

DZIDZO TAPER
versus
LESLEY NYARAI TAPER (Nee RUGARA)

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 10, 11 July & 9 September 2023

Civil Trial – Divorce

Ms L Horris, for the plaintiff
Mr K Gwisai, for the defendant

MUCHAWA J: The plaintiff and the defendant are husband and wife. They were married on the 7th of September 2018 in terms of the then Marriage Act [*Chapter 5:11*]. One child was born to the marriage, namely S.T who was born on 9 April 2019. The parties have been on separation since the 31st of December 2019 and the defendant has custody of the minor child. On the 7th of October 2021, the plaintiff instituted divorce proceedings in which he seeks a decree of divorce on grounds of irretrievable breakdown of the marriage. He wants the defendant to retain custody of the minor child and offers to pay maintenance for the child in the sum of USD50.00 per month or the equivalent in Zimbabwean dollars at the prevailing interbank market rate of the day. In addition, he is offering to pay USD200.00 per term for the minor child's school fees. The plaintiff wants to exercise access rights to the child every fortnight and on public holidays. Furthermore, the plaintiff wants to retain his sole ownership of house number 18943 CABS, Budiro, Harare.

The defendant is agreeable to the granting of the decree of divorce and is happy to retain custody of the minor child. She is however opposed to the quantum of maintenance offered. She wants the plaintiff to pay monthly maintenance in the sum of USD 200.00 and 50% of the school fees which is USD700.00 per term. She is claiming 50% of the Budiro house, 5 cattle from an alleged 10 cattle owned by the parties. Of the movable property, she wants the fridge, washing machine, gas stove and one gas tank.

At the pre-trial conference, the following issues were resolved:

- i. That the marriage has irretrievably broken down.
- ii. That custody of the minor child, S.T be awarded to the defendant.

- iii. That plaintiff be granted access to the child on alternate public holidays and fortnightly on weekends.
- iv. That each party keeps the movable assets currently in its possession.

The issues referred to trial are spelt out as follows:

1. Whether or not house number 18943, CABS, Budiro, Harare is part of the matrimonial property. If so, how should the property be distributed?
2. Whether or not the parties own cattle? If so, how should they be distributed?
3. How much should each party contribute towards maintenance of the minor child?
4. How much should each party contribute towards the fees of the minor child?

I deal with each issue in turn below, not necessarily in the order they appear above.

Whether or not the Parties own cattle? If so, how should they be distributed?

In her evidence, the defendant stated that her father-in-law had gifted them with three female and two male cattle which were then pointed out to them when they went for a visit to the farm in December 2018. By that time two are alleged to have been already pregnant. The farm belongs to the father-in-law and the cattle are said to be in his custody. In her plea, however, it is explained that the wedding gift was four cattle and the fifth one was one given by the plaintiff to defendant's mother in 2018. She assumes that the cattle have reproduced and multiplied to approximately ten now. Her claim for half of those, being five.

Under cross examination, the defendant stated that the cattle could not have died as the plaintiff takes good care of them. She also disputed the plaintiff's averment that the father-in-law had withdrawn the pledge as the marriage collapsed before a year and she argued that he cannot withdraw a pledge.

Furthermore, the defendant stated that the plaintiff personally owns 15 cattle at the farm whilst the father-in-law owns 60. Her claim seems to be focused on the cattle allegedly given as a gift at the wedding as appears in her plea.

The plaintiff's version is that due to the celebratory mood at the wedding, his father pledged a gift of four cattle, but these were never formally handed over and all cattle remain on his father's stock card, which bears his name. The delivery is said not to have materialised as the parties got married on 7 September 2018 but went on separation from May 2019 to 7 December 2019 with defendant coming back home till the 31st of December 2019 when she left, to date.

There is agreement that four cattle were pledged. It is clear too that the claim is not based on the other cattle allegedly owned by the plaintiff but the wedding gift. The point of departure is whether there was delivery of the pledged cattle. It is trite that he who alleges must prove the alleged fact. All the defendant says is that the cattle were pointed out to her. She has no stock card to clearly prove delivery of the cattle to her and her husband. She has offered an approximate number of the cattle. She last visited the farm in January 2019. On the other hand, the plaintiff has given a highly plausible reason for non-delivery of the cattle. The father-in-law who celebrated the marriage, saw it crumble quickly under his watch and did not deliver.

