

PETER MUCHIRAHONDO
and
BARBRA MUCHIRAHONDO (nee TIVENGA)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, November 16, 2010 and May 26, 2011

MATRIMONIAL TRIAL

V. N. Shamu, for plaintiff
L. Chimuriwo, for defendant.

CHITAKUNYE J: The plaintiff and defendant were married to each other at Harare Magistrates Court on 7 June 1993 in terms of the Marriages Act, *Cap 37* (now *Chapter 5:11*) and the marriage still subsists. They had however commenced living together as husband and wife in terms of customary law in between the years 1987 and 1988 (the exact year is not agreed). Their marriage was blessed with two children who were born on 2 May 1989 and 3 March, 1995 respectively.

During the subsistence of the marriage they acquired various movable property and an immovable property namely, House No. 25 Ambleside Crescent, Braeside, Harare.

On 7 August 2009 the plaintiff filed a suit for divorce against the defendant. The plaintiff alleged that the marriage relationship had irretrievably broken down to such an extent that there was no reasonable prospect of the restoration of a normal marriage relationship between them in that:

- “1. Defendant inflicts mental and physical torture upon the plaintiff constantly;
2. The parties have lost love and affection for each other;
3. The parties are no longer compatible
4. The parties have lost trust in each other
5. There has been no enjoyment of conjugal rights for a continuous period of three years.”

He sought that custody of the minor child be awarded to defendant with him enjoying reasonable rights of access. He offered to provide Medical Aid, all school fees and levies for the minor child in addition to providing clothes and food for the child.

On the distribution of properties, plaintiff suggested that the property be distributed as per his Annexure ‘A’ to the summons.

The defendant in her plea conceded that the marriage had indeed irretrievably broken down to such an extent that there were no prospects of restoration of a normal marriage relationship. She thus agreed that a decree of divorce should be granted in the circumstances.

She had no quarrels with being granted custody of the minor child with plaintiff enjoying rights of access.

The defendant further agreed with the manner of sharing the movable property as per plaintiff's annexure 'A'. She however disagreed with the plaintiff's suggestion on how to deal with the immovable property. In her plea she suggested that:-

"It is just and equitable that the defendant remains in the matrimonial home until both children become self supporting whereupon the property will be sold and proceeds shared equally between the parties. Alternatively, the property be sold and the proceeds shared equally between the parties while the plaintiff looks and pays for alternative accommodation for the children."

The plaintiff would not agree to the counter proposal.

On 2 July 2010 during a pre-trial conference held before GUVAVA J. the parties confirmed the areas of disagreement and agreement. They thereafter signed a Deed of Settlement confirming the manner in which all other issues were to be settled serve for the matrimonial home. The Deed of Settlement states among other things that:-

".....Whereas the parties are agreeable on the divorce being granted and share a consensus regarding issues of maintenance and distribution of movable property.
Whereas the parties have agreed to refer one issue to trial.
Whereas the parties have agreed to capture these issues in a deed of settlement which shall be registered as an order of this court as follows:

A MOVABLE PROPERTY

1. The plaintiff shall be awarded the following property:-
 - (i) Mazda 323 registration Number AAI 4843
 - (ii) Peugeot 504 registration Number AAI 7792
 - (iii) LG. 21 inch television set
 - (iv) Satellite dish
 - (v) Multichoice 720 Satellite dish
 - (vi) 210 litres chest freezer (KIC)

2. The defendant shall be awarded the following movable property.
 - (i) Maroon Lounge suite (including tables)
 - (ii) Black center cabinet
 - (iii) Black and Brass T.V. Stand
 - (iv) Samsung stereo 3 CD Changer
 - (v) Phillips Video Player/ Recorder
 - (vi) Phillips 21 inch TV set

- (vii) Fortech Star Satellite Decoder
- (viii) 9 piece dining room suite
- (ix) Display cabinet
- (x) Upright Imperial Fridge/Freezer Double door
- (xi) Princes 4 plate stove
- (xii) Akira Microwave
- (xiii) Dutchess Bedroom Suite (3 piece)
- (xiv) Ortho king bed
- (xv) Foam double bed
- (xvi) Zambezi nomadic wardrobe
- (xvii) Spare lounge suite
- (xviii) Two plate stove with oven.

B CUSTODY AND MAINTAINANCE

- (i) The defendant shall be awarded custody of the minor child with plaintiff being allowed reasonable access upon reasonable notice being given to defendant.
- (ii) The plaintiff shall pay and provide for the minor child's medical aid, all school fees, school levies, food and clothing needs until such time as the minor child attains the age of 18 years or becomes self supporting.....”

C. ISSUE FOR TRIAL

The only issue the parties could not agree on and which was referred for trial was- “Whether or not the defendant is entitled to an equal share of the immovable property specifically House number 25 Ambleside Crescent, Braeside, Harare”; in other words, ‘how the matrimonial home should be divided between the parties’.

