

LIAR MHIKO [Nee MANYIKA]

Versus

OSCAR ITYAI MHIKO

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 22, 28, 30 JUNE 2023 & 15 FEBRUARY 2024

Divorce Action

A. Chingwe, for the Plaintiff
M. Ndlovu, for the Defendant

NDLOVU J

BACKGROUND

On the 6th of April 2021, the plaintiff caused a summons to be issued from this Court praying for a decree of divorce, and sharing of marital property.

Maintenance was to continue being regulated by the extant order of the Kwekwe maintenance court. The defendant entered an appearance to defend and the matter progressed to trial leading to this judgment.

COMMON CAUSE ISSUES

The marriage relationship has irretrievably broken down and there is no prospect that the relationship can be restored to a normal matrimonial one. The plaintiff is to be awarded all the household property the parties acquired during the subsistence of the marriage. House No. 4608 Simbi Park Redcliff, jointly owned by the parties is to be sold by a private treaty to the best advantage of the parties and the proceeds will be shared equally between the parties less the estate agent's commission. The parties are to contribute equally towards the school fees of the two minor children Primrose Paidamoyo Mhiko born on the

14th of July 2006 and Dean Kudakwashe Mhiko born on the 14th of October 2008.

CONTENTIOUS ISSUES

1. Whether or not House No. 25928 Tarisa Park Ruwa in Goromonzi District is subject to sharing upon dissolution of the marriage relationship.
2. Whether or not the Nissan Caravan Constitutes spousal property and is subject to be shared equally between the parties.
3. Custody of the two minor children.

The onus to prove items one and above two issues was on the Defendant. The parties were to continue engaging in respect of item three, and if no common ground was achieved, this Court would be at liberty to decide the issue. It appears from the closing submissions by both parties that they have not found each other in respect of the custody of the two minor children.

PLAINTIFF'S CASE

Her evidence was that she once tried to purchase Stand No. 25928 Tarisa Park, Ruwa. Goromonzi after one Richard Kanhanda had introduced her to the ***SAMUEL PARIRENYATWA HOUSING CO-OPERATIVE*** that was selling the Stands but later abandoned the attempt after being not satisfied about how the scheme was done.

She further testified that Kanhanda once owned a Toyota Wish motor vehicle ***Reg. No. AEQ 1230 [the Toyota Wish]***. Kanhanda would sometimes give her this vehicle to use in her business. The Toyota Wish did not belong to the parties. It was later sold by Kanhanda. She was then left stranded, with no vehicle to use in her business of buying and selling. She was then given a vehicle, a Nissan Caravan ***Reg No. AFH 5642 [Nissan Caravan]*** by a friend in

Beitbridge. The owner of the Nissan Caravan is also involved in the business of buying and selling groceries. The vehicle owner gives the plaintiff groceries to sell and deliver to customers using his vehicle. The plaintiff is paid a commission for selling the groceries.

The plaintiff further told the court that it was not correct that the Toyota Wish was sold and the proceeds later used to purchase a Nissan Caravan. She told the court that the Nissan Caravan belonged to Maryana Investments (Pvt) Ltd. It was her evidence that the parties herein did not have a vehicle of their own during the subsistence of the marriage.

She further told the court that it is not true that the parties herein purchased the building material to construct at number 25928 Tarisa Park Ruwa Goromonzi District. The plaintiff also denied the allegation that she was wasting resources when the defendant was in China.

She also told the court under cross-examination that she has a maid that looks after the children when she is out on business.

RICHARD KANHANDA

The witness further stated under examination in chief that he was the owner of Toyota Wish AEQ 1230. He said that he purchased it sometime in 2018 through an agent. It was his evidence that after the purchasing of the vehicle he was using it and would sometimes give it to the plaintiff to use in her buying and selling business.

The witness led evidence to the effect that it is not true that the Toyota Wish belonged to the plaintiff and defendant. He further repudiated the allegations that the Nissan Caravan was purchased by the plaintiff and defendant using the proceeds from the sale of the Toyota Wish. He said that the Toyota Wish belonged to him and there is no way the sale proceeds could be used to buy a

Nissan Caravan which does not belong to him. He stated that he was never sent to collect the vehicle from Tanzania by the plaintiff and defendant.

He also stated that he owns stand number 25925 Tarisa Park Ruwa Goromonzi. He is also the one who introduced the plaintiff to Samuel Parirenyatwa Cooperative which was selling stands in Tarisa Park Goromonzi. The plaintiff wanted to buy a stand there and paid a deposit and later abandoned the idea to purchase the stand.

DEFENDANT'S CASE

He testifies that the Nissan Caravan was purchased from the proceeds of sale from the Toyota Wish and the plaintiff had topped up the money to make it USD5000.

