

ISABELA NYOKA
versus
BOYSEN REDSON KASAMBARA

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 29 October 2007 and 10 October 2008

FAMILY LAW COURT

Trial Cause

Mr *C. Chipere*, for the plaintiff
Mr *Machiridza*, for the defendant

GUVAVA J: The plaintiff and the defendant are husband and wife. They married on 7 June 2002 in terms of the Marriages Act [*Cap 5:11*]. The parties have one minor child Tamika Madalitso Kasambara (born 17 September 2006). The plaintiff has instituted these proceedings seeking a decree of divorce, custody of the minor child and division of their movable and immovable property. At a Pre- Trial Conference before MAKONI J the parties agreed that their marriage had irretrievably broken down. They also entered into a deed of settlement wherein they agreed on the issue of custody and access to the minor child and distribution of their movable assets.

The issues which fell for determination were thus:

1. What constitutes the parties immovable matrimonial property
2. Whether the defendant is entitled to a share of No 12 Ginger Ave Msasa Park also known as Stand 2041 Chadcombe Township of stand 1257 Chadcombe Township.

The plaintiff testified that she was employed by Stanbic Bank as a clerk. On 27 February 2002 the applicant entered into an agreement of sale for the purchase of stand 6547 Ruwa Township of Dispute Estate situate in the District of Goromonzi measuring 1 102 sq. m otherwise known as 6547 Zimre Park (the Ruwa property) for the sum of \$1 200 000. She obtained a loan in the sum of \$1,500 000 from her employers to purchase a stand. This was prior to her marriage

with defendant. She used the \$300 000 to pay for rates, connect water and have a plan drawn for construction of the house. The parties started living together in July 2002 in Marlborough as the stand was still undeveloped. The plaintiff applied for a joint facility with the defendant after they married and constructed a cottage. She would use the defendant's income to secure a higher loan from her employers. She testified that although the defendant did not contribute financially he was in charge of the builders and the purchase of building material.

In January 2006 she decided to sell the property as it was becoming increasingly difficult for her to secure loans for construction purposes from her employers. She stated that when she sold the property she was not living with the defendant as he had moved out of the marital home. She sold the property for \$1,8 billion. She used \$60 million to clear her outstanding loan with Stanbic Bank, \$900million to purchase a motor vehicle and invested the rest.

In April 2006 the plaintiff bought stand 2041 Chadcombe Township of stand 1257 measuring 410 square metres also known as number 12 Ginger Road Msasa Park (the Msasa Park house) for \$7,250 billion. She obtained a loan from her employer. The plaintiff stated that as far as she was concerned the house in Msasa Park was not matrimonial property as it was bought after she and the defendant had separated. She further stated that the defendant's indirect contributions to the Ruwa property were not more than 33%. She stated that when she sold the house she did not tell the defendant because she felt that he had already benefited from the use of the house as he was not paying for its construction. She also told the court that following a loan they had received from her employers for construction purposes the defendant had asked for half of the amount so that he could buy a motor vehicle. She used her share for the construction of the cottage. She also stated that in the event that the court were to find that the Msasa Park house was matrimonial property the defendant should not be awarded more than 5% as he had already taken out his share by the purchase of the motor vehicle.

The defendant gave evidence in his own defence. He confirmed that he is married to the plaintiff but that the marriage has broken down. He further confirmed that they had settled some of the issues between them and the only outstanding issue concerns the immovable property. He testified that the plaintiff had indeed acquired a stand in 2002 through a loan from her employers. He stated that they then proceeded to develop it together as it became their home. He stated that they would use his salary advice slip to obtain a bigger loan from plaintiff's employer but said he did not make any payments towards servicing the loan as the

money was deducted directly from plaintiff's salary. He stated that he looked after all the needs in the home i. e. paid the utility bills, bought groceries and generally supervised the building of the cottage. He stated that when they built the cottage it was a joint effort and he put in 70% in terms of effort. The defendant confirmed that he had used some money from a loan given to them for the purchase of a motor vehicle. He however stated that it was by agreement with the plaintiff and was for use in the home. He stated that he moved out of the matrimonial home on 9 March 2006. He was not aware that the Ruwa property had been sold nor that the plaintiff had purchased another property.

