

MINORS' DETAILS ANONYMIZED

TENDAI PANGETI
versus
CHRISTINA NYAGUMBO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 22 January 2015

Civil trial

P. Kawonde, for the plaintiff
L. Rubaya, for the defendant

CHITAKUNYE J: The plaintiff and defendant started living together as man and wife in 1999. This was after the plaintiff had paid lobola for the defendant. Traditionally therefore, they were married as from 1999. Their marriage was, however, unregistered. On 17 January 2005 the parties' union was solemnised in terms of the Marriages Act, [*Cap 5:11*].

The marriage was blessed with 3 children whose ages were given as 11 years, 4 years and 6 months as at the time of instituting these proceedings.

On 14 June 2010 plaintiff issued summons seeking a decree of divorce and other ancillary relief. The plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship.

The defendant, in her plea, conceded that the marriage has irretrievably broken down and so a decree of divorce should be granted. She also made a counter claim in which she sought:-

1. A decree of divorce,
2. Custody of the three minor children of the marriage.

3. The right to reside at No. 151 Monavale Road, Avondale, Harare with all the minor children until the youngest attains the age of 18 years;
4. Maintenance for the three minor children in the sum of \$200-00 per month per child until each child attains the age of 18 years or becomes self supporting whichever is earlier;
5. Maintenance for the defendant in the sum of \$150-00 per month;
6. A distribution of assets of the spouses as per para 7.1 – 7.2 of her counter claim; and
7. Costs of suit.

At a pre-trial conference held on 18 July 2012, the parties appeared to have settled on a number of aspects hence the only issues referred to trial comprised:-

1. How much maintenance should the plaintiff pay in respect of the minor children of the marriage;
2. Whether the shop in the plaintiff's possession should be shared and, if so, in what ratio?
3. In what ratio should the immovable property of the parties be shared?
4. At which stage should the immovable property be sold following divorce?

On the trial date the issue of the shop had been resolved such that only issues 1, 3 and 4 remained for determination.

The plaintiff gave evidence and tendered documentary evidence in support of his claim. Thereafter the defendant gave evidence and tendered documentary evidence in support of her contention.

From the evidence adduced it is common cause that when the parties entered into an unregistered marriage union in 1999, the defendant owned an undeveloped Stand No. 3376 Tynwald, Harare. She had acquired it through a mortgage bond from her then employer, Old Mutual, and she was still servicing the mortgage bond.

When the customary law marriage rites were performed she moved in to live with the plaintiff in Warren Park. The plaintiff was a tenant at that house and he was staying with some of his relatives.

Whilst in that rented accommodation, a structure was built on the defendant's Stand 3376 Tynwald, Harare. The plaintiff alleged that he is the one who built that structure from his income. The defendant on the other hand contended she built that structure on her own without the plaintiff's contribution. When that structure was habitable they moved to the defendant's stand.

After staying at the stand for some time, that stand was sold and stand number 3611 Tynwald was bought. Stand 3376 had been bought for Z\$78000-00 and after the erection of a structure was sold for Z\$300000-00.

Stand 3611 was bought using a mortgage bond from the defendant's employer. A structure was built partly from proceeds from stand 3376.

Stand 3611 was later sold for Z\$ 7500000-00 and Stand No. 3641 Tynwald bought. A 4 bed roomed house was built on this stand. Later this property was also sold for Z\$180000000-00. It was then that the stand in question, Stand 151 Monavale, was bought for \$55000000-00. On this stand a 4 bed roomed house was built.

It is common cause that all the stands were registered in the defendant's name except stand 151 Monavale which is registered in the joint names of the parties.

It is also pertinent to note that whilst the parties agreed that stand 151 Monavale was the culmination of a series of events in which undeveloped stands were bought, partially developed and sold, they are in serious disagreement on their respective contributions in the acquisition development and selling of the stands.

It is accepted that the stands that were sold had been bought through mortgage bonds obtained by the defendant from her employer. The properties bought using mortgage bonds were all registered in the defendant's name. It is only Stand 151 that was not bought using mortgage bond. That property is registered in the parties' joint names and it happens to be the last property in the series of buying and selling.

