MOSES MUTANDANGESWA MUTOWO

versus

EMILIA KAGURABADZA

HIGH COURT OF ZIMBABWE

MATANDA-MOYO J

HARARE, 19 January 2018 & 14 March 2018

**Trial**

*C. Chibaya,* for the plaintiff

*J Fusire,* for the defendant

 MATANDA-MOYO J: The plaintiff instituted divorce proceedings against the defendant, whom she married on 3 May 2002 in terms of the Marriages Act [*Chapter 37*] now [*Chapter 5:11*]. Three children were born out of the union namely Tafadzwa (born 5th September 1996), Aramu (born 5th September 1998) and X (born 28th October 2002). Only X is still a minor.

 The plaintiff alleged that his marriage to the defendant has irretrievably broken down to the extent that it can no longer be salvaged. The parties have been staying apart for 14 years.

 The parties are generally agreed that the marriage can no longer be restored to normalcy. They are agreed on the issues of custody, access and maintenance of the minor child. The parties also agreed on the other ancillary issues and a consent paper to that effect has since been filed with the court. The only issue referred to trial is the distribution of the immovable property acquired during the marital union namely house number 1013 Hobhouse 1 Mutare. The plaintiff insisted the house should be shared between the two with the plaintiff receiving 65% of the proceeds. The defendant insisted the house should be sold and both parties share proceeds equally between them.

 The plaintiff testified that the house in question is registered in his name. It was his evidence that he built the house on his own from 1996. He conceded that by that time he was already staying with the defendant having customarily married her. He testified that he was employed as a class two driver by Manica Haulage Company in Mutare. He used to drive heavy vehicles in and outside Zimbabwe. He would be paid a salary plus various allowances. It was his testimony that the defendant was never employed. He vehemently denied that the defendant made any financial contributions towards the construction of the house.

 He also testified that he has since constructed a house at defendant’s rural home. He claimed he also bought cattle and goats for the defendant which he took to her rural home. He sent the defendant to school where she did cutting and designing.

 Under cross-examination he said he married the defendant customarily around 1991. He insisted it was him who constructed the house. He even said when he travelled he left the construction under the supervision of their maid. He initially claimed he was the one who paid the builders. He said he would always travel with his wife such that the defendant could not have supervised construction. He then changed to concede that certain times the defendant did not travel with him.

 He also denied that the defendant assisted in the construction of their rural home.

 On being asked whether the defendant was not involved in the buying and selling business from whose proceeds she contributed in the construction of the house, the plaintiff vehemently denied that. He however conceded that he would give the defendant money to pay the builders. He insisted he should get 65% of the proceeds.

 The defendant testified that she was forty one years old having married the plaintiff when she was 16 in 1992. In July 1998 the two purchased the Mutare stand. This witness testified that she was the one who woke up daily to queue at Mutare City Council for the stand.

 She testified that they commenced construction at the stand sometime in 1999. It took them three years to finish constructing the house. She would cook for the builders and supervise construction. She agreed that during that time she was not formally employed. She however testified that she would sometimes travel with the plaintiff outside and she would buy items for resale. Sometimes she would sent plaintiff to buy goods for resale. She used such proceeds in the construction of the house.

 She testified that she built a 5 roomed house at the plaintiff’s rural home. She also raised the plaintiff’s children from previous marriages. She however denied that the plaintiff built a house at her rural home. She refuted that the plaintiff bought cattle and goats which he took to her rural home. She testified that when the plaintiff left the matrimonial house he took with him a vehicle.

 On why she was insisting on 50% the defendant averred that she is staying with the three children in the house. Although the other two are majors they are not yet self-sustaining and depended on her for accommodation and upkeep. She also wanted the court to consider that the plaintiff has also benefited from the rural home.

 Under cross-examination she conceded that she was not formally employed and never earned a salary. She said they only had a maid after completion of construction. She insisted she directly contributed to the construction of the house through proceeds from her buying and selling business. She insisted she ran around in order to secure the stand. She also said the plaintiff had sold the vehicle and bought a stand in Northview although she did not have specific details to the stand. She insisted the plaintiff had nothing at the time they married and insisted she was entitled to 50%.

