

TANGA ERNEST SANDO  
versus  
IRENE WAIRIMU SANDO (NEE MATHENGE)

HIGH COURT OF ZIMBABWE  
NDEWERE J  
HARARE, 19 & 20 March 2019, 5 & 12 April 2019 and 3 June 2020

**Civil trial**

*M.E. Motsi*, for the plaintiff  
*P. Chakasikwa*, for the defendant

NDEWERE J: The plaintiff and the defendant met in the United States of America when the defendant was 17 years of age while plaintiff was 25 years of age. They got into a customary marriage in Kenya in 1987. On 1 July, 1987 they had their first child Takunda Sando. They moved to Zimbabwe with the young child in 1988. On 11 September, 1988, they solemnised their marriage in terms of Chapter 5:11 in Harare, Zimbabwe

They arrived in Zimbabwe in 1988 with just two suitcases and a baby. They got employed, the plaintiff as an artist and musician and the defendant as a pharmacist. Eventually, they set up businesses both in the pharmaceutical industry and the arts industry. They registered Medicare (Pvt) Ltd in 1992 and Tega Tega Communications in 1997. They each continued working for a salary. Eventually the defendant got employed by Medicare (Pvt) Ltd, the pharmaceutical business. In 1989 they had their 2<sup>nd</sup> child. The plaintiff continued to be gainfully employed in the arts sector, in addition to the businesses. The couple worked hard in both their jobs and businesses. They bought immovable property.

They bought No. 304 Glen Road, Glen Lorne as a family asset in 1997. It became their family home. It was registered in defendant's name. They retained their tenancy in No. 33 Wansford Court, Harare in order to buy it as sitting tenants when the opportunity arose, as a family investment. That opportunity arose in 2001 and the plaintiff as the sitting tenant was offered 33 Wansford Court. He paid a deposit, but paid nothing thereafter. Defendant later took over the purchase of 33 Wansford Court in her own name and paid for it. It was registered in her own name.

As Medicare (Pvt) Ltd, they sought Council commercial land in Highfield and got stand 10230 in October /November 1999. The final payment for Stand 10230 Highfield was on 28 September 2000. The plaintiff later processed the transfer and had the Highfield property registered into his personal name.

There was a Highfield property belonging to the father in law which was donated to the plaintiff. It was registered in plaintiff's name in 1991. That property is Stand 2690 Highfield Township, a residential stand.

There was a property in Gunhill, registered in both their names in 1997 which they sold and shared the proceeds equally in 2013. It was Stand 14569, Gunhill, Harare.

It is common cause that their marriage was turbulent from the early nineties. On 4 April, 1999, the defendant sought the plaintiff's extended family's intervention and at a family meeting in Highfield, the plaintiff declared that the marriage had broken down and he was no longer interested in a reconciliation with the defendant. The following day, he got to the matrimonial home, told the children that he was leaving and took out his personal effects. The parties have not lived together since the day he moved out, on 5 April, 1999. They remained civil to each other for the children's sake. Then in 2002, the defendant left for the United Kingdom with the two children of the marriage. She is still based in the United Kingdom and the two children are now both majors.

On 2 July, 2015, the plaintiff issued summons for divorce and ancillary relief. He said the marriage had broken down irretrievably. He said the defendant deserted the matrimonial home in 2001. He said the parties had lost love and affection and they had not lived together for the past fourteen years. He said their children were grown up so there were no issues of custody, access or maintenance. He said the parties had already shared the moveable property and each party can keep what they got. On the immovable property, he listed No. 304 Glen Road, Glen Lorne, Harare and Number 33 Wansford Court, 66 Josiah Chinamano Road, Harare as the properties acquired by the couple during their marriage. He prayed that both properties be sold to best advantage and the proceeds shared equally between the parties. He said each party should pay its own costs.

