

HENRY CHIGOZIE IKEKPEAZU

Versus

PRIMROSE IKEKPEAZU (NEE MOYO)

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 28 & 29 SEPTEMBER 2021 AND 11 NOVEMBER 2021

Divorce Action

N. Mazibuko, for the plaintiff

D. Vundla-Phulu, for the defendant

MAKONESE J: The plaintiff and the defendant are husband and wife. On 1st June 2006 they contracted a marriage in terms of the Marriage Act [Chapter 5:11]. The marriage was blessed with two children, namely Chidera Ikekpeazu, (female) born on 18th April 2007 and Chigozie Prince Ikekpeazu, (male) born on 24 May 2013. This is an action for divorce in which both parties agree that their marriage has irretrievably broken down. The issue of custody is not in dispute. The parties have agreed that custody of the minor children should be awarded to the defendant subject to the plaintiff having reasonable access. The parties failed to agree on the distribution of matrimonial property. The matter was then referred to trial.

Factual Background

Sometime in 2004 the plaintiff, a Nigerian national arrived in Zimbabwe. He settled in the country to set up a motor vehicle spares sales business. In November 2005 plaintiff and defendant met and soon fell in love with each other. The parties formalised their relationship and got married at Harare in June 2006. The relationship flourished. The parties were blessed with two minor children aforesaid. The marriage relationship soured in 2019. The parties drifted apart as the love and affection between them appeared to evaporate.

On 22nd July 2020 the plaintiff issued summons out of this court seeking a decree of divorce and ancillary relief. In his declaration, plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no reasonable prospects for the restoration of a normal marriage in that:

- (a) The parties have become incompatible and are routinely quarrelling with each other.
- (b) The defendant has routinely disrespected and verbally and physically abused the plaintiff.
- (c) The defendant's relatives have interfered in the parties' marriage thereby fomenting disharmony to an extent that the plaintiff can no longer tolerate it.
- (d) The parties have lost love and affection towards each other.

The defendant, whilst agreeing that the marriage relationship has irretrievably broken down, disagreed with the reasons advanced by the plaintiff for the breakdown of the marriage. She tendered her own reasons for the breakdown and conceded that in the circumstances a decree of divorce may be granted. In this regard she contended that the marriage relationship has broken down for the following reasons:-

- (a) Plaintiff has committed adultery with a woman resident in Nigeria and has assaulted the defendant for enquiring about this affair.
- (b) Plaintiff adopted a hostile disposition towards the defendant and made several unfounded accusations against her.
- (c) Plaintiff abused defendant mentally, physically and emotionally during the course of the marriage. This escalated when the plaintiff obtained permanent residence in Zimbabwe.

It was clear from the evidence presented in court that the parties have lost love and affection for each other. Their relationship is now filled with acrimony to such an extent that the marriage cannot endure. It is just and equitable that the marriage be terminated.

Issues for determination

At a pre-trial conference held before a judge in chambers, the following issues were set out for determination by this court:

1. Whether the Mercedes Benz ML Registration No. AFD 1265 is still available and whether it should be sold to best advantage with the proceeds being shared equally between the parties.
2. Whether the stock owned by Dazebon Incorporated (Pvt) Ltd should be shared equally between the parties after first paying or making provision for payment of all business creditors of Dazebon Incorporated (Pvt) Ltd.

3. Who should retain the shareholding and who should sell over their shareholding to the other in Dazebon Incorporated (Pvt) Ltd?
4. Whether stand No. 18606 Woodlands, Bulawayo owned by Rapid Elevation (Pvt) Ltd should be valued and sold to best advantage with the proceeds being shared according to the shareholding of the parties therein.
5. Whether stand No. 18606 Woodlands, Bulawayo owned by Rapid Elevation (Pvt) Ltd should be awarded to the defendant.
6. Whether the parties own an immovable property in Nigeria and if so, whether the Honourable court has jurisdiction over the same.
7. Whether the plaintiff should pay maintenance for defendant and the children as claimed by the defendant.

Movable Assets

The plaintiff listed assets belonging to the spouses and proposed how he wished the assets to be distributed between the parties. The plaintiff proposed that he receives the following:

- a) Small fridge
- b) One colour TV
- c) One DSTV Decoder
- d) Sony Home theatre system
- e) Ford bantam motor vehicle Registration Number ACK 4023

Plaintiff further proposed that defendant be awarded the following:

- (a) Big fridge
- (b) One colour TV
- (c) DSTV explora with extra view
- (d) 4 plate electric stove
- (e) 4 plate gas stove
- (f) 7 piece lounge suite
- (g) Centre table and 2 side tables
- (h) Kitchen utensils and cutlery
- (i) Microwave
- (j) Mixer/grinder

- (k) Sandwich maker
- (l) Electric kettle
- (m) 2 double beds
- (n) VW Polo Registration No ADQ 4489

It seems to me, that it would be just and equitable to make an award in respect of the movable property as proposed by the plaintiff save for the Mercedes Benz ML Registration No. AFD 1265. The plaintiff testified that prior to the divorce proceedings, the vehicle had been sold to settle debts accrued by Dazebon (Pvt) Ltd. The issue of this vehicle shall be dealt with in detail hereunder.

