SAMUEL SARUDZAI KANOYANGWA
and
WINFREDER KANOYANGWA (NEE CHARLIE)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 17 & 18 March, 2010 and 27 January, 2011

M. C. Mukome, for the plaintiff
V. Muza, for the defendant.

MATRIMONIAL TRIAL

CHITAKUNYE J. The plaintiff married the defendant on 23 December 2000 at Rusape in terms of the Marriages Act, [*Cap 5:11*]. The marriages still subsists. They had however commenced living together as husband and wife about two or three years before that date. Their union was blessed with one minor child born on 20 June 1997. At the time plaintiff and defendant started staying together plaintiff had not yet finalized his divorce from a previous marriage.

During the subsistence of the marriage the parties acquired numerous movable properties. In 2005 they acquired an immovable property, namely Stand 104 Rusape Township, also known as house no. 12 Nyanga Drive Rusape. As fate would have it their marriage was not to last long thereafter. On 14 April 2006 plaintiff sued defendant for a decree of divorce alleging that their marriage had irretrievably broken down, a ground recognized in terms of s 5 of the Matrimonial Causes Act, [*Cap 5:13*].

Apart from seeking a decree of divorce plaintiff also prayed for a division of the matrimonial estate and custody of their minor child. On the immovable property he claimed a share of 75% with defendant retaining 25%.

The defendant in her plea conceded that the marriage had indeed irretrievably broken down to an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them, albeit denying being responsible for the breakdown. She made a counter claim for a decree of divorce, a 50: 50 share of the immovable property and sharing of the movable properties in terms of her own schedule. She also claimed custody of the minor child.

At the pre-trial conference the parties agreed on a number of issues. They agreed on the sharing of the movable property and on the fact that their marriage had irretrievably broken down. On 28 May 2007 a consent paper was filed with court on how the parties had agreed to share the movable properties. That consent paper was duly signed by the parties and their respective legal practitioners and is to form part of the order in this case.

The issues referred to trial were as follows-

1. Whether defendant made any direct or indirect contributions to the acquisition of the matrimonial home Stand No. 12 Nyanga Drive, Rusape. If so, whether she is entitled to a 50% share of the net value thereof.

2. Which parent shall be the custodian of the minor child and what would be reasonable rights of access for the non-custodian parent.

On the trial date the issue of custody and access by the non-custodian parent had been resolved. The parties confirmed that they had agreed that custody be awarded to the plaintiff with defendant being granted reasonable rights of access on agreed terms.

Though in their pleadings neither of them had claimed for maintenance in the event of being granted custody, the question of maintenance was raised as an issue when the parties testified. Plaintiff claimed maintenance for the child from defendant in the sum of one hundred United States dollars per month whilst defendant offered thirty United States dollars per month only.

The issues that the court was left seized with were thus on the sharing of the immovable property and the quantum of maintenance that defendant should contribute towards the child.

1. **Whether defendant made any direct or indirect contributions to the acquisition of the matrimonial home.**

From the evidence adduced from both parties it is common cause that the immovable property in question, that is, stand 104 Rusape Township, also known as 12 Nyanga Drive, Rusape, was bought and registered in the joint names of the parties. The agreement of sale shows the purchasers as Samuel Kanoyangwa and Winifreder Charlie. The Deed of Transfer is also in the joint names of Sarudazayi Samuel Kanoyangwa and Winifreder Charlie. That per se shows that the property is jointly owned.

It is common cause that the plaintiff who was employed by TEL -ONE opted to go on voluntary retirement in the year 2005. As a result he was paid a retrenchment package in the sum of $597 285 061-92 Zimbabwean dollars. It was from this sum that he paid the purchase

price of $315 000 000-00 and the transfer fees in the sum of $ 24 096 985.00. This was all in Zimbabwe dollars.

The plaintiff on his part argued that as the property was paid for entirely from his retrenchment package defendant did not deserve a 50% share. When asked why the defendant's name was included in both the Agreement of Sale and the Deed of Transfer, plaintiff said that as someone who had divorced before, his experience had taught him that even if a spouse's name is not included on the deed of transfer she will still be entitled to a share. Thus, in this case, when the estate agent advised him that defendant wanted her name to be included on the agreement of sale he agreed because from his experience, she would still be entitled to a share even if her name was not included. He however emphasized that when he agreed to the inclusion of defendant's name, it was not that he intended her to be an owner of 50% of the property or even that he was donating to her a 50% share in the property.

