

MELODY MUKWEYA (born NYEKETE)
versus
SAIDI MUKWEYA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 21, 22 August 2019, 2 & 3 October 2019 and 12 December 2019

Divorce Action

D.C Kufaruwenga, for the plaintiff
J. Mudimu, for the defendant

MANZUNZU J: The parties married each other at Harare on 20 November 2011 in terms of the Marriage Act [*Chapter 5:11*]. The plaintiff claims the marriage has irretrievably broken down. She claims for a decree of divorce, custody of three minor children, their maintenance and what she considers as an equitable distribution of matrimonial property.

The three minor children born to this marriage are Aesha Mukweya (born 18 February 2005), Shaquille Mukweya (born 22 April 2008) and Amee Mukweya (born 17 December 2013).

Only four issues emerged at the pre-trial conference as triable issues. These are;

- a) Whether, or not house no. 12028 Johannesburg, Norton is matrimonial property, and if so, how it should be distributed?
- b) Whether or not house no. 9194 Rusike, Phase 3, Marondera falls for distribution as part of the matrimonial estate, and if so, how it should be distributed?
- c) What is the fair and equitable distribution of house no. 129 Edwin Close, Twin Lakes, Norton?
- d) What is the fair and reasonable amount of maintenance for the three minor children payable by defendant?

I will now deal with the issues in turn in relation to the evidence by the parties.

a) House No. 12028 Johannesburg, Norton:

The plaintiff's evidence was that they started in a customary law union as far back as 2004 before their marriage was formalised through registration in 2011. She said the parties own 5

immovable properties which includes the Johannesburg, Norton property being the house where they started staying in 2004. She said the defendant registered the property in the name of his father, Billiat Mukweya. She explained why the house was to be registered in the name of Billiat instead of that of the defendant, because according to plaintiff, defendant did not want his employers to know that he owned some immovable property. Why this was so, it was never explained. Plaintiff admitted that the property was acquired before she was customarily married to the defendant. She does not say when the property got registered in the name of defendant's father. She said they lived at this house for 14 years and that its construction was completed in 2012 when the final inspection by the Town Council was done on 23 February 2012. When the family moved from this house, she kept on collecting rent from the tenant. At one point she signed an acknowledgment of debt with a tenant who had fallen into arrears. In summary plaintiff says this property is the parties' asset because of the following:

- She relied on a document which she said was authored by the defendant in which this very property is listed as one of their assets. The defendant disputed authorship of the document and nothing else suggested he was the author other than plaintiff's word.
- The couple lived in the house for 14 years from 2004.
- She collects rent from the house up to date.
- She signed an acknowledgment of debt with a tenant over the same house.
- That its registration in the name of defendant's father was for convenience, but for all intents and purposes it was their house she insisted.

Defendant's evidence was that the property was acquired by his late father who registered it in his name. This was in 2003 before his marriage to the plaintiff. He said his mother was sickly and staying in Chitungwiza. He said he was not the first person to live at this house as his elder brother had also lived there before him. He called his sister Molly Mukweya who corroborated his story. I find defendant's story more probable than that of the plaintiff. The plaintiff failed to discharge the onus upon her. The property was acquired before she was part of the family. She gives no detail why the property were to be registered in the name of the defendant's father when other subsequent properties were registered in defendant's name. Her claim over the property is dismissed.

(b) House No. 9194 Rusike Phase 3 Marondera:

This is yet another property where the plaintiff fumbled with evidence.

She said defendant acquired this property through a brother-in-law one Michael Kobiri. She further said it was the defendant who bought and developed the stand on the understanding that Michael Kobiri will cede his rights to the defendant. Defendant denied all this and with the support of his witness's evidence he maintained it was not his property. There is an agreement of sale between Municipality of Marondera and Michael Kobiri for the property. The plaintiff failed to discharge the onus upon her to show that the property belongs to the defendant and her claim must also fail.

(c) House No. 129 Edwin Close Twin Lakes Norton

Evidence has shown that this is the parties' asset. The question is how it should be distributed. The plaintiff seeks that the same be awarded to the children as their sole and exclusive property as she wants to live at the house with the children. The defendant wants that the property be awarded to him and the children.

Section 7 (1) as read with s 7 (4) of the Matrimonial Causes Act, governs the distribution of assets at divorce. Section 7 (1) provides that:

“7 Division of assets and maintenance orders

(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time 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;
- (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”

Section 7 (4) provides the following guidelines for consideration in the exercise of the court's discretion.

“(4) 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 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 made by each spouse to the family, including contributions made by looking after the home 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 children in the position they would have been in had a normal marriage relationship continued between the spouses.”

The list is not exhaustive this is why the court must also consider all the circumstances of the case. In exercising its discretion, in an effort to strike a just and equitable distribution, the court must do a balancing act where its decision must strive to place the spouses and children in a position they would have been in had a normal marriage relationship continued.

The circumstances of the parties in summary are that the defendant has been gainfully employed throughout the marriage. He has financially contributed towards the purchase of the property and its improvements. Plaintiff has largely been at school. Defendant says he has been responsible for payment for her education with the assistance of his employer. She has assisted as a house wife and in some instances in technically drawing plans for the house. Defendant offered her a 7 roomed complete house in St Mary’s Chitungwiza which she accepted. The defendant took the Chinhoyi vacant stand.

