

GLADYS CHIKUNI
versus
BUSANI MAVHIYO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 28 June, 1 July 2019 and 09 January 2020.

Matrimonial Trial

B Sadowera for plaintiff
B T Munjere for the defendant

CHITAKUNYE J. The plaintiff and the defendant were married in terms of the Marriage Act, chapter 5:11 on the 23rd April 2011 at Harare. During the subsistence of the marriage the parties acquired some assets.

On the 16th October 2018, the plaintiff sued the defendant for a decree of divorce and for the apportionment and distribution of assets of the spouses in terms of section 7 of the Matrimonial Causes Act [*Chapter 5:13*].

The plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that there are no prospects of restoration to a normal marriage relationship in that:

- (a) The parties have been on separation for a period of more than a year;
- (b) The defendant deserted the plaintiff for a prolonged period of time;
- (c) The defendant has failed to show love and affection to the plaintiff;
- (d) The plaintiff has therefore lost all love and affection for the defendant.

The plaintiff listed assets of the spouses and proffered how she wished the assets to be distributed between the spouses.

The defendant entered appearance to defend. Whilst conceding that the marriage relationship has irretrievably broken down he disagreed with the reasons advanced by the plaintiff for the breakdown of the marriage relationship. He proffered his own reasons for the breakdown and conceded that in the circumstances a decree of divorce may be granted.

On the list of the assets of the spouses, the defendant contended that the plaintiff had left out some assets and these should be included for distribution. He proffered his preferred manner of distribution of the assets.

From the pleadings filed of record it was apparent that both parties agreed that their marriage relationship has irretrievably broken down. They, however, disagreed on the list of assets available for distribution, both movable and immovable, and on how such assets should be distributed.

At a pre-trial conference held on the 18th February 2019 in terms of rule 182 of the High Court Rules 1971, the parties agreed that:

- (a) The marriage relationship between the plaintiff and the defendant has irretrievably broken down to such an extent that there are no prospects of restoration to a normal marriage relationship;
- (b) The Iveco Bus registration number ADC 2136 be awarded to the plaintiff;
- (c) The Iveco Bus registration number ADC 4954 be awarded to the defendant;
- (d) Stand number 1057 Sunningdale 3, Harare does not form part of the matrimonial assets;
- (e) The plaintiff be awarded a 50% of Stand number 6736 of Lot 14 Tynwald, Harare with the defendant being awarded the other 50% of the said property. They also agreed on how each would realise their respective shares.

The issues that the parties could not agree on and hence were referred to trial were stated as follows:

- i. Whether or not the Toyota Belta motor vehicle, registration number ADQ 2081 is matrimonial property? If so, what is a just and equitable distribution thereof?
- ii. Whether or not Stand 13059 Madokero is matrimonial property? If so, what is a just and equitable distribution thereof?
- iii. Whether or not Stand 1805 Arlington, Hatfield, is matrimonial property? If so, what is a just and equitable distribution thereof?

As regard the contested properties the parties were agreed that the above three properties were all registered in the name of the plaintiff.

On the trial date the issues for trial were curtailed to only one as the defendant abandoned his claim in respect of the Toyota Belta motor vehicle and Stand 1805 Arlington,

Hatfield Harare. The outstanding issue was thus: whether or not Stand 13059 Madokero is matrimonial property? If so, what is a just and equitable distribution thereof?

The apportionment division and distribution of assets at the dissolution of a marriage is governed by section 7 of the Matrimonial Causes Act, chapter 5:13. That section provides, inter alia, that:-

“(1) 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.”

The assets to be excluded are provided for in s 7(3) as follows:-

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

The factors to be considered in the apportionment, distribution and division of those assets available for distribution are stated in s 7(4) in these terms:-

“(4) In making an order in terms of subsection (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.”

Though the issue for trial refers to matrimonial property, the proper term as per the above section is ‘assets of the spouses’. The term ‘assets of the spouses’ has been construed to include all such property or assets belonging to a spouse at the time of the dissolution of

the marriage. Such assets may belong to spouses in their individual capacity or jointly owned. The assets may have been acquired before or during the marriage. What is of importance is that the asset must belong to one or both spouses at the dissolution of the marriage. See *Ncube v Ncube* 1993(1) ZLR 39(S)@ 42B-D and *Gonye v Gonye* 2009(1)ZLR 232(S)@ 237B-D.