The defendant filed her plea on 18 March, 2016. She denied deserting the matrimonial home and stated that it was the plaintiff who deserted the home two years before the defendant left for the United Kingdom together with the minor children to further her studies. She said House No. 304 Glen Road, Glen Lorne, Harare and No. 33 Wansford Court, 66 Josiah Chinamano Road were acquired by the defendant on her own without any

contribution from the plaintiff. She disclosed that the plaintiff himself had two properties belonging to the parties which were registered in his name, namely Stand 2690 Highfield township donated to them as a wedding gift and Stand 10230 Highfield Township, a commercial Stand at Machipisa Shopping Centre in Highfield. She alleged that the plaintiff also acquired properties in South Africa using funds belonging to companies owned by both of them. She said a fair distribution would be for the plaintiff to retain the Highfield properties registered in his name and the South African properties while she retained 304 Glen Road, Glen Lorne and 33 Wansford Court registered in her name. She filed a claim in reconvention which stated the same position as in her plea. She said each party should pay its own costs.

In his replication, the plaintiff said Stand 2690 Highfield was registered in his name to enable the couple to use it as collateral security when they sought loans to start their businesses, Medicare (Pvt) Ltd. In his plea to the defendant's claim in reconvention in paragraph 14.2 he admitted that Stand 10230 Highfield Township was an asset of the spouses, subject to distribution. But in the same paragraph, he denied owning any property in South Africa and put the defendant to the proof. He said because of the low value of the Highfield Commercial property, he should be awarded the commercial property together with 33 Wansford Court, while the defendant is awarded the Glen Lorne property which has more value. Alternatively, he said all the properties should be evaluated and sold and the proceeds shared equally. He agreed that each party should bear its own costs.

On 3 April, 2017, the parties concluded the following Joint Pre-Trial Conference minute:

"1. Issues:-

- 1.1 What constitutes the immovable assets of the spouses.
- 1.2 What would be the just and equitable distribution of the immovable assets of the parties."

The admissions made were that the marriage had irretrievably broken down and that each party should retain the movables already in their possession as their sole property.

The matter proceeded to trial on 19 March, 2019 and 20 March, 2019. At the trial, the defendant applied to amend her plea and claim in reconvention in order to claim fifty percent of the property in South Africa and 50 percent of stand 10230 Highfield, Harare. The plaintiff did not oppose the application so the plea and claim in reconvention were amended as stated in the amendment notice filed on 7 March, 2019.

After the trial hearing, the plaintiff filed closing submissions on 5 April, 2019 while the defendant filed her closing submissions on 12 April, 2019.

The first issue is what constitutes the immovable assets of the spouses. From the pleadings, the plaintiff is the registered owner of Stand 2690, Highfield Township and Stand 10230 Highfield Township. The defendant is the registered owner of No. 33 Wansford court and Number 304 Glen Road, Glen Lorne.

So from the point of view of registration, the assets of the spouses seem to be four, the two Highfield properties the Glen Lorne property and No. 33 Wansford Court.

The defendant alleged that the plaintiff had properties in South Africa. Apart from that assertion in her plea in paragraph 8.3 she did not provide proof of the alleged South African properties. The court cannot distribute a property that is not known to the court. Therefore the court finds that no immovable assets of the spouses were proved to be available in South Africa.

The plaintiff referred to an undescribed property in the United Kingdom owned by the defendant in his closing address. However, the plaintiff's pleadings did not include any United Kingdom property. The plaintiff is bound by what he claimed in his pleadings. The court cannot "distribute" the unknown property in the United Kingdom when it was never part of the divorce proceedings.

The defendant alleged that Stand 2690 Highfield was donated to them as a couple by her late father in law as a wedding gift and is therefore an immovable asset of the spouses. From the evidence led during the trial from both the plaintiff and the defendant, the court was not convinced that Stand 2690 Highfield township was an immovable asset of the spouses liable to distribution upon their divorce. This is because the evidence led revealed that this was a property previously owned by the plaintiff's father where his wife, children and grandchildren still lived. The court was satisfied that this was a property registered in the plaintiff's name in trust; on behalf of his father's extended family. It cannot be distributed upon divorce. This position is in line with s 7 (3) (b) of the Matrimonial Causes Act [Chapter 5:13 which exempts assets acquired in terms of a custom.

