

NKOSIZILE MOYO

Versus

WINNET MOYO

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 07 JULY, 01, 27 SEPT, 30 NOV 2023, 08, 15, 19, 22, MAR & 21 NOV, 2024.

Divorce Action

J. Gwapedza, for the Plaintiff.

T. Moyo, for the Defendant

NDLOVU J: This is a divorce action matter. The parties got married on 15 December 1995. The marriage was blessed with two children and the marriage still subsists. The Plaintiff issued a summons in 1999. The action was defended. The defendant filed a counter-claim for sharing property and enlisted moveable property. From around 2000, the matter went into a dormant mode until its revival in 2013 by the Defendant. The defendant amended her counterclaim to include immovable properties: Stand No. 5724 FARADAYS Street KWEKWE and Stand No. 17872/12 MBIZO TOWNSHIP KWEKWE. This amendment meant that the immovable property had been acquired when the divorce action lay dormant.

Before the trial, the parties agreed that Stand No. 17872/12 would be shared between the parties at a ratio of 50%: 50% to each party. The plaintiff then offered the defendant a 30% share of the remaining property 5724 FARADAYS STREET, KWEKWE, which the defendant turned down and insisted on demanding a 50% share. The basis for this offer according to the plaintiff is that the property in question is not matrimonial property. He avers that one Simelani Nkala is the owner of the property and has an interest in the property because she is his new wife. The Plaintiff reckons that the 30% share is more than just in the circumstances.

The sole issue for determination by this Court is the distribution of all House No. 5724 FARADAYS KWEKWE. This divorce has its strange facts and circumstances. It has taken almost ¼ of a century to finalize. The reasons behind that delay are best known by the parties themselves.

The singular question for this court to decide in light of the offer made by the Plaintiff is whether or not the 30% offer by the plaintiff to the defendant is just and equitable in the circumstances of this case. In deciding that question I am aware of the fact that the parties agree that they must share the property, and they only differ on the percentages ratio. This has made my task easier than ordinarily it would have been.

I do not doubt at all that this matter should have been settled by way of a consent paper but for the parties' failure to understand what exactly was at stake. The evidence led during the trial wandered away from what the court is called upon to determine. The Plaintiff's Heads of Argument argue away from his pleadings.

PLAINTIFF

He told the court that he separated from the Defendant in 1999 after instituting the divorce proceedings. The immovable properties were acquired after their separation. The acquisition of the property they are now fighting over was with the assistance of a third party with whom they were and still are in a relationship. The property in question was acquired through a Police Club that initially he was a member of but ceased his membership when he retired from the Police Service. The retirement necessitated that the third party take over the payment of the Club subscriptions since she was a serving member of the Zimbabwe Republic Police, effectively becoming the member herself. What then happened is that when the Stand was allocated in the Police list, it came out in his name. When payment was done at the Municipality he paid a large amount of money in his name. Be that as it may, he is offering a 30% share of the property to Defendant.

DEFENDANT

She told the court that the parties continued living together as husband and wife until 2009 despite the issuing and serving upon her the summons by the Plaintiff. Plaintiff evicted her from Stand No. 5724 their matrimonial home after she had been assaulted by the third party who was Plaintiff's girlfriend. The third party had recently moved in with them. She contributed directly and indirectly towards the acquisition of the property in question.

THE LAW

5724 FARADAYS, KWEKWE is spousal property within the meaning of the law. It is available for distribution between the parties per the dictates of the law. Plaintiff agrees as much and the

Defendant demands as much. Plaintiff has offered Defendant a 30% share. On the other hand, the Defendant is demanding a 50% share.

The Court is statutorily bound to exercise considerable discretion when it apportions the property. This is not a mathematical exercise. Several factors come into play. Critical of those factors is the contribution by either spouse directly or/and indirectly by either spouse. The court aims to try as much as possible to achieve a just and equitable distribution of the parties' property. That ex may involve taking from one spouse and giving the other, regardless of the acquisition and/or contribution towards the acquisition of the property in. question.

Section 7 of the Matrimonial Cause Act [Chapter 5:13]

Takafuma Vs Takafuma 1994 [2] ZLR 103 [S].

Gonye Vs Gonye 2009 [1] ZLR 232.

DECISION

Having heard and seen the parties testify and considered the evidence placed before me I entertain no doubt at all in my mind that on a balance of probabilities, the Plaintiff's evidence in respect of the contribution by each party towards their communal estate is the more probable one. There is evidence of Plaintiff having been the one employed for a longer time than Defendant. There is evidence of indirect contribution by the Defendant. The law obliges the Courts not to disregard indirect contributions by a spouse. The direct contribution by Defendant was in all probability in the minimum. The offer by the Plaintiff of a 30% share in the FARADAY House taken on the backdrop that the parties have agreed to share the other property 50/50 translates to an overall distribution of 60:40 between the parties. This ratio is, in my view, a probable reflection of their contribution. I therefore endorse the Plaintiff's offer of a 30% share in House No. 5724 FARADAYS KWEKWE.

DISPOSITION.

A Decree of Divorce be and is hereby granted.

Plaintiff is awarded a 70% share and Defendant is awarded a 30% share of House No. 5724 FARADAYS. KWEKWE.

The house is to be evaluated by an Estate Agent appointed by the Registrar of the High Court from his register of Estate Agents within 30 Days of this judgment/order. The costs of the evaluation shall be borne by the parties equally. The Plaintiff shall have a right to buy the Defendant out within 90 days of the evaluation. Failure by Plaintiff to buy Defendant out within the specified time will give Defendant the right to buy Plaintiff out within 90 days of Plaintiff's failure. Failing which, the property shall be sold by private treaty to the best advantage to the parties and the

proceeds shared in the ratio of 70% to Plaintiff and 30% to Defendant after all the costs relating to the sale of the property have been settled.

Each party is to bear its costs of suit.

Chitsa & Masvaya Law Chambers, Plaintiff's Legal Practitioners.
Zimbabwe Women Lawyers Association, Defendant's Legal Practitioners.