

WESTON MREWA
vs
CHIPO MREWA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 30 June and 1, 2 and 31 July 2008

Family Law Court-Divorce Action

G. Mutisi, for the plaintiff
F. Nyangani, for the defendant

KUDYA J: At the pre-trial conference that was held on 21 August 2007, two issues were referred to trial. The first issue sought a determination of the suitable custodian parent, while the second concerned the distribution of both the urban and rural immovable properties of the parties. The parties agreed that their marriage had broken down beyond repair. They agreed that the maintenance order issued by the Magistrates Court remain in force and that neither party required personal maintenance from the other. They also agreed on the method and manner of distributing the movables. During trial the parties further agreed on the issue of custody of and access to the minor child.

The parties commenced living together as husband and wife in an unregistered customary law union in 1979. On 24 October 1997 they contracted a civil marriage at Murewa Magistrates Court. Their marriage was blessed with six children. By 2002, when the plaintiff husband deserted the matrimonial home, they had built a two roomed and four roomed house at their rural home in Murewa and completed the nine roomed house in Kuwadzana. The defendant wife remained with the children at the Kuwadzana house. At the time of desertion four of the children were minors. When the plaintiff sued for divorce on 15 August 2005 only two were still minors and by the date of trial one was still a minor.

It was common cause that the plaintiff was a violent man against whom she obtained several peace orders. He commenced an adulterous union with another woman. Since his desertion the parties have not shared bed or board. Attempts at reconciliation by members of their extended family failed to yield any positive results. The acrimony between them was still evident during the trial. I am satisfied that their marriage has broken down beyond repair.

In his declaration, the plaintiff agreed that the rural home be shared equally between them. The defendant however claimed a 65% percent share of the rural home. At first, the plaintiff averred that the parties were holders of an equal and undivided share in the

Kuwadzana home for which he holds title. At the hearing his amendment for an 85% percent claim of the Kuwadzana house was granted. This was because when he gave notice of the amendment in January and April 2007, the defendant filed consent to the amendment on 7 July 2007. I was satisfied that the defendant would not be prejudiced by the amendment.

In his oral testimony, the plaintiff attempted to resile from the contents of his declaration on the share of the defendant in the rural home. He sought to aver that the home belonged to his late parents. He could not resile from the contents of his declaration in the absence of an amendment. The defendant on the other hand justified her higher percentage claim on the extent of her contribution to the construction of the rural home. She stated that she molded the bricks that were diverted to build a two roomed house for her mother-in-law. She also molded the 17 000 bricks that built the four roomed house. Her nephew (son to her sister) assisted the builder to construct the house. She accepted that the plaintiff would come with the builder from Harare during the weekends to construct the house. He purchased the cement though at times she contributed money for this purpose. He purchased the timber and asbestos sheets that were used to roof the house. She paid the builder from funds from her cross-border activities. She bought the fence that is round the homestead in Messina, South Africa. The two roomed house was built for free by their nephew who looked after their rural home. He purchased timber to roof it. She gave him the money to buy asbestos from Dapandove Primary School.

Neither party furnished me with the monetary values of his or her contribution.

The urban house has registered title in the plaintiff's name. The plaintiff stated that even though it is registered in his name it is both their house. He averred that he was solely responsible for the purchase of the stand from the City of Harare. He received a loan from the City of Harare which he used to build the two roomed structure, a bath and toilet. He used his own savings and earnings to construct the foundation for seven rooms. He borrowed \$30 000.00 on 17 May 1996 and a further \$10 000.00 on 5 June 1996 from the Forestry Commission, his employers at the time, to build the seven rooms. He completed nine rooms in 1999 from a \$3 000.00 loan from Beverly Building Society. He produced exhibit 2 from the City of Harare, exhibits 3, 3A and 4 from the Forestry Commission and exhibit 5 from Beverly Building Society to prove the existence and discharge of the loans in question.

His wife agreed that he borrowed the funds to build the urban house. She averred that he used \$60.00 she received from her farming activities to pay the required deposit for the

stand. It was common cause that she came to stay at the stand and was responsible for cooking for the builders and supervising their work while he was at work. She added that she also contributed financially to the purchase of pit sand, river sand and cement that was used at the house from money she earned from the sale of vegetables, firewood and sweets. She cooked for the plaintiff and looked after the household chores for the family while he went to earn an income which he used to service the loans. Her passport showed that she first went to South Africa on 24 February 1995. She would stay there for two weeks at a time. It was common cause that she sold doilies in Durban and brought home blankets, clothing apparels and food items for the family and for sale. She averred that she also purchased a drill, compressor, grinder, welding machine and solar panels which raised money for the construction of the urban house. She helped the plaintiff raise money for the purchase of cement and other building materials between 1995 and 1998 when the house was completed. She specifically mentioned buying the bricks that were used to construct the last two rooms of the house. It was her undisputed evidence that she paid for the construction of the durawall and gate. It took them 13 years to complete the construction of the urban house. She did not produce documentary proof of her contributions. She did not keep any as she neither suspected nor anticipated that she would require such proof on divorce.

