

BASIL NZUWIRE
versus
SHARON NZUWIRE (Nee Chinhamo)

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6 & 19 July 2023

Civil Trial

Mr *C T Tinarwo*, for the plaintiff
Defendant in Person

TSANGA J: The parties in this matter married in 2008. They are agreed that their marriage has broken down and that a divorce ought to be granted. Whilst initially three issues were referred to trial, namely custody, maintenance and the sharing of the immovable property, at the time of the trial the parties had resolved issues relating to maintenance and custody of their minor children. On the issue of the immovable property they had also made significant head way in that they were both now agreed that each party has a 50% share in the property known as Stand 3451 Southlea Park Harare, measuring 240 square meters. Their point of difference however, remained when that property should be sold. Whilst the plaintiff is happy to acknowledge the defendant's fifty percent share and to buy her out of that share, the defendant is adamantly opposed to the sale because she says she would have nowhere to go with the four minor children who are currently aged, 13, 10, 9 and the youngest who is just about to turn 4 years old. She says she cannot afford to buy out the plaintiff. Her proposal is that the sale of the house be deferred until the youngest child reaches majority. The plaintiff resides in South Africa where he works as a taxi driver.

In his evidence at the trial, the plaintiff put forward three possible scenarios for dealing with the property. The first was that the property be valued and he buys out the defendant's 50% share and becomes the sole owner of that property. He would require about six months to raise the money to buy her out. Also under this option he would be prepared to let the defendant reside with the children at the property for five years only from the date of sale of the property.

His second option is to have the house put in their four children's name but with the crucial condition for him that the defendant and the children do not stay at the property but would use rental proceeds to look for somewhere else to stay. For him this condition is necessitated by the circumstances surrounding their break up which involved what he said where uncultured and vulgar words uttered by the defendant in the presence of his friends. His third option is that the house be sold outright and they share proceeds.

As regards maintenance he said they had agreed to him paying US\$25 per child per month. In addition, he will also pay schools fees and school related expenses including school uniforms.

On custody he said the parties have agreed that the defendant would have custody whilst he would continue to have unsupervised access over weekends and school holiday during those time when he is in Zimbabwe.

The defendant's evidence was that what destroyed their marriage was the fact that the plaintiff found another woman whom he currently resides with in South Africa. He had, as a result, sent the defendant and the children back to Zimbabwe under those circumstances a few years ago. She emphasised that she does not want the house sold as she needs shelter for the children. The first option where she would be bought out and allowed to stay for five only years would not work out because two of the children would still be minors after five years. She also emphasised that knowing the plaintiff, the moment he buys her out he would be most likely to chase her from the property. In any event, she emphasised, she would not be able to buy or find another property with her half share as the house is incomplete and therefore its value is low. Her off the cuff estimate was that it is currently not worth more than US\$ 20 000.00 were it to be sold as it currently is. She said she has no professional qualification and ekes a living as a vendor selling vegetables for an average of US\$5.00 a day. As such the issue of buying him out is out of the question.

As for the second option where the house would be in the children's names, she also has no faith that the plaintiff would find them alternative accommodation and pay rentals. The third option of selling the property immediately and splitting the proceeds is also unsuitable for the reason of leaving her and the children with no shelter.

Whilst the parties were now agreed on maintenance, she wanted the court to be alive to the fact that it was only recently that he started paying maintenance with any consistency, his preference at one point having been to send the children to the rural areas to stay with his mother. She also highlighted that the defendant remained with all their movables in South

Africa and he also has cows at his rural home here in Zimbabwe. However, she had not laid claim to any of these in her plea and that property was therefore not one of the issues that had been referred to trial.

The defendant's second witness was her mother who equally emphasised that the defendant and the children would have nowhere to stay if the house is sold. She also highlighted the absurdity of the parties disposing of their house only to look for rental accommodation under circumstances where no landlord would take in a tenant with four children. Moreover, as she pointed out, the children would be so restricted in what they can do at whatever lodgings and this would most certainly make her childhood a misery. The chances of them moving all the time would also be a very real one. As such she emphasised the necessity of the children and their mother being settled under their own house as is currently the state of affairs.