The defendant in her evidence confirmed that both the purchase price and the transfer fees were paid from plaintiff's retrenchment package. None of her earnings went towards the purchase price or transfer fees. The defendant's evidence was more on her indirect contribution. She contended that though she did not make a direct contribution to the purchase price and transfer fees, as plaintiff's wife for 10 years and as someone who contributed in her own way to other household needs and also as a registered joint owner she was entitled to a 50% share.

The issue of distribution of matrimonial property is dealt with in s 7 of the Matrimonial Causes Act [*Cap.5:13*]. Section 7 (4) provides that-

> "In making an order in terms of subs (1) an appropriate court shall have regard to all the circumstances of the case, including the following-
>
> (a) the income –earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
> (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
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> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
>
> (d) the age and physical and mental condition of each spouse and child;
>
> (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;

(f) the value to either of the spouses or to any child of any benefit , including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;

(g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouse."

It is apparent that the at the end of the inquiry or trial court must endeavour to distribute the property in such a way as to place the parties and the children in the position they would have been had a normal marriage relationship continued. That task in my view is not an easy one.

In *casu* the parties concentrated on the considerations in s 7 (4) (e) and (g). Where, as in this case, the immovable property is registered in the joint names of the spouses our courts have in a number of cases advocated the need to recognize this fact as a starting point. This is so because were a property is registered in joint names the presumption is that it is held in equal shares unless proved otherwise.

In *Takafuma v Takafuma* 1994(2) ZLR 103(S) court was faced with a similar situation. In that case the immovable property had been bought using a 100% guarantee provided by the husband's employer. All loan repayments were deducted from the husband's salary. The property was however registered in the parties' joint names. On divorce, the husband contended that the wife did not deserve a 50% share. On appeal against the lower court's decision by the husband MCNALLY JA at p105H stated that-

> "The registration of rights in immovable property in terms of the Deed Registries Act [*Cap 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered."

In *Ncube v Ncube* S 6/93, another case where the property was registered in joint names of the spouses yet the wife was alleged not to have contributed towards the purchase price; KORSAH JA at p11 had this to say-

> "It is incorrect to say that appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money's worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property. The proper approach is to accord her share of that property and then taking into account all the assets of

> both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered, in the exercise of its discretion, to order that any asset be transferred from one spouse to the other."

In order to take a spouse's share and transfer it to the other there ought to be some solid ground for so doing.

In *Lafontant v Kennedy* 2000(2) ZLR 280(S) court had occasion to deal with such a scenario and stated at 284C-D that-

> "The court cannot move from that position on mere grounds of equity. It cannot give away A's property to B on the mere grounds that it would be fair and reasonable, or just and equitable to do so. There must be a more solid foundation in law than that."

Some of the instances were court was persuaded to move from the 50:50 share the court referred to were-

1. *Nyamweda v Georgias* 1988 (2) ZLR 422 (S) where the reason advanced was that Miss Nyamweda was found by the court to have been an agent for her undisclosed principal, Mr. Georgias. She was in effect his nominee at will.

2. In *Young v van Rensburg* 1991(2) ZLR 149 (S) where KORSAH JA held that Van Rensburg created Young a nominee for the respondent (van Rensburg) and that on demand the appellant would transfer the farm to the respondent.

3. In *Lafontant* case supra where at p.285C-D the judge said that-

> "I think, by claiming and proving that she alone paid for the property, it must necessarily follow, if it was registered in their joint names, that she effectively gave him the half share as her nominee, for convenience. By instituting action she is terminating that nomination. The cases of *Nyamweda supra* and *Young supra* are appropriate precedents."

In *casu* it is common cause that the entire purchase price and transfer fees were paid from plaintiff's retrenchment package. That package was not the couple's savings over a period of time. It was not like a loan where repayments would be needed and whereby during the period of repayment defendant would take care of some aspects to cushion plaintiff. Clearly in my view the circumstances show that this is an appropriate case were defendant's share may be tampered in favor of plaintiff.

