EPHRAIM TEWENDE
versus
ROSEMARY TEWENDE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 24 and 25 July and 23 August 2006

Civil Trial

Mrs *Chiperesa*, for the plaintiff
Mr *J. Dondo*, for the defendant

UCHENA J: The plaintiff in this case married the defendant customarily in May 2000. They subsequently solemnized their marriage in terms of the Marriage Act [*Chapter 5:11*] on the 16th February 2001. One minor child Caroline was born to the marriage.

The plaintiff had been in two previous marriages. He first married Esther whom he divorced in 1985. He then married Sophia Machengwa who died in December 1998. He finally married the defendant in 2000 whom he is divorcing in these proceedings.

According to the evidence of both parties their marriage broke down in August 2002.

At the pre-trial conference the parties agreed on the following:-

1. That their marriage had irretrievably broken down to such an extend that there are no prospects of a reconciliation between the parties.
2. That custody of the minor child Caroline born on 21st January 2001 be awarded to defendant with plaintiff exercising reasonable access.
3. That maintenance for the minor child be in terms of the maintenance order in case No. M1930/03.
4. That the parties' movable assets be divided between them as agreed at the earlier P.T.C. held on 8th November 2004.

The issues which were referred to trial are:-

1. Whether defendant is entitled to maintenance in the sum of $100 000.00 per month until she remarries or dies.
2. Whether Stand No. 1256 Warren Park Township of Warren Park forms part of the parties' matrimonial estate subject to division between the parties.
3. If so what percentage share of the same immovable property must be awarded to the defendant?

At the beginning of the trial the defendant amended her claim for maintenance from $1 000 000.00 per month to $6 000 000.00 per month. The plaintiff did not oppose the application. The amendment was therefore granted by consent.

During the trial Mrs *Chiperesa* argued that the defendant was not entitled to maintenance because she previously applied for maintenance in the magistrates' court and her claim was dismissed. Mrs *Chiperesa* submitted that the issue was therefore r*es judicata*. The plaintiff produced the defendant's application for maintenance in the magistrate's court. It is clear that in that application she applied for maintenance for herself and the minor child Caroline. The plaintiff is not sure whether the maintenance granted was for both. Mrs *Chiperesa* who examined the record in correspondence on file said it was just for the child. The plaintiff did not produce the maintenance court's order which should have clarified this issue. However Mrs *Chiperesa* conceded that when she examined the file she did not establish that the defendant's claim was dismissed. She conceded that if the maintenance court omitted or forgot to determine whether or not defendant was entitled to maintenance then the issue of the defendant's maintenance was not *res judicata*. The case of *Derreck Gwizo v Bongani Nkala* SC 135/98 at page 2-3 of the cyclostyled judgment makes it clear that once a claim for maintenance is dismissed on the ground that the respondent has no duty to maintain the applicant that issue becomes *res judicata*. That case involved parties who were not married as the applicant in that case had merely been impregnated by the defendant. In this case

the parties are properly married and in my view a dismissal of a maintenance claim during the marriage may not result in a plea of *res judicata* succedding. This is because maintenance may be dismissed because the claimant has means or is being adequately maintained. If such a claimant subsequently looses employment or the defendant later stops supporting her can she not re-apply? The fact that a maintenance claim was previously dismissed would in my view depend on the reasons for the dismissal. In this case the fact that the maintenance court apparently forgot to make a ruling on the defendant's maintenance means that the issue is not *res judicata*.

The plaintiff offered to maintain the defendant at the rate of $2 000 000.00 per month. He earns a net salary of $12 461 595.00 per month. This was confirmed by exhibit 2 his payslip for July 2006. He has two other minor children to maintain plus Caroline whom he is maintaining at the rate of $1 800 000.00 per month. He is renting a room at $2 million per month for himself in Chitungwiza. He needs money for his transport to and from work in the sum of $6 000 000.00 per month, $4 million is for the journeys from Chitungwiza to Town and back and $2 million is for the journeys from Town to Belvedere Teachers College where he works and back to town. He pays $1 500 000.00 for electricity and water per month for his rented accommodation in Chitungwiza. He sends groceries of about $5 000 000.00 per month to his two minor children with Sophia in Wedza. He needs food for himself.

I have no doubt that his income from the renting out of two rooms of his Warren Park house and from his employment does not enable him to maintain the defendant at a rate higher than he has offered. However a determination on the Warren Park house will determine whether or not his income will increase. If it increases then the defendant will be entitled to more than the $2 000 000.00 offered.