The defendant confirmed that her mother in law had lived at Stand 2690 Highfield all her life and that it would not be fair for her to be left homeless if the property was distributed upon their divorce. She later abandoned her claim for the distribution of Stand 2690 during the trial.

So this leaves the court with three properties to consider.

The plaintiff accepted that Stand 10230 Highfield was a family asset in his evidence to the court. It was acquired in October/November, 1999. The defendant accepted that 304 Glen Road, Glen Lorne was a family asset during her evidence.

So the above two properties are family assets liable for distribution upon divorce.

Then there is 33 Wansford Court. It was acquired during the marriage but after the plaintiff had left the matrimonial home in 1999. The original intention had been that it be purchased as a family investment because the parties had already purchased 304 Glen Road, Glen Lorne as a home. Initially, the plaintiff entered into an agreement of sale to purchase the flat. He signed the agreement and paid the deposit. Later the agents agreed to cancel the agreement with the plaintiff, refund him his deposit and enter a new agreement with the defendant. This is what happened and as far as defendant was concerned, the plaintiff was paid back his deposit. She signed a new agreement, paid a deposit and eventually paid for the property in full. The price for the property was two million and two hundred thousand dollars. The deposit was \$550 000.00 paid on 12 March, 2002. The balance of \$1 650 000 was payable upon transfer. The defendant paid it on 13 March, 2002.

So there is evidence that after cancellation of the sale of 33 Wansford Court to the plaintiff, the defendant bought the flat and paid for it directly on her own on 12 March, 2002 and 13 March, 2002. There was no direct contribution from the plaintiff.

Regarding indirect contribution, when 33 Wansford Court was purchased, the plaintiff had already left the matrimonial home. He was no longer contributing indirectly as a spouse to the defendant. A spouse contributes indirectly when they are sharing a life with the other spouse. When they have deserted the marriage, there is no longer consortium, conjugal rights or company. So there was no indirect contribution by the plaintiff to the life of the defendant.

Furthermore, although this property was purchased by the defendant on her own, the plaintiff still benefited immensely from this property from the date of purchase up to now, to the exclusion of the defendant, the registered owner. There is proof that the plaintiff was not paying even the levies for 33 Wansford Court. The defendant was sending money for the purpose. The defendant's evidence was that she maintained the property, effected repairs and paid levies while plaintiff either lived there, or used it as a studio or let it out and used all the rentals on himself without sending anything to the defendant and the children.

The plaintiff did not dispute that he was the one who had solely enjoyed use of the property from when it was purchased. He admitted that despite collecting rentals from the property, he never sent the defendant money to assist her with the children's upkeep. She

raised the children single handedly from 2002 when she took them to the United Kingdom, till they completed their tertiary education.

Given this background; that of lack of direct or indirect contribution to the purchase of 33 Wansford Court by the plaintiff, coupled with the sole enjoyment of the property by the plaintiff since its purchase, it is just and equitable that the defendant be awarded one hundred percent (100%) of No. 33 Wansford Court, No. 66 Josiah Chinamano Avenue, Harare.

The parties agreed that Stand 10230 was an asset purchased by funds belonging to both of them. Indeed, there is evidence of the application by Medicare (Pvt) Ltd and payments by Tega Tega Communications, Companies belonging to both parties. However, the plaintiff, as the person who was present in the country to develop the property, must have contributed more in the construction of the improvements now present at this property. For that reason the court is of the view that a distribution of (60) sixty per cent to the plaintiff and forty percent to the defendant would be fair and equitable.

The parties also agreed that No. 304 Glen Road, Glen Lorne, was a family asset. However, the defendant's evidence was that she paid for it directly on her own, paying the deposit from her salary as a Pharmacist at Medicare (Pvt) Ltd and continuing to pay for it even after going to the United Kingdom, sending funds to service the mortgage, insurance policies and for maintenance of the property. She therefore wanted the whole property.

