

2017CRMP/LCA/146

IN THE SUBORDINATE COURT OF THE FIRST CLASS

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN

MAVIS PHIRI

PLAINTIFF

AND

COLLINS LAIMO

DEFENDANT

BEFORE: HIS WORSHIP F. KAOMA

FOR THE PLAINTIFF: IN PERSON

FOR THE DEFENDANT: IN-PERSON

JUDGMENT

CASES CITED

- a) Jenala Nambeye V Chileshe Chirwa (1979) Z.R. 117 (H.C.)
- b) Holley V Holley (1965) Z.R. 120 (H.C.)

c) Bank Of Zambia V Jonas Tembo And Others (SCZ Judgment No. 24 of 2002).

This matter came before this court as an appeal against the judgment of the Lusaka BOMA Local Court Grade A by the Appellant who was the Defendant in that court after being dissatisfied with the judgment of the lower court. In the lower court, the respondent sued appellant on allegation of matrimonial dispute which resulted in the Lower Court granting the couple divorce. In addition the lower court granted custody of the first two children to the Plaintiff and the younger one to the Defendant. Plaintiff was further ordered to maintain the younger child with K500 per month. The Court however, declined to grant compensation to either of the parties.

The Plaintiff appealed against the decision of the lower court on three grounds as follows;

The lower court erred by not awarding her compensation despite being in marriage with her ex-husband for 16 years.

1. The lower court erred by awarding her 40% on the share of the house instead of 50% share because she also contributed to the house.
2. The lower court erred by not ordering the share of the car they bought together whilst in marriage.

After perusing through the record of the lower court, I was satisfied that there was no dispute on the divorce granted by the lower court except on property settlement. However, in the interest of justice I decided to hear the matter *denovo*. The parties will therefore be called Plaintiff and Defendant just the way they were called in the lower court.

The burden therefore lies squarely on the Plaintiff to prove her case on a balance of probabilities.

In the Plaintiff's endeavor to prove her case she opted to call one more witness besides her statement while for the Defendant was the only witness. The evidence of both parties is as follows;

PLAINTIFF'S EVIDENCE

The first witness for the Plaintiff was the Plaintiff herself, unemployed of House No. 133/01 Ng'ombe compound. She deposed before this court that she got married to the Defendant in 2000 under Kaonde tradition. They started staying together and had two children. After they had two children her husband deserted the matrimonial home. She sued him for reconciliation at the Chelstone Local Court. He refused to reconcile and opted for divorce and they were divorced in 2011. After the divorce they shared the property equally. The property they had was a house and the court ordered that they should sell it and share the proceeds equally. When her husband saw that, he could not withstand. He came back and convinced her to reconcile and they reconciled so they did not sell the house. They started living together and had a third child. Afterwards her hubby got a loan and bought a car which they agreed that it was going to be a taxi so that they finish the house but it never happened as her husband became worse and even deserted the matrimonial home. They tried to sit to discuss but it failed out. That is how she went to court to sue for reconciliation. On 11/04/17, they went to court but Defendant refused to reconcile which resulted in another divorce on the advice of the court. After the divorce the magistrate said that her husband should get the car and from the house she should be given 40%. No compensation was given and maintenance for the children. She further deposed that her husband works as a driver for his boss who works at the UN. It was her further evidence that all the children are with her and she is only supporting them through piece works. She added that she is still living with the children in the same house although he wants to evict her from the house. She did not understand why the court did not compensate her because it was him who deserted the matrimonial home. She further deposed that during the 2011 divorce she was compensated with K9m then

which is now K9000 but it was not paid due to the reconciliation. He only paid her K6000 which was 2 months monthly installment.

When cross examined by the Defendant, she deposed that she told this court that in 2011, she was chased out of the house and he followed her to her sister's house for reconciliations.

PW2 was Peter Ntau also of Ngombe Compound. This witness testified that what he knows is that the two parties to the matter were married. They had difference and Plaintiff bought summons and they went to court. The court ordered that the house should be sold but it was not sold. They reconciled and started living together. Afterwards the husband deserted the matrimonial home. Thereafter Plaintiff went to buy summons after which he was informed that the marriage had ended

DEFENSE

As already alluded to, the only witness for the defence was the Defendant. He told this court that he got married to Plaintiff on 4/11/2000. They lived well until she started doing business of going to Botswana and Tanzania. She would insult him and shout at him during which he would complain to her sister. According to Defendant these are the most serious problems that led to their divorce. She sued him at the Chelstone Local Court for divorce and that is how they divorced. In addition the court ordered that whatever, they acquired together should be shared equally. After court she went to her sister. He was also order to compensate her with K9000. At church he was told to take back the blocks he got from church and the money his wife got. The church and the family started giving them counseling that is how they started living together. They had another child but his wife started the usual problems of insulting him. In November, 2016, he decided to leave the house because she was sleeping on the floor and because of insults. She later sued him in court and they appeared in court on 11/04/17 and the court divorced them. The court said

the house belongs to the children. According to the Defendant, on the house the court said that if Plaintiff has an interest she should find evaluators and get 40% while Defendant should get 60%

When cross examined by the Plaintiff he deposed that from June, 2016 to November, 2016 she was sleeping on the floor. He maintained that she insults him a lot.