The undelivered cattle cannot be considered an asset of the parties, therefore. Any recourse the defendant might have will be against the father-in-law for the unfulfilled pledge.

The one cow was allegedly given to the defendant's mother, by the plaintiff. It would therefore not fall as theirs for distribution, if at all. The defendant's mother would be the one entitled to claim same as she is a major and does not need the defendant to represent her.

It is my finding therefore that the defendant has failed to sustain her claim for a share of the cattle which were pledged at the wedding. I dismiss this claim.

How much should each party contribute towards maintenance of the minor child including school fees?

The plaintiff's evidence is that the child's monthly maintenance needs come up to USD400.00 and the plaintiff should pay half of that being USD200.00. She accepts that the plaintiff is paying medical aid for the child but says that the medical aid does not cover everything and there are shortfalls on consultation and medication. She says that she is employed as a Procurement Manager at Hammer and Tongues and earns a nett salary of RTGS 322 000.00 and an additional USD500 which comes in an envelope.

A detailed breakdown of the child's needs is provided on pages 10 to 12 of the defendant's bundle of documents. Food is set out from daily fruit requirements, vegetables, drinks, meat, beans, cereals etc. The claim comes up to USD153.00. Gas and medical aid shortfalls come up to USD50.00. Toiletries come up to USD65.00. The young man needs a hair cut every two weeks, toys, clothes, shoes, books and entertainment come up to USD150.00 whilst the child minder requires USD60.00. The grand total is USD478.00.

On his part, the plaintiff produced his payslip which shows that he earns USD650.00 in his employment with the Standards Association of Zimbabwe as a Quality Management

Systems Auditor. He set out his own monthly expenses as USD100.00 for food, toiletries, airtime and data. He spends USD50.00 for his son's maintenance, another USD50.00 for legal fees, and yet another USD50.00 for water, USD50.00 for house maintenance and cleaning services, USD50.00 for transport and another USD50.00 for electricity. The total expenses come to USD400.00. In addition to these expenses, the plaintiff says that his mother is dependent on him, he has *ad hoc* expenses for vehicle maintenance and is paying for the gate he installed. He says he can only afford to pay USD50.00 towards child maintenance, excluding USD200.00 he is offering for school fees per term.

The defendant claims that the plaintiff has other sources of income other than his salary as shown on the payslip. She avers that the plaintiff is into cattle rearing and selling together with his father at the farm and he frequently visits the farm for such purposes even selling to Sanyati Baptist School. Another alleged source of income of the plaintiff is said to be consultancy services offered in South Africa for which he is paid in Rands and holds an FNB account.

The plaintiff denied offering any consultancy services in South Africa and explained that he is employed full time at Standards Association of Zimbabwe and does not hold a South African work permit. He explained his visits to the farm as playing his role as a supportive son to his father who is now elderly. He denied being into any cattle rearing project for any profit. According to him, the defendant's short stint with him was inadequate to enable her to get insight into how he runs his affairs.

On the child's schooling, the defendant enrolled the child for ECD A at Lusitania school where the fees payable is said to be USD1 400.00 per term. Whereas the plaintiff says that he can only afford to contribute USD200.00 per term, the defendant is claiming USD700.00. There are additional school uniform expenses, stationery, grocery and transport expenses which come to USD363.34 on a monthly basis.

The plaintiff's evidence is that the child was enrolled at a school which is beyond the reach of the parents, particularly his own salary. He says he was not agreeable to this choice of school as it is unsustainable, but the defendant still went ahead even though both their salaries are way below this level of school. He questioned how the defendant is affording the school fees if the salary she claims to earn is all that is at her disposal. He suggested that the child be enrolled at the nearby government school, ZIMRE Park or a cheaper private school. He is prepared to contribute up to USD250.00 towards school fees.

It was the defendant's evidence that ZIMRE Park government school is unsuitable for the child due to the poor conditions there which include frequent cholera outbreaks. Lusitania was said to be conveniently located as it is on her way to work. The defendant insisted that the plaintiff is well able to afford payment of USD200.00 per month as general maintenance and USD700.00 per term as school fees.

