

TAPSON CHIVANGA  
versus  
GRACE MWAKURUDZA

HIGH COURT OF ZIMBABWE  
MAXWELL J  
HARARE, 16-17 February 2023, 17 May 2023 & 20 June 2023 & 24 January 2024

### **Civil Trial**

*T S Nyawo*, for the plaintiff  
*M S Musimbe*, for the defendant

### **MAXWELL J:**

#### **BACKGROUND**

On 23 December 1995 Plaintiff and Defendant were married in terms of the then Marriage Act [*Chapter 37*], now the Marriages Act [*Chapter 5:17*]. The marriage was blessed with four children who are all majors. On 15 July 2010 Plaintiff issued out summons claiming a decree of divorce and ancillary relief. In his Declaration, Plaintiff stated that the marriage relationship between the parties has irretrievably broken down to the extent that there is no reasonable prospect of reconciliation. He proposed that he be awarded all household goods acquired prior to the marriage and that Defendant be awarded all wedding cutlery gifts, a double bed, kitchen utensils and all household goods excluding those acquired prior to the marriage. As the children were still minors at the inception of the proceedings, Plaintiff proposed that he be awarded their custody.

Defendant gave notice and entered her appearance to defend. In her plea she disputed that the marriage had broken down irretrievably. She pointed out that she left Plaintiff's rural homestead after Plaintiff started co-habiting with his late young brother's wife. She stated that it is in the best interests of the children that the marriage continues to subsist as they need a father figure and the comfort of two loving parents. She proposed that all the property belonging to the parties continues under both parties' possession since the marriage has not irretrievably broken down. She prayed for the dismissal of Plaintiff's claim with no order as

to costs. She filed her plea as a self-actor on 6 September 2010. However, on 12 October 2010, Legal Practitioners filed a counter claim and a plea on her behalf. In the counter claim she proposed the distribution of property, including two immovable properties. She proposed that she be awarded custody of the minor children and that Plaintiff contributes USD1000.00 for maintenance of the children, pays the children's school fees, buys all school requirements and contributes towards their medical aid. In her plea, she accepted that the marriage relationship had broken down and blamed the Plaintiff's adulterous affair for it.

Plaintiff filed his plea to the counter claim and responded to Defendant's plea. He denied harbouring love and affection for the Defendant. He indicated that he made three attempts to persuade Defendant to come back after she deserted the rural home and even approached her close relatives to persuade her but failed. Further that thereafter he informed her that he was taking the legal recourse for an immediate divorce to which she agreed. He pointed out that his brothers passed away and he assumed the responsibility of looking after their children who were all going to school, taking care of the widow and Defendant was not in support of the role he assumed. He pointed out that in the counter claim, Defendant is claiming property belonging to a third party as well as some acquired prior to the marriage. He commented on each item on Defendant's proposal for sharing, indicating what was not available for distribution. He disputed that it was in the best interest of the children for their custody to be awarded to Defendant. He pointed out that Defendant has no capacity to maintain the children properly and that she is young and can remarry. He indicated that he has no capacity to contribute US\$1000.00 as maintenance for the children. He promised to continue with the upkeep of the children including paying for their education as he had been doing. He prayed for the dismissal of the counter claim.

#### PRE-TRIAL CONFERENCE

A Pre-Trial Conference was held and the following issues were referred to trial; -

1. Whether or not the marriage between the parties has irretrievably broken down.
2. Whether or not the following immovable and movable property form part of matrimonial property.
  - a) Stand No. 3054 Chikanga 2, Mutare.
  - b) Stand No. 631 Chikanga, Mutare.
  - c) Plot 34A Groenvlei Farm, Chipinge Rural District.
  - d) 14 herd of cattle

3. Whether or not the matter for Stand No. 3054 Chikanga 2 Mutare is *res judicata*.
4. If the above properties form part of the matrimonial property, are they supposed to be shared?

## TRIAL

At the commencement of the trial, Mr Nyawo indicated that the parties are agreed that the marriage has broken down irretrievably and the only issue for determination concerns two immovable properties. Mrs Musimbe indicated that the issue of the maintenance of the child who is still in school though he has turned 18 should be determined as well. Plaintiff was the first to give evidence. His evidence was as follows. He started living with the Defendant as husband and wife in 1989 when Defendant had just finished school. They did not acquire any immovable assets during the subsistence of their marriage. They were staying at 631 Chitaka Crescent, Chikanga Phase 1, Mutare. He had acquired a stand between 1983 and 1984 and he acquired a loan from Beverly Building Society for the construction of the house. He got title deeds in 1988. He produced the title deeds as exhibit as well as the mortgage bond documents. Defendant did not contribute anything towards the development of the stand as it was developed before marriage. Defendant was a temporary teacher before marriage. Upon marriage the parties agreed that she goes to technical college for three years. Stand 3054 Chikanga 2 Mutare belongs to his late brother Tambaoga Chibaya and his late brother's family lived there. His family occupied stand 3054 Chikanga 2 after the death of his brother and his late brother's wife went to the rural home in Chivi. Stand 631 Chikanga Phase 1 was leased out and the rentals were utilized to take care of his late brother's family. At the time of the trial Defendant and his children occupied stand 3054 Chikanga 2 Mutare

