS MAGUMISE
versus
CRESSY MAGUMISE (NEE DZINGIRAI)

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 25, 28 February and 11 April 2013

CIVIL TRIAL

Mr R Matsikidze, for the Plaintiff
Defendant in Person

UCHENA J: The plaintiff and the defendant married each other on 20 July 2001. The plaintiff instituted these divorce proceedings which the defendant is strenuously opposing.

The plaintiff offered the defendant a stove, fridge, television, kitchen chairs and kitchen utensils, which they acquired during the subsistence of their marriage, but claimed the matrimonial home he said he acquired long before he married the defendant. The plaintiff left their matrimonial home three years ago when the defendant had obtained a peace order against him, he said the peace order did not order him to leave the matrimonial home. He left because he feared the defendant would manipulate the peace order against him as he no longer loved her. He said he has lost love and affection for the defendant despite her protestations that she still loves him.

The defendant in her counter claim claimed in addition to the movables offered by the plaintiff, a sum of US\$2000-00 being half of the value of improvements to House Number 324/8 Mbizo during the subsistence of the marriage. The defendant further claimed a half share of a fridge, colour television, double bed, and Toyota Land Cruiser she alleges they acquired in South Africa during the subsistence of the marriage. She also claimed for an order of maintenance in the sum of US\$300-00 per month and contribution towards her costs in the sum of \$800-00.

The plaintiff gave evidence in which he told the court of how their marriage broke down because of the defendant's, refusal to comply with his directive that she should give up her cross boarder trading. He also said she is difficult to live with as she is talkative and argumentative.

After all the evidence had been led from the plaintiff and his brother for the plaintiff and the defendant and her friend for the defendant the following became common cause.

1. That the parties have been on separation for three years.
2. That the defendant has been staying in their matrimonial home, and looking after it during the plaintiff's absence.
3. That she was paying electricity, water and rates bills during his absence.
4. That she at some stage stayed with and looked after the plaintiff's children from his previous unions.
5. That their union was not blessed with the fruits of the womb, but that the only pregnancy she conceived for the plaintiff, developed in her fallopian tubes leading to an operation, she said she still suffers from.
6. That she painted the house and contributed towards the purchase of a gate.
7. That she continued with her cross boarder trading.
8. That she did not have evidence of the purchase of a land cruiser and other movables she claimed were purchased in South Africa..
9. That the plaintiff's children eventually left the matrimonial home and that she is now staying there alone.

There is no need to go over the party's evidence. It is clear that the defendant still loves the plaintiff who categorically said he has lost love and affection for her. It is trite that the courts can not force parties to continue in marriage if the other spouse has lost love and affection for the other even though the other spouse still loves the other. See the case of *Kumirai v Kumirai* **2006(1) ZLR 134 (H)** at p 136 B-D. There is no doubt in my mind that the plaintiff no longer loves the defendant. He has proved the break down of their marriage. A decree of divorce will be granted.

There is very little in dispute over the movables. The plaintiff offered to give the defendant the movables which are in the matrimonial home less those which were left by

his former wife which the defendant concedes should be given to that former wife. The defendant's claim to movables she claims were bought by the plaintiff in South Africa is based on speculation. She does not have evidence that such property was ever purchased. Her friend Nomatter Hodzi confirmed that the Toyota Land Cruiser was merely talked about but was never seen. I am satisfied that the defendant's claim over what she believed the plaintiff bought in South Africa was not proved. There was in fact confusion in the defendant's evidence on whether or not the plaintiff was staying in Botswana or South Africa. In evidence she said he was in Botswana though in her plea and counter claim she said he was in South Africa.

The parties should therefore share what they acquired. There is no dispute over the movables. They will be awarded to the defendant. The defendant has proved that she contributed to the maintenance of the matrimonial home even though she did not contribute towards its acquisition. She painted it, maintained it, and looked after it for three years after the plaintiff had abandoned the matrimonial home. Mr *Matsikidze* for the plaintiff in recognition of the defendant's contributions and her preservation of the house offered her an amount of US\$2000-00. That is the amount the defendant had claimed for her contributions towards the immovable property. See paragraph 2 of her counter claim.

The other US\$4 000-00 was half of the property she claimed they had acquired in South Africa. See paragraphs 3 and 4 of her counter claim. In view of her not having proved the existence of that property that claim must fail. She had in fact claimed that they acquired the alleged property in South Africa, yet its common cause that they never stayed together outside Zimbabwe. She has no direct evidence of the purchase of the alleged property.

The defendant in her counter claim claimed maintenance in the sum of US\$3 00-00 per month. In her evidence she reduced it to US\$150-00 per month. In her evidence the defendant said the plaintiff is not permanently employed. She said she cannot look after herself. This is however contradicted by her evidence to the effect that she is the one who was looking after the matrimonial home including plaintiff's children. She is a cross boarder trader. Her friend Nomatter Hodzi confirmed it. Post divorce maintenance is paid

to a spouse who cannot look after herself. I am convinced that the defendant is well able to look after herself. There will be no order for maintenance.

The defendant sought an amount of US\$800-00 being plaintiff's contribution towards her costs of suit. The plaintiff said he is not employed and cannot afford the costs. He was however able to engage a legal Practitioner to represent him at this trial. Though he may be of limited means he cannot claim absolute poverty. It is apparent that the defendant did not want this divorce. She remained looking after the plaintiff's home and children. This demonstrates her commitment to the marriage. The plaintiff is clearly to blame for this divorce. He must contribute towards the defendant's costs.

In the result it is ordered that,

1. A decree of divorce be and is hereby granted.
2. That the defendant be awarded the following movables, a stove, fridge, television, kitchen chairs and kitchen utensils.
3. That the plaintiff shall pay to the defendant a sum of US\$2 000-00, being her contribution towards the maintenance of the matrimonial home.
4. That the plaintiff shall have House Number 324/8 Mbizo Township Kwekwe as is exclusive property.
5. That the plaintiff shall contribute US\$800-00 towards the defendant's costs of suit.

Messers Matsikidze and Mucheche, plaintiff's legal practitioners.
Defendant in Person