Analysis

In *Katsamba v Katsamba* 2014(1) ZLR 187 (H) the court highlighted that the considerations taken into account in how the division of property is dealt with in divorce matters are both adult and child centred. The factual circumstances in that case were virtually on all fours with the case before me. The court highlighted that in reality the day to day child caring responsibilities often remain with the mother of the children with important consequences for the need for shelter. The court therefore reasoned thus in deferring the sale of the house until the youngest child reached majority or became self-supporting:

“Whilst an immediate partnership approach in the division of the matrimonial home especially as pressed for by the plaintiff, with each spouse getting 50% of the value of the house may appear just and equitable between the divorcing spouses, the very nature of the obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater disadvantage compared to the husband. This is more so where she has to factor in accommodation- an indispensable need for the custodial parent. The house in question is a high density house and whatever it is likely to fetch will indeed undoubtedly be modest. The plaintiff would not be able to acquire another house on her half share. Even if she uses the proceeds for rentals, currently shouldering as she does the overall responsibilities for all the children's needs in her real world, will mean that proceeds would soon be dissipated.”

Materially the plaintiff's position in not wanting the defendant to stay at the matrimonial home is coming from anger if not vindictiveness emanating from what he sees as the reasons leading to their divorce. Her reasons, on the other hand, in wanting to stay in the matrimonial home with the children, is fuelled by the best interest of children in ensuring that they have shelter. The plaintiff lives and works in South Africa and is well settled there. In light of the very real post-divorce responsibilities that the defendant will have in looking after

the four children, it is vital that the right to shelter be assured by delaying the sale of the house until the youngest child reaches majority or becomes self-supporting.

I accordingly order as follows:

1. A decree of divorce be and is hereby granted.
2. The defendant is awarded custody of the minor children namely:
 - a. Charmaine Makanaka Nzuwire born 4 November 2009
 - b. Denzel Mufudzi Nzuwire born 30 August 2012
 - c. Hillary Makomborero Nzuwire born 2 January 2014
 - d. Basil Mukudzeyi Nzuwire born 17 July 2019
3. The plaintiff shall exercise right of access to the minor children on alternate weekends from Friday 17.00 to Sunday 16.00 p.m. and every two weeks of the school holidays whenever he is in Zimbabwe upon due notice to the defendant.
4. The plaintiff shall pay maintenance of US\$25.00 to the defendant for each minor child until they become a major or become self-supporting whichever is the soonest.
5. The plaintiff shall be responsible for the school fees, levies and all school related expenses including school uniforms for the four minor children until they each become majors or self-supporting whichever occurs soonest.
6. The defendant and the children shall continue to reside and use the immovable property known as Stand 3451 Southlea Park Harare, measuring 240 square meters and to which each of the parties have a 50% entitlement until the youngest child born 17 July 2019 reaches the age of 18, upon which the following shall occur.
 - a. The immovable property shall at the time be valued by an independent Valuator appointed by the Registrar of the High Court from the list of Valuators within 30 days of the youngest minor child reaching the age of 18.
 - b. The parties shall both meet the cost of valuation proportionately.
 - c. The defendant shall then exercise the option to buy out the plaintiff's share in the immovable property within three months from the date of receipt of the valuation report.
 - d. If the defendant manages to buy out the plaintiff, the plaintiff shall attend to signing all relevant documents for transfer of the property into defendant's names within ten days of the sale, failing which the Sheriff of the High Court or his deputy, will be authorized to sign all such relevant documents.

- e. In the event the defendant fails to buy out the plaintiff within three months at the relevant time or such longer time as the parties may agree to in writing, then the plaintiff shall at that point exercise his option to buy out the defendant.
 - f. If neither party can buy out the other at the time, then the property shall be sold to best advantage by an Estate Agent mutually agreed to by the parties and if they fail to agree, by one appointed by the Registrar of the High Court and the proceeds shared 50-50.
7. Each party shall meet their own costs.

Zimudzi & Associates, plaintiff's legal practitioners