BARRY LUNGU

versus

DOROTHY LUNGU

HIGH COURT OF ZIMBABWE

CHITAKUNYE J

HARARE, 8 November, 2011 and 24 May, 2012

**Matrimonial Trial**

*J Koto* for plaintiff

*R Zvimba* for defendant

CHITAKUNYE J: The plaintiff and the defendant were joined in holy matrimony on 21 November 2004 at Harare in terms of the Marriages Act [*Cap 5*:*11*].Their marriage still subsists.

Their marriage was blessed with one minor child born on 18 May 2001.

Some unhappy differences arose leading to the plaintiff suing the defendant for a decree of divorce and other ancillary relief on 27 November 2007.

The plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that there are no reasonable prospects of restoration to a normal marriage relationship between the parties. The reasons for the breakdown were that:-

1. The defendant has virtually denied the plaintiff conjugal rights by locking him away from the bedroom;
2. The defendant dislikes the plaintiff’s relatives or friends thereby denying the plaintiff the right to association;
3. The defendant ill-treats the plaintiff’s young brother who is epileptic
4. The defendant is reluctant to share proceeds from profits accruing from her business ventures which the plaintiff helped finance from scratch;
5. Sleeping away from home without explanation on several occasions;
6. There is no more love and affection between the parties; and
7. The defendant is violent against the plaintiff.

The plaintiff prayed for the defendant to be granted custody of the minor child with him enjoying reasonable rights of access. He also provided how he wished the movable property acquired during the subsistence of the marriage to be distributed.

The defendant, in her plea, agreed that the marriage relationship had broken down but believed that the relationship could be restored. She denied conducting herself in the manner alleged by the plaintiff.

In the event that the plaintiff’s wish for divorce was granted, the defendant pleaded that she be awarded a 50% share of a Fiat Uno motor vehicle registration number AAL 0850 and a 50% share of an immovable property, namely House number 14968 Zengeza 3 Extension, Chitungwiza. She provided a much longer list of other movable property she alleged parties acquired during the subsistence of the marriage and which should be distributed. For some reason the defendant did not see it fit to file a counter claim despite claims in the form a Plea to the plaintiff’s claim.

At the close of pleadings a pre-trial conference was held. The pre-trial conference minute reflects that the parties agreed that:-

1. The marriage has irretrievably broken down;
2. The defendant be awarded custody of the minor child with the plaintiff being granted rights of access
3. On the sharing and distribution of all the movable assets except for two items.

The issues referred to trial were captured as:

1. Whether or not house number 14968 New Zengeza 3 Extension, Chitungwiza is matrimonial property and, if so, what share is to be awarded to each party.
2. Quantum of contributory maintenance to be paid towards the sustenance of the minor child, Tapiwa Kimberly Lungu, by the plaintiff.

The plaintiff gave evidence and tendered documentary evidence as exhibits in support of his cause. The defendant thereafter gave evidence. From the evidence adduced it was common cause that the parties had not reconciled and both were now intent on divorce. They both accepted that their marriage relationship had irretrievably broken down and so a decree of divorce should be issued. Where parties to a marriage testify that they no longer have love and affection for each other and that they wish to be divorced, the court cannot deny them such a relief. (See *Kumirai* v *Kumirai* 2006 (1) ZLR 134 (H)).

It was also common cause that in 1998 the plaintiff paid lobola for the defendant in terms of customary law but the defendant remained at her parents’ home till the year 2000. Meanwhile in 1999 the plaintiff bought Stand 14968 Zengeza 3 Extension Chitungwiza as a vacant stand. He commenced construction of a house the same year. It was not disputed that at the time the defendant came to live with the plaintiff she found the construction of the house completed. The defendant admitted that she did not contribute anything towards the purchase and development of the Stand.

It is further common cause that during the subsistence of the marriage the plaintiff provided the defendant with a sum of money as capital for the defendant to start her own business. Initially she started as a cross border trader. Later she diversified into trading in stationery.

It is not disputed that their marriage did not last long. The question that arises is: in these circumstances what share should the defendant be awarded?

The division of assets consequent to a decree of divorce is governed by s 7 of the Matrimonial Causes Act, [*Cap5*:*13*] herein after referred to as the Act. Section 7(1) (a) of the Act states 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-

1. 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.”

Subsection 4 of s 7 then enjoins the appropriate court to consider all the circumstances of the case in the exercise of its discretion in this regard by stating that:-

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

1. The income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
2. The financial needs , obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
3. 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;
4. The age and physical and mental condition of each spouse and child;
5. 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;
6. 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;
7. The duration of the marriage;

and in so doing the court shall endeavor 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.”

In the exercise of the wide discretion reposed in it, court is expected to do so judicially. The circumstances of this case show that the plaintiff acquired the property before the defendant came to live with him as man and wife. The defendant admitted she made no contribution whatsoever to the acquisition of the property as she found it already completed. The defendant did not bring anything by which to contribute to the family serve as wife. It is instead the plaintiff who took it upon himself to empower the defendant so that she is able to engage in some income generating activities.

The marriage did not last for long. The parties started staying together in the manner of husband and wife in 2000 and towards the end of 2007 they parted ways. I did not hear the defendant to seriously deny that it is in fact her conduct which comprised, *inter alia*, failing to explain her absence from home on numerous occasions and alleged infidelity that led to the plaintiff throwing in the towel. The defendant admitted that the plaintiff successfully sued a man for adultery damages at the magistrates’ court. Though she said it was not true that she committed adultery with the man, she never the less admitted that such a suit was successfully prosecuted by the plaintiff.

I am of the view that the circumstances of the case do not warrant the defendant getting an award beyond what the plaintiff offered. As already alluded to the defendant found the property already developed, she never made any direct or indirect contribution to the property and her conduct was the proximate cause of the marriage to be terminated so early.

