

LANDINAH MUFUNANI (nee SHUMBA)
versus
FARISI MUFUNANI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 21 January 2016

Divorce Action

T I Gumbo, for the plaintiff
T P Mateisanwa, for the defendant

CHITAKUNYE J: The plaintiff and defendant were joined in holy matrimony on 25 March 1972 at Harare in terms of the Marriages Act, 1964(now Chapter 5:11). Their marriage still subsists.

The marriage was blessed with five children who are now adults and self sustaining. During the subsistence of the marriage the parties acquired some movable assets and an immovable asset namely, No. 17 Dengu Street, Zengeza 1, Chitungwiza.

On 17 May 2014 the plaintiff sued defendant for a decree of divorce and the distribution of the assets acquired during the subsistence of the marriage between the parties. The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no prospects of the restoration of normal marital relations more particularly in that:

1. The parties have been living separate and apart from one another since November 2003 and neither party has any intention of restoring cohabitation to the other;
2. The parties have lost all love and affection for one another and wish to be divorced from each other.

The plaintiff's claim was thus for a decree of divorce on the ground of irretrievable breakdown of the marriage and a distribution of the assets of the spouses as follows:

1. That each party retains the movable property in his/her possession.
2. That the immovable property namely no. 17 Dengu Street, Zengeza 1, Chitungwiza be distributed in equal shares as between the parties.
3. That defendant pays costs of suit.

The defendant, whilst admitting that the marriage has irretrievably broken down, laid the cause for such breakdown on the plaintiff. He denied responsibility for the breakdown of the marriage. The defendant agreed with the plaintiff that on the movable property each party should retain the property in his/her possession. He however disputed the distribution of the immovable property.

In his counter claim defendant sought an order that:

1. A decree of divorce be granted;
2. Each party retains movable property in their possession;
3. The immovable property namely number 17 Dengu Street, Zengeza 1, Chitungwiza be declared the sole and exclusive property of the defendant; lastly
4. Each party should pay their own costs.

At a pre-trial conference held on 15 November 2013, the issues for determination at trial were identified as:-

1. Whether or not a decree of divorce should be granted
2. Whether or not the plaintiff is entitled to a half share in the matrimonial home known as 17 Dengu Street. Zengeza 1, Chitungwiza.

On the trial date the plaintiff gave evidence in support of her claim for a decree of divorce and an order for the distribution of assets of the spouses with each party getting a half share of the immovable property in question.

Though in his pleadings the defendant had conceded that the marriage had irretrievably broken down, and that a decree of divorce should be granted, on the date of trial he seemed to change that stance. The defendant now said that a decree of divorce should not be granted. He contended that he stood by his marriage vows that they should only be separated by death.

The defendant's stance served to confirm the need for court to make a determination as to whether the marriage has irretrievably broken down to an extent that such an extent that there is no prospect of restoration of a normal marriage relationship and so a decree of divorce should be granted.

1. Whether or not a decree of divorce should be granted.

Section 5(1) of the Matrimonial Causes Act [*Chapter 5:13*] states that:-

“An appropriate court may grant a decree of divorce on the ground of irretrievable breakdown of the marriage if it is satisfied 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 them.”

In *Kumirai v Kumirai* 2006(1) ZLR 134(H) at p136A-E MAKARAU J(as she then was) aptly put the legal position as that:-

“In view of the fact that the breakdown of a marriage irretrievably is objectively assessed by the Court, invariably, where the Plaintiff insists on the day of the trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the Defendant still holds some affection for the Plaintiff. Evidence by the Plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this Court as evidence of breakdown of the relationship since the promulgation of the Matrimonial Causes Act in 1985. So trite has the position become that one hardly finds authority for it.”

If, as in this case defendant is to succeed in his assertion that the marriage has not irretrievably broken down and so a decree of divorce should not be granted, the defendant must adduce evidence showing that after the issuance of summons the parties have found each other and are now living in the manner of husband and wife. Sheer hope or desire by defendant that parties should remain bound by their marriage vows is not adequate.

There are basically two aspects to be considered in determining whether a marriage has irretrievably broken down. These are:-

1. Whether the marriage relationship is no longer in its normal state.
2. Whether there are any reasonable prospects of restoration of the normal marriage relationship.

Where the evidence adduced shows that there is no longer a normal marriage relationship in the way the parties relate and that there are no prospects of restoration of a normal marriage relationship, court will be inclined to grant a decree of divorce.

In casu, the pleadings show that the relationship between the parties is no longer in its normalcy. The pleadings show that the parties have not been sharing bed since about November 2003 and neither party has taken steps to restore cohabitation. There is no denying that parties have lost love and affection for each other.

In their evidence the parties confirmed as much. The plaintiff testified that though they had been living under the same roof they have been sleeping in separate rooms since about 2002. They last enjoyed conjugal rights in 1979.

