

JUDY CHILUNDO (nee KISS)  
versus  
JOHN CHILUNDO

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 16 November 2015 and 3 November 2016

## **DIVORCE ACTION**

*E. Matiza*, the for plaintiff  
*C K Mutevhe*, the for defendant

CHITAKUNYE J. The plaintiff and the defendant were joined in holy matrimony in terms of the Marriages Act [*Chapter 5:11*] on 30 August 1997 at Harare. The marriage still subsists. They had however commenced living together as husband and wife in terms of customary law in September 1996.

Their marriage was blessed with two children born on 23 January 1997 and on 1 April 2003 respectively. Their first born child is now a major.

On 2 July 2014 plaintiff instituted summons for a decree of divorce and ancillary relief. The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship. In particular she alleged that:

1. The defendant is engaging in adulterous relationships;
2. The plaintiff and the defendant have not lived together as husband and wife for a continuous period of at least twelve (12) months immediately preceding the date of commencement of this action;
3. The defendant has failed to treat the plaintiff with love, respect and companionship;  
and
4. The defendant has lost love and affection for the plaintiff.

As a result of the above factors plaintiff alleged the factors the marriage has irretrievably broken down. She thus sought for the dissolution of the marriage, custody of the minor child to be awarded to her and that the defendant be granted reasonable rights of access. She proposed that the only immovable property acquired during the subsistence of the marriage, namely Stand 1796A Salisbury Township, also known as Flat number 64 Spencer Cook

Gardens, Harare be donated to the two children of the marriage in equal shares. Of the two motor vehicles she alleged were acquired by the parties, she proposed that she be awarded the Nissan Double Cab Registration No. AAH 4647 whilst defendant is awarded the Land Rover Registration No. 476-648V.

The defendant, whilst conceding that the parties have been living apart for the past seven years and therefore, by implication, the marriage has irretrievably broken down, denied being responsible for the breakdown. He also disputed the division and distribution of the immovable property and the two motor vehicles as proposed by the plaintiff. He contended that the two motor vehicles were not matrimonial property but belonged to Mackchil Fibreglass (Pvt) Ltd, a company in which defendant was a co-director with one Adolph Makombe. He further indicated that the Land Rover vehicle was disposed well before the institution of these proceedings and so it is not available.

On the immovable property defendant contended that this was never matrimonial property as he had acquired it on his own and it was registered in his name early in their marriage. He further stated that in any case the property was donated to JOHN CHILUNDO FAMILY TRUST on 6 July 2007 for the benefit of the two children born of their marriage. This Trust was apparently created without the knowledge of plaintiff and excluded her. The Trustees included defendant and two of his brothers.

At a pre-trial conference held on 29 October 2014 the following aspects were agreed:

1. That the marriage relationship between plaintiff and defendant has irretrievably broken down and a decree of divorce be granted.
2. That the plaintiff's and defendant's matrimonial household goods were equally distributed by and between the parties.
3. That the maintenance order in case No. M905/07 and the ancillary issues thereto be incorporated into a court order.
4. That custody of the minor children of the marriage Aaron Chilundo (born 23 January 1997) and Anotidaishe John Chilundo (born 22 April 2003) be awarded to the plaintiff with the defendant having reasonable rights of access by prior arrangement between the parties i.e. two weeks per every school holiday and two weekends per month from 9am to 4pm.

Issues referred to trial were as follows:

1. What would be a fair and equitable distribution of the matrimonial immovable property namely Stand Number 1796A Salisbury Township also known as Flat number 64 Spencer, Cook Gardens, Harare.

2. Whether or not the motor vehicles namely Nissan Twin Cab registration Number AAH 4647 and Land Rover Registration Number 476-648V are matrimonial property jointly acquired by the plaintiff and the defendant? And if so, what would be a fair and equitable distribution thereof?

The plaintiff gave evidence after which defendant also gave evidence. From the evidence adduced some aspects are common cause. In their evidence the parties confirmed that the marriage has irretrievably broken down. They separated in 2007 and have not shared bed and board since. They thus stayed together for about 11 years including the period before the solemnisation of the marriage. During that period they had their own fair share of matrimonial problems.

