

CAROL AGATHA ZHOU (NEE BVUNZAWABAYA)
versus
EMESON NDOVISAI ZHOU

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 11 & 12 July 2022 & 24 May 2023

TRIAL

K Siyeba, for the plaintiff
H Muromba, for the defendant

MAXWELL J:

BACKGROUND

Plaintiff and Defendant were married on 28 June 1991. The marriage was blessed with three children, Tafara David Zhou (born 15 October 1992) (Tafara), Ruvimbo Charity Zhou (born 23 December 1997) (Ruvimbo) and Rugare Ndovisai Zhou (born 18 October 2009) (Rugare). Plaintiff issued out summons for divorce and ancillary relief on 20 September, 2019, on the grounds that the marriage relationship has irretrievably broken down to the extent that it can no longer be salvaged. In her declaration she stated that one of the children, Rugare is still a minor and given that Plaintiff has been staying with her in the absence of the Defendant, it is just and equitable that custody of the minor child be awarded to her with Defendant being allowed reasonable access. She proposed that Defendant be ordered to maintain the minor child by paying school fees and a cash amount of US\$2000 per month to cater for clothing, school uniforms and school extra curricula activities. She further proposed that Defendant be ordered to maintain Ruvimbo who is still at University in China by paying US\$6100.00 university fees per annum, US\$900.00 accommodation fees per annum and US\$500.00 per month for subsistence/upkeep. She pointed out that during the subsistence of the marriage, the parties acquired nine (9) immovable properties in Zimbabwe and ten (10) in Mozambique. She indicated that the parties also acquired household goods which are at one immovable property in

Harare, Zimbabwe and at 4 immovable properties in Mozambique. In addition, the parties acquired six motor vehicles of which three (3) are in Zimbabwe and the other three (3) in Mozambique. She also listed the farm property comprising of three hundred and eighty (380) cattle, goats, a tractor, a disc roan and a grass cutter. She proposed how the property should be distributed.

Defendant entered his appearance to defend and stated in his plea that the summons came as a surprise as the relationship between the parties had never reflected any disagreements of note. He disputed that the marriage had irretrievably broken down. He nevertheless agreed to Plaintiff being awarded custody of the minor child but challenged the requirement to pay maintenance in United States dollars. He pointed out that the Plaintiff is receiving additional income from the parties' investments which includes rental income from four leased upmarket properties as well as income from two farms being run by the parties. Further that Plaintiff is gainfully employed by a United Nations Agency with a United States Dollar based salary. Defendant submitted that Plaintiff has a constitutional duty to contribute to the maintenance of her children and therefore cannot insist on him solely taking care of the children. In his view, the amounts claimed for Ruvimbo show that Plaintiff is now using the child as an income generating project, as the amount of maintenance claimed is over 200% of what the parties are currently giving the child. He proposed that each party contributes 50% towards Ruvimbo's school expenses. Defendant submitted that he did not own eleven (11) of the immovable properties alleged by Plaintiff to have been acquired by the parties during the subsistence of their marriage. He also denied owning a Nissan Xtrail registration number AFZ 235MC listed in Plaintiff's declaration. He disputed the distribution plan proposed by Plaintiff.

In her replication, Plaintiff pointed out that Defendant can pay the maintenance at the interbank rate. She pointed out that the additional income from the parties' investments was being channeled towards the upkeep of Rugare and Ruvimbo as well as university fees for Ruvimbo, and there is no guarantee that the income will be available after distribution of the properties. She denied inflating the figures for the maintenance of Ruvimbo.

JOINT PRE-TRIAL CONFERENCE

On 18 October 2021, the parties signed a Joint Pre-Trial Conference Minute which was filed on 21 October 2021. The parties agreed on the custody and maintenance of the minor child

as well as school fees and boarding expenses for Ruvimbo. They agreed on sharing the movable properties and came up with a list of immovable properties that constitute matrimonial property. They also listed property concerning which there was disagreement on whether or not it constituted matrimonial property. They failed to agree on the distribution of the immovable properties and referred the following issues to trial.

