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LIZZIE MOYO

Versus

GILTON MOYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 & 31 MARCH & 1 JUNE 2006

Plaintiff in person
J Tshuma for the defendant

Trial Cause

NDOU J: The plaintiff seeks a decree of divorce with ancillary relief. The summons were issued on 6 May 1997. Briefly, the parties were married to each other on 15 February 1991 at Bulawayo Magistrates' Court and the said marriage still subsists. There are two children of the marriage namely C. M., male (who has since become a major after the issuance of the summons) and S. M., male minor born on [day/month] 1992. The marriage faced serious challenges a year after solemnisation as the parties separated in 1992 for a year. They reconciled in 1993. They separated again in 1996 to date. Whereas the marriage subsisted for fifteen (15) years, however the parties only lived together for their mutual benefit for a mere four(4) years. This is a relevant factor.

It is quite clear from pleadings in particular the joint pre-trial memorandum filed on 24 February 1999, the issues of divorce, custody of the children, maintenance of the children and the

division of the parties' movable assets were settled as early as 17 February 1999. The only issue

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that remained outstanding as of that date related to claim (b) of the plaintiff's declaration which reads:

“an order directing that the partially developed stand 43 Malisa Road, Romney Park, Bulawayo be sold and the proceeds shared equally between the parties.”

The question is whether it is fair and equitable that the above-mentioned house owned by defendant should be sold and the proceeds be shared equally. The court has to use a formula set out in section 7 of the Matrimonial Causes Act [Chapter 5:13]. It is trite that in matters of this type it is seldom possible for the court to ascertain with total accuracy the incomes and contributions of the parties to the joint estate. I will use the guidelines set out in the following cases *Dlamini v Dlamini* HB-27-00; *Takafuma v Takafuma* 1994(2) ZLR 103(S); *Ncube v Ncube* 1993(1) ZLR 39(S); *Chikomba v Nkomo* SC-62-91 and *Matsveto v Matsveto* HB-51-04. All marriages are out of community of property. I will have to identify the assets owned by each party. Then I will determine whether it is necessary to move any assets from one party to the other or to sell some asset in possession of one party and pay the other to achieve equity. I have to take into account the standing of the parties. Both are gainfully employed, the plaintiff as a superintendent at the Post and

Telecommunication and the defendant is an engineer by the National Railways of Zimbabwe. Both parties are of secure employment and were not dependent on each other for their individual needs and will not require any assistance from each other in the future. Both parties own houses. The plaintiff owns a house

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registered in her name known as 4427 Gwabalanda, Bulawayo. It is five-roomed and secured by a wall around it. It is important to note that she owns no other immovable property and this property is her home.

The defendant owns 43 Malisa Road, Romney Park. The property is now almost fully developed with ceiling requiring final touches. This is the defendant's sole home and residence. All along he has resided with the parties' two children at this address. The other factor is that all the movable assets acquired during the subsistence of the marriage have all gone to the benefit of the plaintiff except a Peugeot 404 motor vehicle. On the question of the contribution of the parties, there was no meaningful contribution that the defendant made in respect of 4427 Gwabalanda. Equally, there is no significant contribution that the plaintiff made in the construction of the house in 43 Malisa Road, Romney Park, Bulawayo. It is clear from the evidence that even when the parties were living together they were not acquiring property for their joint benefit. The plaintiff claimed in her papers whatever amount she

had lent to the defendant. In her synopsis of evidence, as early as 1999, the plaintiff was claiming that her contributions were in kind i.e buying groceries, clothes and general upkeep of the home. Another issue relevant is whether the plaintiff attended the pre-trial conference before KAMOCHA J on 24 March 2004. She says she remained outside KAMOCHA J's chambers whilst her erstwhile legal practitioner attended with the defendant and his legal practitioner. She has not given any reason why she remained outside. In my view the credible version is that she attended the proceedings of the pre-trial

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conference and is now conveniently removing herself from the Judge's chambers to avoid being part of the agreement reached therein. The relevant part of the pre-trial minute says:

“The outstanding issue was the one regarding the immovable property. It has been agreed that defendant will retain as his property stand 43 Malisa Road, Romney Park, Bulawayo. Plaintiff will be paid an amount of \$10 000,00 in full and final settlement of any claim she may have had in the said property.

