

CHARLES MUKANYIMA  
versus  
ALICE MUKANYIMA

HIGH COURT OF ZIMBABWE  
GOWORA J  
HARARE 13 February and 26 July 2006

**Civil Trial**

*M C Mukome*, for the plaintiff  
*J Dondo*, for the defendant

GOWORA J: The parties in this matter were married under customary rites in 1979 in Mozambique. Sometime thereafter, presumably after independence, they returned to this country. In 1987 their union was solemnized under our customary law. They were blessed with two children Mike and Takudzwa born in 1986 and 1991 respectively. The union was thereafter solemnized at Mutare on 5 July 1997 under the then Marriage Act [*Chapter 37*]. Unhappy differences then arose between the parties resulting in their being separated from each other in September 1999.

Both parties are in agreement that due to the unhappy differences that have arisen between them the marriage has broken down irretrievably. There is therefore consensus that a decree of divorce be granted. The plaintiff has claimed for divorce and ancillary relief. In turn the defendant has filed a counter-claim for divorce and ancillary relief. At the pre-trial conference held by this court in relation to this matter, it was agreed and therefore recorded in a joint pre-trial conference minute filed by the parties subsequently, that custody of the minor child of the union be awarded to the defendant. It was further agreed that each of the parties would retain such of the movable items as were in their respective possession. These will be incorporated in the order that I will issue.

When the plaintiff gave his evidence he did not lead evidence on the breakdown of the marriage, nor did he in specific terms ask that he be granted a decree of divorce. He seemed more concerned about the

distribution of the matrimonial property. The defendant however claimed for a decree of divorce in her counter-claim. She told the court that they had been married in 1980 and the union was solemnized in 1997 under the then Marriage Act [*Chapter 37*]. She confirmed that she and the plaintiff had last lived together as husband and wife in 1999. It was her view that the marriage had broken down irretrievably. As this was the same sentiment expressed by the plaintiff, it was my conclusion that the marriage had indeed broken down and therefore a decree for divorce would issue in favour of the defendant.

The only other issue for me to determine related to the distribution of the immovable property belonging to the parties. At stake are two houses being Stand 262 Chikanga and Stand 389 Chikanga Phase 1.

Stand 262 was purchased in 1985 or 1986 as undeveloped stand. The plaintiff was in formal employment and the stand was purchased through a loan granted to him by Beverley Building Society. Through the loan the plaintiff managed to build two rooms at the stand which the parties lived in. Two more rooms were completed with the assistance of the defendant. Utilizing funds paid to her from the War Victims Compensation Fund, the defendant had tiles put in the kitchen, paved the outside yard with concrete and had the entire property fenced. The plaintiff does not dispute that she assisted in the development of this property.

Stand 389 was purchased by the defendant with funds again received by the defendant from the War Victims Compensation Fund. When purchased the house had five rooms and the plaintiff caused two more to be added to the structure. It is not disputed that beams for roofing two of the rooms were purchased from the plaintiff's employer resulting in the defendant obtaining a discount. The plaintiff also purchased doors to all the seven rooms from his employer at a discount to the defendant. The plaintiff claims that he also dug a foundation for the additional rooms and that he helped rectify an error in the roof. This claim is disputed by the defendant. The purchase of the beams and doors is however not disputed. The

defendant's counsel in his closing submissions conceded that stand 389, although purchased solely with funds from the defendant, was acquired during the subsistence of the marriage.

The plaintiff has prayed that the house on Stand 262 be declared his sole property and that the defendant be awarded stand 389 as her sole property. The defendant in turn wishes that she be awarded a forty percentage value of stand 262 and that stand 398 be declared her sole property.

The contention by the defendant is that stand 389 should be excluded from the matrimonial assets and thus not distributed because it was "acquired in a manner which has particular sentimental value" to her. The basis of this contention is that she had gone to Mozambique as a girl to participate in the war of liberation of this country and the injuries she sustained there were the cause for the financial benefits she received which then made it possible for her to purchase stand 389 Chikanga. In her evidence the defendant said she had bought the house as a reminder of the period she had spent at war. She also wished it to be a reminder to her own family who were worried about her safety during the period in question.

In terms of section 7 of the Matrimonial Causes Act, the Act, an appropriate court has the power to make an order for the division, apportionment or distribution of the assets of the spouses including an order for the transfer of an asset from one spouse to another. Section 7(3) limits the court's power to distribute assets which are proved to the satisfaction of the court to have been acquired by either spouse, either before or during the marriage, by way of inheritance, in terms of custom permitting the spouse to hold the asset personally or in any manner and which have particular sentimental value to the spouse concerned. In my view, the defendant had the onus in this case to establish that Stand 389 was of sentimental value to her and was as a consequence not amenable to distribution as provided for in s 7(3).