- a) Whether or not donated property constitute matrimonial property,
- b) Whether or not Market Link Ltd Properties constitute matrimonial property,
- c) Whether or not Trust Property constitutes matrimonial property,
- d) Whether or not House number 139 Villa Sol, ao Lado da Casa 320, Bairro Triumfo, Maputo, did not constitute Matrimonial Property at the time of its sale.
- e) What constitutes equitable distribution of assets?

TRIAL

Plaintiff gave her evidence in chief on the first day of the hearing. The court adjourned at the end of the day. On resuming the hearing the following morning, Mr *Siyeba* indicated that the parties had extensively found each other on the distribution of most of the property. Only one issue remained, the equitable distribution of house number 139 Villa Sol Au Lado Dakasa 320 Bairro Triumfo Maputo (the house). This was confirmed by Mr *Muomba*. This Court has to consider whether or not House number 139 Villa Sol, ao Lado da Casa 320, Bairro Triumfo, Maputo, constituted Matrimonial Property at the time of its sale.

The Plaintiff's evidence on the house was as follows. Sometime in 2017-2018 Defendant informed her that he had purchased a new house for the family, being the house in question. When she and her family travelled to Mozambique, the parties met to celebrate the purchase of the new house with their relatives. Defendant informed her that he had sold the parties' matrimonial house and used the proceeds of the sale to purchase the property in question. She however heard through the grapevine that the matrimonial home had not been sold but that Defendant was keeping his mistress there. She demanded to see the agreement of sale for the house and Defendant threatened to reverse the transaction. The house was initially in Defendant's name but was now in the name of Robson Mutandi, Defendant's friend. She discovered that the house had been sold after divorce summons were issued. Summons were issued out on 20 September, 2019 and the agreement of sale for the house is dated 20 October

2019. In her view the house was sold in an attempt to defeat her claim to assets of the marriage. Under cross examination she indicated that Defendant had held this property since 2007.

Defendant testified that he assisted Robson Mutandi to acquire the house in Mozambique in 2015. Robson Mutandi did not have the requisite paperwork to procure property in his name at the time therefore it was registered in Defendant's name. It was always clear between him and Robson Mutandi that the property belonged to Robson Mutandi. The agreement of sale was done on the date of transfer. Early 2019, when he was moving to South Africa, Robson Mutandi offered to sell the property to Defendant. He did not have the funds to buy the property. He approached Plaintiff with a proposal to sell the property in Maracuane to fund the purchase. Plaintiff initially agreed but changed her mind. He abandoned the deal and decided to transfer the property to its rightful owner. The process of transfer started before he was served with the divorce summons. He disputed that the transfer of the property was done to frustrate any claims arising from the divorce. The property has been registered in Robson Mutandi's name since October 2019.

Indeed a document titled agreement of sale of immovable property states that the parties appeared before a Notary Public on 29 October 2019 confirming the agreement. It is common cause that prior to 29 October 2019 the said property was registered in Defendant's name. It is trite that a title deed is *prima facie* proof that a person enjoys real rights over an immovable property defined in the deed. See *Savanhu v Hwange Colliery Company* SC 8/15. Defendant's allegation that he bought the house on behalf of Robson remained unsubstantiated. It is trite that he who makes an affirmative assertion bears the onus of proving the facts so asserted. See *Nyahondo v Hokonya* 1997 (2) ZLR 457 @ 459. Defendant did not produce any evidence from Robson confirming his allegation, either orally or on affidavit. Neither did he produce proof that money to pay the purchase price came from Richard. He therefore did not discharge the onus upon him. Accordingly the sale of the house after the issue of the divorce summons was a ploy to deprive Plaintiff of her share. Accordingly the Plaintiff is entitled to 50% of the value of the property at the time of transfer to Richard.

That being said, the value of the house at the time of transfer to Richard was not established. In closing submissions, Plaintiff prayed for an order that Defendant transfers one of his half undivided share in the properties that the parties have agreed shall be exclusively his in

order to ensure fairness in the distribution of the parties' assets. Defendant submitted that the relief sought by the Plaintiff in relation to this property is incompetent for two reasons. The first is that the order sought by the Plaintiff has the effect of varying the terms of the agreement reached by the parties. Indeed the court cannot vary the terms consented to by the parties. The second is that Plaintiff did not lead evidence on the value of the said property. In my view that cannot be a basis for denying Plaintiff her share. The parties must agree on a value of the property at the time of transfer to Richard failing which they should enlist the help of an agreed property valuer which valuation must be conducted within a period of two months. If the parties fail to agree, a valuer is to be appointed by the Sheriff of the High Court and the valuation shall be carried out at the defendant's expense.

