

SUSAN ZOWA (NEE CHIDEME)

Versus

JAMESON ZOWA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5 JULY & 15 DECEMBER 2011

L. Mcijo for plaintiff
J Sibanda for defendant

Civil Trial

NDOU J: This matter has a chequered history as evinced by the number of cross-reference files. But for the determination of the issues before me, the salient facts are the following. The parties were husband and wife who married each other on 1 March 1996. When the parties developed irreconcilable differences the wife (“the plaintiff”) instituted divorce proceedings against the husband (“the defendant”) on 7 July 2006. The defendant entered appearance to defend and filed his plea. The defendant failed to file discovery documents timeously resulting in the plaintiff applying and was granted an order compelling him to do so within five (5) days failing which his defence would be struck off and she would be granted leave to set down the matter on the unopposed roll without notice to him. He was unable to comply and the matter was set down on the unopposed roll. A default judgment granting the divorce and ancillary was granted in favour of the plaintiff on 4 December 2008. On 11 June 2011, under case number HB-45-10, KAMOCHA J rescinded the said judgment, in part, in the following terms:

“It is ordered:

- (1) That the order of this honourable court made on the 4th December 2008 be rescinded and the following substituted:
 - (a) A decree of divorce be and is hereby granted to the plaintiff;
 - (b) The parties proceed on trial of the division of matrimonial assets and ancillary relief.
 - (c) The parties be and are hereby permitted to make discovery in terms of the Rules of court, with the defendant having to make discovery within 5 days of the uplifting of this order;

- (d) Henceforth the parties shall proceed in strict compliance with the Rules.
(2) The costs of this application shall be costs in the causes in the main action.”

It is clear that the defendant managed to have the matter re-opened simply to enable him to challenge the issue of the share that the plaintiff had claimed in respect of matrimonial house and ancillary relief.

During the subsistence of their marriage the parties bought a stand commonly known as house number 29 Heythrop Road, Montrose Bulawayo. This property was registered in their joint names. *Ex facie*, they own the house in equal shares. Both parties contend that they sold their respective properties which they owned before they got married. The plaintiff sold her flat while the defendant sold his house in Nketa, Bulawayo. Each party claimed that the proceeds from sale of his or her property were channeled towards the purchase of the matrimonial house. The plaintiff, on the one hand, claims that she be awarded 80% of the said former matrimonial property and the defendant 20%. The defendant, on the other hand, maintains that the parties should be awarded 50% each. In her testimony the plaintiff justified her entitlement to 80% by producing several copies of her pay slips which evince that the parties obtained a loan from Founders Building Society, which loan has been repaid by way of deductions from her salary by way of a stop order facility. She also testified and established that the deposit for the purchase of the disputed property was a flat that she owned before the defendant featured in her life. It is her testimony that although the property was registered in their joint names, it was never her intention that they owned it in equal shares as she contributed substantially more towards its purchase. She, however, admitted that the defendant would sometimes contribute towards the settling of the loan but that such contribution does not exceed 10% of the purchase price and value of improvements of the property. The plaintiff produced two documents one of which showed that the defendant collected all the money raised through a loan for home improvements from the lending bank. He gave part of the amount to a named woman whom she believed was a girlfriend. The other document was a funeral insurance policy in another woman's names who was described as the defendant's spouse. The net effect of this testimony is that the defendant was an irresponsible husband who went around splashing money on women or girlfriends at the exclusion of the plaintiff and their family and that he contributed insignificantly towards the purchase and improvement of the matrimonial property. Looking at the documents that she produced and what she said in her evidence, I am satisfied that she has made out a credible case that she contributed substantially more than the defendant did. The defendant on his part failed to establish through credible evidence that he contributed anyway close to the 50% that he is claiming. I find his explanation for secretly taking out a funeral policy in another woman's

name incredible. Why would he take out funeral policy in favour of his brother's wife behind his wife's back? The same applies to the proceeds of the home improvement loan which he gave to the other woman. His explanation for this act is unbelievable.