Both parties gave evidence. From the evidence adduced certain aspects are common cause. It is common cause that at the time of marriage defendant had just completed her Ordinary Level education. She thereafter, with the assistance of plaintiff, attended a teacher training college from where she obtained a diploma in teacher education. She went on to obtain a degree in education from a local University. As a qualified teacher she started working in January 1994. At that time the couple had no immovable property. Plaintiff was working for Merchant Bank of Central Africa (MBCA).

It is further common cause that the immovable property in question was acquired in 1995 through a loan facility provided by plaintiff's employer. The loan repayments were being deducted from plaintiff's salary. In as far as the purchase price is concerned there was no direct contribution by defendant. It is because of this lack of direct financial contribution

towards the purchase price that plaintiff argued that defendant did not deserve any share in the immovable property.

In his evidence in chief plaintiff was asked –

“At this stage you are not prepared to offer anything to defendant?”

To which he replied- “yes. The reasons are that when she went for training as a secondary school teacher I paid for her fees. She has been awarded every thing and I am walking onto the ground. When my employer bought the house they were buying it for their employee, not for employee and wife.”

When asked if defendant had made any direct and indirect contribution to the house plaintiff was categorical that defendant made no direct contribution all she could do as a normal wife was to suggest what the couple should do and he would then use his resources to do that. On indirect contributions plaintiff admitted that defendant made indirect contributions. The defendant paid the salary for the maid for the duration of their marriage since she started working. Defendant also bought grocery items for the family. Plaintiff’s response in this regard was in these words- “Yes I agree she would pay maid’s salary as she engaged them and I would pay gardeners I engaged. I let her buy perishables whilst I would buy capitals like meat.”

It was clear that plaintiff, whilst admitting that defendant used her income for the benefit of the family, tried to belittle that contribution. Under cross examination he admitted that defendant besides grocery items also bought clothes for their children,

The defendant in her evidence contended that whilst she did not make a direct contribution towards the purchase price, she made a direct contribution towards improvements such as the extension of sections of the house. She also bought house hold goods such as furniture on hire purchase and through loans she got from financial institutions. She used to pay the maid, buy clothes for the family, pay telephone landline bills, buy movables, and buy groceries except meat which plaintiff used to buy. When asked about her contribution to the loan for the purchase of the house she replied that-

“The major contribution I made to the purchase of the matrimonial home is the emotional support I gave defendant during our time together.”

Besides that emotional support it was also her evidence that she “paid for the extension of the house, paid for construction of the veranda, paid for slab at the backside of the

house". She went on to say that she has been paying all bills for the house since 2007 when plaintiff moved out such as owner's charges/ rates and maintaining the house.

In his cross examination of defendant I did not hear plaintiff to deny that defendant used her income for the benefit of the family though of course he denied that she expended any of her money on improvements/extensions to the house. One can thus safely say that since she started working defendant has contributed her income towards the needs of the family. The question is: does that entitle her to any share in the matrimonial home? If so, what share is she entitled to? The plaintiff's position was simply that what ever contributions defendant did entitled her to only the movable items the parties agreed she should get.

The question of distribution of matrimonial estate is dealt with under s 7 of the Matrimonial Causes Act, [*Chapter 5:13*].

Section 7 (1) provides that:-

"Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to-

- (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other
- (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage."

As regards the basic considerations in deciding on how best to distribute the assets or property, s 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;
- (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 spouses.”

It is apparent therefore that the fact of direct contribution to the purchase of a particular asset is not the only consideration to be taken into account. Court is enjoined to consider **all the circumstances of the case**, including the above stated factors. The crux of the matter is in deciding on what weight to place on each of the factors to be considered. Whatever weight is placed on the factors must be such as to place the spouses in the position they would have been in had a normal marriage relationship continued.

In *Sithole v Sithole and Another* HB 14/94 at p11 of the cyclostyled judgment CHEDA J (as he then was) remarked that-

“It is accepted that even a wife who is not employed makes a contribution if she looks after the family’s affairs and the parties’ children enabling the man to be away to work and earn a living for the family. Such a wife cannot, on divorce, go empty handed just because she did not contribute financially.”

In that case both spouses had been employed throughout their marriage with the wife earning far much less than the husband. The matrimonial home was acquired through a mortgage bond whose repayments were deducted from the husband’s salary. The wife took care of other expenses such as telephone bills and groceries. She also bought most of the movables. The wife claimed a 50% share of the matrimonial home whilst defendant offered her a 25% share. After a careful consideration of the matter, court awarded plaintiff a 40% share of the matrimonial home.

Equally in *Muteke v Muteke* S 88/94, the wife made no direct financial contribution except as a housewife but court considered primarily her needs and expectations rather than her contribution.