Cases were a house wife has been awarded a substantial share of an immovable property she found already developed have been those were the marriage subsisted for long or she made direct or indirect contribution to improvements to the property and her needs were such that she deserved a substantial share. This is not the situation in this case. Despite having been empowered and earning some income the defendant was not willing to contribute to household needs as requested by the plaintiff.

**On quantum of maintenance**

The plaintiff’s evidence was to the effect that he is not gainfully employed. He is self-employed as an artist. His art business has not been doing well due to bad publicity the country has been subjected to. He thus realizes about 150 United States Dollars per month. It is from that average income that he was offering a sum of USD 50-00 per month. He also offered to meet the child’s school fees and other school related expenses.

The defendant on the other hand contended that only a sum of USD 100-00 per month would be just and equitable. She conceded that the plaintiff’s business has not been doing well and that the average of USD 150-00 per month was about correct. She nevertheless insisted on USD 100-00 per month for the child. She contended that the one hundred dollars will be utilized as follows: USD 40-00 for day to day needs of the child and USD 60-00 for payment of utility bills.

The defendant also contended that she would need to remain in occupation of the house till the child attained the age of 18 years.

The defendant admitted that she was engaged in some incoming generating business of cross border trading and stationery business. Of late she has however abandoned those ventures and is now in fulltime employment earning a monthly salary of USD 150-00. She however did not produce proof of employment or salary. It is thus her own word that she is no longer into business against the plaintiff’s word that she is still into business employing a complement of at least five employees. Nothing could be established on this serve to say that she is in receipt of an income and can also contribute to the child’s needs.

In the determination of an appropriate quantum of maintenance court is enjoined to consider, *inter alia,* the standard of living of the parties. The child’s basic needs should continue being provided as was the case when the parties were still living together. The income and expenditure of both parties must be taken into account in order to ensure that the order is within the means of the party required to pay and the other party is able to provide for the other needs of the child.

In *casu* the nature of expenditure the defendant wished to use USD 60-00 for was not shown to have been one the parties were used to in their marriage. It was clear to me that the defendant wished the plaintiff to meet even her own daily needs under the guise of maintenance payment for the child. The parties’ incomes are such that they have to cut down on some aspects of their needs in order to provide for the child.

From the income and expenditure revealed to court I am of the view that the plaintiff cannot afford a sum of USD 100-00 per month. I am of the view that taking into account the standard of living of the parties, the plaintiff’s offer is quite reasonable.

As already alluded to above, the parties agreed on the manner of sharing the movable property except for two items namely a Fiat Uno motor vehicle and a large Satellite Dish. They agreed that the movable property be shared in terms of exhibit 4, a document prepared by the defendant. The issue of the Fiat Uno motor vehicle was resolved at the pre-trial conference where it was agreed the vehicle had been sold to meet family obligations. As for the large Satellite dish the plaintiff maintained that he should retain that dish and that the defendant should get the smaller dish. The defendant did not seem to have much to object to that offer and so she will be awarded the smaller satellite dish whilst the plaintiff retains the large one. The rest of the movable property shall be shared in terms of exhibit 4.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted
2. The defendant is hereby granted custody of the minor child namely, Tadiwa Kimberly Lungu (born 18 May 2001).
3. The plaintiff is hereby granted reasonable rights of access to the minor child upon notice to the defendant at periods not less than two weekends per month and alternating school holidays.
4. The plaintiff shall pay maintenance in the sum of USD 50-00 (fifty United States dollars) per month for the minor child until the child attains the age of 18 years or becomes self-supporting whichever is earlier.
5. The plaintiff shall pay the minor child’s school fees and other school related expenses until the child attains the age of 18 years or becomes self-supporting whichever is earlier.
6. The movable property shall be distributed in terms of annexure A attached hereto.
7. The defendant is hereby awarded a 15% share in the immovable property namely Stand Number 14968 New Zengeza 3 Extension, Chitungwiza with the plaintiff retaining 85% thereof.
8. The parties shall agree on the value of the property within twenty one days of the date of this order failing which they shall, within thirty days of such failure, appoint a mutually agreed evaluator to evaluate the property.
9. Should the parties fail to agree on an evaluator, the Registrar of the High Court shall be and is hereby directed to appoint one from his list of evaluators to evaluate the property.
10. The parties shall share the cost of evaluation as per their shares in the property, which is 85:15. The plaintiff shall pay off the defendant her share within twelve months from the date of receipt of the evaluation report unless the parties agree on a longer period.
11. Should the plaintiff fail to pay or make a payment plan acceptable to the defendant within the period stipulated in (10) above, the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the Registrar of the High Court and the net proceeds to be shared as per their respective shares in the property.
12. Each party shall bear their own costs of suit.

*Koto & Company*, plaintiff’s legal practitioners

*MambosasaLegal Practitioners*, defendant’s legal practitioners

**ANNEXURE A**

Movable property awarded to the plaintiff

1. Dual View Decoder
2. Wooden Kitchen Unit
3. Hisense Refrigerator
4. Kitchen chairs and table
5. Black couch
6. Computer desk
7. P.A. System
8. 1x Large Satellite Dish
9. Wooden Wardrobe
10. Computer
11. Sony Video Camera
12. Digital Camera.

Movable property awarded to the defendant

1. 4 Piece Maroon Lounge suite
2. 29 inch Colour Television
3. Black TV stand
4. Maroon Carpet
5. Brass Dining Room Set
6. ¾ Bed for the child
7. 3 Piece Metal Kitchen Unit
8. Capri Deep freezer
9. Microwave
10. Play station game for the child
11. PSP game for the child
12. 1x Small Satellite dish
13. Three Plate Stove