The defendant further testified that in terms of their Pension Fund Regulations he could not acquire a house in his name as they already owned a house through his wife the plaintiff. He stated that since he did not benefit from the sale of the Ruwa property he has been prejudiced and he should be awarded 50% of the value of the new property.

I will deal with the issues raised in turn.

1. Whether the Msasa Park property is matrimonial property

The plaintiff submits that the Msasa Park property is not matrimonial property because it was purchased after the parties' separation. In order to determine whether or not it is matrimonial property it is necessary to examine the legislation governing matrimonial property. The matrimonial Causes Act [Cap 5:13] (the Matrimonial Causes Act) does not define matrimonial property. The only provision in the Act which deals with this aspect is couched in the negative and outlines property which is excluded from matrimonial property. Section 7 (3) of the Matrimonial Causes Act provides as follows:

“ The power of an appropriate court to make an order in terms of paragraph (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
- (b) in terms of any custom and which, in accordance with such custom, are intended to be held by such spouse personally, or
- (c) in any manner and which have particular sentimental value to the spouse concerned.”

It seems to me that a proper interpretation of this provision would be that all property which is not specifically excluded is matrimonial property. This would, in my view, include property purchased even after the parties have separated. The wording of the provision is

couched in very wide terms and includes property acquired before and during the marriage. Upon separation of a married couple the marriage in my view has not ended. It only terminates upon an award of a decree of divorce by an appropriate court. The only issue that may be subject to argument would be whether or not the property should be distributed between the parties.

I therefore find that the Msasa Park house is matrimonial property as it was purchased during the subsistence of the marriage.

2. Whether the defendant is entitled to a share of the Msasa Park property

The question of what would be an equitable award to the defendant is a question of the courts discretion. Section 7 of the Matrimonial causes Act empowers a court in distributing matrimonial property to take into account the past and the present so as to avoid making an order which will have the effect of subjecting either spouse to a life after divorce which is less pleasant and less comfortable than the life they led during the subsistence of the marriage. This involves balancing the divorcing couples conflicting interests so as to make an equitable distribution such that one spouse is not enriched at the expense of the other. Where the property which the parties bought when there were still together has been sold by one of the parties and another property purchased the distribution becomes all the more challenging.

It seems to me that the test to be applied in the exercise of the courts discretion would be whether there is a link between the two properties. In other words if it can be shown that the proceeds of the sale of the matrimonial property were utilized in some way in the purchase of the new property then there would be a basis for making an award of the property in question.

In this case it was quite apparent from the evidence that the plaintiff was the one who purchased the two properties which are the subject of this litigation. Both properties were registered in her name. She had the resources as availed by her employer to make the necessary purchases. It is also apparent and beyond dispute that the defendant did not contribute directly to the acquisition of the properties. It is however clear that in order for the plaintiff to obtain the loans she did she required the defendants' salary advice slip in order to prove that she had the resources to repay the loan. It is clear to me that without defendants input the plaintiff would not have been able to access the size of the loan which she did. In her evidence she concedes that had it not been for defendant's assistance she would have only accessed 40% of the amount she received. She further accepted that whilst she paid the

mortgage the defendant would meet the other household bills. To that extent the defendant did contribute in the construction of the Ruwa property. He also went further and assisted in sourcing building materials and supervising the construction.

The question of whether there is a link between the proceeds of the sale of the Ruwa property, where the defendant has established his contribution and the purchase of the Msasa Park property can only be ascertained from the evidence. The plaintiff stated in her declaration that after she sold the Ruwa property the proceeds were reserved by her employer as security for a new loan. The plaintiff subsequently purchased the Msasa Park property. In her evidence the plaintiff abandoned that explanation and instead told the court that she had used the money to purchase a motor vehicle and invested the rest in the money market. She used the proceeds from the investment to buy groceries and clothing for herself and the minor child.