Once assets belonging to either or both spouses have been identified the next stage is to determine how such assets should be distributed. It is at this stage that s 7(4) of the Act is invoked. That subsection enjoins court to consider all the circumstances of the case, including factors specified therein from (a) to (g) with a view to ensure that the distribution will place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.

Where a spouse wishes to have an asset excluded from consideration in terms of s 7(3) of the Act, the onus is upon that spouse to show that the asset falls within that category of assets to be excluded. Without such exclusion all assets must be placed on the table for consideration. It is during the process of consideration that the spouses' preferences including manner of acquisition will be taken into account. It must, however, be borne in mind that the manner of acquisition or by whom an asset was acquired would not necessarily result in that asset being awarded to that spouse. Section 7 empowers court to transfer a spouse's asset to the other in an endeavour to attain the objective of the section.

In *casu*, it is common cause that the outstanding asset is in the name of the plaintiff. By virtue of such registration it is deemed to be her property. However, the plaintiff's position was that though the property was still registered in her name, she in fact sold the property to one Lennon Tswana on 9 August 2017 before separation and subsequent suit for divorce. According to the plaintiff the property is, therefore, not available for distribution as it is no longer her asset.

To establish her position, the plaintiff gave evidence and called Lennon Tswana to testify in that regard. The defendant thereafter gave evidence insisting that he must be awarded a 50% share in that property as he contributed equally to the acquisition and development of that property.

Documentary exhibits were tendered into evidence mostly by plaintiff in support of her position that the property was no longer available for distribution.

From the evidence adduced it is common cause that the parties resolved to divorce. They are no longer compatible and wish to have their marriage dissolved. That shall be

granted. It is also common cause that at the time of their marriage on 23rd April 2011 the plaintiff was engaged in the business of buying and reselling residential stands after effecting some improvements. She also operated some shops in which she traded in various wares. She owned her own house namely Stand 3643 Mainway Meadows, Harare which on marriage the two agreed would remain as her property. When they got married defendant moved to stay in the plaintiff's said house.

It is also common cause that at the time of marriage defendant was a bus tout operating in Beitbridge. He thus had no formal employment. After marriage he moved in with plaintiff but continued with his work as a bus tout. At times he would go to neighbouring countries in that capacity. When the plaintiff bought her first IVECO Omnibus in 2014, the defendant then switched to driving and managing that bus. That then became his occupation. The plaintiff later acquired a second IVECO Omnibus and defendant managed the transport business whilst also driving one of the buses. The income from the transport business became defendant's main contribution to the family. The plaintiff on the other hand continued with her business ventures as before.

As regards' the property in issue the plaintiff's evidence was to the effect that she bought it in the normal course of her business of buying and reselling stands. She bought the Stand from Altaworld Investments (Pvt) Ltd on 31st July 2014. The property had recently been granted subdivision permit and had no title deeds as yet. Transfer into her name was only effected on 11 April 2019 after she had already resold the property. The agreement of sale was tendered into evidence as exhibit 4. She testified that after acquiring it as a vacant stand in 2014, she effected improvements comprising a dwelling house on her own to an extent that it became habitable in 2017. The family then moved from her Mainway Meadows House to number 13059 Madokero in 2017. The plaintiff tendered receipts pertaining to building materials she said she bought on her own for the construction of the dwelling house at the stand in question. After the family had been in the house for some months, on 9 August 2017 she sold the property to Lennon Tswano as she had debts to pay. The agreement of sale dated 9th August 2017 was tendered into evidence as exhibit 2. The plaintiff also tendered documents headed 'acknowledgment of receipt' as proof of payment by Lennon of the purchase price for the property as exhibits 3(a) – (d).