The plaintiff and minor children are currently occupying this property. The defendant resides in Chitungwiza with his mother. The plaintiff have since their separation been benefitting from occupation of the matrimonial house. She also benefits from the rentals from the family house. The defendant has also given her financial support through his salary. The plaintiff will benefit from the award of Chitungwiza house and cannot be seen to ask for a life usufruct to this house if same were granted to the children. The defendant has asked that the house be awarded to him and the three children in equal shares. He suggests the house be registered in his name and that of the children in equal shares.

That proposal, in my view, is just and equitable in the circumstances of the parties. However the children are still minors and of school going age. Parties agreed plaintiff should have custody. The children need to be placed in the position they would have been had a normal marriage relationship continued between the parties.

Maintenance:

The parties could not agree on the quantum of maintenance for the children. Both parents have a duty to contribute towards the maintenance of their children. The level of contribution is determined by their respective means and resources.

The plaintiff produced a monthly breakdown of the requirements for the three minor children to the tune of \$2 728-80. This does not include educational requirements which the defendant was taking care of. She said she was receiving a total of \$1060 from rentals of the Chitungwiza house, Johannesburg Norton house and defendant's salary in the figures \$320, \$300 and \$440 respectively. She then expects the defendant to meet the shortfall of \$1668-80 which will add up to \$2 728-80 when added to what she already receives. The question is whether such a claim is within the defendant's means. The defendant is employed as a salesman on an average salary of \$360 per week. The defendant says has no other sources of income. The plaintiff maintained he has but without proof. All she could tell is what the defendant did e.g. purchasing a telephone for a child costing \$1800, payment of children's school fees as a way of showing that the defendant had other sources of income other than his salary. However, the defendant said all that was through the benevolence of his employer. Mr Liaqua Perker his employer gave evidence as plaintiff's witness. He confirmed loans extended to the defendant to the tune of \$3 8000 which will become due and payable if the two's relations go sour. The defendant offered to pay \$400 for maintenance. The plaintiff is a young woman in her 30s who is capable of finding a job. She says she is currently on a course in culinary art and is into the business of cake making. She estimated her income at \$150 per month. No other concrete financial sources by the defendant were proved by the plaintiff. An amount for maintenance cannot be based on speculation. Going by the parties' resources and how the distribution of the assets is going to be done it is only fair that the defendant contributes maintenance in the sum of \$135 per month per child over and above his duty to pay for the children's school fees. The court will therefore make the following order:

IT IS ORDERED THAT:

1. A decree of divorce be and is hereby granted.
2. Custody of the three minor children namely Aesha Mukweya (born 18 February 2005) Shaquille Mukweya (born 22 April 2008) and Armeel Mukweya (born 17 December 2013) is awarded to the defendant
3. The defendant shall have access to the minor children as follows:
 - (i) on alternate weekends which are not part of school holidays
 - (ii) on the first two weeks of every school holiday
 - (iii) on every public holiday which occurs during the school term

4. The defendant shall pay school fees for the children and contribute the sum of RTGS\$135 per month per child as maintenance until each child attains the age of 18 years or becomes self- supporting whichever is the sooner.
5. The following movable property is awarded to the plaintiff as her sole and exclusive property:-
 - 1 Commuter Omnibus
 - Toyota Runex Motor Vehicle
 - Kitchen stove and oven
 - 4 piece Kirsty Leather Lounge Suite
 - 3 double beds
 - 1 bunk bed
 - 1 single bed
 - Rest of blankets
 - 4 small carpets
 - Dining room suite
 - Curtains
 - Kitchen utensils
6. The following movable property is awarded to the defendant as his sole and exclusive property:-
 - 2 commuter omnibuses
 - Nissan Hardbody Pick up truck
 - Bedroom suite from main bedroom
 - 1 colour TV set (main lounge)
 - Radio and home theatre sound system
 - 1 lounge suite (TV room)
 - Garden tools
 - Upright fridge
 - 3 blankets (main bedroom)

7. The immovable property, being house No. 5662, St Mary's Township, Chitungwiza, which is registered in defendant's name is awarded to the plaintiff as her sole and exclusive property.
 - i. The defendant shall meet the costs of transfer of the property to the plaintiff
 - ii. The defendant shall sign all documents to facilitate transfer to the plaintiff within 3 months of the date of this order.
 - iii. In the event of failure by defendant to sign such transfer documents, the sheriff be and is hereby authorized to sign such documents.
8. The immovable property being stand No. 22783, Ruvimbo Infill, Chinhoyi, which is registered in defendant's name, is awarded to the defendant as his sole and exclusive property.
9. The immovable property being house No. 129 Edwin Wilson Close, Twinlakes, Norton registered in the name of the defendant, is awarded to the defendant and the three children namely Aesha Mukweya, Shaquille Mukweya and Ameel Mukweya as their sole and exclusive property in equal and undivided shares.
 - i. The defendant shall meet the costs of transfer of the children's shares
 - ii. Defendant shall facilitate the transfer of the children's shares within 6 months of this order failing which the Sheriff is authorized to sign documents for such transfers of the children's shares.
10. The plaintiff as the custodian parent shall live in the house with the children until she remarries or until the last child attains 18 years whichever happens sooner.
11. House No. 12028 Johannesburg, Norton and House No. 9194 Rusike, Phase 3 Marondera are not part of the matrimonial estate.
12. Each party shall meet his /her own costs.

Dzimba, Jaravaza & Associates, plaintiff's legal practitioners
Mudimu Law Chambers, defendant's legal practitioners