

ANN P. NKHOMA v SMART NKHOMA

High Court
Justice J.A. Kabalata
7th March, 2003

Headnote

Family Law - Matrimonial Property - Entitlement after dissolution of marriage. Civil Procedure - Divorce - Customary marriage - Whether High Court has jurisdiction.

Headnote

The brief facts of the case are that the applicant and the respondent were married in 1991, under customary law and their marriage was dissolved by the local court at the Boma Courts on 8th January, 2002. After dissolution of the marriage, the applicant by originating summons sought for the following order:

- (a) A declaration that after divorce she is legally entitled to an equal share of the matrimonial property acquired during the subsistence of the marriage;
- (b) That she be given plot Number 2035 Pemba Road, Lusaka;
- (c) That house number 11 Lipusi Road, Lusaka be held by the applicant in trust for the two children of the family;
- (d) That the applicant be given a deep freezer and one musical machine technic;
- (e) Interim costs; and
- (f) Any other relief the court may deem just; and costs.

By notice filed into court on 12th November, 2002, counsel for the respondent raised a preliminary issue. That is to say, whether the High Court has jurisdiction to hear an application filed with the court by the applicant to determine the question of settlement of the property acquired during the currency of a marriage contracted under customary law and dissolved by a local court in accordance with the relevant customary law.

Held:

1. A Local Court shall administer only African customary law applicable to any matter before it provided such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.
2. When a matter has been transferred from a local court to a subordinate court, the parties in that case do not lose the right to have their case dealt with according to

their customary law.

3. The law applicable both at the High Court and in the Supreme Court in divorce matter is the English divorce law applicable at the time.
4. Since the applicants case has not come to the High Court by way of appeal or order of transfer, and the fact that the parties in this case were married under customary law and the marriage was dissolved in a local court, the High Court has no jurisdiction over the proceedings because the law applicable in the High Court is the English divorce law and not the customary law of the parties.

Case referred to:

Munalo v Vengesai (1974) ZR 91

Legislation referred to:

1. English law (Extent of Application) Chapter 11 of the Laws of Zambia s. 2
2. High Court Act Chapter 29 of the Laws of Zambia Section 11.
3. Local Courts Act, Chapter 29 of the Laws of Zambia S. 8,127 and 53.
4. Subordinate Courts Act Chapter 28 of the Laws of Zambia Section 16.

G.M. Kanja, Palan and George Advocates for the applicant

M.N. Ndhlovu, Messrs Chifumu Banda and Associates for the respondent

Judgment

KABALATA, J, delivered the ruling of the court.

By Originating Summons the applicant Ann P. Nkhoma prays for the following:

- (a) A declaration that after divorce she is legally entitled to an equal share of the matrimonial property acquired during the subsistence of the marriage;
- (b) That she be given Plot N0. 2035 Pemba Road, Lusaka for reasons stated in the affidavit hereto;
- (c) That house No. 11 Lipusi Road be held by the applicant in trust for the 2 children of the family;
- (d) That the applicant be given a deep freezer and one musical machine-technics;
- (e) Any other relief the court may deem just and costs; and
- (f) Interim Injunction.

By notice filed into court on 12th November, 2002, counsel for the respondent has raised a

preliminary issue which is:

Whether the High Court has jurisdiction to hear an application filed with the court by the applicant to determine the question of settlement of the property acquired during the currency of a marriage contracted under customary law and dissolved by a Local Court in accordance with the relevant customary law. Mr. Ndhlovu the learned counsel for the respondent argues that the proceedings commenced by the applicant at the High Court did not come to the Court by way of transfer from the Local Court nor by way of appeal from the Local Court. He therefore, contends that in the absence of an order for a transfer or for appeal, the Court has no jurisdiction over these proceedings.

Mr. Kanja the learned counsel for the applicant counters that submission by saying that this court has the jurisdiction to hear the determination of matrimonial property acquired during the existence of the marriage between the applicant and the Respondent on the grounds that this court has inherent jurisdiction to hear and determine any matter that has been brought before it.

The brief facts of the case are that the applicant, Ann P. Nkhoma the respondent Smart Nkhoma were married in 1991, under customary law and their marriage was dissolved by the Local Court at the Boma courts here in Lusaka on January 8, 2002.

In resolving this issue, I intend to look at the provisions of the Local Courts Act, Cap 29 of the laws of Zambia and the High Court Act, Chapter 27 of the laws of Zambia, as well as the English law (Extent of Application) Act, Cap 11 of the laws of Zambia. Section 8 of the Local Courts Act provides:

8. Subject to the provisions of this Act, a local court shall have and may exercise, within the territorial limits set out in its court warrant, such jurisdiction as may be prescribed for the grade of court to which it belongs, over the hearing, trial and determination of any civil cause or matter in which the defendant is ordinarily resident within the area of jurisdiction of such court or in which cause of action has arisen within such area:

Provided that civil proceedings relating to real property shall be taken in the local court within the area of jurisdiction in which the property is situate.

