

JACKSON CHIKONYE
versus
ANNAH CHIKONYE

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 30 & 31, May, 7 June 2012 & 10 January, 2013

Trial Cause

Z. Macharaga, for the Plaintiff
T. Makanza, for the Defendant

GUVAVA J: The plaintiff and the defendant are husband and wife. They contracted a customary law union in 1992 and married in terms of the Marriage Act [*Cap 5:11*] on 17 February 2005. The marriage was blessed with three children the eldest who is now a major. The other two are aged 14 and 5 years respectively. In August 2010 following an altercation between the plaintiff and the defendant the plaintiff moved out of the matrimonial home. On 24 March 2011 the plaintiff issued summons in this court seeking a decree of divorce, custody of the minor children and division of the parties' matrimonial assets.

At a Pre-Trial Conference held before a judge in chambers the parties agreed that their marriage had broken down. They were also agreed that there were no prospects of reconciliation. The parties further agreed that defendant should have custody of the minor children. The maintenance of the minor children would be governed in terms of a maintenance order issued by the maintenance court. They also agreed that the moveable property would be awarded to the defendant. The sole issue which was referred for determination was the distribution of the parties' immovable property being stand number 3629 Mainway Meadows Waterfalls Harare. The plaintiff in the summons claims a 50% share of the property whilst the defendant submits that he is not entitled to more than 13, 5% to 18, 5%.

It was common cause that the property in question was acquired during the duration of the marriage in 2007. The property is registered in the parties' joint names. The plaintiff opened his case by giving evidence in connection with the purchase of the immovable property. He stated that he paid Z\$1.5 billion whilst the defendant contributed Z\$300 million. The property was purchased as an undeveloped stand. He stated that at the time he was

working as a car dealer and operating from Analaby House. He was last formally employed in 1993 and thereafter he was running his own business. At the time his wife the defendant was employed as a nurse aid at Medicare.

Payment for the property was made in two batches. The first payment was for Z\$1,5 billion and the balance of Z\$300 million was paid later. The defendant made the payments as he was busy. She was accompanied by his brother's son. The plaintiff stated that he had paid the bulk of the money which he had raised from his car sales business and the defendant paid Z\$300 million. It took them a month to raise the money as they had not saved for it. The agreement was only signed after they had finished paying for the property. He stated that he was entitled to 50% share of the property as he had paid the bulk of the purchase price. The plaintiff submitted that he wanted his share immediately and could not wait until the youngest child attained the age of 18 year.

In cross examination the plaintiff conceded that he may have made a mistake with regards to the actual purchase price of the property when he was shown the receipts. They showed that the property had cost Z\$1,968 billion. He also confirmed that the defendant was staying at the property with the minor children. When asked where they would live if the property is sold the plaintiff stated that he would provide alternative accommodation. He however conceded that he has not been paying maintenance for the children but providing whenever he could. He was unaware of the improvements that have been effected on the property by the defendant and had not contributed to such improvements.

The defendant testified that she is employed by a nursing agency called BE MED. She explained that at the time she joined the agency in 1999 it was called MEDCARE and it changed its name 5 years ago. She stated that she has been married to the plaintiff for 19 years. At the time they got married the plaintiff was employed by National Carpets. After that they had their own company called Jackson Carpets but it got broke after a year. During the marriage they acquired both moveable and immoveable property. They purchased three motor vehicles and household goods and the immoveable property in Waterfalls. The defendant stated that she purchased the immoveable property on her own after she changed some foreign currency that she had saved. She stated that they had initially bought a stand in Norton which they sold and shared the purchase price equally. She changed her share into foreign currency whilst she did not know what the plaintiff had used his money for. She further explained that as a nurse aid when a patient whom they have been looking after dies the relatives give a token of appreciation. She would convert the money she received and

save it as foreign currency. She did not tell plaintiff of her savings as he was in the habit of selling household goods but kept the money hidden under her mattress. She only told him of the stand after she had purchased it. She denied that plaintiff had given her any money for the purchase of the stand. She stated that when she told him of the stand he was not happy and the dispute was only resolved when she agreed to include him as a co-purchase on the agreement of sale. She produced as exhibit the receipts for the purchase of the stand which showed that she had in fact paid Z\$1,9 billion and not Z\$1,8 as testified by the plaintiff.

She testified that the plaintiff left home in August 2010 and she has been struggling on her own with the children. She stated that the plaintiff has not been maintaining the children and she was of the opinion that he would not be able to maintain them even after the divorce and he received a share of the property. She stated that she was happy to buy out the plaintiff his share of the property so that she can remain on the stand with the minor children. She offered US\$1,500 to the plaintiff as his share which she changed to US\$2,000. When questioned by the court the defendant stated that the stand was valued at about US\$12,000 and she would be able to pay the plaintiff 35-40% of that amount with the help of her employer.

In cross examination the defendant contradicted herself on how the property came to be in both their names. At first she said she had added his name as a mere nominee as he was her husband and later stated that the plaintiff had been so violent that she had to add his name. She also failed to explain how she could have kept money under her mattress from 2005 when she admitted that in 2006 the family was in dire financial distress. She wasn't clear about the amount of foreign currency she had and how much she converted it to.