The plaintiff's evidence was to the effect that when the parties started living together indeed the defendant had a stand, namely Stand 3376 Tynwald. He indicated that the loan deductions on the defendant's salary were such that she remained with little money. He is therefore, the one who financed the construction of a 2 bed roomed cottage at this stand. They sold this property and used part of the proceeds to pay off the bond. The defendant obtained another bond to purchase Stand no. 3611. This was again an undeveloped stand. They used the balance of the proceeds from Stand 3376 to start construction on this new stand. He also put his own resources to augment. This stand was sold and the parties bought Stand 3641. The Old Mutual bond was cleared and the parties used some of the proceeds to start developing this stand.

The defendant obtained a retrenchment package and part of that money was used in the construction. After building a 4 bed roomed house the couple sold Stand 3641 and used

the proceeds to buy Stand 151 Monavale. As this was bought on cash basis they registered it in their joint names. On previous stands they had not registered the stands in their joint names due to loan requirements by the defendant's employer as this was tied to her employment.

In an effort to prove his contribution in the development of the Stands plaintiff referred to several invoices and receipts that are in his name.

The defendant on the other hand contended that the plaintiff did not make any direct financial contribution towards the purchase and development of the Stands. She is the one who solely acquired the stands and financed the improvements on those stands. To confirm this, she referred to the fact that all stands acquired prior to 151 Monavale were all in her name. She contended that Stand 151 was registered in their joint names not because the plaintiff had made any direct financial contribution but in order to secure their children's inheritance. She had been persuaded by the plaintiff that if the property was registered in her sole name in the event of her demise her relatives may turn out to be greedy and grab the property to the detriment of the children's interest. He thus persuaded her that if the property was in their joint names her relatives would not find it easy to deprive children of their inheritance.

On the receipts and invoices tendered by the plaintiff, the defendant indicated that that did not prove the source of the money. The plaintiff had more time to run around buying building material but he was using money provided by the defendant. As for the receipts and invoices for dates after the year 2005 the defendant contended that these did not relate to Stand 151 Monavale as no construction was done after 2005. She argued that the invoices and receipts, after 2005, may in fact be for building materials bought by the plaintiff for his young brother's house. That brother is based in Namibia and was sending money for the plaintiff to attend to the construction of that brother's house.

From the evidence adduced, it is clear the parties were so much engrossed in establishing their direct financial contributions to the detriment of other factors that court is enjoined to consider in the distribution of assets of the spouses.

Section 7(4) of the Matrimonial Cause Act [*Cap 5:13*] provides that:-

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

- (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 has or is likely to have in the foreseeable future;
- (c) The standard of living of the family, including in which any child was being educated or trained or is expected to be educated or trained;
- (d) The age and physical and mental condition of each spouse or child;
- (e) The direct or indirect contribution by each spouse to the family, including contributions made by looking after the house and caring for the family and any other domestic duties;
- (f) The value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse 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 the children in the position they would have been in had a normal marriage relationship continued between the spouses.

It is apparent from the above provisions and various court pronouncements that court has wide discretion in the distribution of the assets.

Section 7(1) (a) of the Act gives court power to transfer assets from one spouse to the other in the exercise of such discretion in stating that:-

Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate 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.

Even where court finds that an asset is owned by one of the spouses that does not stop court from awarding that asset or part thereof to the other spouse. What is of paramount importance is a consideration of all the circumstances of the case and arriving at a decision that places the spouses and children in the position they would have been had a normal marriage relationship continued. See *Kanoyangwa v Kanoyangwa* 2011 (1) ZLR 90 (H).

In *casu*, it is common cause that Stand 151 Monavale is registered in the joint names of the parties. Where a property is registered in the names of two parties the presumption is that such property is jointly owned with each party owning a 50% share in the property. It is for the party alleging that the property is not so owned to rebut that presumption.