The amount of maintenance payable by each parent is determined by their respective means and resources. In computing the actual figure, the court must make a value judgment based on the income and assets of the parties. See *Barrass v Barrass* 1978 RLR 384.

Both parties must furnish the court with information regarding earnings, income, savings, other resources, together with their monthly expenses. The court then must balance these and assess the amount of maintenance payable. Section 6 (4) of the Maintenance Act [*Chapter 5:09*] enjoins a court to have regard to the general standard of living of the responsible person and the dependant, including their social status; the means of the responsible person and the dependant; the number of persons to be supported; and whether the dependant or any of his parents are able to work and if so whether it is desirable that they should do so.

In the case of *Kasu v Kasu* HH 106/18, the law on maintenance was aptly set out as follows:

“On maintenance payable for the children, the needs of the children have to be balanced against the means of the person responsible for payment of maintenance. It is however the obligation of both parents to maintain their children each according to their means and at the same time trying to ensure that the children enjoy the quality of life they were accustomed to before the divorce.”

The plaintiff gave his evidence well on this aspect and produced a pay slip as proof of his earnings. His expenses were well set out in giving evidence and explained satisfactorily. On the other hand, the defendant did not provide proof of her earnings at all. She simply alleged that she only earns USD500.00 and an RTGS component of 322 000.00. It is puzzling how the defendant has been managing to pay for school uniforms and related expenses which come up to USD364.34 per month, USD478.00 per month as general maintenance and then school fees of USD1 400.00 on her alleged salary as the plaintiff contributed only USD200.00 towards fees for second term and has been paying maintenance of USD50.00 only.

The defendant bears the onus to prove the alleged additional source of income of the plaintiff. All she was able to show is that the plaintiff frequently visits the farm which is

owned by his father. She could not relate to any income amount made from the alleged cattle rearing project. The court can not act on such a bare allegation. Equally, the claim of consultancy fees earned from South Africa was just that. It was not shown how much income the plaintiff makes from this and how frequently. I am inclined to find that no proof of additional income was made.

I am left to work with the plaintiff's proved income of USD650.00 and his expenses of USD400.00. I believe the defendant has much more income than she has disclosed otherwise, how else would she afford the lifestyle she has set for the minor child? There is an adage which says, "cut your cloth according to your size". The plaintiff fears that the minor child will be damaged if he is thrown out of school because the parents cannot afford fees. It cannot be true that there are no other more reasonably priced private schools in the Greendale area where the minor child is enrolled which are within the joint means of the parents.

It is my finding that the plaintiff should pay general maintenance of USD100.00 per month and school fees of USD250.00 per term.

Whether or not house number 18943, CABS, Budiro, Harare is part of the matrimonial property. If so, how should the property be distributed?

It is common cause that the Budiro house was acquired by the plaintiff in 2014 way before the marriage to the defendant in 2018. The house was then subsequently registered in his names in 2016. See the agreement of sale and deed of transfer on pages 45 to 56 of record. It is also agreed that the parties stayed at this house during the seven plus months they stayed together before separation on 31 December 2019. The plaintiff is still resident at this property.

The plaintiff extended the core house from two rooms to four rooms prior to his marriage to the defendant. He claims to have also put tiles in the ablution facilities, connected water and electricity, put in burglar bars, planted fruit trees, put in a laundry sink, put in a small vegetable garden, and painted the interior. The plaintiff gave evidence that the only development done during the defendant's presence, was to put skirting around the house and this cost USD50.00 as it was done by locals. He explained that there was a lot of pressure for the baby preparation such that no other developments were done. The defendant's contribution is alleged to be only to the tune of USD25.00 and cooking for the builders. After the separation on 31 December 2019, the plaintiff says he erected an iron garage at the side of the house, put in a Durawall and gate and put in solar for back-up power.

Furthermore, the plaintiff gave evidence that after the marriage, the defendant was never in support of developing the house as she said it was a high-density area where people of vulgar language resided, and she preferred to stay in ZIMRE Park as her parents would retire to the farm. According to the plaintiff, the defendant made minimum contributions to the development of the house during the short stint they stayed together.

