

DARIYO MAPIYE

Versus

PAMHAYI MAPIYE (NEE DOKWANI)

IN THE IGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 19 & 20 JULY 2016 & 23 MARCH 2017

Civil Trial

N. Mashayamombe for the plaintiff
R. Mahachi for the defendant

TAKUVA J: Plaintiff and defendant are husband and wife. Plaintiff instituted divorce proceedings in June 2011 – praying for a decree of divorce on the grounds of irretrievable break down of marriage, sharing of immovable matrimonial property outlined in paragraph 10 of plaintiff’s declaration as read with schedules “A” and “B” respectively, and that each party bears its own costs. Defendant filed a notice to defend and subsequently she filed her plea.

The following issues were agreed by the parties at the pre-trial conference:

- “1. Whether or not the following property constitutes matrimonial property
 - 1.1 Stand 16718 Romney Park, commonly known as No. 5 Whistler Road, Romney Park, Bulawayo.
 - 1.2 Homestead and tin house/kiosk in Umguza
 - 1.3 Mitsubishi Pajero, registration number AAQ 8654
 - 1.4 Mazda Capella, registration number AAC 6588
 - 1.5 8 head of cattle

2. Whether or not the following property should be distributed equally between the parties
 - 2.1 631 Senga area 2 Gweru
 - 2.2 5180 Village 15 Mkoba, Gweru
 - 2.3 kiosk in Gweru
 - 2.4 share equally development structures at Umguza homestead

3. Whether or not the movable property should be distributed in terms of schedule 'A1' and 'C' of the defendant's plea."

At the commencement of the trial, the outstanding issue between the parties related to the distribution of movable and immovable assets acquired during the subsistence of the marriage. After both parties had led evidence, further engagement enabled the parties to reach a consensus regarding the distribution of the movable assets. They filed a consent paper on 13 September 2016 wherein it was agreed that each party retained whatever movable property that is in their possession save for the motor vehicles, namely Mitsubishi Pajero and Mazda Capella. Defendant further made a concession regarding her claim for a share of the beasts allegedly acquired during the subsistence of the marriage. Defendant abandoned this claim. On the other hand, plaintiff made a concession with regards the status of stand 16718 Romney Park, Bulawayo which property was initially averred to have been transferred into Dariyo Mapiye Family Trust. Plaintiff consented to the property being considered as matrimonial property and hence subject to distribution in these proceedings.

As a result of these concessions, the issues that fall for determination can be synthesized as follows:

1. How the following immovable assets should be distributed as between the parties.
 - a. Rights, title and interest in stand 16718 Romney Park, Bulawayo also known as number 5 Whistler Road, Romney Park, Bulawayo;
 - b. Rights, title and interests in stand 631 Senga Township, area 2, Gweru;
 - c. Rights, title and interests in stand 5180 Mkoba Township, Gweru;
 - d. Rights, title and interests in the kiosk situate in Gweru;
 - e. Homestead in Umguza and kiosk.
2. The distribution of the following motor vehicles acquired during the subsistence of the marriage.
 - 2.1 Mitsubishi Pajero
 - 2.2 Mazda Capella

The Law

Division of assets upon dissolution of a marriage is governed by section 7 of the Matrimonial Causes Act (Chapter 5:13) [the Act]. In terms of this provision the court is provided with a wide discretion to be exercised judiciously in balancing the parties' conflicting interests in order to make an equitable distribution of the matrimonial assets.

Section 7 (1) of the Act states:

“Subject to this section in granting a decree of divorce, judicial separation or nullity of marriage, or at anytime thereafter, an appropriate court may make an order with regard to:-

- (a) The division, apportionment or distribution of the assets of the spouses, including an order that any assets be transferred from one spouse to the other.
- (b) The payment of maintenance, whether by way of a lump sum or by way of periodical payment, in favour of one or other of the spouses or of any child of the marriage.”