It is common cause that when they met plaintiff was attending college whilst defendant was employed.

It is further common cause that the immovable property that is subject of dispute was acquired during the subsistence of the marriage. The parties never, however, lived in that flat. They have been leasing it out since its acquisition.

The two motor vehicles in issue were also acquired during the subsistence of the marriage. Parties were however not agreed as to how the motor vehicles were acquired and by whom. The plaintiff in her pleadings alleged that the two motor vehicles were bought by the parties and not by Mackchil Fibreglass Company. In her evidence she seemed to now agree that the two vehicles were bought by the company and that she is in fact the one who formed the company after her husband had lost his job. It was the plaintiff's evidence that though her name did not feature as one of the directors of the company, she was in fact the brains behind the company. As the vehicles were bought by the company she should be awarded the Land Rover with defendant being awarded the Nissan Double cab.

Under cross examination plaintiff confirmed the motor vehicles belonged to the company. She alluded to having lost interest in her claim for a motor vehicle.

### **Immovable property.**

It is pertinent to point out that in her pleadings plaintiff's position was that the immovable property be donated to the two children of the marriage in equal shares. The defendant did not agree to that, he instead indicated that the property was not matrimonial property as he had bought it alone and had proceeded to donate the property to John Chilundo Family Trust on 6 July 2007. He indicated that the trust was for the benefit of the children.

It was as a result of a stalemate as to how the property should be dealt with that the question of how to distribute the property between the spouses came about.

The plaintiff in her evidence now claimed a 50% share in the property whilst defendant claimed a 90% share with plaintiff getting a 10% share.

In this regard both parties seemed to concentrate on the issue of contributions towards the purchase price as the main consideration.

The plaintiff testified that the property was acquired during the subsistence of the marriage. She contributed financially towards its acquisition as she was employed and earning a salary.

The plaintiff's evidence was to the effect that the immovable property was bought in 2000.

It was her evidence that whilst at Harare Polytechnic College she was in receipt of Zimbabwe Manpower Development Fund (Zimdef) allowance and when she was on attachment at Kentry (Pvt) Ltd she was also in receipt of an allowance. She used these allowances, or part thereof, for the needs of the family.

She completed her attachment in 1998 and Kentry (Pvt) Ltd employed her and so she continued contributing towards family needs. In about 2000 she left Kentry (Pvt) and joined Mega Pak in Ruwa. She left Mega Pak after defendant had complained about her having to do night shifts. She then joined 'William Smith', another company in the plastics industry. She later left William Smith and joined Headway Enterprises (Pvt) Ltd.

It was her evidence that after the acquisition of the property in 2000, her husband lost his job in that same year and so she took over the payment of mortgage instalments from her income. She did this for about one and half years and the mortgage was fully paid when defendant was paid his terminal benefits.

On indirect contribution, the plaintiff said that she performed her wifely duties as usual and contributed to family needs. She did all the household chores expected of her as a wife and provided defendant with the attendant comfort and companionship.

She thus argued that from her direct and indirect contributions she deserved a 50% in the immovable property.

The defendant on the other hand contended that he bought the property on his own without the plaintiff's contribution in the year 2000. He got a loan from his employer which he used to deposit for the property. Thereafter the employer deducted repayments from his

salary. Later in the same year 2000 he lost his job. Fortunately enough he had some savings which he used to continue paying the instalments.

After about 6 months from the time he lost his job he was paid his terminal benefits in the form of lump sum. That is the money he used to pay off the balance of the loan. He thus maintained that the plaintiff did not make any direct contribution towards the purchase price.

It was also his evidence that in fact plaintiff did not know about the purchase till about six months later when she learnt about it at a family gathering as a relative was congratulating him for the purchase. He had deliberately not informed his wife for reasons he did not disclose.

Though the defendant denied that the plaintiff was in receipt of a Zimdef allowance, he admitted that Kentry (Pvt) did provide her with an allowance. He also conceded that the plaintiff secured employment with Mega Pak but he stopped her from continuing with it due to the requirement that she performs night shift. So, it was his wish that she stops working. He also said the other reason was so that she would take care of their child who was still very young. If he indeed stopped the plaintiff from working so that she would take care of the child it would be unjust to then belittle her indirect contribution in that regard during the time she was taking care of the child.