Mercedes Benz ML

Defendant claims that she is entitled to half of the value of the Mercedes Benz ML. During trial the plaintiff led evidence indicating that the motor vehicle had been sold prior to these proceedings. The evidence shows that the sale took place a few months before the issuance of the summons on 29th May 2020. Plaintiff tendered an acknowledgment of receipt of the purchase price, which seemed genuine. The onus was on the defendant to rebut the authenticity of the tendered document. No allegation was made by the defendant that the document was a fiction or that the purported buyer was none existent. The defendant made a bold assertion that the vehicle was still held by the plaintiff but did not produce any evidence supporting such an averment.

The plaintiff testified that the proceeds from the sale of the vehicle were used to pay for the release of goods which had been ordered from overseas by the plaintiff. Plaintiff averred that payment for the same goods had been converted by a Pakistani national. The plaintiff's evidence was credible on this aspect and was not shown to be false. In *Gladys Chikuni v Busani Mavhiyo* HH 21/20 at p 7 CHITAKUNYE J (as he then was) reiterated that;

“A genuine sale in such circumstances would lead to a finding that the property was no longer available for distribution at the dissolution of the marriage. If, on the other hand the sale was not genuine, as alleged by the defendant, the property would be available for distribution. It is trite that an owner of a property has the right to dispose of their property in a manner they desire. In cases of husband and wife relationships a spouse can dispose of his or her property without the consent of the other as long as such disposal is not mala fide...In this regard the spouse seeking the

court's interference in the disposal must show the lack of bona fides in the disposal and that the sale was a sham or simply intended to defeat his/her just cause."

In this matter no evidence was placed before the court by the defendant to show that the sale of the Mercedes Benz motor vehicle was *mala fide*. This court makes a finding that the motor vehicle was no longer available for distribution.

Dazebon Incorporated (Pvt) Ltd t/a CC Motor Spares

The parties hold shares in Dazebon Incorporated (Pvt) Ltd. The company was registered on the 25th of July 2006. Dazebon Incorporated was established by both parties and one Osujoku Charles Uzoma. The plaintiff holds 58.3% and the defendant holds 41.7% of the shares. Defendant claims to have borrowed R2000 and P1000 from her mother to invest in the company. Plaintiff proposed in his evidence that the business be valued after taking into account proven liabilities, including creditors. The parties would then share the net value of the assets equally. In that proposal, the plaintiff would buy out the defendant of her interest in the company or the parties would physically share the stock in equal shares. The defendant though sceptical as to whether there would be any stock left to share after paying out the liabilities conceded that the course suggested by the plaintiff was otherwise fair in the circumstances. It would, in my view, not be fair to saddle the plaintiff with all the debts and pay the defendant the net value of the stock. A just and equitable approach is to apportion the shares after taking into account proven debts. As regards the control of the company after divorce, it is just and equitable that plaintiff should remain in control of the company after paying out the defendant's share. The plaintiff is better placed to take over the control of the company. Plaintiff has been in charge of the day-to-day running of the company. The Plaintiff has all the contacts that are needed to secure spares for the business. Plaintiff explained that the spares are supplied on his personal goodwill. Defendant has been mainly involved as the sales person also responsible for preparing the monthly accounts for the company. It makes sense to leave the Plaintiff in control of the company. If plaintiff loses control of the company he would certainly have constraints in maintaining the children as ordered by the Maintenance Court. It is my view that the plaintiff should retain the shareholding in the company, subject to him paying the defendant her half share of the value of the stock after deducting the outstanding debts.

RAPID ELEVATION (Pvt) Ltd

The parties also hold a shareholding in a company known as Rapid Elevation (Pvt) Ltd whose sole asset is an undeveloped stand Number, 18606 Woodlands, Bulawayo. The property is valued at approximately USD 25 000. Both parties hold 50% shares each in the company. The plaintiff suggested that the defendant sign over her shareholding in the aforesaid company to him with payment to her of a sum of USD 8 500.00 or the Zimbabwean dollar equivalent within a period of 6 months of the date of the granting of the decree of divorce, failing which the stand shall be sold and proceeds distributed equally between the parties.