In *casu*, there is no denying that defendant made direct financial contribution towards household needs of the family throughout the period of their marriage from when she started working. I did not hear plaintiff to complain that defendant did not commit most of her income to the needs of the family. By such contributions defendant enabled plaintiff to comfortably repay the housing loan from his employer. In a way defendant did contribute indirectly to the purchase of the house. Her contribution cannot be trivialized as it enabled plaintiff to concentrate on repaying the loan knowing fully well that the other needs of the family were being taken care of by defendant.

In *Usayi v Usayi* 2003 (1) ZLR 684 (S) the Supreme Court in upholding a High Court decision to award a 50% share to a non-working housewife of many years held that:-

“It is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as wife, mother, counselor, domestic worker, house keeper, and day and night nurse for her husband and children. It is not possible to place a monetary value on the love, thoughtfulness and attention to detail that she put into the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy; nor can one measure in monetary terms the creation of a home and an atmosphere from which both husband and children can function to the best of their ability. In the light of these many and various duties, one cannot say, as is often remarked: “throughout the marriage she was a house wife. She never worked.”

In that case the parties had been married for a period of about 35 years. In *casu* the marriage lasted about 20 years and defendant contributed most of her salary and other income to the needs of the family. A period of 20 years is certainly long. It is a period whereby the plaintiff and defendant lived as husband and wife, each contributing to the best of their ability, to the well-being of their family. They were amassing their estate as a family and not that each was amassing their individual estate. The defendant’s contribution cannot in my view be trivialized in those circumstances.

The plaintiff’s argument that the movable property allotted to defendant suffice for her contribution was without merit. A careful analysis of the movable property shared between the parties shows that plaintiff got valuable movables as well. In the absence of given values, it is my view that the sharing of the movables should not prejudice defendant in the sharing of immovable property.

In *casu* both parties are still in employment and so capable of earning their own living. They had reached a stage in their lives were they owned an immovable property. If anyone is to move out he/she must go out with a reasonable share to probably be able to acquire or secure accommodation for him or herself. It is also important to consider that both of them committed their salaries to their family during the 20 years of their marriage. It is only fair and just that the sharing ratio reflect the above key considerations in this case. .

After a careful analysis of the evidence and circumstances of the parties I am of the view that a 55:45 sharing ratio would meet the justice of the case.

Accordingly it is hereby ordered that:-

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

2. The defendant is awarded custody of the minor child, Gwinyai George , born 3rd March 1995, with plaintiff being granted reasonable rights of access upon reasonable notice to defendant
3. The plaintiff shall pay and provide for the minor child's Medical Aid, all school fees, school levies, food and clothing needs until such time as the child attains the age of 18 years or becomes self supporting whichever is earlier.
4. The plaintiff is awarded the following movable property
 - (i) Mazda 323 motor vehicle registration No. AAI 4843
 - (ii) Peugeot 504 motor vehicle registration No. AAI 7792
 - (iii) LG. 21 inch Television set
 - (iv) Satellite dish
 - (v) Multichoice 720 Satellite dish
 - (vi) 210 litres Chest Freezer (KIC)
5. The defendant is awarded the following movable property-
 - (i) Maroon Lounge suite (including tables)
 - (ii) Black center cabinet
 - (iii) Black and Brass TV. Stand
 - (iv) Samsung stereo 3 CD Changer
 - (v) Phillips Video Player/ Recorder
 - (vi) Phillips 21 inch TV set
 - (vii) Fortech Star Satellite Decoder
 - (viii) 9 piece Dining room suite
 - (ix) Display Cabinet
 - (x) Upright Imperial Fridge/Freezer Double door
 - (xi) Princess 4 Plate stove
 - (xii) Akira Microwave
 - (xiii) Dutchess Bedroom suite (3 piece)
 - (xiv) Ortho King bed
 - (xv) Foam double bed
 - (xvi) Zambezi nomadic wardrobe

- (xvii) Spare lounge suite
- (xviii) Two plate stove with oven

On the immovable property.

6. The plaintiff is awarded a 55% share of the matrimonial property, being Stand 8670 Salisbury Township of Salisbury Township Lands also known as House No. 25 Ambleside Crescent, Braeside, Harare.
7. The defendant is awarded a 45% share in the above described matrimonial property.
8. The plaintiff is hereby granted the option to buy out the defendant in respect of her 45% share in the matrimonial property
 - (i) The parties shall agree on the value of the property within 14 days of the date of this order. If parties fail to agree on the value they shall within 28 days of this order appoint a mutually agreed evaluator to evaluate the property.
 - (ii) Should they 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.
 - (iii) The plaintiff shall meet the cost of such evaluation.
9. The plaintiff shall pay off defendant her 45% share of the value of the property within 120 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 there from shall be shared in the ratio 55:45
10. Each party shall bear their own costs of suit.