Section 12(1) of the Local Courts Act Provides:

*12(1) Subject to the provisions of this Act, a local court shall administer
(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality incompatible with the provisions of any written law;*

This provision is quite explicit because it says that a local court shall administer only African customary law applicable to any matter before it provided such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law. The Act itself also provides the mode of transferring of cases and this is to be found in Section 53(1) and (4) of the Act. Section 53(1) and (4) of the local courts Act, Cap 29 of the laws of Zambia provides:

53(1) Where any proceedings, civil or criminal, have been commenced in a local court, such local court, or an authorized officer within whose area of jurisdiction such local court is situate, may at any time before judgment either with or without an application from any time before judgment, either with or without an application from any interested party in that behalf, by order, and for reasons which shall be recorded in writing on the record of the case, stay such proceedings and, on such terms as may be just, transfer such proceedings for hearing and determination by some

other local court or to a Subordinate Court of the first or second class within whose area of jurisdiction the local court wherein such proceedings have been commenced is situate.

(a).....

(b).....

(c) Any interested part who is aggrieved by any order of transfer made by a authorized officer under the provisions of subsection(1) in the case in which he is concerned, or by the refusal of such authorized officer to make such order, may appeal therefrom to the High Court.

When the matter has been so transferred from a local court to a subordinate court of the first or second class, the parties in that case do not lose the right to have their case dealt with according to their customary law because of the provisions of the subordinate courts Act Cap 28 of the laws of Zambia which provides in Section 16 as follows:

(16) Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law:

Provided that:-

(i) no party shall be entitled to claim the benefit of any African customary law, if it shall appear, wither from express contract or from the nature of the transactions out of which any civil cause, matter or question shall have arisen, that such party agreed or must be taken to have agreed that his obligations in connection with all such transactions should be regulated exclusively by some law or laws other than African customary law:

(ii) in cases where no express rule is applicable to any matter in issue, a Subordinate Court shall be guided by the principles of justice equity and good conscience.

Quite clearly, the Subordinate Court has the jurisdiction in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and transfer property, and inheritance and testamentary dispositions.

The issue of customary law in relation to the administration of a deceased's estate was considered by the High Court in the case of *Munalo v Vengesai (1)*, a case which is of particular relevance to this case. The brief facts of the case are as follows:

The deceased was resident and domiciled in the Republic of Zambia for many years, clearly with the intention of staying here permanently. Both the deceased and his widow were Rhodesian,

members of the Kalanga tribe which is a sub-division of the Shona tribe. In 1961, the deceased had married his wife in Zambia by Shona law. The deceased and his wife were living in Zambia as ordinary Africans but among a fairly large Shona community in the Mumbwa District. Apart from their marriage, their life had not been affected by Shona law. The deceased was killed in an accident. The widow of the deceased took out a summons to obtain an order that the deceased's estate be administered by the High Court under the English Probate law which applied in Zambia and not under the African customary law. The respondent, a cousin of the deceased, claimed that the estate was governed by Shona customary law. Neither party in the proceeding claimed that the deceased was subject to the African customary law other than Shona law.

It was held by Doyle C.J., as he then was that:

(iii).....

(iv).....

- (v) That on the evidence before the court, the parties to the marriage were living in a Shona community and had been married by Shona law, that the deceased was living among and after the manner of an expatriate Shona, and that it would be catastrophic if it were held that persons living in the manner of the deceased did not retain their customary law, as this would also mean that the customary marriage law would not apply and would bring into doubt the validity of a marriage celebrated under such laws, and that since the deceased had not lived in a manner to divest himself of his customary law, it followed that the law to be applied to the administration or distribution of his estate was Shona customary law.
- (vi) That whether the administrator was appointed by the High Court or by the local court, he would still have to distribute the estate in accordance with the Shona law applicable and, since there did not appear to be any good reason why the estate should be administered through a grant by the High Court rather than the local court, the application would be refused.

The question that arises therefore, in the light of the provisions I have referred to above and the case cited is, whether this court has jurisdiction to determine the question of settlement of real property acquired during the currency of a marriage contracted under customary law and dissolved by a local court in accordance with the relevant customary law.

In answering this question, I wish to state that the law applicable both at the High Court and in the Supreme Court in divorce matters is the English divorce law applicable at the time. In support of this fact, I draw support from Section 2 of the English law (Extent of Application) Act Cap.11 of the laws of Zambia which provides:

- 2. *Subject to the provisions of the Constitution of Zambia and to any other written law:-*
- 3.
 - (a) *the common law: and*
 - (b) *the doctrines of equity; and*
 - (c) *the statutes which were in force in England on the 17th August,1911(being the commencement of the Northern Rhodesia Order in Council, 1911); and*
 - (d) *any statutes of the later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or*

otherwise; shall be in force in the Republic.

Section 11(1) of the High Court Act Cap 27 of the laws of Zambia provides:

11(1) The jurisdiction of the Court in divorce and matrimonial causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England.

In the light of the provisions of the law that I have referred to above, I have no difficulty whatsoever in finding that since the applicant's case has not come to this court by way of appeal or order of transfer, and the fact that the parties in this case were married under customary law and their marriage was dissolved in a local court, this court has no jurisdiction over these proceedings since the law applicable in this court is the English divorce law and not the customary law of the parties in this case. For these reasons, therefore, the preliminary objection raised by counsel for the respondent succeeds. This means that the relief's sought by the Applicant by way of Originating Summons filed into Court on 11 January, 2002 cannot be entertained by this court for reasons already given above. There will be no order for costs.

Dated.....Day of March.....2003

Application dismissed