In her counter-claim the defendant proposed that she be awarded the Woodlands stand as her sole and exclusive property. The defendant contended that plaintiff's declaration left out a certain immovable property situate at Iwoma Estate, Oyigbo, in Oyigbo Local Government area, River State, Nigeria. Defendant testified that the plaintiff is Nigerian by origin and that after the divorce he will return to Nigeria to join his family. She further testified that the Plaintiff has already secured his accommodation in Nigeria. The defendant proposed that stand 18606 Woodlands be awarded to her exclusively and the property in Nigeria be awarded to the plaintiff. Under cross examination, the defendant admitted that the proposed sharing of the Woodlands stand would be just and equitable if one did not take into account the property in Nigeria.

In seeking to address issue of the Woodlands stand, it is pertinent to note that the apportionment, division and distribution of assets at the dissolution of a marriage must be governed by section 7 of the Matrimonial Causes Act, (Chapter 5:13). That section provides, *inter alia*, that:-

“(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.”

This provision gives wide discretion to this court with regards to the sharing and distribution of matrimonial property upon divorce. In terms of Section 7(4) of the Act, the

court is enjoined to take into account certain factors in making an order for the division, apportionment or distribution of the assets of the spouses or the payment of maintenance. It is provided 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 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

It is clear from the evidence led in court that the defendant believed that the plaintiff was not entitled to any share at all in the Woodlands stand, for the simple reason that the Plaintiff has alternative accommodation in Nigeria which was acquired during the subsistence of the marriage. The defendant testified that it would be fair and reasonable if she is awarded the Woodlands stand as her sole and exclusive property. The general principle in law is that where property is jointly owned there should be a justification for the court to award any party more than a 50% share.

In *Lafontant v Kennedy 2000(2) ZLR 280(S)* it was held at page 283H as follows;

“Where two persons own immovable property in undivided shares (as in this case here) there must, I think, be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when (as here) the parties are married to each other at the time ownership was acquired...The court cannot move from that position on mere grounds of equity. It cannot give away A’s property to B on the mere grounds that it would be fair and reasonable, or just and equitable to do so. There must be a more solid foundation in law than that.”

In *Kanoyangwa v Kanoyangwa 2011(1) ZRL 90 (H)* it was noted that,

“In order to take a spouse’s share and transfer it to the other, there ought to be a solid ground for so doing.”

In casu, the parties are joint owners of the immovable property hence the starting point will be that each is entitled to a half share of the value of the property. It is therefore proper and in accordance with the laid down principles that the Woodlands property must be shared equally between the parties. See *Takapfuma v Takapfuma 1994 (2) ZLR 103(S)*.

THE NIGERIAN PROPERTY

Defendant testified that the plaintiff purchased a stand in Nigeria sometime in 2014. She alleged that both parties contributed towards the purchase of the stand. Defendant claims to have purchased building materials and furniture for this property. During trial the Plaintiff indicated that he had no title to the stand, but the right to occupation. Plaintiff claims that his brothers also made contributions towards the construction of the property. The property is more like a family house. He suggested that the property be dealt with in terms of the laws of Nigeria. Plaintiff asserted that the defendant has a permanent residence permit which allows her to settle in Nigeria. Plaintiff tendered a copy of the permit into the record. A Deed of Conveyance was tendered by the Plaintiff. It is clear that the Deed of Conveyance is not a certificate of title in the land but rather a confirmation of an agreement between the plaintiff and the vendor for the acquisition by the plaintiff of the rights to occupation and use but not ownership of the property. The Deed of Conveyance is a simple version of a Cession Agreement. That is what it is.

Section 1 of the Land Use Act (Chapter 202) of the Federation of Nigeria states as follows;

“Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation is hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.”

The plaintiff gave his evidence well. He proposed a fair and equitable distribution of the property in Zimbabwe. He generously conceded that defendant should be awarded most of the movable property. Plaintiff is prepared to share the assets of Dazebon Incorporated

(Pvt) Ltd. I must mention that this court simply does not have enough information to make a ruling one way or the other on the Nigerian property. This court does have jurisdiction to deal with this property, however, the court must not make an order that may not be enforceable. It is not clear whether plaintiff's right of occupation in this property is even subject to division. It is my view that the Nigerian property is best dealt with under Nigerian laws. Nothing prevents the defendant from pursuing any claims she may have in that property in Nigeria. In defendant's closing submissions it is argued that the Nigerian property was purchased and developed using profits from Dazebon Inc. However the defendant did not place before the court any information indicating the amount contributed by either party towards this property. The court simply does not have adequate information to make a determination in respect of the property. The defendant cited the case of *Little v Little* 1990 SCL 785. This case simply sets out the principle that the court must exercise discretion and common sense in distributing matrimonial property. The court stated as follows:

"The division of matrimonial property under the 1985 Act is essentially a matter of discretion, aimed at achieving a fair and practicable result in accordance with common sense."