The Warren Park House

It is common cause that the Warren Park House was acquired before the defendant married the plaintiff. It is however also common cause that they stayed together in that house from 2000. The plaintiff left the matrimonial home in August 2002. The defendant is still living there using four rooms of the 7 roomed house. She accommodates her son from her previous union plus his wife and child. She also rents out one of the four rooms to a lodger. It is therefore clear that her own accommodation needs and those of the minor child do not require four rooms.

The first issue however is whether or not the Warren Park House is matrimonial property? In my view matrimonial property is any property the spouses owned during the marriage which does not fall under section 7(3) of the Matrimonial Causes Act [*Chapter 5:13*].

Section 7(3) provides as follows:-

> "The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court to have been acquired by a spouse whether before or during the marriage –
> (a) by way of an inheritance, or
> (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally or
> (c) In any manner and which have particular sentimental value to the spouse concerned." (emphasis added)

My understanding is that section 7(3) only excludes property acquired in situations covered under (a) to (c). The section also specifically refers to property acquired "before or during the marriage." This puts beyond doubt the fact that property acquired before marriage is matrimonial property. The fact that a property was acquired before marriage is only relevant to the shares to be allocated to the spouse who acquired it before marriage and the spouse who found it in existence. This is when the court can make an order that "any asset be transferred from one spouse to another as provided in section 7(1)(a) of the Matrimonial Causes Act." This is again when a property that is "his" or "hers" can be shared between the spouses as was referred to in *Takafuma v Takafuma* 1994(2) ZLR 103(S) at 106E.

I am therefore satisfied that the Warren Park house is matrimonial property subject to the following observations.

The house was a matrimonial home to two other wives who were married to the plaintiff before the defendant. The plaintiff said his first wife Esther whom he divorced in 1985 was married to him when they acquired the house. He said when they divorced she opted that her share be for the benefit of their children. This was not challenged by the defendant.

I will therefore bear in mind that Esther's children who are currently using two rooms of this house should not be dispossessed as a result of my distribution of the property.

It is also common cause that Sophia who died in 1998 was married to the plaintiff. At the time of her death she was entitled to a share of this house. On her death the law provides that her share devolves to the surviving spouse and her children. I appreciate that this court was not told under what law the plaintiff had married Sophia. Section 3 (a), (b) and (c) of the Deceased Estates Succession Act [*Chapter 6:02*] provides for the inheritance of a deceased's spouses estate by the surviving spouse and their children if they had any.. As regards a house as is the case in this case section 68 F (2) (d) of the Administration of Estates Amendment Act No. 6 of 1997provides as follows:-

> "(d) Where the deceased person is survived by one spouse and one or more children, the surviving spouse should get
> (i) ownership of or if that is impracticable a usufruct over the house in which the spouse lived at the time of the deceased persons death, together with all the household goods and
> (ii) a share in the remainder of the net estate determined in accordance with the Deceased Estate's Succession Act [*Chapter 6:02*]."

This means the plaintiff inherited a portion of this house which Sophia was entitled to. In terms of section 7(3) of the Matrimonial Causes Act the inherited portion can not be shared. This leaves a very small percentage available for distribution between the plaintiff and the defendant.

The defendant conceded that she did not contribute directly to the purchase of the stand or construction of the house. She merely lived in it and contributed indirectly. The indirect contributions are negligible as the marriage lasted for barely more than two years. The indirect contribution was towards maintaining the house and looking after the plaintiff's children. The fact that the whole house is not available for distribution further limits the defendant's entitlement to a share of the house.

Therefore in terms of section 7(4) (e) and (g) of the Matrimonial Causes Act the defendant's entitlement to a share of the house is negligible.

I must also consider the parties current income earning capacities, their assets and financial resources including those of the child. The only income available to the parties and the child is that earned by the plaintiff. The defendant does not work and is not likely to work as she is of ill health. She is H.I.V. positive. She has been in and out of hospital. She has been put under treatment for T.B. She simply has to be the plaintiff's dependant. She says she can no longer use the sewing machine the plaintiff bought for her. When she gave evidence in court she was visibly ill. I am satisfied that she cannot generate any income now and in the future. The parties have shared the movables they had. What needs to be shared is the immovable.

The immovable property either has to be sold for the proceeds to be shared or one party can buy out the other. It is also possible that the defendant can be given a life usufruct allowing her to use part of the house until her death or remarriage. In the case of *Rosin Ndapazwa v Martin Ndapazwa* SC 65/97 at page 5 of the cyclostyled judgment MUCHECHETERE JA had this to say:-

> "In my view the condition of the appellant will require her to be in town where she will readily receive medical assistance. It is most probable that she will not live long because of the illness. In the circumstances, a life usufruct on the matrimonial home instead of a one third share in the net proceeds of the sale seems to me to be reasonable. It has the advantage that the matrimonial home will not be sold. The appellant will spend the rest of her life in the comfort of a house she knows. Her medical and rehabilitation expenses will be lessened thus reducing

> future maintenance demands on the respondent and at the end of it all, the whole property will belong to the respondent."