In *Lafontant v Kennedy* 2000(2) ZLR280 (S) at p 284 C-D McNALLY JA alluded to the need for a party to lay a solid foundation for the transfer of another spouse's share when he said that:-

The court cannot move from that position on mere grounds of equity. It cannot give away A's property to B on the mere grounds that it would be fair and reasonable, or just and equitable to do so. There must be a more solid foundation in law than that.

Some of the instances where such solid foundation was found to exist include where the other party was found to have been a mere nominee of an undisclosed principal. In the *Lafontant v Kennedy* case McNALLY JA went on to say that:-

I think, by claiming and proving that she alone paid for the property, it must necessarily follow, if it was registered in their joint names, that she effectively gave him the half share as her nominee, for convenience. By instituting action she is terminating that nomination.

Court thus found that a case had been made to transfer party of another spouse's property to the other.

In *Kanoyangwa v Kanoyangwa* 2011 (*supra*) the circumstances were such that though the property was registered in the joint names of the parties, the entire purchase price and transfer fees were paid from the plaintiff's retrenchment package and the defendant had not contributed anything in that regard. I found that as a case where the defendant's share could be tampered with in favour of the plaintiff.

In *Ncube v Ncube* S 6/93 the property was registered in the joint names of the parties and the husband wanted the wife to be treated not as owner on the basis that she had not contributed towards the purchase price. KORSAH J had this to say at p11 of the cyclostyled judgement-

It is incorrect to say that Appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money of money's worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property. The proper approach is to accord her share of that property and then taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered in the exercise of its discretion to order that any asset be transferred from one spouse to the other.

In *casu*, the question is whether the defendant has laid a solid foundation for this court to interfere with the plaintiff's half share in the property?

The defendant's stance was that she alone bought the initial stand, built an illegal structure on it and sold it. She did the same for subsequent stands. She contended that the plaintiff's contribution was insignificant as it consisted mostly of running around getting quotations and buying material using money she will have sourced.

It is common cause the stands were being acquired as undeveloped stands. The funds to purchase the stands came through mortgage bonds obtained by the defendant in her name. The issue is however, on the developments made after the purchase of the undeveloped stands. There is no doubt that whatever development that was an improvement which enhanced the value of the property. Thus when disposing such property, the value realised included value for the improvements.

It is common cause from the evidence adduced that for most part of their union both parties were employed. Each thus earned an income they were expected to contribute towards their family needs. It is my view that each contributed according to their means to the family. It may have been a situation of the defendant earning more than the plaintiff but that is no just cause to say he never contributed. I am inclined to accept that the plaintiff did contribute both directly and indirectly towards the developments on the properties the parties acquired. The contributions were so intertwined that it was not easy to disengage a party's contribution from the other.

I am therefore of the view that a 50:50 share would have been appropriate but for other factors that must be considered.

The defendant, as the party to retain custody of the minor children, deserves such share as would enable her to acquire another property. She is going out of the marriage with an onerous responsibility of ensuring she has shelter for the children. It is a long way before all the children reach age of majority. I am of the view that taking into account the needs and responsibilities of the parties, their financial positions and expectations, the defendant deserve a 60% share and the plaintiff a 40% per cent share. The defendant will be granted the option to buy out the plaintiff.

The other issue tied to the immovable property pertains to the stage at which the immovable property should be sold following the grant of a decree of divorce.

The plaintiff argued that the property should be sold immediately whilst the defendant contended that it should only be sold after the youngest of the children attains the age of 18 years.

The plaintiff's argument was on the basis that he needed to boost his business so that he generates enough income to be able to maintain the children whilst the defendant's basis was that she needed shelter for the children. After a careful consideration of the grounds advanced by each party I am of the view that the provision of shelter can be taken care of by awarding the defendant a bigger share of the proceeds. A delay in the disposal of the property till the youngest child attains the age of 18 years has potential dangers or risks that may lead to potential conflict. For instance the property will require to be maintained and be kept in good condition. Such maintenance may be contentious. It is thus prudent to dispose of the property such that each party gets their due share and are able to move on.