The plaintiff further testified that after the purchaser had made full payment, they began paying rentals for their continued stay in the house from April 2018 in the sum of \$300.00 per month. Due to some financial difficulties at some point she had to sell a bath tub

to raise money for the rent. As she faced further difficulties in raising rentals she vacated the property in August 2018 and left defendant in occupation. The defendant later left the property in about September 2018 thus enabling the purchaser to take occupation from about October 2018. It was her evidence that defendant vacated the property as he could not pay the rent. In leaving the property defendant went to occupy the couple's property Stand 6736 of Lot 14 Tynwald Township though the property was not still under construction.

The plaintiff maintained that Stand 13059 Madokero was bought and sold as her property in the course of her business. It was never intended to be matrimonial property. The property they had bought as the family property was Stand 6736 of Lot 14 Tynwald. To signify their intention in this regard though she contributed the most towards the purchase of the Tynwald property, the parties were both endorsed as purchasers and the property was thus jointly owned.

Lennon Tswano gave evidence to the effect that he bought Stand 13059 Madokero from the plaintiff as he believed she was the owner. He duly paid the agreed purchase price in instalments. In this regard he referred to the Agreement of Sale and the acknowledgments of receipt for the payment of the purchase price tendered by the plaintiff. Lennon further confirmed that as from April 2018 the plaintiff and the defendant were paying rentals to him in respect of the property in question. He thereafter took occupation in October 2018 after the plaintiff and the defendant had vacated the property. Lennon categorically refuted the suggestion that he had not purchased the property but had merely connived with plaintiff to pretend to have bought the property.

The defendant thereafter gave evidence. In his evidence the defendant conceded that the plaintiff had told him that she had sold the Madokero property before the parties had separated. He also confirmed that after the sale plaintiff told him that they now had to pay rent to the purchaser. He confirmed that plaintiff left the house in August 2018 leaving him behind. As he could not pay rent he also vacated the house in September 2018. Though the defendant contended that he did not accept as true that plaintiff had sold the property, hence he was not willing to pay rent, he nevertheless confirmed that the alleged sale took place before they separated. He further indicated that despite his misgivings about the sale he never took any legal steps to assert or protect his rights and interests in the property. He instead moved to their jointly owned Tynwald house which was still under construction but was nevertheless habitable. The defendant could not proffer any plausible explanation for not taking any legal steps to protect his perceived rights and interests in the Madokero property.

This failure was in spite of his evidence that he came to know that plaintiff had purchased this Stand in December 2014 and had put it into her sole name to his exclusion contrary to his expectation that it would be in their joint names. From December 2014 to September 2018 he virtually took no steps to assert his rights and interests in a property he said his initial contribution was about \$10 000 towards the \$20 000.00 purchase price. He also did not find it necessary to assert his rights and interests despite his mistrust of the plaintiff from the manner in which he said plaintiff omitted his name from the Agreement of Sale. This is a property he said he had contributed towards its purchase and development in equal measure with plaintiff and yet plaintiff was acting as if he had not contributed anything.

Such inaction must also be considered in the light of his own admission that plaintiff was involved in the business of buying and reselling residential stands. In such ventures she would put the stands into her name.

The evidence adduced clearly confirms that the sale, if true, took place over a year before issuance of the summons and when parties were still staying together. A genuine sale in such circumstances would lead to a finding that the property was no longer available for distribution at the dissolution of the marriage. If, on the other hand the sale was not genuine, as alleged by the defendant, then the property would be available for distribution.

It is trite that an owner of a property has the right to dispose of their property in a manner they desire. In cases of husband and wife relationships a spouse can dispose of his or her property without the consent of the other as long as such disposal is not mala fide. In *Isaac Sithole v Lucia Sithole* HH 674/14 at p 9 of the cyclostyled judgment I reiterated that:

“It is trite law that a wife cannot bar her husband from selling assets registered in his name more so when no divorce action requiring the distribution of those assets is instituted. However, court can intervene where a sale is not genuine but is meant to defeat the wife’s cause.”