I found the defendant a better witness than the plaintiff. She readily accepted the important role he played in building their matrimonial estate. She even mentioned that he sold his Honda 90 motor cycle to finance the construction of the foundation for the seven rooms. He said he sold it to buy a motor vehicle. In contradistinction he underplayed and despised her equally important contributions in building their matrimonial estate. It seemed to me that he became greedy when he abandoned his initial view that they had made equal contributions to the matrimonial estate. This was exemplified by the amendment to his declaration which increased his purported contribution at her expense and his attempts to deny her a fair share of the rural home.

I come to the conclusion on the evidence that I have outlined above that they both contributed equally to the building of both their rural and urban houses.

In his oral submissions, Mr. *Mutisi*, for the plaintiff, urged me to regard the immovable properties under the heading of theirs in the three tier categories recommended by McNally JA in *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) and to apportion the rural home in equal shares between the parties while awarding the plaintiff an 85 % share against a 15% share for

the defendant. He also agreed that the custodian parent be permitted to reside in that house until the minor child turns 18 and thereafter the plaintiff be allowed to buy her out of her share.

Mr. *Nyangani*, for the defendant, urged me to apply the seven factors set out in section 7 (4) of the Matrimonial Causes Act [*Chapter 5:13*] and award the defendant a 60% share as against the plaintiff's 40% share and permit her to buy him out of his share. He further urged me to increase the defendant's share in the urban house by an equitable percentage of her shares in the rural home as she is not comfortable in residing at the rural home.

In resolving the dispute between the parties, I prefer to apply the approach of Gillespie J in *Shenje v Shenje* 2001 (2) ZLR 160 (H). Mr. *Nyangani*, by reference to *Marimba v Marimba* 1999 (1) ZLR 87 (H) and *Nyangani v Nyangani* HH 55/1999 contended that I should in resolving the dispute have regard to the parties' respective misconduct, which he submitted was the cause of the dissolution of the marriage, and award a greater portion of the immovable property to the defendant.

It does not seem to me appropriate to pay regard to the aspect of misconduct in apportioning the immovable property for the reason that the parties agreed that their marriage had irretrievably broken down. In the result neither party saw the need to fully ventilate the party responsible for the breakdown. The fact that the plaintiff deserted the matrimonial home does not appear to be due to his desire to cohabit with a mistress but may have been caused by the atmosphere in the home which he found unbearably oppressive arising as it did from his allegations that he contracted a venereal disease from his wife. Their mutual recriminations appear to counter balance each other. In disregarding the element of fault I adopt the wise approach of Korsah JA in *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 42 A that:

“once the parties finally consented to the dissolution of their marriage on the ground of irretrievable breakdown, and their mutual recriminations appeared to counter-balance each other, and the conduct of one was not more gross than the other, there was no duty on the court to dwell on the conduct of the parties in its assessment of what would otherwise be a fair and just apportionment of the assets of the spouses”

The objective of applying the approach set out in *Shenje's* case is to achieve as far as is possible a just and equitable determination which does not favour one spouse at the expense of the other.

The first consideration is concerned with the present and future income generation ability of each spouse. The plaintiff stated that he earns \$120 billion per month in his present

job. He pays \$70 billion in rentals for the two rooms he is renting in Kuwadzana. He is left with \$50 billion to look after himself and meet his other responsibilities. He did not disclose any other income generating assets or financial instruments that are at his disposal. The defendant on the other hand did not disclose her earning capacity. She is a cross-border trader who plies the Harare- Durban route once every month. She has been able single handedly to look after the family of six children from the time the plaintiff deserted the matrimonial home. She is able to send the minor child to boarding school and meet all his material needs and the needs of the other adult children who are still her dependants. It seems to me that she is at present earning more income than the plaintiff regard being had too to the exchange rate differentials between the rand and the local currency. As long as she remains able to pursue her trade as she has done for the past 13 years, she is likely to earn more than the plaintiff in the foreseeable future. The first consideration is decided in her favour.

The second consideration is concerned with their respective present and future expenses. It represents the debit side of their respective balance sheets. The plaintiff has lesser responsibilities than the defendant. He looks after himself and pays an insignificant sum for the maintenance of the minor child. The second consideration is tilted in his favour.

The third consideration is on the standard of living of the parties and their children. The plaintiff's standard fell when he left the matrimonial home. The defendant and the minor child remained enjoying the comfort of that home. If the home is taken away from the defendant she will suffer a fall in her standard of living. During the time that they both lived in the home their standard of living was the same. Divorce and the allocation of more shares to one spouse with the prospect of a buy out order will dilute the losing spouse's standard of living. The order to dispose at best advantage will result in both losing out the enjoyment of the urban house.

The fourth consideration is the age and physical condition of the parties. Exhibit 1, the marriage certificate shows that the plaintiff is 51 while the defendant is 47. Both enjoy good health. They are still able to work for themselves and their children into the foreseeable future.