It is recorded that defendant owes plaintiff an amount of \$8 000,00 which he agrees to pay her together with the \$10 000,00 making a total of \$18 000,00 ...”

A consent paper was drafted by the plaintiff's erstwhile legal practitioners incorporating the above. The plaintiff declined to sign it and instead terminated the services of her legal practitioners. I am satisfied that the plaintiff was present during the pre-trial

conference before KAMOCHA J. Although she did not mention it in her papers/pleadings it is common cause that KAMOCHA J went for an inspection *in loco* at 43 Malisa Road, Romney Park, Bulawayo to see the extent of the development of the stand before capturing the above mentioned pre-trial minute. So the \$10 000,00 was arrived at from an informed position which I suspect is what the learned Judge was trying to ascertain when he went for an inspection *in loco*.

Although this undertaking on its own may not suffice to resolve the outstanding issue it is however, a factor that I have to take into account together with the others mentioned above. At the time the agreement was conducted \$10 000,00 was fair and equitable share looking at the totality of the evidence adduced in this case. It is no fault of the defendant that the

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plaintiff failed to prosecute her matter to conclusion within a reasonable time. In the circumstances, it would not be fair to sell the plaintiff's only home in which he expended substantial resources after the separation of the parties. She has her own house (not under construction) which the defendant is not claiming. It would be unfair to sell the defendant's only home which he shares with the parties' two sons - *Chepaziwa v Chepaziwa* HH-375-88 and *Penduka v Ncube* SC-24-94. The plaintiff belatedly tried to claim house number 26 Avenue, West Sommerton, Bulawayo. There are serious procedural and substantive flaws in this late claim. Procedurally,

the plaintiff has to apply for leave to amend her pleadings as this claim was not part of her original claim. There is no such application so I cannot consider the claim. Even on the merits the application has no leg to stand on. She did not contribute to the purchase of this property. It was acquired when the parties were already living apart. She says their marriage certificate was used. The property was part National Railways of Zimbabwe married quarters. In order to qualify to rent the property the defendant used their marriage (certificate) to qualify for allocation of the house (lease and not sale). However, years after the parties went on separation the National Railways of Zimbabwe decided to sell its rented houses to sitting tenants. This was how the National Railway of Zimbabwe sold the said property to the defendant as a sitting tenant. Through her erstwhile legal practitioners the plaintiff addressed a letter to the defendant's legal practitioners of record on 9 May 2003 which read, *inter alia*,

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"... our client further indicates that the house was acquired pursuant to the parties marriage certificate but your client's ownership is not being disputed as all".

So why the change of heart now? In the circumstances I hereby

order that -

- a) A decree of divorce be and is hereby granted.
- b) The defendant be and is hereby awarded stand 43 Malisa Road, Romney Park, Bulawayo as his sole and exclusive

property subject to him paying the plaintiff \$10 000,00 together with interest thereon at the prescribed rate from 6 May 1997 to date of payment in full.

- c) The plaintiff be and is hereby awarded the following property as her sole and exclusive property-

1 x four plate stove

1 x fridge

All kitchen utensils

Kitchen table and chairs

1 x deep freezer

Dinning room suite

2 x colour television sets

1 x video recorder

1 x satellite dish

Bedroom suite

1 x Renault R5 motor vehicle

1 x Hi-fi sound system

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1 x wardrobe

- d. The defendant be and is hereby awarded a Peugeot 404 motor vehicle as his sole and exclusive property.
- e. The plaintiff is awarded custody of the minor child S. M., a male born on [day/month] 1992 with defendant being entitled to reasonable access to the child.

- f. Each party to bear own costs.

Webb, Low and Barry, defendant's legal practitioners