 From the evidence led by the two the defendant struck me as an honest and hardworking woman who tolerated ill treatment from the plaintiff for the sake of the marriage. She gave her evidence well and was very emotional on the issue of divorce. Otherwise her evidence was not contradictory in any way. The plaintiff on the other hand gave contradictory evidence. Initially he was adamant the defendant contributed nothing whether directly or indirectly to the construction of the house. He even testified that the maid did the construction. From the defendant’s evidence it became clear that the parties had no maid during the period. The plaintiff later changed his evidence and conceded that indeed the defendant supervised construction and paid the workers. He only conceded after being shown a book where the builders signed for their monies. The defendant would also counter sign.

 I also believed the defendant when she narrated that she would order goods for resale from South Africa and use the proceeds for construction. The defendant acknowledged from the onset that she was never employed. She also acknowledged that the plaintiff gave her the funds to order the goods for resale. It is my finding that both parties did contribute financially to the construction of the house. It is also my finding that it was the defendant who physically braved it out to wait in long queues in order to get the stand upon which the house was constructed. It is the defendant who approached City of Mutare for the stand although the plaintiff provided the money to purchase the stand.

 The division of assets during divorce is governed by s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. It provides:

“(1) Subject to this section, in granting a decree of divorce, …….., an appropriate court may make an order with regard to-

(a) the division, apportionment on distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;

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

1. the income earning capacity assets and other financial resources which each spouse has or is likely to have in the foreseeable future;
2. the financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future;

(c) the standard of living of the family,---

(d) the age and physical and mental condition of each spouse

(e) the direct and indirect contribution made by each spouse --- including

 contributions made by looking after the home and caring for the family and other

 domestic duties;

(f) the duration of the marriage and in so doing the court shall endeavour as for as

 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---”

 From the above it is clear that the court has so many considerations to make before coming out with distribution percentages. The list above is not exhaustive. Whilst the issue of what the parties contributed towards the purchase of the stand and construction of the house is paramount, there are other factors to be considered in coming to a just distribution of the immovable property.

 From the evidence adduced it is not in issue that the plaintiff was the one who was gainfully employed. However it was through the defendant’s efforts that such a stand was secured from the City Council. The Supreme Court has held in the case of *Masiwa* v *Masiwa* 2007 (1) ZLR 167 (S) that there is need for the courts to have regard to both direct and indirect contributions of the spouses. The defendant contributed indirectly by securing the stand, suspevision of the construction of the house, preparing meals for the builders, looking after the family including plaintiff’s children born out of previous marriages. The defendant further made direct contributions through provisions of finances which she raised through buying and selling. The plaintiff on the other hand only made direct financial contributions towards the purchase of the stand and the construction thereof. His job entailed being away from home most of the times. He could not have supervised the construction of the house.

 The plaintiff moved out of the house sometime in 2003 during which period he was not looking after the family. The defendant single handedly raised the family from 2003 until 2009 when she sought an order of maintenance from the magistrate court. Such conduct by plaintiff is deplorable. The plaintiff was selfish and cruel. The plaintiff had an obligation to maintain defendant and the children but abrogated all responsibilities to the defendant. As was enunciated by this court in *Katsamba* v *Katsamba* 2014 (1) ZLR 187 (H) at 188 A – C,

“where a wife, as in this case, has performed the child rearing and caring role, relying largely on financial support from the husband, the reality of continuing such obligations post separation, without adequate support, can be particularly detrimental for the physical and mental well-being of the spouse and children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food are met---”

With all that the defendant went through and considering all the circumstances of this

case, including that the defendant was married at the tender age of 16 – it is only fair that the parties share 50 – 50 the value of the house.

 Our Constitution is premised on values which recognizes the rights of women and children – See s 3 (2) (i) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. Section 17 (2) of the Constitution also enjoins the state to rectify gender discrimination and imbalances resulting from past practices and policies. Section 7 of the Matrimonial causes Act is that one piece of legislation which now ensures that women do benefit from the sharing of matrimonial assets at the dissolution of marriage.

 Considering that the defendant still looks after even the other two children, though majors, but are still dependent on her. And also considering that the plaintiff has benefited from a vehicle which does not form part of this claim. The plaintiff had a house built for him in his rural area where he currently resides, it is just an equitable that the defendant received the 50% share she sought.

 In the result I order as follows:

1. That the plaintiff be and is hereby awarded 50% of proceeds to the House Number 1013 Hob house 1, Mutare whilst defendant is awarded the other 50%.
2. That plaintiff pays costs of suit.

*Chibaya and Partners c/o Rubaya and Chatambudza,* plaintiff’s legal practitioners

*Legal Aid Directorate*, defendant’s legal practitioners