MAINTENANCE

The plaintiff stated that defendant's claim for maintenance was extremely high as he was the one who was to pay for the school fees, groceries and clothing for the children. He is also responsible for paying rentals for defendant's premises. He produced evidence showing that the company was facing dire financial difficulties and that this was his only source of income. Evidence in form of a letter from Petra College proved that the school fees for the minor children had significantly increased. Plaintiff argued that it would be unjust for him to pay such a huge amount of maintenance considering that business has been low due to various issues in the economy in this country.

The defendant claimed maintenance in the sum of USD 750 per month. The breakdown of maintenance is as follows: USD \$250 per month per child. Defendant seeks personal maintenance in the sum of USD250 per month for a period of 12 months from the date of the divorce order. Defendant contends that plaintiff should pay school fees, buy uniforms, pay for extra-curricular activities for the children and provide 100 litres fuel per month. In so far as the children are concerned both parents have an obligation to maintain the

children. Section 81(1) (d) of the Constitution of Zimbabwe (Amend) (No.20) 2013 is instructive. It provides that:

“Every child, that is to say every boy and girl under the age of eighteen years, has the right to family or parental care, or an appropriate care when removed from the family environment.”

In this matter both parents have an equal duty to adequately maintain the children.

In *Kanoyangwa v Kanoyangwa HH23-2011* at page 7, Chitakunye J (as he then was) highlighted that:

“An order for maintenance must be within the means of the non-custodian parent.”

The defendant’s request for variation maintenance was brought before the court on the grounds that there has been a change in financial circumstances from the time of the maintenance order. The defendant conceded during cross examination that her claim for maintenance was on the high side. In any event this court was not provided with sufficient information to make a proper inquiry into an appropriate order for maintenance. In this regard, it is best for the issue of maintenance to be dealt with by the Maintenance Court. The existing maintenance order of the Maintenance Court must remain in place. The defendant is at liberty to approach that court seeking an upward variation should this be deemed necessary, taking into account the income of the parties. The plaintiff will have the obligation to pay rentals at the current premises for a period of 6 months from the date of the divorce order. The defendant shall thereafter be liable for her own accommodation.

In the result, and accordingly the following order is made;

1. A decree of divorce be and is hereby granted.
2. Custody of the minor children, namely, Chidera Ikekpeazu (female) born on 18th April 2007 and Chigozie Prince Ikekpeazu (male) born on 24th May 2013 be awarded to the defendant with the plaintiff exercising reasonable rights of access during weekends, public holidays and school holidays.
3. Plaintiff be and is hereby ordered to pay maintenance in respect of the minor children aforesaid in terms of the existing maintenance order of the Maintenance Court.

4. Defendant be and is hereby ordered to sign over all relevant documents to facilitate transfer of her shareholding in Dazebon Incorporated (Pvt) Ltd to the plaintiff upon full payment of half of the value of the stock-in-trade in the aforesaid company, less the amount owed to various creditors. A valuation report shall be prepared within 30 days of the date of this order after which the plaintiff shall pay the amount due to the defendant within a period of 30 days from the date of such valuation. The plaintiff and defendant shall share the costs of such valuation in equal shares. Alternatively, the parties shall physically share the company's stock as equitably and as equally as possible after deducting the amount owed to the creditors.
5. Defendant be and is hereby ordered to sign over her shareholding in Rapid Elevation Investments (Pvt) Ltd to the plaintiff upon full payment to the defendant of the sum of USD 8 500.00 or the Zimbabwe dollar equivalent, being half share of the value of Stand 18606 Woodlands, Bulawayo. Plaintiff shall effect such payment within 3 months from the date of this order.
6. Plaintiff and defendant be and are hereby ordered to share the matrimonial property as follows:

Plaintiff

- (a) Small fridge
- (b) One colour TV
- (c) One DSTV Decoder
- (d) Sony Home theatre system
- (e) Ford Bantam motor vehicle Registration Number ACK 4023

Defendant

- (f) Big fridge
- (g) One colour TV
- (h) DSTV explora with extra view
- (i) 4 plate electric stove
- (j) 4 plate gas stove
- (k) 7 piece lounge suite

- (l) Centre table and 2 side tables
 - (m) Kitchen utensils and cutlery
 - (n) Microwave
 - (o) Mixer/grinder
 - (p) Sandwich maker
 - (q) Electric kettle
 - (r) 2 double beds
 - (s) VW Polo Registration No ADQ 4489
7. Each party bears its own costs.

Messrs Calderwood, Bryce Hendrie & Partners, plaintiff's legal practitioners
Messrs Vundhla-Phulu & Partners, defendant's legal practitioners