

ANGELINE USAIWEVU
versus
THOMAS USAIWEVU

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 18, 22 and 8 November 2006
Civil Trial

Mr *T.B. Ndoro*, for the plaintiff
Mr *T. Sakutukwa*, for the defendant

BHUNU J: The parties were married on the 18th September 1976 in terms of general law. The marriage was blessed with 3 children who have all since attained the age of majority.

The plaintiff sued the defendant for divorce and ancillary relief on the 15th August 2003. She obtained default judgment against the defendant on the 18th December 2003.

The defendant however successfully applied for rescission of judgment in respect of division of the matrimonial assets only. That issue was then referred to trial.

Before the hearing commenced the parties however hammered out a deed of settlement which put to rest the bulk of the issues leaving out basically one issue for resolution by the court.

The sole issue for resolution is whether or not the defendant is entitled to a share of the monetary value of the property known as 41 Station Street, Chegutu and if so the quantum of his share.

It is common cause that the property in dispute is registered in the plaintiff's name. It was so registered under deed of transfer number 6146/89 at Harare on the 20th June 1989.

It will be remembered that the parties' marriage was only annulled on the 18th December 2003. That being the case I find as a fact proved beyond question that the property in question was acquired during the subsistence of the marriage. For that reason alone it constitutes matrimonial property. That being the case it is subject to division between the parties in terms of the Matrimonial Causes Act [*Chapter 5:13*].

The plaintiff however denies that the defendant is entitled to any share of the disputed property on the grounds that she personally acquired the property without any contribution from the defendant. That assertion is hotly disputed by the defendant who claims that he made substantial contributions towards the acquisition of the property.

In support of her evidence the plaintiff testified that the parties were married in 1976. Their marriage effectively collapsed in 1986 when the defendant persistently denied her conjugal rights yet he was having adulterous relationships with other women. Despite the defacto breakdown of the marriage the couple continued to live together as husband and wife. Apart from sexual intercourse everything remained to a large extent as it had been before.

She continued to cook and care for him in the normal way as a dutiful wife would do. She took all reasonable steps to restore her conjugal rights but all was in vein.

As a result of the breakdown of the marriage they began to acquire some property jointly and others separately.

About three years after the alleged collapse of the marriage they jointly acquired the matrimonial home being 17 Concession Hill Road, Chegutu. The property was duly registered in their joint names on the 25th August 1989.

She says that prior to that she had solely acquired the disputed property and had registered it in her name on the 20th June 1989.

According to her evidence she was introduced to the seller Mrs Elizabeth Mula Williams by her uncle Mr Ganganzungu.

The plaintiff is a crossborder trader. While on her foreign trips she would leave the disputed business under the management of the defendant. Upon coming back she would find that the defendant had mismanaged the business. Generally she would leave him in charge of her affairs in her absence including her transport business.

In her testimony she explained their living arrangement after 1986 as follows:

"None of us approached the court for a divorce until 2003 because we as Africans are respected when referred to as Mr and Mrs.

I also wanted my children to continue to have a father figure until our last born Charmain attained the age of 18 in 2003.

We had no intention to divorce between 1986 and 1996. It was our intention to live as husband and wife until death even if there was no real marriage.

I only approached the court for a divorce in 2003 because I wanted the children to grow up having a father figure. The

other reason why I filed for divorce was that he was now bringing different women home.

After 1990 the defendant misused money until we got broke. He also misused my transport business until I got broke.

Each time I went outside the country I brought money but whenever I came back I found him having misused the money until 2000.

At one time I went to Mauritius and defendant phoned me to say electricity had been cut off.

These are minor issues, which I assumed one would deal with but I paid for the r`````estoration...

He showed me that he was somebody irresponsible and this pained me.

When I came back I told him that I was going to rent out the shop because he had failed. I then rented out the shop that is number 41 Station Street to Mr John Mandizha.

I did not do away with the defendant. I gave him another shop I had been renting. It was a corner take away shop. He took the shop. I had nothing to do with the shop but it belonged to me. I did not take any money from the shop. The things he started using in the shop were bought by me.

When I came back from Mauritius the people from Red Star had come to collect everything from the store. The owner of the shop then said you have failed, you should leave the shop.

I am now operating number 41 Station Street since December 2003.

I have not been working with the defendant since 2000 when I rented out the shop he did not come back.

After he had been evicted from the shop I put him where I had been running a flea market. I gave him cement so that he could build. I then assisted him until he started running a kiosk till it was demolished during operation Murambatsvina and he was now saying all that money belongs to him."