When it was put to the plaintiff that the defendant had been taking care of him during their stay together and that she is taking care of the child, he admitted this.

The defendant did not dispute that the parties stayed together for just over seven months. She claimed that the breakup was a result of emotional abuse and infidelity. In detailing the infidelity, the defendant showed that she was merely suspicious of the plaintiff's conduct on two occasions. The parties attended some professional counselling after the initial separation in May 2019 after the marriage in September 2018. It seems the mistrust persisted leading to the final separation in December 2019.

Upon her arrival, the defendant says that the house was more of a bachelors' home, and she acquired kitchen ware apart from what they had been gifted at the wedding. She also acquired most of the curtaining, couch, and rug. Contrary to what the plaintiff said, she claims to have contributed to the skirting which she says cost USD150.00. She says they installed a water tank and stand at the price of USD850.00. Other improvements done together are alleged to be the fitting of built in cupboards for the main bedroom at USD200.00, installation of 3 motion sensor security lights at USD100.00, installation of solar power at USD1 000.00, putting in laundry line at USD 50.00 and veranda awning whose price was not stated. She says she also contributed to general plumbing and electricity repairs at USD100.00. The cost of curtains comes to USD100.00. This means that the total monetary contributions come up to USD2 550.00. It was the defendant's evidence that these costs were shared as they were doing everything together and she is not able to state her own personal contribution. No proof of such costs was availed by the defendant and the plaintiff did not also provide any proof of the skirting costs.

As a working mother, the defendant says she contributed to the household expenses by providing monthly groceries and her car was the one always used, and she saw to fuelling the car. She claims to be providing all the child's needs.

It appears to me that each party was trying to exaggerate their contribution and underplay the other's. I will proceed to make a value judgment, therefore. It cannot be true that the defendant's monetary contribution only came to USD25.00. She was a newly married

woman who wanted to make a home out of her husband's place. She must have done more than is alleged by the plaintiff.

At law, the question as to what property falls for distribution was already traversed in the case of *Gonye v Gonye* SC 15/09, as follows:

“It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an Order with regard to 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”. The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of the broad discretion.

The terms used are the “assets of the spouses” and not “matrimonial property”. **It is important to bear in mind the concept used because the adoption of the concept “matrimonial property” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise.** The concept “the assets of the spouses” is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.

To hold, as the court *a quo* did, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the parties depend.

It must always be borne in mind that s 7(4) of the Act requires the court in making an order regarding the division, apportionment or distribution of the assets of the spouses, and therefore granting rights to one spouse over the assets of the other, to have regard to all the circumstances of the case.” (My emphasis)

It is clear from the above that the proper question should not be whether the house is a matrimonial home, but whether it is an asset of the parties subject to distribution in terms of s 7 (4) of the Matrimonial Causes Act [*Chapter 5:13*]. The fact that the house was acquired before the marriage is just one of the many factors to be considered in the court's exercise of discretion. The property is not excluded from consideration just because the plaintiff bought it in 2014 and did most of the major developments before the marriage.

The Matrimonial Causes Act [*Chapter 5:13*] in s 7(4) in particular, lays out the considerations that the courts must consider in the exercise of their discretion as to how property is to be distributed upon divorce. These include factors such as the income earning capacity of the spouses; financial needs, obligations and responsibilities; standard of living, age, physical and mental condition of each spouse; direct and indirect contributions, value of pensions and gratuities; and the duration of the marriage.”

In *Shenje v Shenje* 2001 (1) ZLR 160 (H), GILLESPIE J had this to say:

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division

order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantage, to the extent they are not inevitable, of becoming divorced.”

In this case the most outstanding factor is that this marriage, though it was for four years and some months on paper, the parties only lived together as husband and wife for some eight months only. The house in issue is the only house the plaintiff has and has lived in since before his marriage. He developed it as the home he would live in. The defendant did not challenge that she never liked the location of the house and preferred to live in ZIMRE Park, where she moved out to. Her contributions to the development of the house were minimal, both directly and indirectly. Given the lifestyle the defendant is setting for herself and the minor child, she has a higher earning capacity than the plaintiff. Disposing of the house to give her a 50% share of the house would be unreasonable, impractical and unjust in the circumstances. My decision must secure for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantage, to the extent they are not inevitable, of becoming divorced. It would be most disadvantageous for the plaintiff to lose the most asset he has worked for all this while simply because he chose to get married to the defendant and the marriage is ending in a divorce. The most she is entitled to is compensation for her alleged contributions to the development of the house.