Section 7 (4) of that Act states:

“In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including,

- (a) The income earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) The financial needs, obligations and responsibilities which each spouse and child being educated or trained or expected to be educated or trained;
- (c) The standard of living of the family including the manner in which any child was being educated or trained or expected to be educated or trained.
- (d) The age and physical and mental condition of each spouse and child.
- (e) The direct and indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
- (f) The value of either of the spouses or to any child of any benefit including a pension or child will lose as a result of the dissolution of the marriage;
- (g) The duration of the marriage and in so doing the court shall endeavour as far as is reasonable and practicable and having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

The *locus classicus* in determining an equitable distribution in line with section 7 of the Act is *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) where the principle was succinctly put as follows:

“The duty of a court in terms of section 7 of the Matrimonial Causes Act involves the exercise of considerable discretion, but it is a discretion which must be exercised judiciously. The court does not simply lump all the property together and then hand out in a fair way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term “his”, “hers” and “theirs”. Then it will concentrate in the third lot marked “theirs”. It will apportion this lot using the criteria set out in section (7) (3) of the Act. Then it will allocate to the husband the items marked “his” plus the appropriate share of the items marked “theirs” and the same to the wife. Next it will look at the overall result applying the criteria set out in section (7) (3) of the Act and consider whether the objective has been achieved namely as far as reasonable and practicable and having regard to their conduct. If it is just to do so, to place the parties in the position they would have been in had a normal marriage relationship continued ... Only at that stage, I would consider taking away from one or other of the spouses which is actually “his” or “hers”. Per McNALLY JA

See also *Ncube vs Ncube* 1993 (1) ZLR (39) (S)

Applying the law to the facts *in casu*, it is not in dispute that the parties have lived as husband and wife for close to twelve years before the plaintiff moved out of the matrimonial home due to irreconcilable differences. On the evidence, it is clear that during the subsistence of the marriage the parties cultivated a fair level of affluence which is reflected by the purchase of numerous immovable properties that now fall for distribution.

The acquisition of immovable assets and motor vehicles was achieved largely through the direct contribution of the plaintiff who is a member of the Zimbabwe Republic Police. During his tenure of office, he was seconded to Kosovo and Liberia on United Nations assignments. While working outside Zimbabwe, the plaintiff would be paid allowances which he remitted home to the defendant in order to feather their nest. Also defendant had access to plaintiff's salary, bonus and other allowances.

It is common cause that defendant who has largely been a housewife indirectly contributed through the execution of motherly and wifely duties at home during the plaintiff's

absence. Defendant provided love, comfort and support to the plaintiff which enabled him to soar up the ranks in his line of work. Over and above the “wifely” duties, the defendant single handedly managed a company called Career Pursuit Consultancy (Pvt) Ltd whose profits were channeled towards the family upkeep and projects. Further, defendant engaged in trans-border trade in Botswana where she bought some building material for the family projects. Also, largely through defendant’s guidance, supervision and moral support the family was able to successfully raise three children who managed to acquire tertiary qualifications. It was also accepted that throughout the period the parties were husband and wife, defendant took care of plaintiff’s extended family which includes the plaintiff’s parents and siblings.

In order to arrive at a fair and equitable distribution, the court is enjoined to take into account the direct and indirect contributions of the parties. *In casu*, however, sight should not be lost of the fact that the defendant has had the benefit of occupying the matrimonial home number 15 Whistler Road, Romney Park, Bulawayo where she collects monthly rentals for a 4 roomed cottage that is let out to tenants. Defendant also collects rentals from the kiosk in Gweru as well as from the property in Senga – Gweru.

On the other hand plaintiff, inspite of his immense contribution is left in a position where he has to make do with make-shift government accommodation at his workplace. For these reasons, I have to make a judicious decision that does not inconvenience or unduly prejudice one party, whilst at the same time unjustly enriching another party.

I now turn to the immovable property subject to distribution.