I have quoted the plaintiff verbatim in extenso to put her version in its correct perspective.

The defendant's story is a simple and straightforward one. He confirmed that the couple was married in 1976. He however disputed that the marriage collapsed in 1986 as alleged by the plaintiff. His version is that they continued to live together as husband and wife until 1994. He conceded that sometime around 1985-6 he was not consummating the marriage. He attributed this to customary practices which forbid a man from indulging in sexual intercourse with his wife after the birth of a child. The plaintiff disputed the customary practice but it is not necessary to resolve that dispute.

He however went on to say that when he married the plaintiff she was unemployed and living in the rural areas. He then brought her to town and found her a job where he was employed. When he married her he already owned a house at number 19 Skies. He later sold the house, 30 herd of cattle, his Barclays shares and insurance policies to finance the purchase of the matrimonial home at 17 Concession Road and the disputed property at number 41 Station Street. Both properties were bought from the same person Mrs Elizabeth Mula Williams.

He said having acquired both properties he decided to register the matrimonial home in their joint names and the

disputed property in plaintiff's name only. He decided to register the disputed property in plaintiff's name only to avoid inheritance problems in the event of him predeceasing the plaintiff.

Both parties called no witnesses. It is a question of one litigant's word against the other. The matter therefore falls to be determined by credibility.

The plaintiff testified on oath that she purchased the disputed property for \$20 000.00 whereas the defendant told the court that he paid \$15 000.00. The deed of transfer being number 6146.89 clearly states that the purchase price was \$15 000.00. She was however unable to give a satisfactory explanation as to why she did not know the purchase price if she was the sole purchaser of the disputed property.

The plaintiff's story that she was introduced to Mrs Williams by his uncle Mr Ganganzungu without the knowledge of the defendant is highly unlikely and not in the least probable because both the matrimonial home and the disputed property were purchased from the same person Mrs Williams in close proximity of time.

The plaintiff's claim that they continued to live a normal married life jointly purchasing property and registering it in their joint names and jointly operating businesses long after the marriage had allegedly collapsed has no ring of truth.

Her assertion that she continued to prop up the defendant financially and buying him businesses long after the marriage had collapsed in 1986 is unbelievable. It sounds like an except borrowed from a book of fiction.

The plaintiff was unable to explain why if she had all along held out the defendant to be her husband until 2000 she now wants the world to think otherwise. If she misled the defendant and the world at large through her conduct and behaviour for a period spanning 14 years then, she is stuck with it. She cannot be allowed to blow both hot and cold.

By shifting her stance she exposed herself as a person who cannot be trusted to tell the truth. On the other hand the defendant was an honest and credible witness who told a simple believable story. He was consistent throughout his testimony and not once did he contradict himself. I believe him.

I therefore find as a fact proved on a balance of probabilities that the disputed property was jointly acquired by the parties.

What remains to be determined is their respective level of contribution.

It is not in dispute that at the time the property was acquired the parties were employed by the same employer. Their earnings were probably more or less the same. The parties are agreed that the matrimonial home which was jointly acquired more or less at the same time should be shared equally. In the absence of any compelling reasons I see no reason why the disputed property should be treated differently.

In the result it is ordered:

1. that an order be and is hereby granted in terms of the deed of settlement filed of record dated 19 September 2006.
2. that the defendant be and is hereby awarded a half share of the monetary value of the property known as 41 Station

- Street, Chegutu registered in the name of Angeline Violet Usaiwevu under Deed of Transfer 6146.89.
3. For the purposes of both immovable properties being:
 1. number 17 Concession Hill Road Chegutu and,
 2. 41 Station Street, Chegutu,the properties shall be valued by an estate agent agreed upon by both parties within 14 days of the date of this order failing which either party may request the President of the Estate Agents Council of Zimbabwe to appoint a Chartered Valuer to evaluate the properties and submit a sworn valuation report to both parties within 14 days of his appointment.
 4. The plaintiff shall pay to the defendant a half share of the properties' monetary value against tender of transfer to her of the latter's 50% undivided share in the property within forty-five days of delivery of the sworn valuation report.
 5. Should the plaintiff fail to tender payment to the defendant within forty five days in terms of clause 4 above, the defendant shall have the option to purchase plaintiff's 50% undivided half share in each property within forty-five days failing which the properties may be sold to best advantage with the net proceeds being shared equally between the parties.
 6. Valuation costs shall be borne equally by both parties.
 7. Each party shall pay its own costs.

Ziumbe & Mutambanengwe, the plaintiff's practitioners
Sakutukwa & Partners, the defendant's legal practitioners