From the evidence, it appears the plaintiff indeed did not contribute directly. He did not even know what the deposit was. He claimed to have given money to the defendant but the defendant countered that and said the modest amount he gave her was for the children's maintenance. So the court received evidence of the defendant's direct monetary contribution, but it got no evidence from the plaintiff of any direct contribution. So the court rules that the plaintiff did not contribute directly to the purchase of No. 304 Glen Road, Glen Lorne, Harare.

However, on indirect contribution, the plaintiff said he was sending the children to school. He said he sent them to the best schools when they were in Zimbabwe. The defendant also accepted that while she was still in Zimbabwe with the children, the plaintiff paid their fees. The court finds that to be a relevant indirect contribution by the plaintiff. Put differently, the defendant was able to focus on depositing for the house and paying for it while she was in Zimbabwe because the defendant was carrying the school fees' burden.

However, from his own evidence, after the children left Zimbabwe, the plaintiff's indirect contribution stopped while the defendant continued to contribute directly by

servicing the mortgage, insurance as well as maintenance of the property; in addition to funding the children's maintenance and schooling single handedly. This means the defendant contributed more towards the acquisition of Stand 304 Glen Road, Glen Lorne, Harare. It would not be fair therefore to share the property on a ratio of fifty to the plaintiff and to the defendant fifty when there is a party who contributed much more than the other. As a result, the court's view is that it is just and equitable to award the defendant 70% of Stand 304 Glen Road, Glen Lorne with the plaintiff getting thirty per cent for his indirect contribution when he helped maintain the children and paid their school fees before they left for the United Kingdom in 2002.

On costs, the defendant, in her closing submissions asked that she be awarded costs because she had to travel to and from the United Kingdom. That cannot be. In her relief, she never prayed for costs. She said each party should pay its own costs. She cannot start praying for relief which she never sought in her pleadings.

IT IS ORDERED THAT:-

1. A decree of divorce be and is hereby granted to the plaintiff.
2. The plaintiff shall retain ownership of Stand 2690 Highfield Township as his sole property.
3. The defendant shall retain Number 33 Wansford Court as her sole property.
4. The plaintiff be and is hereby awarded sixty percent (60%) of the value of Stand 10230 Highfield Township, with the defendant being awarded the remaining forty percent (40%) of the value.
5. The defendant be and is hereby awarded seventy per cent (70%) of the value of stand 304 Glen Road, Glen Lorne, with the plaintiff being awarded the remaining thirty (30%) per cent of the value.
6. Stand 10230 Highfield Township and Stand 304 Glen Road, Glen Lorne shall be valued by valuers agreed to by the parties and paid by both parties or appointed by the Registrar within two months of the date of this order; to enable the parties to ascertain the values awarded to them in monetary terms.
7. The plaintiff shall have the first option to buy out the defendant from Stand 10230 Highfield by paying her the equivalent of her forty percent value within four months of the date of this order. Failing that, the defendant shall have the option to buy out the plaintiff from Stand 10230 Highfield by paying him the equivalent of his sixty percent of the value within two months of the plaintiff's failure to pay her off her

forty percent share. If neither party wishes to buy out the other, the property shall be sold at the market value and each party awarded its share after deducting the costs of the sale.

8. The defendant shall have the first option to buy out the plaintiff from Stand 304 Glen Road, Glen Lorne by paying him the equivalent of his thirty per cent value within four months of the date of this order. Failing that, the plaintiff shall have the option to buy out the defendant by paying her a seventy per cent share of the value within two months of the defendant's failure to pay him off his thirty per cent share. If neither party wishes to buy out the other; the property shall be sold at the market value and each party awarded its share after deducting the costs of the sale.
9. The parties are free to set off their awards in Stand 10230 Highfield and Stand 304 Glen Lorne, respectively; against their aggregate share.
10. Each party shall pay its own costs.

*M.E. Motsi and Associates*, plaintiff's legal practitioners  
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