According to her evidence from the initial amount of \$16 664.59 received by her, an amount in excess of \$4 000.00 was spent by her on clearing the mortgage bond registered against stand 262. She also purchased building materials to add two rooms to the structure that was on the stand. She also bought clothing and bedding for the entire family. From the next installment received by her she bought furniture and made certain improvements to the house. A third payment was used by her in obtaining a driver's licence for the plaintiff and even more furniture for the home. It was from the proceeds of the fourth payment that she purchased stand 389 in her name. Although she stated that the plaintiff had agreed that the property be registered in her name, the evidence before belies that assertion. I say so for the following reasons. The plaintiff gave her the bus fare to go to Harare to process the application for compensation. He also gave her money for food during the period she was in Harare for the purpose. He was sufficiently interested in the house to purchase roofing timber for the stand at a discount of 50% of the actual price. He also purchased all seven doors. He also stated, which evidence I accept, that he had dug all the trenches at the house and had rectified errors in the roof. He would not have been so helpful had he been given to understand that the house was to be for the benefit of the defendant and her family to his exclusion.

In order to satisfy this court that stand 389 was not amenable to distribution the defendant had to prove that it was an asset that had particular sentimental value to her. All she has proved was that the funds to purchase it came from the compensation received by her for having participated in the war of liberation in Mozambique. Those funds were spent by her on improving the lifestyle of the parties including extensive improvements to the stand she refers to as the matrimonial home. The income she received during the marriage is part of the family assets of the parties. See *Wachtel v Wachtel*<sup>1</sup>. In that matter LORD DENNING MR

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<sup>1</sup> [1973] 1 All ER 829 at 836 c-d

described family assets as those things which are acquired by one or other or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The defendant clearly used the money obtained by her for the benefit of her family. From the plaintiff's attitude to the purchase of stand 389 it is clear that his view was that it, the house, had been meant for the benefit of the family. I do not therefore accept that it had sentimental value to the defendant. It is a matrimonial asset which falls for distribution in terms of the Act.

I turn now to the issue of distribution. Although the plaintiff purchased stand 262 using mortgage finance it cannot be denied that the defendant gave him sufficient funds in 1996 to pay of the mortgage. His evidence is to the effect that she had demanded that he pay her back nevertheless she contributed to the purchase price of the stand, and he would probably have paid more in bond repayments if she had not paid up the bond. To that extent I find that he received a benefit from her. She also assisted with the construction of two additional rooms on stand 262 and various other improvements of an aesthetic nature. He in turn assisted in the purchase of roofing material and doors at a reduced price to the financial benefit of the defendant. He also contributed his labour. In my view, both parties contributed in some measure to the development of each of the stands. When the parties were married neither was in formal employment. The defendant got some money in 1982 as her demobilization pay which went towards the upkeep of the family. The plaintiff would occasionally get odd jobs. However, as from 1985 it is accepted by both that the plaintiff was in formal employment.

An assessment of contribution in the acquisition of matrimonial assets can never be reduced to a mathematical equivalent and I am not about to do so in this judgment. Apart from their financial contributions to the purchase of the assets the parties played their parts as husband and wife to each other. The plaintiff was for a considerable time the sole

breadwinner for the family. Equally the defendant undertook various schemes to raise money for the upkeep of the family when the plaintiff was not in formal employment. They also played equally important parts as parents to their two children. No monetary value can be placed on the roles I have just referred to. A marriage is a contract between two parties in which each undertakes to contribute 'their all' for their joint benefit and that of their issue. It is *sui generis*. In my view where there is a commitment on either side to commit himself or herself to the marriage, it makes sense that each of them leave the marriage on the same footing. The purpose of the Act in the distribution of the assets of the spouses is to place the parties thereto and the children as much as possible in the same position they would have been had the marriage relationship continued. If the marriage relationship had continued the parties would have had between them a house each. The children would have had a place to stay. If I distributed the assets in the manner suggested by the defendant it is unlikely that the plaintiff would be able to purchase another home. The defendant on the other hand would end up much better off than the plaintiff. The spirit of the Act in my view is to distribute the assets in such a way as not to completely disadvantage one party and benefit the other. For almost twenty years the plaintiff was solely responsible for the upkeep of the defendant and the children of the union, and it would be most inequitable for her to benefit exclusively from funds she received toward the end of the relationship to the exclusion of her spouse. In my view stand 389 has not been proved to have sentimental value to the defendant.

The disposition of the dispute is as follows;

IT IS ORDERED THAT:

1. That a decree of divorce be and is hereby granted.
2. That custody of the minor child Takudzwa Harry Mukanyima (born 4<sup>th</sup> November 1991 be and is hereby awarded to the defendant

with the plaintiff having reasonable access to the said child.

3. Each of the parties is to retain such movable assets as is in their respective possession
4. The plaintiff be and is hereby awarded as his exclusive property Stand 262 Chikanga 1, Mutare.
5. The defendant be and is hereby awarded as her exclusive property Stand 389 Chikanga 1. Mutare.
6. That there shall be no order as to costs.

*Mugadza Mazengero & Dhliwayo*, legal practitioners for the plaintiff.

*Bere Brothers*, legal practitioners for the defendant.