It seems to me that the plaintiff has not been candid with the court. The plaintiff sought to hide the fact that she had used some of the proceeds from the first property to purchase the second one. She must have realized that if the proceeds of the Ruwa house could be linked to the Msasa Park house the defendant would be able to show his entitlement in that property. That in my view would be the only explanation for the unexplained change in her evidence and clear departure from her pleadings. Whilst the banking facility document which was produced, does not itself refer to any sum held by the bank as security for the loan, there is no explanation why plaintiff would have told the court that information if it was not a requirement by her employers. It is my view that in selling the property the plaintiff intended to deprive defendant of a share of the matrimonial home as she was of the opinion that he was not entitled to a share. It should be noted that at the time of the sale the parties were already facing matrimonial challenges and whilst there is a dispute of whether or not defendant had left it is apparent that the marriage had broken down and parties were contemplating divorce. In my view therefore the proceeds from the sale of the Ruwa property were used in the purchase of the Msasa Park house. There is thus a direct link between both properties that would entitle defendant to a share of the Msasa Park house.

The application of the principles set out in s 7 (4) of the Matrimonial Causes Act have been set out a number of judgments of this court. In the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 McNALLY JA gave guidance on how the discretion given to the court should be exercised. In this case there is only one property for determination by the court which is clearly in the category of "Hers". Taking into account the evidence led, the indirect

contributions made by the defendant in relation to the Ruwa property would in my view constitute a 30% share. The property was sold for the sum of \$1, 8 billion. The Msasa Park property was bought for \$7, 250 billion. The price realized from the sale of the Ruwa property was insufficient to purchase the new property without considerable contribution by the plaintiff. The defendant contribution in as far as his 30% share is concerned would not amount to much as a percentage of the purchase price of the Msasa Park property. It is apparent that the plaintiff will be solely responsible for servicing the bond for the new property. In determining the defendants share I will also take into account that the property in Ruwa had only a cottage constructed upon it whilst the Msasa Park property is a complete house. Although I would have benefited from the valuations of the properties in order to make a more equitable distribution such evidence was not placed before me. Taking into account all the circumstances of this case it is my view that a 20% share of the Msasa Park property would be a fair award to the defendant.

The plaintiff has been residing on this property since 2006. In my view it is only just that she be given opportunity to pay out the defendant his 20 % share so that she remains with the property.

It seems to me that since most of the issues were resolved by agreement it is not necessary to make an award of costs in this matter.

In the result I make the following order:

1. A decree of divorce is hereby granted
2. Custody of the minor child Tamika Madalitso Kasambara (born 17 September 2003) is hereby awarded to the plaintiff.
3. The defendant is hereby awarded access to the minor child once every fortnight from 1:00 p.m. on Saturday to 3:00 p.m. on Sunday.
4. The plaintiff is hereby awarded the following movable property:
 - 1 reffridgerator
 - 1 stove
 - DSTV Decoder
 - Video Cassete Recorder
 - Television
 - Kitchen utensils and smalls

5. The defendant is hereby awarded the following movable property:
 - Nissan Sunny AAA 0953
 - 1 Photocopier
 - 1 set of sofas
6. Stand No 2041, Chadcomb Township of stand 1257 Chadcomb Township also known as no 12 Ginger Avenue, Msasa Park is hereby declared to be matrimonial property.
7. The defendant is hereby awarded a 20% share of the immovable property.
 - (a) The property shall be valued by an estate agent appointed by the Registrar from his list of valuers within 30 days of this order.
 - (b) The plaintiff shall have an option to pay the defendant his 20% share 30 days from the date upon which the valuation is made.
 - (c) In the event that the plaintiff fails to pay the defendant in terms of this order the property shall be sold at best advantage and the nett proceeds shared with the defendant getting 20% and the plaintiff 80%.
 - (d) The cost of the valuation shall be shared equally between the parties.
8. There shall be no order as to costs.

Munangati & Associates, plaintiff's legal practitioners
Muzangaza, Mandaza & Tomana, defendant's legal practitioners.