I am of the view that the evidence by the parties on this aspect left a lot to be desired. The plaintiff was eager to impress that she made direct contribution and in that eagerness she alluded to contributions she made from the salary/allowance she was getting from Kentry (Pvt) Ltd whilst on attachment and Zimdef allowance from government. It is however difficult to understand how she did this when the attachment and Zimdef allowances were in the period 1996 to 1998 and yet the property was acquired in 2000. It was not her evidence that she made savings from the allowances that she later used to contribute. Clearly she was not clear on this aspect.

The defendant had his own difficulties on this aspect as well. In a bid to show that this was not matrimonial property he initially stated that he bought the property in 1998 when the plaintiff was still at college and so she could not have contributed anything. It was only later and after lunch break that he changed his story to now say that the property was acquired in 2000. Obviously the desire to distance the property from any possible contribution from the plaintiff may have blinded him to the truth.

What is clear is that the property was acquired in 2000 and that the defendant obtained a loan in order to pay the required deposit. Thereafter deductions from his salary

were being made towards repayment of the loan. At the time he lost employment measures had to be put in place to service the loan before he was paid the terminal benefits. It is during this stage when plaintiff probably chipped in.

Besides the direct contribution, it is accepted that plaintiff also made indirect contribution. The defendant admitted this albeit belittling it.

It is my view that whilst contributions by the parties both direct and indirect are important, it is pertinent to note that those are not the only considerations in the distribution of assets of the spouses. There are other factors that must be considered which may be of equal importance or even of greater importance depending on the circumstances of the case. In this regard s 7(4) of the Matrimonial Causes Act sets out some of those factors. That subsection enjoins court to consider all the circumstances of the case in a bid to arrive at a fair and just distribution order.

In *Shenje v Shenje* 2001(2) ZLR 160(H) at 163E- 164A GILLESPIE J had this to say on this subject:

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. This list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantages, to the extent they are not inevitable, of becoming divorced.

The factors listed in the subsection deserve fresh comment. One might form the impression from the 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 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.”

The above speaks well into the evidence by the parties whereby they concentrated on contributions and not other circumstances of the case that would assist court to distribute the assets in a fair and equitable manner.

The defendant did not want plaintiff to get any meaningful share because she did not contribute directly to the purchase of the assets. The plaintiff on the other hand wanted a 50% because she believed that was the extent of her contribution. It is my view that parties ought to be encouraged to testify on other circumstances of their case so as to aid court in arriving at a fair and equitable distribution of their assets.

Another aspect of interest in this case is that the plaintiff's initial claim was for the immovable property to be donated to the two children of the marriage. The defendant on his party contended that he had donated the property to John Chilundo Family Trust which was for the benefit of the children. This trust was to be under his control and plaintiff was not part of it. This idea was rejected by plaintiff. It was clear that the Trust was a ruse by defendant to deny plaintiff a benefit from the property and to reserve it for himself because, as he insisted, plaintiff had not contributed to its purchase. The idea of a family trust was not in good faith hence its rejection by plaintiff. Had defendant been sincere that the two children should be the only beneficiaries he could easily have agreed with plaintiff's suggestion that the property be donated to the children. That way the children's interests would be better protected than in a Trust which was in defendant's sole control.

I thus find that the defendant was simply intent on denying plaintiff any meaningful share in the immovable property. This attitude was simply untenable.

In his closing submissions defendant's counsel appeared to have realised that even from the numerous case authorities cited by the parties defendant's denial of a meaningful share to plaintiff was untenable. He thus upped the defendant's offer to 30 percent from the original 10 percent.

This is a case where the parties had lived together for about 11 years. During those 11 years plaintiff had contributed both directly and indirectly to the needs of the family. After 11 years both parties had their own expectations from the marriage. Both parties expected to benefit from the property acquired during the marriage.