The plaintiff also produced by consent an affidavit by her brother Jeremiah Chideme whose basic contents was that the defendant never contributed towards the upkeep of plaintiff's parents. The defendant had alleged that he had assisted the plaintiff's parent i.e as a way of indirect contribution.

It is beyond dispute that the defendant contributed towards the purchase of the disputed property. The issue is how much he contributed. The pay slips that evince the plaintiff's contribution (i.e through salary deductions) amounting to about \$218 000 on top of the 51% deposit which she had paid from the proceeds of the sale of her flat. The plaintiff was working throughout the period that she was settling the loan and the stop order for the loan was always being deducted from her salary.

The plaintiff, therefore, contributed substantially more than the defendant did towards the acquisition of the matrimonial property. On the question of contributions towards improving the matrimonial house, the plaintiff stated that both parties contributed towards extending the cottage and filling cracks. The defendant says he did so single-handedly. I believe the plaintiff's version because she established that these extensions and improvements were financed through a loan which she repaid. As far as the indirect contributions made by the defendant, it is beyond dispute that the plaintiff was employed throughout her stay with the defendant, whereas the defendant was in and out of employment and at one time he was serving a prison term. During the days when the defendant was out of employment, the plaintiff would be looking after the defendant and the family and over and above contributing towards the acquisition of the matrimonial home. The plaintiff and the defendant were not blessed with children but plaintiff was also looking after defendant's children from previous relationships. In fact, at one stage the defendant deserted the matrimonial home to go to live with a girlfriend leaving the plaintiff taking care of these children. From the foregoing I find that the defendant was trying to overstate both his direct and indirect contributions towards the acquisition and improvement of the matrimonial home. The defendant's testimony is characterized by evasiveness and gross exaggerations. I find that the defendant is not a credible witness. It is clear that his contribution towards the acquisition and improvement of the matrimonial house is far less than that of defendant. Another relevant fact is that the plaintiff and defendant are aged 61 years and 57 years respectively. The parties are in the afternoon of their lives. Further, the parties' marriage lasted twelve (12) years. In coming to a just and equitable distribution of the matrimonial home, this court is enjoined to consider the

Judgment No. HB 197/11
Case No. HC 790/09
X REF HC 789/09; 1039/09; 1848/08; 1293/08;
1498/06; 786/09 & HB-45-10; HB-36-10

parties' age and duration of the marriage. As alluded to above, the property is registered in the parties' joint names. This is an important fact. The parties are both registered on the on the property with equal shares. The parties are sophisticated as evinced by their life style and business venture. In registering the property in their names the plaintiff was alive to the fact that she was giving the defendant an undivided half share in the property. It is trite law that the registration of right in terms of the Deeds Registries Act is not just a formality. It is a matter of substance as it conveys real rights to the person in whose name the property is registered. The plaintiff has to lay out a basis for the taking away part of the 50% share of the defendant in the matrimonial home. The onus is on the plaintiff to show that defendant, despite being a 50% holder of real rights in the property, deserved to have his share reduced. The presumption of equal ownership can be rebutted by looking at the parties' respective contributions as well – *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) at 719. In claiming 80% share, the plaintiff was effectively revoking the donation due to the ingratitude shown by the defendant – *Lafontant v Kennedy* 2000 (2) ZLR 280 (S). Though the plaintiff did not specifically plead that she was donating part of her share, her testimony that she was mindful of the parties' respective contributions indicates this. The court cannot ignore this because this was not specifically pleaded – *Mtuda v Ndudzo, supra*. From the above evidence, the plaintiff has managed to rebut the presumption of equal ownership. In my view taking all the above factors into account I order that it is just and equitable that the matrimonial house being number 29 Heythrop Road, Montrose, Bulawayo be sold and plaintiff be granted 60% and the defendant 40% of the proceeds thereof. Each party to pay own costs.

Lazarus & Sarif, plaintiff's legal practitioners
Job Sibanda & Associates, defendant's legal practitioners