

CLETUS NYATSAMBO
versus
CHIEDZA NYATSAMBO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 November 2016

Civil Trial

G. Mlanga, for the applicant
Defendant in person

CHITAKUNYE J: The plaintiff and the defendant were married in terms of the Marriage Act [*Chapter 5:11*] on 13 August 1997. Two children were born of their marriage. It would appear from the evidence that they had started staying together before the solemnization of the marriage as one of the children was born in 1996.

The plaintiff sued the defendant for divorce alleging that the marriage has irretrievably broken down to such an extent that there is no prospect of restoration of a marriage relationship between them. The factors pointed out were:

1. That the parties have lost love and affection for each other.
2. The plaintiff and the defendant have not lived together as husband and wife since March 2003 which is a period well in excess of 12 months immediately preceding commencement of this action.

He also indicated that in granting the divorce can each party be asked to retain the property that is in their present custody and that the defendant retains custody of the minor children of the marriage with the plaintiff enjoying reasonable access.

He had also offered maintenance for the two children who were then minors at 100 pounds per month broken down as 50 pounds per month per child.

The defendant entered appearance to defend and filed a plea and a counter claim. In the plea she virtually agreed with the assertion that they got married in terms of [*Chapter 5:11*] and that the marriage has irretrievably broken down. As regards the order to be granted she provided a counter claim in which, after agreeing with all the other offers made by the plaintiff, she argued that she also needed to be maintained by the defendant. She asked that the plaintiff pay maintenance for the children and the defendant in the sum of 200 British pounds per month which suggestion the plaintiff in his replication and plea to the defendant's counter claim agreed to. For some reason the parties found themselves having to go through a pre-trial conference apparently because they could not agree on going by way of a consent paper in spite of having agreed on almost everything.

In that regard a joint pre-trial conference was prepared after the pre-trial conference of 7 April 2014. In that minute almost all the issues were agreed. The issues referred for trial were basically two.

1. Whether or not the marriage between the parties has irretrievably broken down.
2. Whether or not the plaintiff acquired property in the United Kingdom and Zimbabwe which must be distributed.

The issues that were admitted and hence agreed were as follows:

1. That the plaintiff shall pay 200 British pounds per month as maintenance for the defendant until she remarries or dies whichever occurs first.
2. That the defendant shall be allowed to remain at the family home that is the Nyatsambo family home she is currently staying at, that is at 36 Mungongoma Road Mufakose.
3. That the custody of the minor children be awarded to the defendant.
4. That the plaintiff shall have access to the children as and when he is in Zimbabwe.
5. That the plaintiff shall pay 50 British pounds per child per month through the defendant.
6. The plaintiff shall pay the minor children's school fees.
7. The defendant be awarded all the matrimonial movable property in her possession in Zimbabwe.

This minute was duly signed by the parties' legal practitioners. Upon presenting themselves for trial before me I enquired as to the cause for the two issues referred for trial being so when the pleadings, as filed of record, did not disclose that there was any dispute as regards the matters that are referred to in those issues. In their pleadings parties had agreed that the marriage had broken down. In the pleadings there was no issue about United Kingdom and Zimbabwe property which had to be distributed serve to say that the property in the defendant's possession had been offered to her.

The discovery schedule that had been filed did not also disclose any other property serve that which had been referred to as the ones in the defendant's possession. It then transpired during that enquiry that the defendant's concern was that in view of her health problem, which she ascribed to have been caused by the plaintiff, she required guaranteed accommodation. In short, she does fear that because she will be remaining staying at the family home that had been admitted to, but not guaranteed by the plaintiff, she may be evicted from there as the house is owned by someone else.

She also alluded to her wish that the plaintiff can go on with his new wife but she be allowed to retain her marriage certificate, which aspect she later conceded was not tenable. Where a decree of divorce is granted a marriage certificate cannot then be retained as a valid document because the marriage has been dissolved.

The plaintiff gave his evidence confirming the position as already alluded to in terms of the status of the marriage and the date of marriage itself confirming that he no longer has any love and affection for defendant. So, as far as he is concerned the marriage has irretrievably broken down. He also reiterated his position that the Nyatsambo family has made an undertaking to provide the defendant with accommodation even after divorce and so the defendant should not have anything to fear as regards the issue of accommodation. In that regard he said he has brought his elder brother to confirm such an arrangement within the Nyatsambo family. Upon being questioned on that he undertook that he is the one who will be leading the process to ensure that his ex-wife is accommodated at 36 Mungongoma Road and that if she is to be moved from that property, he will again take the lead in ensuring that she is accommodated. From his evidence clearly there is nothing that remained in dispute.

After a brief adjournment, counsel for the plaintiff indicated that the parties had discussed and they had agreed that the matter can be settled and the terms of such settlement were stated. The terms were basically as per the admissions on the joint pre-trial conference minute and an undertaking by the plaintiff to ensure that the defendant is accommodated at 36 Mungongoma Road, failing which he will have to find alternative accommodation for her at his cost

In view of this, I asked the defendant to also take the witness stand which she duly did. In her evidence she confirmed that indeed having listened to what transpired in court and also having discussed with her husband's legal practitioner she now conceded that a decree of divorce can be granted as long as she is guaranteed that she will be provided with accommodation by the Nyatsambo family and also if the husband will be taking the lead. In light of such an undertaking she was no longer opposed to the grant of a decree of divorce as per the agreed terms.

It is in those circumstances that a decree of divorce will be granted. Accordingly, it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. That the plaintiff shall pay 200 British pounds per month as maintenance for the defendant until she remarries or dies whichever occurs first.
3. The plaintiff must ensure that the defendant is provided with accommodation at 36 Mungongoma Road, Mufakose.
4. In the event that she is to be removed the plaintiff shall provide alternative accommodation to the defendant at his cost until defendant dies or remarries whichever occurs first.
5. The defendant is awarded custody of the minor children of the marriage as one child is now an adult.
6. The plaintiff shall have access to the children as and when he is in Zimbabwe.
7. The plaintiff shall pay 50 British pounds per child, per month through the defendant as maintenance for the minor child until the child attains 18 years or becomes self support whichever comes first.
8. The plaintiff shall pay the minor children's school fees.
9. The defendant be and is hereby awarded all the matrimonial movable property in her possession here in Zimbabwe.

10. In the circumstances each party will bear their own cost of suit.

The order is so granted.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners