

TENDAYI MAUREEN CHIKOMBA (NEE MANYERUKE)
versus
VITALIS TINASHE CHIKOMBA

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 14, 23 & 24 MARCH 2011 AND 15 MARCH 2012

Divorce Action

FAMILY LAW COURT

Ms *M. Gwaunza* for the plaintiff
Mr *N. Munyuru* for the defendant

GUVAVA J: The plaintiff issued summons out of this court claiming a decree of divorce, distribution of the parties' matrimonial assets and costs of suit. The defendant in turn counter claimed for a decree of divorce and division of the matrimonial estate. It was common cause that the parties married on 12 April 2001 in terms of the Marriage Act [*Cap 5:11*]. During the subsistence of their marriage they acquired various moveable property and an immoveable property known as stand 1822 Chadcombe Township of 1844 Chadcombe Township Harare.

At a pre trial conference held before a judge in chambers the parties agreed that their marriage had irretrievably broken down and agreed on the distribution of most of their moveable assets. The following issues were however referred to trial:

1. Whether or not the deep freeze is matrimonial property and subject to be shared by the parties.

2. How should the matrimonial house known as Stand number 1822 Chadcombe Township of 1844 Chadcombe Township be apportioned between the parties.

The plaintiff gave evidence in relation to the immovable property and the deep freezer. She testified that she met the defendant in 1999. At that time she was already a qualified teacher. They married in terms of customary law in December 2000 and started living together in January 2001. She stated that stand 1822 Chadcombe Township of Stand 1844 Chadcombe Township (the property) was purchased in January 2001 through Barclays Bank as that was the defendant's employer. The repayment for the purchase price was deducted every month from the defendant's salary. She produced as an exhibit a receipt dated 24 January 2001 for the sum of \$61 652, 50 from Scanlen and Holderness Legal Practitioners who were dealing with the transfer of the property. The transfer fees were paid by the defendant. She further testified that she would buy groceries for the family and pay their accounts. She gave an example of the lounge suite which was purchased from Bradlows Furniture Store and the repayments were deducted directly from her salary. At the time they purchased the immovable property it consisted of only two bedrooms, a kitchen and a dining room. They have since effected improvements on the property. It now has four bedrooms as well as a garage. The developments commenced in 2003 again through a loan from the defendant's employer. At the relevant time the plaintiff was working in Goromonzi and she would buy maize from the area for resale in Harare. In 2004 they established a phone shop. They set up a company to run the enterprise. She testified that the defendant suggested that he and his young brother should be the directors and shareholders of the company. His brother was a student at Midlands State University at the time.

The company was operating from Mabvuku. She would pass through there every week day after work and would go with the defendant over the weekends. They decided to have a tuckshop in the same premises. They then took the deep freezer from the house and installed it in the tuckshop. The plaintiff stated that she would order goods for resale at the tuckshop at Macro Wholesales. The money generated from these sales would be used to construct the house.

She also directly assisted in the construction of the house as she would supervise the builders and cook for them. She also arranged for people to collect water which was used by the builders as there was a shortage of water in the area they lived. She also used the money that she was paid during the voters roll inspection process to buy doors for the property. In 2007 she received some back pay at work. She gave the money to the defendant and it was used to pay for the plumbing.

The plaintiff stated that there was never enough money in the home as they looked after a number of relatives at their house. She named the defendant's young brother, his wife and child, sister, nephew and an elder brother's son who was attending a nearby school. The defendant also paid maintenance for two children whom he had out of wedlock. They paid fees for defendant's elder brother's child who came and lived with them whilst going to school. At the relevant time they did not have a maid and plaintiff had to do all the household chores, cook for the family as well as supervise the child's homework. She stated that no one assisted them in looking after the extended family and the burden fell on her and the defendant.

The plaintiff stated that she was entitled to a 50% share of the property based on her direct and indirect contribution to the purchase of the property.

With regards to the deep freezer she stated that they had purchased it at Gretermans Department Store. The defendant paid the 40% deposit which was required and she paid the monthly installments. She testified that since she had paid the bigger portion of the purchase price she should be awarded the deep freezer.

In cross examination she conceded that the defendant paid for the mortgage on the property and paid the utility bills. In her evidence in chief she had denied that they were getting help from the defendant's siblings in the United Kingdom but it was apparent from the exhibits produced by the defendant that they were indeed receiving some money to assist in the upkeep of the family. This to a large extent dented the plaintiff's assertion that she was single handedly providing groceries for the family other than the defendant buying meat. When questioned by the court she stated that her marriage had broken down. They had tried to reconcile with the assistance of family to no avail. They had now been living apart for a period of twelve months.

The defendant told the court that he was employed by Barclays Bank and has been so employed for the past twelve years. On 6 December 2000 he entered into an agreement of sale to purchase the immovable property. He had managed to secure a loan from his employer. At the time he was living at his parents' house in Mabvuku. The property was purchased for \$780 000. The money was advanced by his employer and the repayments were deducted every month from his salary. The loan was to be repaid over a period of 30 years. He testified that from his salary the bank deducted \$4,358 for the housing loan. He was earning a net salary of \$35 000 per month. He thus had enough money to buy food, service the car, pay accounts and buy clothes for the plaintiff. He would also assist his wife by buying food for her siblings who were at boarding schools at Gokomere and Plumtree. He would visit plaintiff's parents in Gokwe and give them loans to pay for their children's school fees. He would also visit her brother who was at the University of Zimbabwe and assist him when he had financial problems.

The defendant testified that the plaintiff did not assist at all with the household bills save for paying the telephone bill. He would obtain loans from his employer to buy building materials to effect extensions to the house. He stated that the plaintiff had a lot of family responsibilities and was the sole bread winner for nine people from her home as no one else was employed. He thus had to help her so that she meets her family obligations. He denied that he had used his salary to maintain his children who were born out of wedlock. He stated that he only paid fees for one child and this was paid directly by his employer. He had disputed paternity on the other child and was therefore not paying any maintenance. The defendant stated that he also had other sources of income other than his salary so he could afford to look after his extended family. He owned a commuter omnibus and was in the business of buying and selling cars. He also received rent from his parent's house in Mabvuku.

The defendant stated that his marriage to the plaintiff had irretrievably broken down and they could no longer live together as husband and wife. He testified that he wanted a divorce and as the plaintiff had made no contributions at all to the purchase or development of the property she should not be awarded more than a 10% share.

Turning to the issue of the deep freezer he stated that he and his brother were the sole shareholders and directors of a company known as Vittinach Enterprise. He stated

that the plaintiff was never involved with the company at any stage as she worked out of town. His nephew Lovemore, who was living with them, would collect money on a daily basis and he would go there on Sundays when the lady who operated the phoneshop was off duty. He denied that plaintiff went to the shop on a daily basis as she was staying in Mutoko and would only come to Harare over the weekend. He stated that they would go together to the phoneshop with the plaintiff during this time so as to see the progress being made. The defendant stated that when they started the tuckshop business they decided to buy the deep freezer from Greatermans. He stated that the freezer was purchased on his personal account specifically for the shop and it was never part of the household goods. He denied that plaintiff had paid the installments although she did offer to make the repayments. He stated that he had declined her offer as he did not want to mix company with family business.

In cross examination he failed to explain the deductions from his salary to the clerk of court in the sum of \$2,900. This money was for maintenance which was being deducted directly from his salary. I did not believe him when he stated that Romeo was of independent means as the plaintiff and defendant had to look after him and his family. He was a student at University and had a wife and child. I also did not believe him when he stated that the plaintiff had done nothing at all towards the development of the property. He conceded that she would cook for the builders and receive construction material in his absence. He however denied that she had purchased any doors or paid for the plumbing.

It is trite that where parties are agreed that their marriage has broken down it is not necessary for a court to inquire into the reasons for the breakdown or to allege fault. (See *Ncube v Ncube* 1993 (1) ZLR 39). In this case both parties have told the court that they no longer love each other and wish to be divorced. They have not lived together as husband and wife for a continuous period of twelve months. They are therefore entitled to a decree of divorce.

In making an award for the distribution of matrimonial property a court must apply the provisions of s7 of the Matrimonial Causes Act [*Cap 5:13*] (the Act). The court is enjoined to consider the factors set out in subsection (4) of section 7. These factors are the income earning capacity of the spouses, assets and other financial resources which each spouse is likely to have in the foreseeable future, financial needs and obligations of

each spouse in the foreseeable future, the standard of living of the family, the age and physical well being of each spouse, direct and indirect contributions to the family, the value to either of the spouses of any benefit including a pension or gratuity which such spouse will lose as a result of the dissolution of the marriage and the duration of the marriage. These factors, where applicable, must be taken into account together so as to assist the court in making an equitable distribution of the matrimonial estate. In the case of *Hatendi v Hatendi* 2001 (2) ZLR 530 (S) it was held that in making an award in terms of s7 the court is given very wide discretionary powers so as to enable it to make an equitable distribution between the parties.

The defendant has urged this court to adopt the approach in *Takafuma v Takafuma* 1994 (2) ZLR 103 where the court proposed that matrimonial assets be divided into categories of “his”, “hers” and “theirs”. When applying this approach it is clear that the immoveable property falls in the “his” category as the property is registered in his name. It was apparent from the agreement of sale which was produced that the house was purchased even before the parties had a customary law union. It is not in dispute that the purchase price of the house was made through a loan from defendant’s employers. The purchase price was paid up over a period of six years and this was proved by the bank statements which were produced in court. The plaintiff’s contributions were thus to a large extent indirect. At the time she married the defendant she was a qualified teacher and was earning a salary. She contributed actively to the household to the extent of her means. When they decided to develop the property in 2003 the plaintiff used her resources to assist in the construction. She contributed towards the plumbing and the doors. There was no doubt from the plaintiff’s evidence that she was very enterprising and was involved in various projects to secure additional money for the family such as buying and selling of maize. She was also a mother and caregiver in a house which had a large number of people from the defendant’s family. The importance of this type of contribution is emphasized in the case of *Usayi v Usayi* 2003 (1) ZLR 684 at 688 where ZIYAMBI J (as she then was) remarked as follows:

“How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother counselor, domestic worker, housekeeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to

detail that she puts into all routine and sometimes boring duties attendant and keeping a household running smoothly and a husband and children happy?.... ”

In the present case it is accepted that the parties were married for ten years and did not have any children of their own. However it was apparent from the evidence that there were a large number of people from the extended family who lived with them and for whom the plaintiff had to look after. I accepted plaintiff's evidence that she had to oversee the building of the house to the extent of arranging for water for construction and cooking for the builders and receiving construction material which was delivered. She also used her money to purchase the doors and contributed towards the plumbing. The house developed from a small two bedroomed house to a four bedroomed house with a separate lounge and a garage.

In my view the defendant, in his testimony, went to great lengths to undermine the plaintiff's contribution with regards to the development of the marital home. As I have already stated I did not believe his evidence that she used her money only to look after her family. Her evidence in my view had a ring of truth which I did not find in the defendant's evidence. Whilst the deductions for the house were made from his salary there was no doubt that the plaintiff used her best efforts to look after the home. It was a large extended family but she looked after everyone as her own. When defendant's sister fell ill she lived with them because they all knew she would be cared for by the plaintiff. The property is incomplete seven years after the construction project was commenced. I did not believe the defendant when he said that he deliberately slowed down progress on the development as he foresaw that their marriage was in trouble. Plaintiff's explanation that the financial resources were so strained because of the burden of looking after the extended family was so great that they did not have the financial resources to complete the building seems to me much more likely.

The plaintiff claimed a 50% share of the immovable property whilst the defendant offers 10%. In my view a consideration of the factors which I have outlined above would not justify an award of a share of 50 % to the plaintiff. Taking into account all the above factors it is my view that an award of 35% would be appropriate. The tender of 10% by the defendant was in my view totally unjustified. The defendant sought in his submissions to rely on the case of *Tungamirai v Tungamirai* HH 168/10 where an award

of 15% was made. In my view the facts of that case can be clearly distinguished from the present one to show that an award of 10% is not justified. Firstly the parties were married for only four years whereas in this case they have been together for ten years. Secondly the property in the Tungamirai case was purchased at the end of the marriage when the parties were almost separating whereas in the present case the property was purchased at the beginning of their marriage. Finally the parties in Tungamirai's case never lived in the house that they sought to share. The plaintiff in that case had used his company loan to purchase the house to which no developments or improvements were made. In this case the parties lived in the house all their married life and effected major improvements on the property.

The deep freezer which was a source of conflict in this case in my view was never matrimonial property. From the evidence the defendant purchased the deep freezer using his VIP credit card. Apart from plaintiff's mere say so there is no evidence that she contributed towards its purchase. There was no evidence that the deep freeze was ever used in the matrimonial home before it was taken to the tuckshop. The plaintiff was neither a shareholder nor a director in the company. I take the view that the deep freeze belongs to the company and is not matrimonial property.

The order that I make will give the defendant an opportunity to buy out the plaintiff so that he retains the property. Both parties in their submissions asked for the court to incorporate their agreement with regard to the moveable property. I will therefore incorporate their agreement in the order that I make.

The plaintiff had asked for her costs in this matter. In my view both parties have been relatively successful in their claims and therefore each should bear their own costs.

I thus make the following order:

1. A decree of divorce is hereby granted.
2. That the plaintiff is hereby declared the sole owner of the moveable property set out in Annexure A.
3. That the defendant is hereby declared the sole owner of the moveable property set out in Annexure B.
4. That the plaintiff is awarded a 35% share of stand Number 8122 of Chadcombe Township of 1844 Chadcombe Township.

- (i) That the property shall be valued by an estate agent appointed by the Registrar from his list of valuers within 30 days of this order.
 - (ii) That the defendant is hereby granted the option to buy out the plaintiff of her 35% share within 90 days from the date upon which the valuation is made.
 - (iii) That the cost of the valuation shall be shared in the ratio of 35% for the plaintiff and 65% for the defendant.
5. In the event that the defendant fails to pay the plaintiff the 35% share as set out in paragraph 4 of this order the property shall be sold at best advantage and the net proceeds shared with the plaintiff getting 35% and the defendant getting 65%.
6. That each party shall bear their own costs.

Messers Gwaunza and Mapota, plaintiff's legal practitioners
Messers Musunga and Associates, defendant's legal practitioners

ANNEXURE A

TENDAYI MAUREEN CHIKOMBA

1. Kitchen Utensils
2. Carpet
3. Curtains
4. 2 x 2 in one blankets
5. 2 pairs of sheets
6. One pillow
7. 2 Comforters
8. Hose pipe
9. CPU
10. 5 x 25 Litre containers
11. 3 x Cupboard doors
12. Summit – Iron
13. Electric kettle
14. Bed
15. Sofas
16. Microwave
17. Blankets
18. Nissan Sentra

ANNEXURE B

VITALIS TINASHE CHIKOMBA

1. Bed
2. Wardrobe
3. T.V
4. DVD Player
5. Wiztech Decoder
6. Radio
7. Upright fridge
8. Four plate stove
9. Wall lights, ceiling light spot light
10. Carpet
11. 3 x 2 in one blankets
12. 1 x bedspread
13. Two pillows
14. Green Comforters & Brown Comforter and Cream Comforter
15. Blinds
16. Electric motor
17. Coffee table
18. 6 window frames
19. Aluminium rods
20. CPU
21. Computer desk
22. 4 x 25 Litre containers

23. Bricks

24. VW Beetle

25. 2 x Wall pictures

26. Electric jug