1. Stand 631 Senga, Gweru

Defendant submitted that this property should be awarded to the plaintiff together with other immovable properties in exchange for number 5 Whistler Road, Romney Park, Gweru. The evidence led by both parties clearly confirmed that this property was purchased solely from the proceeds of allowances that the plaintiff received during his tour of duty in Kosovo sometime in 2001. Under cross-examination, the defendant

confirmed that she did not contribute materially to the purchase of the property but she averred that she indirectly contributed as she was left behind with the family and ran the kiosk to supplement the plaintiff's efforts. Plaintiff accepted this position.

The property is registered in the joint name of the parties. Therefore notwithstanding the contributions made by the respective parties they are co-owners. Following through on the principle in *Ncube v Ncube (supra)* I take the view that each party is entitled to a half share of the net value of that property.

2. Kiosk in Gweru

It is common cause that this kiosk is registered in the name of the defendant who has prayed for a 50% share of its value. There was a dispute surrounding the circumstances under which it was acquired and registered in defendant's name. According to the defendant, she applied and obtained the stand through the ZANU (PF) Women's League initiative to empower women in the constituency. On the other hand plaintiff contended that it was acquired through a relative of a colleague and workmate who worked for the City of Gweru Housing Office. Be that as it may, both plaintiff and defendant agree that plaintiff secured a US\$20 000,00 loan from SEDCO to develop it. All repayments due to SEDCO were made through deductions from plaintiff's salary. The kiosk was built through the singular efforts of the plaintiff. Evidence was led to confirm that since 2012 rentals due from the property were collected by the defendant and she continues to benefit from the same at the exclusion of the plaintiff.

Applying the principle in *Takafuma (supra)* I find that whilst the kiosk is registered in the name of the defendant (hers), the plaintiff directly and significantly contributed to the development of the kiosk. Therefore, it would be just and equitable regard being given to section 7 of the Matrimonial Causes Act that the plaintiff be awarded a 50% share of the value of the kiosk in consideration of his direct contribution to its development.

3. Stand 16748 Romney Park

This is the matrimonial home where plaintiff and defendant raised their family. Plaintiff moved out of this house several times, the last of which was sometime in 2012 due to irreconcilable differences with the defendant. Defendant resides at the property with Trust Mapiye, a final year student at NUST. The property has a 4 roomed cottage which is let out to tenants and rentals are collected by the defendant.

This immovable property is registered in plaintiff's name – see exhibit 29. The background to the acquisition and development of the property is not largely disputed. Plaintiff stated that he purchased the undeveloped stand from the City of Bulawayo. Defendant stated that the property was acquired in 2002 and developments commenced in 2003. According to her, the property was built using resources remitted by plaintiff whilst he was posted to Liberia on United Nations peace keeping duties. Defendant supervised the construction of the house whilst she was a director of Career Pursuit, a family business. She confirmed that plaintiff would send money regularly and she would pay the builders.

The basis upon which defendant claims the property is that she resides in the property with the children and has no alternative accommodation. She also indicated that she directly and indirectly contributed towards the construction of the property through purchasing building material from Botswana. Further, defendant stated that she lives with her son who is diabetic and still in college. The child needs special care in that he is required to take two injections every day. She contended that where they are staying now is comfortable and it would be “disastrous” for child's health if the environment is radically changed by allowing plaintiff to move in with the child.

Plaintiff's preferred position on this property was that it be awarded to him as his sole and exclusive property due to the sentimental value he attaches to the property arising from the perilous expeditions he went through resulting in him being able to construct the property from scratch right up to completion. He tendered documentary evidence of allowances he received monthly and remitted same through his Barclays Bank Foreign Currency Account (exhibit 2B). It was accepted that over and above this, defendant

would access plaintiff's salary, bonus and allowances from his work place and the family was well catered for.

However, plaintiff made a concession that in the event of the court considering that defendant is entitled to a share of the property, such distribution should be at a ratio of 70:30 respectively. This concession is made on the acknowledgment that the defendant indirectly contributed but however his direct contributions far outweigh the indirect contributions of the defendant. He relied on *Masveto v Masveto* HB-75-04.