Whilst in his plea defendant admitted that the parties had been separated for the period stated in the summons, in his evidence in court he now seemed to say that they last enjoyed conjugal rights in 2012. Upon being questioned on this, defendant was not confident of that date. He however confirmed that the plaintiff left the Matrimonial home in 2012 and

since then parties have been on separation. The defendant could not explain his latest stance *vis-a-vis* his own admissions in his plea and counter claim.

It is also common cause that each party obtained a protection order against the other. Clearly they have become incompatible and unable to live with each other as husband and wife.

The defendant's contention that a decree of divorce should not be granted was purely based on the marriage vows the parties took. As far as he is concerned they can only be separated by death.

I am of the view that defendant's desire for the continuation of the marriage is not bona fide. He clearly has not done anything to express desire to reconcile with his wife. All he is saying is that because we took a vow that we will only be separated by death, since neither of us is dead, the marriage must go on. He is not applying his mind to the fact that the relationship that now exists between them is not conducive to the continuation of a normal marriage relationship.

I am satisfied that the evidence adduced confirms with certainty that the marriage relationship has irretrievably broken down and a decree of divorce must be granted.

2. Whether or not the plaintiff is entitled to a half share in the matrimonial home known as 17 Dengu Street, Zengeza 1, Chitungwiza.

The plaintiff's claim was for the only immovable property of the spouses to be distributed equally between the parties. The defendant on the other hand asked for that property to be declared as his sole and exclusive property.

The division and distribution of assets of the spouses at divorce is governed by s 7 of the Matrimonial Causes Act, [Chapter 5:13]

Section 7(1) (a) of the Act provides that:-

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at anytime thereafter, an appropriate court may make an order with regard to-
(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other.”

In making the order for the division, apportionment or distribution of assets of the spouse court has a wide discretion.

Section 7(4) of the Act provides some guiding factors as follows:-

“In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case including the following-

- (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or is expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child;
- (e) the direct or indirect contribution by each spouse to the family, including contributions made by looking after the house and caring for the family and any other domestic duties;
- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
- (g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and the children in the position they would have been in had a normal marriage relationship continued between the spouses.”

It is evidently clear that court is enjoined to consider all the circumstances of the case.

In casu, it is common cause that the property in question was allocated to the couple upon production of their marriage certificate. It appeared agreed that during the material time the production of a marriage certificate or at least proof of marriage was a requirement for one to be allocated a house. It was agreed that the rentals paid was twelve dollars per month. Apart from the rentals no particular purchase price was paid.

Upon listening to the evidence by the parties there was really nothing of significance either party contended as a basis for a great differentiation in the distribution of the property. For instance, whilst defendant was the only one in formal employment, he acknowledged that the plaintiff did engage in some income generating activities. Though he tried to down-play the significance of such activities he nevertheless acknowledged that the plaintiff contributed indirectly to the needs of the family. By implication the defendant appreciated that the plaintiff deserved a share in the property. He was however unable to state what share he deemed fair and reasonable taking into account the circumstances of this case.

The defendant could not justify his claim to be declared the sole and exclusive owner of the property despite his own admission that the plaintiff deserved a share in the property.

I am of the view that taking into account all the circumstances of the case including the duration of the marriage, needs of the parties, and the manner of acquisition of the property, a fair and equitable distribution of the immovable property would be an equal share

for each spouse. The fact that the plaintiff may not have made a direct financial contribution is outweighed by the indirect contribution she made over the four decades of marriage.

See *Usayi v Usayi* 2003(1) ZLR 684(S), *Masiwa v Masiwa* 2006(1) ZLR 167(S).

In their evidence neither party expressed ability to buy out the other. They both seemed financially incapable of buying out the other. Despite their expressed inability to buy each other out, I am of the view that opportunity be availed to either party to buy out the other as the first option. Where neither party is able to buy out the other, the property will be sold to best advantage and the net proceeds shared equally between the parties.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted
2. Each party shall retain the movable assets currently in his or her possession.
3. The plaintiff be and is hereby awarded a 50 per cent share in the immovable property namely, No. 17 Dengu Street, Zengeza 1, Chitungwiza.
4. The defendant is hereby awarded the remaining 50 per cent of the above stated immovable property.
5. The parties shall within 30 days of this order appoint a mutually agreed estate agent to evaluate the property. Failing such agreement the Registrar of the High Court is hereby directed to appoint such agent from his list of registered estate agents.
6. The defendant shall be given the first option to buy out plaintiff. Should the defendant fail to exercise this option within 60 days from the date of receipt of the evaluation report the plaintiff shall be given the option to buy out the defendant within 60 days of defendant's failure.
7. The exercise of the option to buy out the other shall include the reaching of an agreement of a payment plan within an agreed period.
8. Should neither party exercise the option to buy out the other within the 60 day period stated above, the property shall be sold to best advantage by the estate agent appointed in terms of clause 5 above.
9. The costs of evaluation and other related costs shall be shared equally by the parties.
10. The net proceeds there from shall be shared as per the parties' respective shares in the property.
11. Each party shall bear their own costs of suit.

Atherstone and Cook, plaintiff's legal practitioners

Legal Aid Directorate, defendant's legal practitioners