The last issue pertains to maintenance. From the evidence adduced in court both parties appear to have fallen on hard times. The shops that the parties were operating after leaving formal employment appear to have been adversely affected by the harsh economic realities obtaining in the country.

The plaintiff's evidence was to the effect that he operates a motor spares shop from which he realises a net income of plus or minus USD800-00 per month. He outlined his expenses after which he argued that he can only afford the maintenance sum of \$50-00 per child per month as per current maintenance order.

The defendant on the other hand contended that \$50-00 per child per month is too little and she would want a sum of \$200-00 per month per child. She also outlined what she considered as needs for the children.

In determining an appropriate order for maintenance court is urged to take into account the basic needs of the children such as are necessary to enable the children to enjoy the same standard of living they enjoyed when the parents were living together. Court is also enjoined to consider the ability of the responsible person to pay the sum ordered.

In *casu*, apart from the monetary payment of \$50-00 per child per month the plaintiff was also ordered to provide for the children's school needs.

After a careful analysis of the needs of the children, the plaintiff's income and other provisions he will continue providing, I am of the view that a slight adjustment is necessary. The plaintiff seemed to acknowledge this when he alluded to the fact that the defendant

received other income from tenant's leasing the main house which she should use towards the maintenance of the children. Clearly therefore now that the property will be sold it means he has to make up for the loss of that income. The defendant is also expected to contribute towards the needs of the children. She cannot expect the plaintiff to pay for all the needs of the children. Parties must accept that it may not be possible to enjoy the same lifestyle they were used to as they now have to split whatever income they get between two households.

I am of the view that an award of \$75-00 per month per child with the plaintiff continuing paying the schools fees and buying school uniforms for the children will meet the justice of the case.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted;
2. The defendant is hereby awarded custody of the three minor children namely I, O and V.
3. The plaintiff shall pay maintenance in the sum of \$75-00 per month per child till each child attains the age of 18 years or becomes self supporting whichever is earlier;
4. The plaintiff shall pay the minor children's school fees and buy school uniforms until each child attains the age of 18 years or becomes self supporting whichever is earlier;
5. The plaintiff shall enjoy reasonable rights of access to the minor children on such times and occasions as would not unduly interfere with the defendant's rights as the custodian parent. Such access shall be upon arrangement with and notice to the defendant. The defendant shall not unreasonably deny the plaintiff access to the minor children.
6. The plaintiff is hereby awarded a 40 per cent share in the matrimonial home namely Stand 151 Monavale Township of Mayfield Estate, Harare also known as No. 151 Monavale Township, Monavale, Harare.
7. The defendant is hereby awarded a 60 per cent share in the above cited immovable property being No. 151 Monavale Township, Monavale, Harare.
8. The parties shall agree on the value of the property within 14 days of the date of this order failing which they shall, within 14 days, appoint a mutually agreed valuer to do the valuation. Should the parties fail to agree on a valuer the Registrar of the High Court shall appoint such valuer within 14 days of the parties' failure to do so.

9. The parties shall share the cost of valuation according to their pro-rata shares in the property.
10. The net proceeds shall be shared between the parties at the rate of 40% for the plaintiff and 60% for the defendant.
11. The defendant is hereby granted the option to buy out the plaintiff in respect of his share in the property. Such option shall be exercised within 6 months from the date of receipt of the report of valuation or date of agreeing on the value whichever is earlier.
12. Should the defendant fail to exercise the above option within the period stated or such longer time as the parties may mutually agree, the property shall be sold by an Estate Agent to be mutually appointed by the parties within 14 days of the defendant's failure. In the event that parties fail to agree on an estate Agent, the Registrar of the High Court shall, within 14 days of such failure, appoint an Estate Agent to conduct the sale. The costs in this regard shall be met by the parties according to their pro-rata shares in the property.

Kawonde and Company, Plaintiff's Legal Practitioners
Mandizha and Company, Defendant's Legal Practitioners