Plaintiff submitted that he has no problems staying with his son Trust Mapiye as well as attend to his medical needs as he has always done. As regards the compensation for the 30% in favour of the defendant he urged the court to consider the option of taking plaintiff's 50% share in the Senga property and awarding it to the defendant.

While I agree that plaintiff's contribution is more than that made by defendant. I do not agree that an award of 70:30 in favour of the plaintiff would be just and equitable in the circumstances. I say so because on the evidence, the defendant also contributed substantially to the construction of the property. In the result, I take the view that an award of 55% : 45% in favour of the plaintiff would be just and equitable.

4. Stand 5180 Mkoba 15 Gweru

According to the evidence led during the trial, it is common cause that the property was registered in the plaintiff's name and that it was sold before divorce proceedings had been commenced. Since the parties' marriage was out of community of property, the plaintiff had the right to dispose of the property without the leave or consent of the defendant. The property has since been transferred to a 3rd party one Elias Fumbisa. Defendant's gripe here is that she did not benefit from the proceeds of the sale.

In terms of section 7 (1) (a) of the matrimonial Causes Act, this court has no jurisdiction to distribute property that does not belong to the parties at the time the marriage is dissolved. The section states:

"... subject to the section, in granting a decree of divorce, judicial separation or nullity of a marriage or at anytime thereafter, an appropriate court may order with regard to:-

(a) The division, apportionment or distribution of assets of the spouses including an order that any asset be transferred from one spouse to the other." (my emphasis) Quite

clearly, the powers conferred on the court by this law are strictly confined to matrimonial assets in the present or assets to be held by the parties in the future. This power or discretion does not have retrospective effect, hence the court cannot be seen to distribute what is not before it. If defendant has a claim to the Mkoba property or its value, such claim falls outside the ambit of the Matrimonial Causes Act.

See *Raymond Mwale Munyama v Alice Munyama* HH-692-15 and *Matarira v Matarira* SC-246-06.

5. Motor vehicles

- (a) Mistubishi Pajero registration number AAQ 8654
- (b) Mazda Capella

Both parties agree that these motor vehicles were sold well before the commencement of divorce proceedings. The defendant claims a share of the proceeds of sale of these vehicles. This claim in my view is unsustainable in terms of section 7 of the Act. It is accordingly dismissed.

6. The round hut and kiosk at Umguza

The plaintiff was offered State land to lease by the Government of Zimbabwe during the land reform programme in Umguza. Subsequently the parties constructed a round hut and a kiosk. The defendant's claim is for 50% of the value of these improvements on the land. Plaintiff argued that since this constituted improvement on state land it cannot constitute matrimonial property.

I am satisfied that it would be just and equitable that each party be awarded 50% of the value of the round hut and kiosk at Umguza.

Accordingly, it is ordered that:

1. A decree of divorce on the grounds of irretrievable breakdown of the marriage be and is hereby granted.
2. Each party shall retain movable property that is in their custody or possession as their own and exclusive property.

3. Each party be and is hereby awarded a half share of the value of the property known as stand 631 Senga Township Gweru.
4. Each party be and is hereby awarded 50% of the value of the kiosk in Gweru.
5. The matrimonial home being stand 167818 Romney Park also known as number 5 Whistler Road, Romney park Bulawayo is hereby awarded to the plaintiff and the defendant on a ratio of 55% for the plaintiff and 45% for the defendant.
6. The immovable properties mentioned in paragraph 3, 4 and 5 shall be valued by a registered estate agent appointed by the Registrar of this court to determine their market values after which either party shall be entitled within 3 months from the date of the valuation to pay to the other his or her share and retain full ownership of it.
7. The cost of evaluation shall be shared equally between the parties.
8. In the event of the parties' failure to exercise the option given to them by clause 6 herein, then the properties shall be sold by an estate agent appointed by the Registrar of this court at the best advantage and the proceeds shared in terms of this order between the parties.
9. Each party shall bear its own costs.

Mashayamombe & Company, plaintiff's legal practitioners
Messrs T. Hara & Partners, defendant's legal practitioners