

MARGARET CHAU (NEE KUMBEMBA)
versus
DOUGLAS CHAU

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 14 July 2022 & 11 January 2023

Divorce Action

J R Tsivama, for plaintiff
K Matyasira, for defendant

TSANGA J: This is a divorce action in which the only issue in dispute relates to the division of the matrimonial home described as Stand Number 167 Vainona Township of Vainona situate in the District of Salisbury and measuring 4599 square meters. It is otherwise known as 11 Granta Road Vainona, Harare. The house is registered jointly in the plaintiff and the defendant's names.

Despite this position the plaintiff, in her evidence, asserted that the defendant should only be entitled to 20% of the value of this property. She had her reasons for so maintaining. She said that she added his name to the property registration merely to keep the peace in the house as he was uncomfortable with the fact that at the time they married she already owned a flat in her name. That flat was later sold. She claimed that he did not contribute financially to the house as the full amount for the house which was acquired in 2001, came from her employer.

The defendant at the time was a tailor by profession and a recreational gardener. Whilst he did make some clothes for her, she told the court this was not much as he would often take as long as six months just to complete an outfit. She also said that he would occasionally contribute groceries towards the house, but generally only if he was hungry. Her complaint was that he had a serious drinking problem and spent most of his resources on womanising and buying alcohol.

She also told the court that to the extent that she had indeed added his name to the property, this was an act of donation which she had "revoked" when she found out that he was

sending pornographic material to the domestic helper. Essentially, therefore, her position was that there was absolutely no justification for awarding him anymore than 20% which she asked the court to give her at least six months to raise since she does not desire to sell the property. When put to her in cross-examination that he had sourced a builder and supervised building renovations to the house, she said that he had even been too drunk to do a proper job of supervising.

The defendant's picture of his contribution was different. It was largely, though not entirely, non-financial. He had helped source the house from a friend who worked for an estate agent. He had run around to get the papers signed since he had more time on his hands as compared to his wife. The house was not in good shape. The kitchen needed renovations, the floors needed tiles and the walls needed painting. He was there making sure contractors did the right thing. He would also go out to buy renovation materials. He had also fitted the apron to the house single handily. He had further helped the contractor in putting up a gazebo. Particularly, he had helped source the rubble needed and to compact the floor. In addition, he had also helped to fill the swimming pool with rubble. He had also gotten the fishing pond running having looked for the oxygen plant and fixed the water pump. Further, he had bought the fish. He acknowledged the help of their gardener in all this. In so far as certain renovations were done by contractors, his role had been supervisory but as a hands-on man, he helped with the painting of the house for instance. As for the garden, he had helped design it and to look for the flowers.

Financially, he had also used some of the money from his tailoring proceeds. He had further bought antique furniture for the house. Whilst plaintiff said no deposit had been paid for the house he said it had been paid but could not remember how much. He also could not state exactly how much he had contributed but maintained that whenever he had money, he would contribute. He disputed that he was a drunkard. He also disputed that his share was donation.

He had moved out of the house because he had been asked to do so by the plaintiff as her condition for moving back in since she had left the house. He has no pension to rely on and survives doing horticulture and selling vegetables. His position was that he is entitled to his 50% share especially as they became one person in one marriage. Moreover, by having a vasectomy to save his wife's health by ensuring that she did not fall pregnant again after their second child, he argued that he had sacrificed more than most men would have.

The legal arguments

Mr *Tsivama*, the plaintiff's lawyer argued that this was not the sort of marriage where there was equality of contributions but one where the defendant exhibited serious ingratitude by drinking and womanising. He argued that whilst indeed there are numerous divorce cases that have involved women's indirect contributions, these have involved spouses that were staying at home and looking after the family whereas in this case the husband was not carrying out any duties that a wife would normally have under these circumstances. This was said to be a case where a woman who was working tirelessly had had to in fact embrace and look after a husband who persistently and constantly went out drinking. There was therefore no equality of obligations since only one party carried the burden.

He further argued that the plaintiff could not be expected to be burdened with looking after someone who was responsible for the breakdown of the marriage as that would be rewarding him for wrong doing. It was also not the plaintiff's responsibility to provide the defendant with a lifestyle which he cannot fund himself. He therefore argued that the court, in the face of these actual realities, had the power to take away part of his share in order to achieve fairness. Reliance was placed on *Ncube v Ncube* 1993 (1) ZLR 39 (s) a 44 A-B for the position that it would only be in exceptional circumstances that a spouse may benefit from assets which they did not contribute to. This was said to be the reason why the Matrimonial Causes Act [*Chapter 5:13*] requires the courts to weigh various factors including direct and indirect contribution with a view to preventing a spouse from obtaining an undeserved advantage. As for the donation, he argued that it was accepted in *Michael Taylor v Heather Margaret Taylor* SC 70/2007 that where a party engages in extra marital affairs, that is ingratitude.