When the Toyota Wish was purchased the initial plan as a family was to purchase a Honda Fit. When the Be Forward agent was called to their home the Honda Fit they identified on the site was taken and Defendant suggested they purchase a Toyota Wish. The idea was to use the vehicle as a pirate taxi. They purchased the vehicle for USD1700. He produced an invoice reflecting the value of the vehicle. The invoice shows that payment was made in January and the collection was in March in Tanzania.

Richard Kanhandanda was tasked to go with the agent to go and bring the vehicle and when he collected the same he did so in his name hence the import documents at the border reflected his name hence its registration in his name. When the vehicle arrived Richard asked to use it to go to Harare which he was allowed and after that, it was returned and was kept at their home for their use.

The Toyota Wish was sold to Muchinepi Moyo a brother to one Agrippa who is now late. It was sold in August 2020 for USD\$2,500. Shortly after the sale of the Toyota Wish the Nissan Caravan in dispute herein was purchased. It has

been at their home since that time in their possession. It is insured at Nicoz Diamond as their vehicle. When the vehicle was involved in a collision on 14 March 2023 their driver was wrong and Defendant had to go to the Insurance Company to sign documents for the claim in his capacity as the owner of the vehicle.

Regarding the Ruwa property defendant testified that the same was purchased in January 2018. The initial aim was to develop the same with his pension when he eventually retired from his work with the government. He testified that they started building the stand bit by bit and there never was a cancellation of the agreement. The building project stalled in 2021 when the divorce proceedings started. The defendant testified that he has been to the stand physically and the structure they started still stands. He produced pictures of the construction and the building.

During cross-examination, he remained unmoved. His answers remained consistent with his evidence in chief. He had moved in good faith with his wife not aware of their machinations against him otherwise he would have ensured that the properties now in dispute were in their names. It cannot be said the Ruwa property does not exist as it exists and he has been there physically as shown by the photo evidence.

FINDINGS

The onus of proof in respect of the contentious issues was on the Defendant. The Defendant's case is full of detail regarding the acquisition of the properties in issue, unlike the Plaintiff's case which has no more than bold allegations on the acquisition and ownership of the properties concerned. Had Plaintiff's version been the truthful one, in all probability Defendant would be short of the details he gave to the Court. In addition to that, Defendant would have been confronted with counter details during cross-examination. Probabilities favour

and are consistent with what Defendant has told the Court and what he has adduced as evidence in support of what he told the Court. I, therefore, entertain no doubt at all that Defendant has discharged the onus on him and has successfully proven on a balance of probabilities that the house in Ruwa and the Nissan Caravan are properties acquired and owned by the parties during the subsistence of their marriage and are therefore subject to sharing per S7 of the Matrimonial Causes Act Chapter. One wonders why the Plaintiff will contest the Ruwa property if it does not belong to either of the parties. In my view she will lose nothing if she is not given a share of it.

The minor children are already in the Plaintiff's custody. They are about to turn major. The plaintiff has a helper staying with her and the children. Her frequenting South Africa on average 2 [two] days per week should be viewed as absence calling for a relocation of the children to their father who by the nature of his job, his availability at home is never guaranteed. Such relocation may necessitate the children changing their Schools as well which potentially may negatively affect their performance at school.

DISPOSITION

The Ruwa immovable property and the Nissan Caravan motor vehicle are marital properties.

I accordingly make the following order.

1. A Decree of Divorce be and is hereby granted in favour of the Plaintiff.
2. Custody of the two minor children, namely PRIMROSE PAIDAMOYO MHIKO [Female, Born on 14 July 2006] and DEAN KUDAKWASHE MHIKO [Male, Born on 14 October 2008] be and is hereby awarded to Plaintiff, with Defendant enjoying access to the children during alternate weekends and School Holidays.

3. The cost of maintaining the two minor children shall continue to be borne by both parents equally until each child turns 18 years old or becomes self-supporting, whichever occurs first.
4. The Plaintiff be and is hereby awarded as her sole property all the household property acquired during the marriage of the parties.
5. House No. 4608, SIMBI PARK, REDCLIFF, shall be evaluated by an independent evaluator mutually agreed upon by the parties, sold by private treaty and the proceeds thereof shall be shared equally between the parties after deduction of the expenses related to the evaluation and sale of the property, within 6 months of this order.
6. The Defendant be and is hereby awarded as his sole property Stand No. 25928 TARISA PARK, GOROMONZI and Plaintiff shall facilitate the registration of the Defendant in this regard within 30 days of this order, failure to which the Sheriff of this Court be and is hereby authorized to do so in Plaintiff's stead.
7. The Nissan Caravan motor vehicle Reg. No. AFH 5642 shall be sold to the best advantage, within 30 days of this order, to an individual mutually agreed upon by the parties and the proceeds shared equally between the parties.
8. There is no order to costs.

NDLOVU J

15/02/2024

Hore & Partners, Plaintiff's Legal Practitioners.
Ndlovu Mehluli & Partners, Defendant's Legal Practitioners.