

DISTRIBUTABLE (72)

BERNARD MAHARA MUTANGA
v
TSITSI MUTANGA

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA & MUSAKWA JA
HARARE: JULY 16 2021 & 29 JULY 2022

G. Ranganai, for the appellant

B. Mtetwa, for the respondent

Judgment No. SC 85/22

Civil Appeal No. SC.95/20

1

MUSAKWA JA: This is an appeal against the entire judgment of the High Court delivered on 5 February 2020. The court *a quo* held that eighty-five percent (85%) of Number 16 Hawkshead Drive, Borrowdale, also known as Lot 1 of Lot 4 of Lot FA Quinington situate in the District of Salisbury measuring 1, 2770 Morgen held under Title Deed 3999/96 be awarded to the respondent as her sole and absolute share with the appellant being awarded the remaining 15 per cent share.

BACKGROUND FACTS

The appellant and the respondent married in terms of the Marriage Act [*Chapter 5:11*] in 1996. Both parties were business partners involved in the property sector. The appellant was into property development and the respondent was into real estate management.

Both were directors of a company called Bern-win Development Company. This company was liquidated, and the parties lost everything. They were advised by their lawyers to separate their business properties from their family assets by forming trusts.

Consequently, Mai-Kai Property Development Trust was formed in January 2000 and Paradza Trust in July 2000. The beneficiaries of both Trusts were Tsitsi Mutanga, Bernard Tanatsa Mutanga, Lucinda Ropafadzo Mutanga and Rusiya Mutekenya who is the appellant's mother. It was the intention of both parties that Paradza Trust be the asset holding Trust while Mai-Kai Property Development Trust would be the property selling Trust. The proceeds of the business were pooled together and used to buy assets for the family which were registered under Paradza Trust. Unfortunately for the parties, their marital relationship broke down and the respondent issued summons for divorce in which she cited irretrievable breakdown of the marriage as the cause for divorce. She further sought an order for distribution of the assets of the parties.

Judgment No. SC 85/22
Civil Appeal No. SC 95/20

2

PROCEEDINGS BEFORE THE COURT A QUO

During the proceedings in the court *a quo*, the parties agreed on all ancillary issues including custody and maintenance of their children save for the distribution of one immovable property which is No. 16 Hawkshead Drive Borrowdale (hereinafter referred to as the property).

According to the appellant the property was not an asset of the spouses. He claimed that the property belonged to a private company called Brabourn Investments (Private) Ltd and that the company was wholly owned by Brabourn Trust of which the respondent was neither a trustee nor a beneficiary.

The appellant further claimed that the reason why the property could not be distributed in terms of s 7 of the Matrimonial Causes Act was that Paradza Trust had failed to raise the purchase price and hence the sale was not *perfecta*. He also claimed that it was at that point that Brabourn Trust purchased the shares in Brabourn Investments (Private) Limited. He however failed to produce evidence to the effect that Paradza Trust had failed to raise the purchase price and that the contract had been cancelled.

According to the evidence adduced by the respondent during the trial the property was acquired through the purchase of shares in Brabourn Investments (Private) Limited by Paradza Trust. Paradza Trust purchased 100 per cent paid up shares in Brabourn Investments (Private) Limited which represented ownership of the property. The effect of such acquisition was that the property now vested in Paradza Trust in which the appellant, the respondent, their children and the appellant's mother were beneficiaries.

The respondent claimed that the property in dispute was an asset owned by both parties and as such was distributable in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. The respondent further testified that Brabourn Trust which was purported to own Brabourn Investments (Private) Limited was fraudulent. She highlighted to the court that the Trust deed creating Brabourn Trust was null and void as it did not have the mandatory protocol number, that the dates in the deed were inconsistent with the sequence of events and lastly that the legal practitioner who purported to have drafted and registered the Trust deed was still at law school at the time of such registration and as such was not yet practicing law.

Basing on the evidence placed before it the court *a quo* held that No.16 Hawkshead Drive Borrowdale was an asset that belonged to Paradza Trust. It further held that the property was distributable in terms of s 7 of the Matrimonial Causes Act. It also held that Brabourn Trust was a stratagem by the appellant to thwart the respondent's claim to the property. The property was then distributed with the respondent being awarded an 85 per cent share in the property while the appellant received the remaining 15 per cent share.

Aggrieved by the decision of the court *a quo*, the appellant noted an appeal to this Court on the following grounds.

1. The court *a quo* misdirected itself in finding that number 16 Hawkshead Drive, Borrowdale was a family asset and registered in Paradza Trust that could be distributed, a finding which is contrary to the evidence presented.
2. The court *a quo* misdirected itself in finding that the Brabourn Trust Deed was null and void.
3. The court *a quo* erred at law when it concluded that Paradza Trust was the original purchaser of Brabourn Investments (Private) Limited with 100 per cent paid up shares being the only one with a claim to number 16 Hawkshead Drive Borrowdale.
4. The court *a quo* erred at law when it concluded that the respondent was entitled to a share of number 16 Hawkshead Drive Borrowdale, not just as a spouse but as a beneficiary of Paradza Trust when there was no evidence that Paradza Trust acquired the property.
5. The court *a quo* misdirected itself in granting an order that number 16 Hawkshead Drive Borrowdale also known as Lot 1 of lot 4 FA Quinnington situate in the District of

Judgment No. SC 85/22
Civil Appeal No. SC 95/20

Salisbury held under title deed number 3999/96 measured 1,2770 Morgen instead of 1,0938 hectares.