Mr Mutyasira for the defendant, on the other hand, insisted that this is a no fault jurisdiction and that emphasis should not be placed on who was responsible for the breakdown of the marriage but on the fact that the respondent owns a 50 % share in the property.

Analysis

The gist of the matter is that the defendant is the registered half owner of the property. The cases of *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 105H-106A and *Chapeyama v Chapeyama* 2000 (2) ZLR175 SC outlay the principle that where property is registered in the names of both spouses, what this means is that each is the owner of an undivided half share in the property as a starting point. Regarding the alleged donation, unlike the *Taylor* case where the court was satisfied that the property had indeed been donated and transferred to the husband,

here there was no evidence that spoke to a donation in the initial instance. What the plaintiff's evidence spoke to was a matrimonial home that had been acquired and jointly registered because the plaintiff wanted to give the husband assurance from the start that he too owned that home that they were jointly acquiring. It was their joint home. The plaintiff's argument that the half share was a donation was clearly an afterthought as there was nothing in the evidence submitted that pointed to a donation or its revocation other than her say so.

As a starting point therefore, the defendant is undoubtedly entitled to his half share just as the plaintiff is to her half share in that property. This position is only to be further altered where justice and equity in a case further demand it. In light of the plaintiff's submissions and arguments and in view of principle also laid out in *Takafuma v Takafuma* (supra), the question is whether this court should further take away from his share in order to achieve equity and fairness. Section 7 (4) of the Matrimonial Causes Act lists the factors that the court must take into account in distribution of property and also states that as far as is reasonable and practicable and is just to do so, **having regard to their conduct**, to place the spouses in the position they would have been in had a normal marriage relationship continued between them.

However, as outlined in *Kassim v Kassim* 1989 (3) ZLR 234 (HC), for the misconduct to be taken into account leading to the breakdown of the marriage, it must be of an exceptional character and should not be in the nature of minute domestic grievances. It must have stripped the family of financial expectations from the spouse and resulted in the inability to contribute towards the matrimonial estate. Whilst the plaintiff now regards the defendant's contributions as minimal as her reason for seeking to reduce his registered half share, in reality her reasons centred on his conduct in philandering and drinking.

The reason why upon divorce a spouse should receive a fair share of what was accumulated is because the basic philosophy underlying equitable distribution is that marriage is an economic partnership. The reality is that having an affair or communicating with the domestic help is not conduct which shocks the conscience in a way that affects property distribution. Fault is not normally be considered, especially when divorce itself is granted on no-fault grounds. See the discussion in *Ncube v Ncube* (supra) at p 41-B-D.

What is considered is what may be termed 'economic misconduct' of a serious magnitude. There is a basic reason why the conduct must have economic implications. What is being dissolved is an economic partnership. As such it would not be fair to take into account fault or conduct which is not related to the economic partnership or economic conditions in dividing up its assets. It is for this reason that in line with the guidelines stipulated in section 7

(4) of the Matrimonial Causes Act, the court's focus is confined to consideration of such factors as economic contributions to the marriage, contributions to the family's well-being, and the overall economic conditions of the partnership and of each party. A focus on marital fault would be incompatible with basic philosophy underlying equitable distribution.

Granted drinking excessively does have economic implications on any household since money which could have been effectively spent on domestic needs is diverted towards alcohol. Having said that, there was no evidence of how much his drinking actually cost their economic partnership. The conduct complained of in this divorce had no bearing on the acquisition of the property as a joint enterprise. No doubt modern working women who are better off than their spouse do end up contributing much more to the household both financially and in terms of domestic duties. If the property had been registered entirely in her name, there would have been a reason to focus more keenly on indirect contributions as a way of assessing his share. The defendant's evidence of his largely non-financial contributions is accepted more so as he is a registered half owner and there is no other property to be taken into consideration in any further balancing act.

There is no legal basis for depriving him of his registered half share as the evidence is that the property was acquired in partnership at the time.

It is therefore ordered that:

1. A decree of divorce be and is hereby granted.
2. The matrimonial home being Stand Number 167 Vainona Township of Vainona situate in the District of Salisbury measuring 4599 square meters otherwise known as 11 Granta Road, Vainona, Harare, shall be valued by estate agents agreed upon between the parties to determine its current market value.
3. Each party shall contribute 50% towards the costs of the evaluation.
4. The plaintiff shall pay to the defendant within 6 months of the date of such valuation, 50% of the value of the property in settlement of the defendant's entitlement to his share.
5. In the event of the plaintiff's failure to pay the defendant in terms of paragraph 4 above, then the said house should be sold to best advantage and the proceeds shared equally between the parties.
6. Each party shall bear its own costs.

Messrs *Sawyer and Mkushi*, plaintiff's legal practitioners
Messrs *Mubangwa & Partners*, defendant's legal practitioners