In the present case the defendant is also terminally ill. She due to her illness constantly incurs huge medical bills. She said she will find it difficult to find lodgings because of her H.I.V. status which is now visible by merely looking at her. She says her parents shun her. She said prospective landlords are likely to treat her in the same way.

Her financial needs, obligations and responsibilities call for certainty and stability. If she has to rent accommodation rentals can be increased at any time. Her tenancy is not likely to be certain because of her ill health. She is better off in the house she is presently occupying. It will in my view be irresponsible in view of the plaintiff's limited means to leave the defendant and a minor child without accommodation in the hope that increased maintenance will enable her to acquire accommodation. The other option of her getting a share from which she can buy a house of her own is not an option at all. She cannot get more than 10% of the remaining divisible share of the house because of her limited indirect contributions over a very short time. Her only strong points are her age, physical condition and custody of the minor child which increases her financial needs and obligations.

As to the parties standard of living they did not have any to talk about. When they started living together the plaintiff's two children with Sophia were without adequate clothing and had to be clothed by the defendant and her friends. The defendant had to also provide these children with decent meals. This was of course when she was still employed. After this they all depended on the plaintiff's income which has always been inadequate. Therefore the maintenance and share the defendant should get should remain in keeping with the standard of living she accepted when she married the plaintiff.

On the issue of the co-operative contributions from which she claims she could have acquired a house of her own which she claims the plaintiff

caused her to abandon the defendant has not proffered any convincing evidence on this aspect. She soon got out of employment. She could not pay the contributions. The plaintiff had to pay for her for two months. I do not think it can be considered to be an asset she could have acquired. In my view that hope faded away when she lost employment at the beginning of their marriage. There could be merit in her allegation that she lost employment because the plaintiff wanted her to look after his children. That has however already been considered as her indirect contribution.

After considering that the house the defendant wants to share at 50% each was built when Esther was the plaintiff's wife and that Esther did not take her share having agreed with the plaintiff that her share benefits her children, the 50% the defendant seeks is an exaggerated claim. Even if this factor was absent, her own lack of direct contribution and the limited duration of their marriage would still have resulted in the claim being exaggerated.

There was also another wife Sophia before the defendant. She died in December 1998 while she was still the plaintiff's wife. The law entitles the plaintiff to inherit her share and property acquired through inheritance cannot in terms of section 7(3) (a) of the Matrimonial Causes Act be distributed.

In the result we have a property which has portions not available for distribution and very little of what remains can be awarded to the defendant. I am satisfied that justice can be done by granting the defendant a life usufruct of a portion of the house.

It is common cause that the parties have not been staying in harmony. This includes the plaintiff's children with Esther who are staying at the house. It is true that where there are other realistic options parties with such a history should not be forced to co-exist. They are at the moment staying together and a peace order has been applied for. Fortunately the plaintiff is not staying at this house. Should the violence or threats of it continue the affected party can seek the protection of the law.

I have already said the defendant does not need four rooms. She is currently accommodating persons who the plaintiff has no duty to look after. The defendant's real needs can be covered by granting her a life usufruct over two rooms. The other two rooms must be released to the plaintiff for renting out so that he can be able to pay maintenance to the defendant in a sum higher than he offered. He will also be able to look after his other minor children and himself from the additional income. I am satisfied that the plaintiff can in the circumstances afford to maintain the defendant in the sum of $4 000 000.00 per month.

In the result the house in Warren Park should be awarded to the plaintiff with the defendant being awarded a life usufruct over a bedroom and a kitchen from the four rooms she is currently using.

On costs the defendant has succeeded in proving that she is entitled to maintenance. She also proved that the Warren Park property is matrimonial property and that she is entitled to a share in the property. The costs should follow the result.

In the result it is ordered as follows:-

1. That a decree of divorce be and is hereby granted.
2. That the custody of the minor child Caroline born on 21st January 2001 be awarded to the defendant with the plaintiff exercising reasonable access.
3. That maintenance for the minor child Caroline be in terms of the Maintenance Order in case No. M1930/03.
4. That the plaintiff shall maintain the defendant at the rate of $4 000 000.00 per month until she dies or re-marries whichever occurs first.
5. That Stand 1256 Warren Park be awarded to the plaintiff subject to a life usufruct being granted to the defendant over the bedroom and kitchen she is currently using.
6. That the plaintiff shall pay costs of suit.

Mkuhlani, Chiperesa, plaintiff's legal practitioners
Chinamasa, Mudimu & Chinogwenya, defendant's legal practitioners