It is common cause that after separation the defendant continued to benefit from rentals from the parties' immovable property to the exclusion of the plaintiff. Whilst claiming to have been using the rentals for the children's needs it is clear that the plaintiff had to sue him for maintenance in order for him to contribute. That contribution having been squeezed out of him via a suit for maintenance the defendant should not get credit for it. His stance was simply that plaintiff did not deserve anything from the immovable property even if that was to benefit their minor children.

The defendant's counsel submitted that due to the requirement to pay maintenance for the children the defendant needed to retain the Flat so as to be able to raise money from rental. That is not a good reason on its own to deny plaintiff her due share. The plaintiff as custodian parent also needs to be providing certain daily needs for the children. She needs accommodation and other basic needs as custodian parent. Her late parents' property where

she is currently staying has no security of tenure as it is shared with other siblings. A decent share from the assets would enable her to set herself up in a way that is commensurate with the standard of living the children and herself had been used to.

### **Motor vehicles**

The issue of the motor vehicles was not well ventilated. Whilst it is true that at some point there were two motor vehicles, plaintiff could not prove that the vehicles were jointly acquired by the parties as she had alleged in her pleadings. The defendant testified that the motor vehicles were bought by Mackchil Fibreglass (Private) Limited. The plaintiff conceded just as much later on in her evidence. Her argument was now that she was the one who formed that company and so she should still benefit from her efforts in that direction. She could not, however, rebut the assertion that the Land Rover motor vehicle was in fact disposed before the institution of these proceedings. Only one vehicle will thus be considered as available for distribution.

At some point plaintiff indicated that she was no longer interested in the motor vehicles but if she is entitled to a share she would gladly accept it. That attitude was clearly out of frustration and not an abandonment of her claim.

The defendant testified that the company is no longer in operation and he is the one using the Nissan Twin Cab. It is a property he is deriving benefit from and so can be shared with plaintiff.

### **Conclusion**

As aptly noted by MALABA JA in *Gonye v Gonye* 2009 (1) ZLR 232 (H) at 236H – 237B this court has wide discretion regarding the distribution of assets of the spouses. In the exercise of that discretion and taking into account all the circumstances of this case, it is my view that the immovable property be distributed as follows 35% for plaintiff and 65% for defendant. The Nissan motor vehicle be shared on a similar ratio 25:75 in favour of defendant.

Accordingly an order encompassing all aspects including those agreed to shall be granted as follows:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child Anotidaishe John Chilundo (born 22 April 2003) be and is hereby awarded to plaintiff with the defendant having reasonable rights of access by prior arrangements between the parties for two weeks per every school holiday and two weekends per month from 9am to 4pm.

3. The maintenance order in case Number M905/07 and ancillary issues thereto shall be incorporated into this order.
4. The parties shall retain household goods in their possession as at the time of separation.
5. The plaintiff be and is hereby awarded a 25% share in the motor vehicle Nissan Twin Cab registration no. AAH 4647  
The defendant shall retain 75% share thereof. The motor vehicle shall be valued by a valuer appointed by the parties within 14 days of this order failing which one shall be appointed by the registrar of the High Court from his list of valuers of motor vehicles.
6. The defendant shall be granted the option to pay out plaintiff's 25% share in the motor vehicle within 6 months from the date of receipt of the valuation report. Should defendant fail to do so, the motor vehicle shall be sold to best advantage by a seller appointed by the registrar from his list of sellers and the net proceeds shared in the already stated ratio.

Immovable property

7. The plaintiff be and is hereby awarded a 35% share in the immovable property namely Stand No. 1796A Salisbury Township, Harare with the defendant being awarded a 65% share.
8. The property shall be valued by a valuer agreed to by the parties or failing such agreement, by one appointed by the Registrar of the High Court within 30 days of the date of this order.
9. The defendant shall be granted the option to buy out plaintiff's share within 6 months from the date of receipt of the valuation report.
10. Should defendant fail to buy out plaintiff within the stipulated period, or such longer period as the parties may agree, the property shall be sold to best advantage by an estate agent mutually agreed to by the parties. If parties fail to agree on an estate agent one shall be appointed by the Registrar of the High Court.
11. The net proceeds of the sale shall be paid to the parties as per their respective shares.
12. Each party shall bear their own costs of suit.

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