

ISAAC CHAMBA  
versus  
MAYBE NGWARATI

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 22 January 2015

**Civil trial**

*P. Muchemwa*, for Plaintiff  
*B. Musandire*, for Defendant

CHITAKUNYE J: The plaintiff and defendant were customarily married to each other in 1976. In July 1978 their marriage was solemnised in terms of the Customary Marriages Act [*Cap 5:08*] (then known as African Marriages Act).

In 1979 the couple acquired Stand number 7113/14 Zengeza Township, Chitungwiza, also known as House number 7113, Tsambakodzi Road, Zengeza 3, Chitungwiza, from Chitungwiza Town Council. The Memorandum of Understanding for the purchase of the property was in plaintiff's name. The improvements on the stand comprised a two roomed core house.

The couple was blessed with 4 children who are all adults.

On the 3<sup>rd</sup> September 1991, the plaintiff obtained a divorce order from Mutoko Community Court. The ground advanced for seeking divorce was one of a long period of separation.

A Certificate of Dissolution of the marriage was issued by the said court on the 10<sup>th</sup> January 1992.

That order has remained unchallenged.

On the 3<sup>rd</sup> April 2012, the plaintiff issued summons out of this court for the sharing of House number 7113, Tsambakodzi Road, Zengeza 3, Chitungwiza. The plaintiff alleged that when the marriage was dissolved in 1991 the issue of property sharing was not dealt with as neither party had claimed for such sharing.

He thus wished the property to be shared as at the time defendant deserted him in 1982 when he alleges there was only the core house. He alleged that the parties separated in 1982 to about year 2004.

The defendant in her plea denied that there was any long separation as alleged by plaintiff. She objected to the sharing of the property. In para 2 of her plea she categorically stated, *inter alia*, that the plaintiff and defendant never separated as alleged by the plaintiff. It is only in 1998 that she said the parties briefly separated due to the plaintiff's infidelity but they soon reconciled and continued staying together.

At a pre-trial conference held in February 2013, the following issues were referred to trial:

1. Whether or not Plaintiff and Defendant had already separated prior to their divorce in 1992
2. Whether or not House No. 7113/14 Tsambakodzi Road, Zengeza 3, was a core house when plaintiff and defendant separated.
3. Whether or not the defendant directly contributed financially towards the acquisition and subsequent construction of the house to its present status.
4. Whether or not the parties' mentally challenged child needs accommodation and extra care and if so, whether or not that extra care can only be provided by Defendant.
5. Whether or not the house should therefore be shared and if so, in what percentage.

The plaintiff's evidence on the issues above was to the effect that the parties separated in 1982. At that time there was only the core house and the extension of the house to a seven roomed house was at slab level. He is the one who was in gainful employment and so the improvements were effected by him alone. After the defendant had left he continued constructing the house to completion in 1985.

Upon the defendant not returning and on learning that she had in fact married another man with whom she had two children, he approached the courts seeking dissolution of the marriage. This was granted in September 1991 and the certificate of dissolution issued in January 1992.

It was the plaintiff's evidence that the defendant did not make any financial contribution towards the initial payments for the core house. She equally did not contribute

financially towards the improvements. Initially her failure to contribute was because she had no sources of income. Later when she was doing some dressmaking and cross boarder trading albeit only twice, she still did not contribute towards the improvements. She did not bring proceeds from her ventures to the family table. This was the source of their misunderstandings that culminated in their separation.

As far as he is concerned therefore defendant should only be granted a 20% share of the value of the Stand as at the time she left.

The defendant on the other hand contended that she immensely contributed towards the initial deposit for the house and subsequent improvements. She contended she was engaged in vending wares and later in dress making (sewing) and cross boarder trading. In this way she realised a bigger income than plaintiff and so she deserved an 80% share in the property. It was also her evidence that at the time she left in 1982 the property was complete as a seven roomed house.

Though in her pleadings defendant had denied that the couple had separated for a long time leading to the dissolution of the marriage, in her evidence in court she conceded that after separation in 1982 she only returned to the matrimonial house in 2004 after being called back by some aunts as their child Chamunorwa had become mentally challenged. Though she denied marrying Caswell Chiwaridzo during that period, she admitted bearing two children with Caswell Chiwaridzo. The dates of birth of those children were given as 16<sup>th</sup> July 1985 and 5<sup>th</sup> August 1991.

Based on the defendant's concession it is thus clear that the parties had already separated prior to the dissolution of their marriage in 1992. Hearing defendant testifying one was left wondering why in her pleadings including the summary of evidence she had been denying this fact.

The issues that remained contentious were thus the last four.

The evidence by the parties on these issues shows a heavy reliance on what each party claimed to have directly contributed.

The plaintiff's evidence was to the effect that he is the one who paid the purchase price and paid for all the improvements without the defendant's direct financial contribution. He testified that at the time of separation in 1982 there was only the core house and a structure up to slab level for the extension of the other 5 rooms. He however could not produce any evidence in support of the state of the improvements at the time of separation.

The defendant on the other hand contended that at the time the property was bought she was into selling wares and would realise more income than plaintiff. She thus contributed more towards the purchase of the property and the construction of the improvements. In support of her contention she tendered some receipts for the purchase of building material. Those receipts were meant to prove that she is the one who bought those building materials. Unfortunately most of those receipts were cash sale receipts with no name of the buyer. None of the receipts contained defendant's name. Some of the receipts in fact had the plaintiff's name. I am of the view that due to lapse of time and the fact that the parties were married, the issue of who purchased what cannot be resolved by the production of receipts. Receipts in such instances would be kept in the house and whoever has access to them may not necessarily be the purchaser. I thus rule that the receipts tendered are of no value as to who purchased what.

