RICHARD KAZIZI
versus
WINNIE KAZIZI

HIGH COURT OF ZIMBABWE
MAKARAU & HLATSHWAYO JJ
HARARE, 18 May and 21 June 2006

Civil Appeal

Appellant in person
Respondent in person.

MAKARAU J: The precise property rights that a husband and a wife each have in the matrimonial estate during the subsistence of a marriage are not easy to define.

The facts of the above appeal brought the issue to the fore and required us to reflect on the effect of section 7 of the Matrimonial Causes Act [*Chapter 5:13*] on the property rights of spouses during the subsistence of a marriage. As fact go, they are quite simple and commonplace. They however mask a legal issue of some complexity. We summarise them as follows.

On 7 June 2005, the respondent appeared before the magistrates' court at Harare, on an affidavit, alleging that her estranged husband had sold a beast belonging to the matrimonial estate and she was apprehensive that he would proceed and sell the remaining livestock and certain other household effects set out in the affidavit. Without hearing the husband, the magistrate issued a rule nisi, calling upon the appellant to show cause why he should not be restrained from selling the livestock and property set out in the respondent's affidavit. The rule nisi was returnable to court on 7 July 2005. Pending the return day, the rule was to operate as a temporary interdict, restraining the appellant from disposing of the livestock and

property. For good measure, the rule authorized the police to arrest the appellant should he breach the terms of the order.

On the return day, the appellant appeared before the magistrates' court and filed an opposing affidavit. In the affidavit, he denied that the respondent and him were estranged but averred that they had had a misunderstanding (which he brushed off as minor), leading to the respondent leaving the matrimonial home. He had made efforts to have her return home and at the time of the hearing, she was resisting such efforts.

The record of proceedings is not clear as to whether the parties made any oral submissions before the magistrate in addition to their respective affidavits.

In his ruling, the magistrate confirmed the *rule nisi*. His reason for so doing appears in the following two paragraphs of his reasons for judgment:

> "It is this court's observations that there is a matrimonial wrangle. Whatever the parties decide to do it is of no harm or prejudice to respondent to be stopped from disposing of matrimonial assets.
> On a balance of equities, it is just for an order to stand to protect the interests of the applicant. In the event that both parties fail to reconcile and decide to divide the property, it will be there to share."

Dissatisfied with the outcome, the appellant noted an appeal to this court.

Two grounds of the notice of appeal are in my view worth setting out in full as they capture the issue that falls for determination in this matter. In paragraphs 1 and 3 of the notice of appeal, the appellant wrote:

> "1. The learned magistrate erred in confirming the *Rule Nisi* without considering the operation of the court order and the effects it (the court order) will have on the appellant, the husband, the head of the home and the entire clan of Kazizi family groupings.
> 2. …………………………………….

3. By confirming the Rule Nisi the court actually gave the respondent powers to do as
she likes or feels at the Kazizi home and during Kazizi family groupings."

At the hearing of the matter, it was confirmed before us that there is no divorce pending between the parties and that the parties are not estranged. They resolved their differences and are back together. The rule nisi however remains in force.

A number of issues arise from the order granted by the trial magistrate.

Firstly, while the point was not taken on appeal, we are not persuaded that this was a proper matter for the magistrates' court to have issued a rule nisi without first affording the appellant the right to be heard. While the magistrates court Rules 1980 permit the bringing of *ex parte* applications without defining the instances where such is permissible, there was no basis laid out in this application why notice to the appellant should not have been given. The right to be heard in legal proceedings is fundamental and is integral to a fair hearing. It should only be denied a party if there is evidence of a good reason, set out in the affidavit, why the application should not be served on the other party. No such good reason was set out in the respondent's affidavit.

Secondly, the interdict granted by the trial magistrate is a perpetual or permanent interdict, restraining the appellant from ever disposing of the assets. It has no time limiting the extent of its operation. It is commonsensical that this was not a matter where a permanent interdict was being sought or could be granted.

Thirdly, the order appears to have no basis at law.

The respondent did not allege in her affidavit that the property the appellant was disposing was hers. This could have been one basis upon which she could have succeeded in restraining the appellant from disposing of the property. In that regard, she simply would have been asserting her rights of ownership, which hold not only against her husband but the world at large.

Further, the respondent did not allege that the property in issue was jointly owned property. Again, as co-owner, she would have been entitled to assert her rights of part ownership to defeat her husband from disposing of jointly owned property without her consent.

It appears to us that the respondent and the trial magistrate in turn regarded the assets, which may be matrimonial assets, as jointly owned. This appears from the wording used in the ruling by the trial magistrate that the assets in issue are matrimonial property, to be preserved so that in the event that the parties do not reconcile, there would be something for the parties to share upon divorce. It is in this regard that the trial magistrate fell into error as there was no evidence before him that the parties were married in community of property.

There is no principle of law that binds spouses to retain property acquired during the subsistence of marriage for distribution in terms of s7 of the Matrimonial Causes Act [*Chapter 5:13*] "(the Act"), in the event of their divorce. In this regard, the remarks of McNALLY JA in the unreported judgment of *Nyatwa v Nene* S119/91, though he was dealing with a somewhat different issue, are apposite. At page 3 of the cyclostyled judgment, he had this to say:

> "The respondent may indeed have a claim for maintenance and or division of property rights against her former husband. I say nothing in that regard, except that, if and when she institutes proceedings against him, she must take him as she finds him at that stage. She cannot force him to retain all property, movable and immovable that he possessed on the day of divorce on

> the grounds that one day she may make a claim for division of that property, which claim may succeed."

The issue before the court in the *Nyatwa* case was whether a divorced wife could compel her former husband to retain the property acquired during the subsistence of the marriage to enable the plaintiff wife to claim it in future under section 7 of the Act.

Were the parties divorcing, then the considerations discussed in the *Muzanenhanmo case* and upheld and applied in *Muganga v Sakupwanya* 1996 (1) ZLR 217 (S) may have applied.

Since the parties are not divorcing, such considerations are not applicable.

In our view, the respondent failed to establish any one of the recognized grounds upon which the court should have moved to her aid to restrain the appellant from disposing of the assets in question.

In the result, the appeal is allowed and the order by the magistrates' court is set aside.

HLATSHWAYO J, I agree:…………………