The fifth is about their respective contributions to the immovable properties. I have found that their contributions were equal in both the rural and urban home. They were both building their home together. In fact the plaintiff stated that though the urban home was registered in his name he considered it to be both their house.

The sixth consideration of the value of the immovable property and of other assets to the spouses is intrinsically linked to the third consideration, which deals with their standard of living.

The last one of the duration of the marriage goes hand in glove with their respective ages. The parties were married started married life together in 1979. They lived for 23 years together and in that time built the immovable properties in question. The court must ensure that each is rewarded for his contribution and fortitude in building the common estate.

Applying these factors to the issue at hand, I am satisfied that the aims of the distribution set out in section 7 of the Matrimonial Causes Act are best achieved by awarding each party an equal share in the immovable properties in question.

Both parties were agreed that the urban property is more valuable than the rural one. No monetary figures were provided on their respective values nor was I provided with the total cost of each property. I was urged by Mr. *Nyangani* to take a robust view based on the number of rooms that each type of property has. I am alive to the hazards of doing so especially in the light of the absence of commercial value for rural land. Fortunately, in *Derby Farms (Pvt) Ltd v Stewart Musonza Chirunga & Another* HH82/2007 at p 17-18, I had occasion to deal with the modern methods that are used to evaluate immovable property. These are the gross replacement cost and the depreciated replacement cost. Thus in my view rural improvements are capable of valuation using either of these methods.

I am permitted to take property from one spouse and award it to the other if the exigencies of the case so demand. In like manner, a court has the power to swap shares in one property for shares in another property. In the absence of any monetary figures to go by I would estimate that the half share of the defendant in the rural properties would be equivalent to a tenth of the urban property. The result would be that I would add 10% to the defendant's half share while reducing 10% from the plaintiff's half share in the urban property.

In my view the fair and equitable distribution would entail awarding the plaintiff the rural home in its entirety and awarding them the urban property in the ratio of 60% for the defendant against 40% of the plaintiff.

Accordingly, it is ordered that:

1. A decree of divorce be and is hereby granted.
2. The custody of the minor child Prosper Mrewa born 7 March 1993 is awarded to the defendant.

- 2.1. The plaintiff is granted access to the minor child after making prior arrangements with the defendant, on every alternate school holiday commencing from the December 2008 school holidays.
3. The maintenance order for the minor child that was imposed by the Magistrates Court shall remain in force.
 4. Each party shall maintain itself
 5. The plaintiff is awarded the following movable property:
 - a) the Morris 1000 motor vehicle registration number 293-130T
 - b) 4 piece sofas
 - c) 1 wardrobe
 - d) 2 double beds
 - e) 1 coffee table
 - f) 1 cart
 - g) 1 ox drawn cultivator
 - h) 1 ox drawn plough
 - i) Telephone line (04) 210581
 - j) Nokia cellphone 5110
 - k) 1 cart axel
 - l) 2 drilling rods
 - m) 1 wheelbarrow
- 5.1. The defendant is awarded the following movable property:
- a) 1 14 inch President Colour TV
 - b) 1 DVD baseline
 - c) 1 Hoover compressor
 - d) 1 ox drawn cultivator
 - e) 1 Karaoke radio
 - f) 1 kitchen table
 - g) 4 kitchen chairs
 - h) 1 western 2 doors refrigerator
 - i) 1 x 4 plate stove
 - j) 3 wardrobes
 - k) 4 double beds with bases
 - l) 3 piece room divider
 - m) 2 electric scissors
 - n) 1 Desk fan
 - o) 1 ox drawn plough
 - p) 1 solar panel
 - q) Metal kitchen unit
 - r) Nokia 3310 cellphone
 - s) Kitchen utensils
 - t) Sewing machine
 - u) Knitting machine

6. The plaintiff is awarded a 40 % share while the defendant is awarded a 60% share in the immovable property Stand No. 4818 Kuwadzana 6, Harare
 - 6.1 the defendant is granted the sole right of occupation in respect of the said immovable property until the minor child turns 18 years of age;
 - 6.2 thereafter and within 14 days of the minor child attaining 18 years of age, the Sheriff shall appoint an evaluator from his list of evaluators;
 - 6.3 the evaluator appointed in terms of clause 6.2 above shall evaluate the property and submit his report to the parties and the Sheriff within 14 days from the date of his appointment
 - 6.4 The costs of such evaluation are to be shared equally between the parties;
 - 6.5 the defendant shall make payment to the plaintiff within 90 days of the evaluation of such amount as represents 40 % of the value of the property;
 - 6.6 In the event of the defendant failing to pay the plaintiff in terms of clause 6.5 above, the Sheriff is authorised to attach and sell the said property, after which he shall pay 40 % of the proceeds to the plaintiff and 60% thereof to the defendant.
7. The 2 roomed and 4 roomed houses in Mukusha Village Murewa are awarded to the plaintiff.
8. Each party shall bear its own costs

Sawyer and Mkushi, plaintiff's legal practitioners

Nyangani Legal Practice, defendant's legal practitioners.