The plaintiff stated in his closing submissions that the court should apply the principles that were set out in the case of *Takafuma v Takafuma* 1994 (2) ZLR 103. It was argued on his behalf that as the property is jointly owned by the parties the court should make an award of 50% share of the immovable property to each of the parties. The defendant on the other hand contended that the court should apply the principles which are set out in the Matrimonial Causes Act [Cap 5:13] (the Act). It was submitted for the defendant that if a proper application of the principles is made the defendant should get a higher percentage of the immovable property than the plaintiff.

In my view the plaintiff correctly submitted that the court should apply the principles set out in the case of *Takafuma v Takafuma* (*supra*) However, it is apparent from a proper reading of the case that the award of his and her share is only the starting point when the court makes a distribution of matrimonial property. In dealing with the distribution of

matrimonial property the court is always enjoined to take into account section 7 of the Act in order to come up with an equitable share of the property of the parties. Section 7 (4) of the Act sets out the factors that the court should take into account when considering such an award and these include some of the following: income earning capacity of the parties, financial needs obligations and responsibilities of the parties, and their direct or indirect contributions.

It was apparent from the evidence led by the parties that they were focusing on the direct and indirect contributions of the parties in seeking an award. The plaintiff was at pains to show that he had contributed most of the purchase price whilst the defendant was also trying to show the same. It was apparent from the evidence that the plaintiff and the defendant were both bringing an income into the home. I did not believe the plaintiff when he stated that he had raised Z\$1,5 billion of the purchase price. Indeed it was apparent during cross examination that he did not know what the purchase price of the property was. In the same vein the defendant exaggerated when she stated that she had raised the whole purchase price on her own. It was not in dispute that in 2005, that is, prior to the purchase of the property the families' financial position was in a very bad way. At some stage the plaintiff had to go to the communal home to sell an ox to feed the family. In my view it was highly unlikely that the defendant would have kept money in hidden in her mattress when the family was literally starving. It seems to me that the parties did both contribute to the best of their abilities to the purchase price of the property.

However when one applies the factors which I outlined above it was apparent that the defendant would be entitled to a bigger share than the 50%. It was not disputed from the evidence that the defendant has been looking after the minor children of the marriage on her own since the plaintiff moved out of the matrimonial home. Although there is a maintenance order in existence the plaintiff has not been able to pay. The burden of looking after the children will therefore continue to rest with the defendant. Although the plaintiff stated in his evidence that once the property is sold and he has received his share of the purchase price he will be able to provide the children with another place to stay I did not believe that the plaintiff. The plaintiff does not receive a regular income and it is unlikely that he will fare much better even after he has received his share of the immovable property. The immovable property is the only place that the children have been able to call home for some time. It seems to me that therefore that the defendant is in need of the property more than the

plaintiff as she would have to provide shelter for the minor children. The youngest child is only 5 years old which means he has not even started formal school.

Section 7(4) b) of the Act also provides that the court should take into account the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future. It seems to me that if the plaintiff was in a position to look after the minor children the appropriate award would have been to give each of the parties a 50% share of the property. However in view of what has been stated above the plaintiff should get a lesser share as his obligations are mainly to himself.

The defendant has effected some improvements on the property since the plaintiff left in 2007. She has built a more permanent structure and put up a wall around the property. The difference in the award will also take that into account.

The defendant stated in response to questions from the court that she would be able to pay out the plaintiff 35 to 40% share of the value of the property. Taking into account that the defendant is going to bear the responsibility of taking care of the children she should get a slightly higher share than that of the plaintiff. Although the defendant had submitted that she was offering to buy out the plaintiff over a period of six months it is my view that this period is too long. The plaintiff stated that he would like to move on with his life. He cannot do so until he has received his share of the immovable property. The defendant is employed and with the assistance of her employer she can pay him off. The plaintiff indicated in his evidence that he was not opposed to the defendant buying him out as long as he received his share without waiting until the youngest child attains the age of eighteen.

In view of these factors it seems to me that the defendant should get the opportunity to buy out the plaintiff.

In the result I make the following order:

1. A decree of divorce is hereby granted.
2. Custody of the minor children Eugene Chikonye (born 14 September 1996) and Ashley Chikonye (born 24 February 2006) is awarded to the defendant.
3. The plaintiff is granted rights of access to the said minor children on alternative weekends and school holidays.
4. The plaintiff shall pay maintenance in the sum of US\$75.00 per month per child until they turn eighteen (18) or become self-sufficient whichever occurs first.
5. The moveable property be and is hereby awarded to the defendant.

6. The plaintiff is hereby awarded a 40% share and the defendant a 60% share of the immovable property known as stand 3629 Mainway Meadows, Waterfalls.
- a) The defendant is hereby awarded the right to buy out the plaintiff his share of the property.
 - b) The property shall be valued by an estate agent appointed by the Registrar from his list within 30 days of this Order.
 - c) The defendant shall pay the plaintiff his 40% share in the property within three (3) months of the date of valuation of the property.
 - d) In the event that the defendant fails to buy out the plaintiff in terms of this Order the property shall be sold at best advantage through a registered estate Agent and the parties shall be paid out their shares from the net proceeds.
 - e) The plaintiff shall pay 40 % of the cost of the evaluation and the defendant shall pay 60%.

Each party shall bear their own costs

Mupindu & Mugiya, Plaintiff's Legal Practitioners
Matimba & Muchengeti, Defendant's Legal Practitioners