Further, in *Muswere v Makanza & Others* 2004 (2) ZLR 262 (H) MAKARAU J (as she then was) had occasion to deal with a situation where a husband had disposed of the house that the wife believed she had a share in. The wife had argued that the husband should not have disposed it without her consent. The learned judge at p 266 D-E stated that:

“The position in our law is therefore that a wife cannot even stop her husband from selling the matrimonial home or any other immovable property registered in his sole name but forming the joint matrimonial estate: There must be some evidence that, in disposing the property, the husband is disposing it at under value and to a scoundrel. Mere knowledge that the seller of the property is a married man who does not have the consent of the wife to dispose of the property is not enough..”

A spouse has a right to sell a house forming part of the matrimonial estate but registered in his or her sole name without the other spouse's consent. Court may, however, intervene when such a sale is intended to defeat the other spouse's just rights. In this regard the spouse seeking court's interference in the disposal must show the lack of *bona fides* in the disposal and that the sale was a sham or simply intended to defeat his/her just cause. see *Muzanenhano & Another v Katanga and Others* 1991(1) ZLR 182(S); and *Muganga v Sakupwany* 1996 (1) ZLR 217(S) at 220 F-G.

Clearly, therefore, the existence of a dispute between spouses *per se* would not be adequate to interfere with the disposal to the third party.

If a spouse is to succeed, he/she has to show that the third party is guilty of fraudulent intent and there was intention to defeat the spouse's just right. In *casu*, it was incumbent upon the defendant to show that the alleged sale of the Madokero property to Lennon was not genuine but was a ruse to deprive him of his just claim.

The plaintiff tendered an Agreement of Sale which on the face of it seemed genuine and acknowledgments of receipt of the purchase price. As alluded to above the onus was on the defendant to rebut the authenticity of the tendered documents and show that no such sale took place or that it was a sham.

The defendant's contention that the sale was not genuine is out of a sense of intuition or suspicion. It was incumbent upon the defendant to disprove the alleged sale and not to merely rely on suspicion. One could not discharge such an onus by merely alluding to their suspicion; they are required to move beyond mere suspicion and present credible evidence of the sham. This sadly, was lacking in this case. In my view the defendant lamentably failed to establish that the sale was a ruse to deprive him of his rights in the property. The few inconsistencies alluded to in the closing submissions were not material or such as would show that there was no sale at all.

I am of the view that as at the time of the issuance of the summons the Madokero property had been sold and the defendant was aware of this. It was thus no longer available for distribution. The fact of the title deeds being in plaintiff's name was due to delays in registration just as had happened after the sale to plaintiff. The parties nevertheless acknowledged that Lennon had bought the property hence they paid rentals to him before vacating the property. The defendant could not proffer a plausible explanation for vacating the property if he did not believe it had been sold and the new owner was demanding rentals. It is not the norm that an owner would vacate their property for no reason or at the instance of

a third party with no acquired rights or interests in the property. The defendant's inaction in the face of the alleged sale and his vacation of the property only served to confirm that a genuine sale transaction took place.

I am of the view that the balance of probability favours the plaintiff's version that the Madokero property was no longer available for distribution. In that regard no distribution will be made regarding that property.

As this was the only outstanding issue the matter has to be decided on the aspects already agreed to by the parties.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. The plaintiff is hereby awarded the IVECO Motor vehicle registration number ADC 2136 as her sole and exclusive property;
3. The defendant is hereby awarded the IVECO Motor vehicle registration number ADC 4954 as his sole and exclusive property;
4. The plaintiff be and is hereby awarded a 50% share of Stand number 6736 of Lot 14 Tynwald, Harare with the defendant being awarded the other 50% thereof.
5. The Registrar shall appoint an estate agent to evaluate the said property from his list of valuers within 30 days from the date of request by the parties. The costs of evaluation shall be shared equally by the parties.
6. The said Stand 6736 of Lot 14 Tynwald, Harare, shall thereafter be sold to best advantage on the open market by the estate agent appointed in clause 5 above or one mutually appointed by the parties with the parties being awarded a 50% share of the net proceeds.
7. Each party shall bear their own costs of suit.

Tadiwa & Associates, plaintiff's legal practitioners
Mazhande Mazhande legal practice, defendant's legal practitioners.