

RAYMOND MWALE MUNYAMA
versus
ALICE NDOUDZANI MUNYAMA (NEE MAPFIDZA)

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 30 June 2015, 1, 7,8,16 July 2015 and 6 August 2015

Civil Trial

Ms B Makuwisa, for the plaintiff
M. H Chitsanga, for the defendant

MWAYERA J: The parties contracted a civil marriage on 1 July 2008 whereby their marriage was solemnized in terms of Marriage Act [*Chapter 5:11*]. The marriage was blessed with three children. In May 2014 the plaintiff issued summons for divorce and ancillary issues thereto. The defendant entered appearance to defend and filed subsequent pleading thereto. At pretrial conference the parties agreed on the following:

1. That the marriage has irretrievably broken down.
2. That the defendant shall retain custody of the three minor children
3. That the maintenance order granted by the magistrate's court to continue and to be incorporated into the main order.
4. That the plaintiff shall have access to the minor children during half of every school holiday.
5. All movable property had been awarded to the defendant.

As such the parties agreed to refer to trial two issues namely:

1. What constitutes the parties immovable matrimonial property?
2. How should such property be apportioned amongst the parties?

Most aspects of this case given the agreed issues are common cause. It is not in dispute that the parties have irreconcilable differences and have lost love and affection for each other as

evidenced by not staying together as husband and wife since 2012. This is and also evidenced by the parties agreement that the marriage has irretrievably broken down. It is also further common knowledge that there is an existing maintenance order for the parties' children.

The plaintiff testified to the effect that the parties acquired immovable properties in the form of stands during the subsistence of the marriage. He was definite about the acquisition of the Cold Comfort Stand 11524 Harare and also 350 Juru Growth Point and 3050 Nyatsime Park Chitungwiza. The plaintiff had no problems in the properties 350 Juru and 3050 Nyatsime being awarded to the defendant.

As it surfaced from the defendant's evidence that the Juru stand was sold, the plaintiff indicated he did not wish to claim that property. It was also the plaintiff's evidence that stand 11524 was sold prior to developments to one Dr Rita Mwale. According to the sale agreement which was tendered as exhibit 2 by consent, the property was sold in 2008, specifically on 20 June 2008. To exhibit 2 was also attached exhibit 2 (c) a receipt in acknowledgment of payment and also a cession agreement exhibit 2 (a) wherein the plaintiff ceded his rights to the buyer DR RITA MWALE. The documents were tendered by consent of the parties. The plaintiff also produced a letter from Kamu Construction, a Property Developer as exhibit 3 by consent. The letter served to confirm that the stand 11524 Cold Comfort was owned by Mangara Chirinda who had in turn bought the stand from RITA MWALE after the latter bought the stand from the plaintiff. The plaintiff also relinquished claim to stand 3050 Nyatsime Park which according to the defendant had not yet been allocated although she was on "buy stand" scheme with money being deducted from her salary for that stand.

The defendant insisted that the other two properties were not matrimonial assets even though the plaintiff had indicated no interest in premises. She also insisted the stand 11524 Cold Comfort was their matrimonial asset she however, oscillated from saying there was a cottage that they had constructed as husband and wife to saying the cottage was demolished, and finally to giving a version that there was a superstructure. At some stage she said she did not know what was there in terms of development at the stand. In another breath she indicated that she learnt the property belonged to somebody else. The defendant also admitted to having attended at the developer's offices, Mr Chirima of Kama Construction, with both their legal practitioners in attendance and that exhibit 3 confirming property was sold to Dr Rita Mwale who in turn sold to

Mangora Chirinda was issued out. She was however adamant even in her closing submissions that the property 11524 Cold comfort was a matrimonial asset and that the sale agreement was not authentic. Despite being given a chance to adduce evidence to the contrary on sale, the defendant had none to proffer. Her contention was that the stand could not have been sold to Dr Rita Mwale as the defendant and Dr Rita Mwale had bad blood. What is not in dispute is that the defendant says she became aware of the sale in 2014 but insists the property could not have been sold to the person she did not get along with.

From the totality of the evidence, it is apparent both the plaintiff and the defendant seem to have divested themselves of any interests in the property in question as evidenced by the sale agreement and lack of knowledge of developments thereon. The defendant merely alleges the sale is not authentic with no substantiation of that allegation. There is nothing placed before the court to question the sale agreement. The defendant further talks of contributing towards construction of a cottage after obtaining a loan, although she did not seek to give evidence to prove that aspect. Even if this was accepted, the fact would still remain that the defendant agreed the cottage had been demolished and she did not seek anything further. In any event the land in question, on a balance of probabilities, was sold to Dr Rita Mwale who in turn sold, to Mangarai Chirinda as per the property developer's records. What sticks out from the evidence, after the plaintiff and the defendant's evidence is analysed, is that there are no matrimonial assets to talk about. In the absence of evidence to show that the stand 11524 Cold Comfort was not sold, the defendant's claim over the property remains speculative. More so, both parties agree they bought an underdeveloped stand in 2008 and that they cannot explain the developments currently at the stand in the form of a super structure, the main house.

The division of assets consequent to divorce is governed by s 7 of the matrimonial causes Act [*Chapter 5 : 13*].

Section 7 (1) reads:

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of a marriage, or at any time thereafter, an appropriate court may order with regard to
a) the division, apportionment or distribution of assets of the spouses including as an order that any asset be transferred from one spouse to the other.”

A reading of this section reveals that the property that falls for consideration is the property which falls under the ambit of spousal matrimonial assets. The property of third parties is certainly

not subject of apportionment for sharing and distribution. The evidence is clear that the Juru Stand, and the Cold Comfort stand were disposed off by sale and the Nyatsime stand is yet to be allocated. Clearly therefore, the insistence on sharing what is to the knowledge of the parties unavailable, is not only illogical but unreasonable. From the evidence, it is apparent the parties have not been living together as husband and wife for a period in excess of a year and that their marriage relationship has broken down beyond reconciliation. The parties have agreed to regulate maintenance by an existing maintenance court order. They have also agreed on custody and access. There is no property to share.

Accordingly, it is ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the three minor children namely:
 - a). T born 10 July 2006
 - b). L born 27 August 2008
 - c). D born 25 December 2009 be and is hereby awarded to the defendant.
3. The plaintiff shall have access to the minor children during half of every school holiday as per the parties's arrangement.
4. The existing maintenance order MC 3103/13 shall continue to regulate maintenance.
5. There are no matrimonial assets to share.
6. Each party is to bear its costs.

Legal Aid Directorate, plaintiff's legal practitioners
Mangwana and Partners, defendant's legal practitioners