On the state of the house at the time of separation in 1982, defendant contended that the house had been fully completed as a seven roomed house. To prove her point she tendered some photographs she said depicted part of the house. She also called Agnes Nyathi, the woman whose love relationship with plaintiff led to the 1982 separation.

Agnes' evidence was to the effect that she came into the house a few weeks after defendant had left and found the house complete except that it was not painted. Agnes also tendered photographs she said confirmed the house was completed. It was however evident that Agnes' evidence was tailored to suit what was needed. She on occasions confirmed she had just been told as to when defendant had left. I am also of the view that the pictures are not conclusive in themselves as they do not depict when they were taken.

Though the evidence on the state of the house at the time of separation has not been conclusive I am of the view that that should not be cause not to distribute the property.

It is my view that whilst the state of the house at the time of separation is important, it must not be forgotten that the distribution of assets of the spouses is not dependant on one's direct financial contribution or on the state the property was in at the time of separation.

Section 7(1) of the Matrimonial Causes Act empowers court to apportion or distribute assets of the spouses at the time of granting a decree of divorce or at anytime thereafter.

The term 'assets of the spouses' connotes assets that maybe in either spouse's name or jointly owned. See *Gonye v Gonye* 2009 (1) ZLR 232(S). Such assets include all assets purchased whether before or during the marriage and includes property acquired after

separation unless such property is specifically excluded in terms of s 7(3) of the Act. See *Musonza v Musonza* HH 35/10 and *Ncube v Ncube* 1993 (1) ZLR 39 (S).

Section 7 (4) of the Act enjoins court to consider all the circumstances of the case and to endeavour as far as is reasonable and practicable to place the spouses and children in the position they would have been in had a normal marriage relationship continued.

Section 7(4) (a)-(g) outlines some of the factors identified by the legislature. The first four considerations all address the needs of the parties rather than their dues. The parties' direct and indirect contribution is listed as the fifth. The last two considerations pertain to what each spouse stands to lose and the duration of the marriage.

The most important objective in the consideration of all the circumstances of the case, including factors outlined above, is to 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.

It is apparent from the above that court is granted wide discretion. The assets to be considered are not restricted to assets acquired when the spouses were living together but includes those acquired whilst on separation.

In *casu*, even by plaintiff's evidence the improvements were completed during the subsistence of the marriage and so such improvements would still be considered in the distribution. Thus the value of the asset to be considered is as at the time of the dissolution of the marriage.

The parties made concerted effort to outdo each other on the question of direct financial contributions. As already alluded to above, all the circumstances of the case must be considered and not just one's direct financial contribution. On contributions I am of the view that plaintiff contributed more. It may also be noted that from the time of separation in 1982, plaintiff remained solely responsible for maintaining the property whilst defendant engaged in other relations leading to the birth of two children. She had more or less gone out of the matrimonial equation only to resurface 22 years later. I am of the view that the circumstances, including conduct of defendant, are such that plaintiff deserves a greater share in the property. This will be a share of the property in its current state and not its state as a core house.

As regards the issue of Chamunorwa, their mentally challenged child, the plaintiff's evidence was to the effect that that should not be used to deny him his dues as that child is

now an adult and as a male adult he can take care of him, defendant would be ill-equipped to attend to the needs of an adult male child.

The defendant on the other hand contended that she can take care of that child. She however went on to say she had in fact recalled their other male child from South Africa to come and assist with Chamunorwa. That in my view lends credence to the fact that a male adult person would be more suited to take care of Chamunorwa. I thus hold that whilst Chamunorwa needs accommodation and extra care, such care cannot only be provided by defendant. As for accommodation any rented accommodation can do, I say so because both parties seemed to agree that Chamunorwa has in the past rented his own accommodation. The challenges he faced were to do with him staying alone at those rented premises.

After a careful analysis of the evidence adduced in court, I am of the view that the property should be distributed. The sharing ratio will obviously depend on the various factors already alluded to.

After a careful analysis of the evidence tendered it is clear to me that the issue of Chamunorwa cannot be used to deny the parties a distribution of the property. Chamunorwa, as noted, is able to do some work on his own as long as he takes his medication. What he needs is someone to remind him to take his medication. That can be done at any other property.

In the result the plaintiff will be awarded a 75% share in the property in question whilst defendant retains 25%. The plaintiff shall be given the option to buy out defendant failing which the property shall be sold and the proceeds shared in their respective ratios.

Accordingly it is hereby ordered that:-

1. The plaintiff is hereby awarded a 75% share in Stand number 7113/14, also known as House number 7113/14 Tsambakodzi Road, Zengeza 3, Chitungwiza.
2. The defendant is hereby awarded a 25% share in the said immovable property.
3. The plaintiff is hereby granted the option to buy out defendant in respect of her share in the property. In order to exercise this option, the parties shall, within 14 days of this date, appoint a mutually agreed estate agent to value the property failing such agreement, one shall be appointed for them by the Registrar of the High Court. The cost of valuation shall be met by the parties as per their shares that is- 75:25.
4. The plaintiff shall buy out defendant's share within 6 months from the date of receipt of the valuation report unless parties agree on a longer term. Failing such payment or

a payment plan acceptable to defendant, the parties shall within 21 days of such failure appoint a mutually agreed estate agent to sell the property to best advantage. Should they fail to agree on an estate agent one shall be appointed for them by the Registrar of the High Court.

5. The net proceeds of the sale shall be shared between the parties as per their respective shares in the property.
6. Each party shall bear their own costs of suit.

*Legal Resources Foundation- Harare*, plaintiff's legal practitioners  
*Legal Aid Directorate*, defendant's legal practitioners