This case is clearly distinct from the many cases such as the *Usayi supra* case the Supreme Court upheld an award of 50% share of the immovable property to a woman who had made indirect contributions to the acquisition of the assets and had been married for thirty-nine years. A similar approach was followed in *Mufanani v Mufanani* HH 32/16 and in *Mhora v Mhora* SC 89/20. These were long marriages unlike this one which faltered upon take-off.

The application of the Constitutional and Regional and International provisions on equality is not a one size fits all. These provisions should not just be skewed in favour of women but aim to arrive at an equitable distribution in the circumstances of each case. Honourable TSANGA J wrote a seminal judgment on division of matrimonial property upon divorce in the light of international and regional instruments and the local law in the case of *Mhangami v Mhangami* HH 523/21. I can do no better than quote extensively from her:

“THE LEGAL POSITION

[12] Section 26 of our Constitution of Zimbabwe¹ deals with marriage. Therein, it espouses the principle of “equality of rights and obligations of spouses during marriage and at its dissolution”. Section 56 also lays down equality and non-discrimination as fundamental rights. Discrimination is prohibited on grounds such as custom, culture, sex and gender among others. Furthermore, in interpreting the provisions on fundamental rights and freedoms, s 46 also requires the courts to take into account international law and all treaties and conventions to which Zimbabwe is a party. Zimbabwe is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration of Human Rights; the Covenant of Civil and Political Rights; and the African Charter on Human Rights and its Protocol on the rights of women. All these instruments contain provisions on men and women’s status within the family. As such the principles out laid in these instruments with respect to marriage and family are crucial considerations in dissolution of marriage.

[13] On marriage, Article 16 (c) of CEDAW² for example stipulates equality in marriage and at its dissolution as a fundamental principle. Article 5 of CEDAW also requires States to actively address stereotypes on roles of both men and women that impede equality. As another example the Protocol to the African Charter on Human and People’s Rights on the rights of women also requires State parties in its article V1, to ensure that women and men enjoy equal rights and are regarded **as equal partners** in marriage. The net effect is that there is bedrock of principles both constitutionally and from obligations under international treaties that are of relevance. As part of State machinery, courts are therefore enjoined to ensure that the treatment of both men and women in law and in private life accords with the principles of equality and justice when it comes to marriage.”

It is my considered opinion that an award of 50% value of the house to the defendant would be a failure to ensure that there is no discrimination against the plaintiff on the grounds of sex. It would be simply, blindly awarding 50% to her because she is a woman without considering the peculiar circumstances of this matter. To meet the justices of this case, the defendant should be awarded USD1 000.00, for the developments she claims to have put into the house. I have rounded off the figure to USD1 000.00 given my observation of the exaggerations in the evidence of both parties.

I accordingly make the following order:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child, S.T, born on 9 April 2019, be and is hereby awarded to the defendant.
3. The plaintiff shall exercise access rights to the minor child, S.T fortnightly on weekends and on alternate public holidays.
4. Each party keeps the movable assets currently in its possession.

¹ Amendment (No 20) Act 2013

² See Art 16 (1) (c) and (h) of CEDAW and also CEDAW General Recommendation No 21 on Equality in Marriage and Family Relations

5. The plaintiff shall pay maintenance for the minor child, S.T in the amount of USD100.00 per month until the child attains the age of eighteen or becomes self-supporting, which ever shall occur first.
6. The plaintiff shall contribute school fees in the amount of USD250.00 per term for the minor child.
7. The plaintiff is awarded house number 18943 CABS, Budiro, Harare, which is already registered in his names, as his sole and exclusive property.
8. The plaintiff shall pay the defendant the amount of USD1 000.00 within sixty days of this order as compensation for her contributions to the development of house number 18943 CABS, Budiro, Harare.
9. Each party to bear its own costs.

Musunga & Associates, plaintiff's legal practitioners
Tamuka Moyo Attorneys, defendant's legal practitioners