SUBMISSIONS ON APPEAL

The appellant's counsel argued that the property in dispute did not belong to the appellant individually, and that it had not been purchased by and was not owned by Paradza Trust. He submitted that it did not fall under the ambit of property that was distributable under s 7 of the Matrimonial Causes Act as it was owned by a third party which is Brabourn Investments (Private) Limited. He further argued that besides the agreement of sale of the 100 per cent shares in Brabourn Investments (Private) Limited, there is no proof of transfer to Paradza Trust which further clarifies the position that the property belonged to Brabourn Trust.

Counsel for the respondent per *contra* argued that the property belongs to Paradza Trust. She submitted that the parties lived on the premises until the time they decided to lease it out. She further submitted that to date, the property belongs to Paradza Trust and all monies derived from that property go to the beneficiaries of the Trust who at the time of registration were Rusiya Mutekenya (appellant's mother), their two children Bernard Tanatsa Mutanga, Lucinda Ropafadzo Mutanga and the respondent herself.

As will become apparent shortly, both counsels were asked to address this Court on the non-joinder of the trustees of Paradza Trust. Mr *Ranganai* submitted that the trustees of Paradza Trust should have been joined in the proceedings *a quo*. On the other hand Ms *Mtetwa* submitted that the issue of joinder was defeated by the appellant's claim that the property belonged to Brabourn Trust. That is why the chairman of the trust was subpoenaed to testify before the court *a quo*. Ms *Mtetwa* also placed reliance on s 7 of the Matrimonial Causes Act

which provides that a court can direct that property of one spouse be transferred to another spouse.

ANALYSIS

In view of the non-determination by the court *a quo* of an issue that was argued before it this appeal stands to be disposed of on that very issue. It therefore becomes unnecessary to advert to the appellant's grounds of appeal.

At the onset of trial in the court *a quo*, Mr *Zhuwarara* who appeared for the appellant highlighted to the court *a quo* that it was now seized with an issue in relation to whether or not the trustees who administered the property should be ordered to transfer property to either of the parties, when the trustees had not been cited in the proceedings. He further submitted that there had been a material non-joinder of interested parties in the proceedings in that the court *a quo* was being asked to distribute the property of other people who were not parties to the proceedings. Mr *Zhuwarara* went further to submit that while in terms of the rules a Trust can be cited in its own name, it does not hold property in its own name, but it does so for the benefit of the beneficiaries. Hence the trustees should have been cited. Lastly he submitted that it would be more convenient, just and proper for the administration of justice for the Trust to be joined to the proceedings to enable it to protect the interests of the beneficiaries.

Ms *Mtetwa* who appeared for the respondent in the court *a quo* drew the court *a quo*'s attention to the joint pre-trial conference minute in which one of the issues was whether any trustees should be ordered to transfer assets to the parties. She further submitted that, that

was why the joint pre-trial conference minute had been crafted in such a fashion. She also submitted that there had been difficulties in establishing the identities of the trustees. The appellant was also blamed for not furnishing the respondent with all the documentation that had been requested.

One of the issues in the joint pre-trial conference minute was:

“Whether it would be fair and equitable to order any Trustees to transfer any of the Trust assets to either of the parties.”

The court *a quo* resolved to proceed with the matter notwithstanding that the issue of joinder had been raised. In its judgment at the conclusion of the proceedings the court *a quo* did not address the issue of joinder of the trustees.

I agree with Mr *Zhuwarara*'s submissions *a quo* regarding the non-joinder of interested parties to the proceedings, especially the trustees. This is the same submission made by Mr *Ranganai* following questions from the bench.

Judgment No. SC 85/22
Civil Appeal No. SC 95/20

The duty of an appellate court is to determine whether a trial court came to the correct conclusion of the case that was placed before it. In this respect see the cases of *Goto v Goto* 2001 (2) ZLR 519 (S) and *Cole v Government of the Union of South Africa* 1910 AD 263. A court is enjoined to determine all issues placed before it unless the issue that it determines to the exclusion of other issues is dispositive of the dispute before it. See the case of *Longman Zimbabwe (Pvt) Ltd v Midzi And Others* 2008 (1) ZLR 198 (S). According to the decision in *Arafas Mtausi Gwaradzimba v C.J. Petron and Company (Proprietary) Limited* SC 12-16 failure by a court to consider an issue placed before it amounts to gross irregularity. Therefore the

failure by the court *a quo* to determine whether the trustees should have been joined to the proceedings amounts to gross irregularity.

DISPOSITION

In terms of s 25 of the Supreme Court Act [*Chapter 7:13*] the Supreme Court has certain powers that are vested in it which include the power to review proceedings and decisions of lower courts. Of particular importance is subs (2) which provides that the powers to review can be exercised whenever it comes to the attention of a judge or the Supreme Court that an irregularity has occurred in any proceedings notwithstanding that such proceedings or decision is not the subject of appeal. It has come to this Court's attention that there was an irregularity in the proceedings of the court *a quo* and such irregularity is not the subject of appeal. The irregularity pertains to the court *a quo*'s omission to determine the issue of joinder despite the fact that such issue was argued before the court *a quo*.

Judgment No. SC 85/22
Civil Appeal No. SC 95/20 8

In light of the disposition of the appeal on a ground not raised in the notice of appeal, the appellant will not be awarded costs. The matter will have to be remitted to the court *a quo* for hearing afresh before another judge since the trial judge is no longer on the bench. This will be subject to joinder of other interested parties.

In the result, it is ordered as follows:

- (1) The appeal be and is hereby allowed.
- (2) The judgment of the court *a quo* be and is hereby set aside.

- (3) The matter is remitted to the court *a quo* for hearing afresh before another Judge.
- (4) Each party shall bear its own costs.

MAVANGIRA JA:

I agree

UCHENA JA:

I agree

Judgment No. SC 85/22
Civil Appeal No. SC 95/20

IEG Musimbe and Partners, appellant's legal practitioners.

Mtewa & Nyambirai, respondent's legal practitioners.