This is the evidence in totality which I have closely considered from which seems to me that most of the facts are not in dispute chief among them is the fact that the couple got married in 2000 under customary law and had 2 children. They were divorced by the Chelston Local Court in 2011. During the subsistence of the marriage they had built a house together in Ng'ombe compound which was their matrimonial home. The local court ordered for the sale of the house and the proceeds to be shared equally. Defendant was further ordered to compensate Plaintiff with K9000. The judgment of the local court was not enforced as the couple reconciled after divorce and started living together. During the subsistence of the new union, the couple had another child. Difference started again and in 2016, they went back to court and they were divorced for the second time with a different order in relation to the share of the house. In the latter order the court order 40% for the Plaintiff in the house and no compensation was ordered compelling Plaintiff to appeal to this court.

The question to be resolved there is whether or not reconciliation reached after a competent court of competent jurisdiction has pronounced a divorce has the effect of annulling the divorce.

Before resolving the foregoing it is imperative at this point to define the jurisdiction of the local court to dissolve customary marriages. This was clearly stated by the High Court in the case of JENALA NAMBEYE v CHILESHE CHIRWA (1979) Z.R. 117 (H.C.). In that case it was held stated as follows;

"It should be said that original jurisdiction in respect of marriages under African customary law is also exercised by the local courts under s. 5 and s. 12 of the Local Courts Act, Cap. 54. However,

in terms of s. 56 of the Local Courts Act, subordinate courts of the first and second classes are also entitled to hear and determine appeals from judgments or decisions of local courts and these would include appeals in respect of matrimonial disputes decided by local courts under African customary law."

Section 12(a) of the Local Court Act being referred to in the above holding is couched as follows;

"Subject to the provisions of this Act, a local court shall administer the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law"

It follows that the local court is a competent court of competent and original jurisdiction ^{to} ~~can~~ dissolve a customary marriage and as such divorce granted by the local court is valid and binding on the parties until it is quashed or reversed by the appellate court. In the premise the principle of *res judicata* applies in decisions of the local court in relation to dissolution of customary marriages like any other court of competent jurisdiction. The Learned authors of Phipson on Evidence, Seventeenth edition, (London, Thomson Reuters (Legal) Limited 2010) ^{states} in paragraph 43-~~28~~, at page 1433, as follows:

"A final adjudication of a legal dispute is conclusive as between the parties to the litigation and their privies as to the matters necessarily determined, and the conclusions on these matters cannot be challenged in subsequent litigation between them. This principle applies absolutely to a conclusion that a cause of action does not exist, but it will not apply to other issues necessarily determined if there are special circumstances."

The forgoing is buttressed by the holding of the Supreme Court of Zambia in BANK OF ZAMBIA v JONAS TEMBO AND OTHERS (SCZ Judgment No. 24 of 2002). In that case it was held in *inter alia* that;

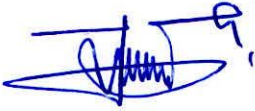
"In Order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second."

Further in HOLLEY v HOLLEY (1965) Z.R. 120 (H.C.) it was held by the High Court for Zambia that the principles of res judicata and issue estoppel apply no less to proceedings for orders for alimony and proceedings to vary or discharge such orders than to other proceedings.

It follows that the principle of res judicata applies in matrimonial proceedings with the same force like any other proceedings. In the premise, the decision of the local court in this matter of 2011 dissolving the marriage of the parties hereto is ~~was~~ valid and binding on both parties and no amount of reconciliation would annul it. The reconciliation of the Plaintiff with the Defendant after the local court dissolved their marriage did not by any stretch of imagination resuscitate the marriage. It follows that the union that followed after the divorce was a mere cohabitation without any legal effects unless the parties had decided to go through the same customary process of another marriage. In the absence of that the union as already alluded to was a mere cohabitation and not a marriage. The Local court therefore, fail into grave error by granting another divorce to the couple as there was no marriage to dissolve because it was already dissolved in 2011. In the circumstances and by the reasons I have stated the divorce granted by the local court in this matter is forthwith quashed including the ancillary reliefs granted such as property settlement and maintenance. For guidance the parties therefore I wish to state that the judgment of 2011 is binding on both parties and must be enforced that is to say the house in question should be sold forthwith and the money shared equally as ordered by the local court and Defendant should immediately start paying the compensation ordered by the local court that is to say K9000. To this extent therefore the appeal succeeds. It has been said costs follow the events. However, I am of the view that this is not the right case in which to grant costs. Each party will therefore have to bear its own costs. IRA

DELIVERED IN OPEN COURT

DATED THE.....DAY OF.....2017



F. KAOMA

Resident Magistrate