As for her contribution defendant contended that she operated a video club and did some interior décor work making curtains. She also was a director of a family company

SAMECORD. I did not however hear her to seriously say that the ventures brought in substantial income to the family. Indeed plaintiff said he had to subsidize defendant in the video club. The video club was more to keep defendant occupied than anything viable. The interior décor business even from defendant's evidence was not a big income generating venture. It was more of a hobby or pastime activity than a serious business. As for the family company SAMECORD, not much could be gathered on its operations and contributions to the family estate. What is unquestionable is that no income from that venture went towards the purchase of the immovable property in question. Its insignificancy can also be discerned from the fact that both spouses never brought it up in their pleadings. It is something that came up as they testified. Had it been a serious venture with substantial income I am of the view that either of the spouses would have mentioned it in their pleadings.

This must however not be taken to demean defendant's contribution to the matrimonial estate. She did contribute in her own way for those 10 years they were married by doing the usual household chores expected of a wife and providing moral support to plaintiff. Financially she contributed in her own way.

I am however of the view that a proper foundation has been laid for the reduction of defendants share from 50%. A reduction by a 15% would in my view meet the justice of the case.

2. Maintenance

The issue of maintenance was never raised in the pleadings. It only arose after the parties had agreed that plaintiff should be awarded custody of the minor child. As a result of this neither party seemed prepared to properly testify on this issue. The plaintiff said he required a sum of $100 United States dollars per month from defendant as part of her contribution towards the upbringing of their minor child. When asked to justify the figure plaintiff had to literally think on his feet as to how to arrive at that figure. In that regard he gave his list of expenses as follows-

Accommodation…… $ 40.00,
Food…….. $20.00,
Clothing ……. $20.00, and
School fees …… $20.00.

He conceded that he had not discussed the issue of maintenance with defendant. He also had not attempted to ascertain defendant's income and whether defendant could afford such a sum. The plaintiff said he was not employed but somehow did not disclose how he is

surviving and how he had been able to provide for the child so far. When defendant's dire financial situation was put to him he had no ready answers save to say that he knows that she is working at a certain school. Plaintiff was unaware of the nature of engagement defendant was involved in at the school. He thus could not deny that defendant was doing voluntary work. He was equally unaware of her income from that voluntary work and other activities she engaged in. Plaintiff could not rebut defendant's contention that she can not afford a $100 per month as her monthly income averages between $80 and $120 dollars per month.

The defendant's evidence on this issue was to the effect that she is working on a voluntary basis at a private school. The school has provided her with accommodation. She also does some odd jobs. From all these activities she realizes $80 to $120 per month. It is from this income that she survives. She thus offered a sum of $30 maintenance for their minor child.

It is my view that in the absence of better evidence from which a higher sum may be derived the defendants offer has to stand. An order for maintenance must be within the means of the non-custodian parent. In the circumstances a maintenance order in the sum of $30 per month will be granted.

Accordingly it is hereby ordered that-

1. A decree of divorce be and is hereby granted.

2. Custody of the minor child Kundai Nesbert Kanoyangwa (born 20 June 1997) is hereby awarded to the plaintiff

3. The defendant shall enjoy reasonable access to the minor child every fortnight during weekends. During school holidays the child shall be with defendant for 2 weeks of the holiday.

4. The consent paper signed by the parties and filed of record and annexed to this order shall regulate the distribution of the parties' movable property.

5. The plaintiff is hereby awarded a 65% share in the matrimonial home being Stand 104 Rusape Township, also known as House No. 12 Nyanga Drive Rusape.

6. The defendant is awarded 35% of the said matrimonial property.

7. The parties shall agree on the value of the property within 7 days of the date of this order failing which they shall appoint a mutually agreed evaluator to evaluate the property within 14 days of the date of this order.

Should the parties fail to agree on an evaluator, the Registrar of the High Court shall be and is hereby directed to appoint an independent evaluator

from his panel of evaluators to evaluate the property.

The plaintiff shall meet the costs of such evaluation.

8. The plaintiff shall pay off defendant her 35% share of the value of the property within120 days from the date of receipt of the evaluation report unless the parties agree otherwise.
Should the plaintiff fail to pay defendant's share in full within the stipulated period the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the Registrar of the High Court and the net proceeds thereof shall be shared in the ratio 65:35.

9. Each party shall pay their own costs.

Muvingi Mugadza & Mukome, plaintiff's legal practitioners
Muza and Nyapadi, defendant's legal practitioners.