COSTS

Plaintiff claimed costs on a legal practitioner and client scale. She indicated that she had to expend monies to investigate the assets of the parties in Mozambique as the Defendant was not forthcoming. She indicated that she had to seek professional assistance to translate agreements of sale in Portuguese and had to interdict the Defendant from disposing of any further properties. In essence, Plaintiff's claim is that Defendant's conduct brought additional and unwarranted expenses to her. Defendant pointed out that there was no winner or loser in this matter as the parties compromised and resolved most of their differences through engagement. It is trite that an award of costs on a legal practitioner and client scale is given in exceptional circumstances. Plaintiff did not take the court into her confidence with regard to the amounts she claimed to have expended in investigations. Neither did she avail to the court the cost of translation services. The cost of the litigation to interdict Defendant from disposing of any further properties was also not placed before this court. Her claim remained unsubstantiated. I am therefore inclined to agree with the Defendant.

DISPOSITION

IT IS ORDERED BY CONSENT THAT; -

1. A decree of divorce be and is hereby granted.
2. The custody of the minor child, Rugare Ndovisai Zhou born on 18 October 2009 be and is hereby granted to the plaintiff.

3. The Defendant shall have access to the minor child, Rugare Ndovisai Zhou born on 18 October 2009 on alternative school and public holidays.
4. Plaintiff shall retain as her sole and exclusive properties
 - a) House number 36 Stratford Drive, Greystone Park, Harare,
 - b) House number 31 Pat Palmer Owen Drive, Mabelreign, Harare,
 - c) Flat number 2 Dover Court, No 1 Jason Moyo Avenue, Harare,
 - d) Stand number 550 ZIMRE Park, Ruwa,
 - e) Parcella 461 Bairoo, Jafar , Maracuena, Maputo, Mozambique,
 - f) Stand number 3891 Bairoo Trangapassio, Chimoio/Manica, Mozambique, and,
 - g) Propert in Dandemaro Wealth Trust.
5. Defendant shall retain as his sole and exclusive properties
 - a) Flat number 215 Northwood Flats, Corner Josiah Tongogara Avenue and Third Street, Harare,
 - b) House number 5 Hilltop Close, Sentosa, Mabelreign, Harare,
 - c) Stand number 934 Bannockberry, Mount Pleasant Heights, Harare,
 - d) Flat Condominio Novio Paeco Oasis Rua 3258 Districto de Kumaxakeni, Maputo Town, Mozambique,
 - e) Parcella 855 1198 Macaneta Beach, Maracuena, Mozambique,
 - f) 100% ownership of the shares of Market Link Limited,
 - g) Properties in Pfidzei Family Trust,and,
 - h) 100% inheritance from Estate of Late Gail Alterman DRB 4318/08.
6. All the properties to be retained by the Plaintiff are to be transferred into Dandemaro Wealth Trust within a period to be agreed to by the parties.
7. Plaintiff shall transfer her 50% shareholding in Market Link Limited to the Defendant within a period to be agreed to by the parties

IT IS FURTHER ORDERED THAT

8. The Plaintiff be and is hereby awarded a 50% share of the value of House number 139 Villa Sol, ao Lado da Casa 320, Bairro Triumfo, Maputo, as at 20 October 2019.

9. The parties are to agree on the value of House number 139 Villa Sol, ao Lado da Casa 320, Bairro Triunfo, Maputo, as at 20 October 2019, failing which there shall be valuation by a mutually agreed valuer which shall be carried out at the defendant's expense.
10. If the parties fail to agree on a mutually agreed valuer, then the registrar may appoint a valuer from his list of valuers at the defendant's expense.
11. The valuation of the house shall be done within a period of two months of the date of this order.
12. Each party bears its own costs.

Bherebhende Law Chambers, plaintiff's legal practitioners.
Kantor & Immerman, defendant's legal practitioners.