Under cross-examination he indicated that the receipts for building materials in his name in respect of stand 3054 Chikanga 2 Mutare are because he was helping his brother and making payments on his behalf. He indicated that the property was transferred to Irene Kuyumani, his late brother's widow, on 21 September 2011. He admitted siring a child with his late brother's widow and indicated that it was after 13 years of his brother's death. He indicated that he was allocated a farm by the government and a caretaker is using it. That was the Plaintiff's case.

Defendant testified on her behalf. She stated that she married the Plaintiff customarily in 1988 when she was gainfully employed as a temporary teacher. At the time the customary marriage was conducted, they were staying at 3<sup>rd</sup> Floor Masasa flat in town. The unregistered

customary law union was registered in 1989 on 1 September. Plaintiff had stand 631 which was undeveloped and they developed it together. She was enterprising, making and selling chalk, sewing clothes and selling to schools and selling maize from Honde Valley in addition to temporary teaching. When Plaintiff obtained mortgage bonds, they were together. They pooled financial resources for the benefit of the family. She contributed financially as well as in supervising the construction at stand 631 Chikanga Phase 1. They agreed to move to the property before it was completed to save money. Plaintiff was looking after his late brothers' children as well as Tambaoga Chibaya who was still in school. Tambaoga was staying with them from form 1 up to form 4 and they were meeting all his expenses, educationally and welfare wise. She listed a number of Plaintiff's relatives and family members she accommodated before she had any children of her own. In 1994 she was advised by Plaintiff that he had been offered stand 3054 Chikanga Phase 2. She did not see the documentation. They started developing the stand, pulling their resources together as a couple. Some cash obtained as wedding gifts was utilized towards construction and some was used to buy eight heifers. She produced receipts for building materials in the name of the Plaintiff as exhibits. When the house was completed, they rented out Stand 631 Chikanga Phase 1 and went to live at Stand 3054 Chikanga Phase 2 in March 1997. After some time, she started to see bills coming from City of Harare in the name of Tambaoga Chibaya. Plaintiff assured her that the property was theirs. Tambaoga Chibaya never stayed at the property, neither did his widow. Tambaoga Chibaya failed form 4 and went to the rural home. Plaintiff would call him to do some chores here and there. The parties also acquired a farm in Plaintiff's name. She blamed the Plaintiff for not only giving moral and financial support to widows and orphans but ending up being intimate with one widow and siring a child.

When Tambaoga Chibaya died, Plaintiff was appointed as the executor. He transferred stand 3054 to himself and later to the widow. She was not aware of how many cattle are available for distribution but wants her fair share. Later she stated that there are 13 cattle and she was requesting to be awarded six. Under cross examination she submitted that Plaintiff was the treasurer and kept the proceeds from the fundraising activities she undertook. She indicated that she was not aware of how much was realized. She stated that from the chicken rearing project she would realize roughly \$2 400.00 per month. She also stated that from 1997 she has been staying at stand number 3054 Chikanga Phase 2 Mutare paying rates and bills. Rita Mabhedhla Chivanga gave evidence in support of the Defendant. She is married to Plaintiff's elder brother. She stated that Plaintiff and Defendant wedded after they had four

children. The wedding celebrations took place at their property in Phase 2 Chikanga. The parties have two properties in Mutare and a homestead in the rural area. She did not know in whose names the properties are registered. She was not aware if Tambaoga Chibaya owned any property in his life time. She confirmed that the parties bought cattle from wedding gifts. She was not aware if the cattle are still there and if so, how many. Under cross examination she confirmed that she had not seen the documents relating to the properties in question. That was the Defendant's case.

## THE LAW

The assets subject to distribution in divorce proceedings are those that were acquired by the parties during the subsistence of the marriage which they consider to be belonging to the family. The law relating to the sharing of the assets of the spouses is set out in section 7 of the Matrimonial Causes Act [*Chapter 5:13*], (the Act). The concept "the assets of the spouses" was defined in *Gonye v Gonye* 2009 (1) ZLR 39 SC as clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets. In subsection 4 of s 7 of the Act, the Court is enjoined to have regard to all the circumstances of the case, including the following—

- “(a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child;
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
- (g) the duration of the marriage;...”

The Act further directs that in distributing the assets, the court shall endeavor as far as is reasonable and practicable and, having regard to the conduct of the parties, where it is just to do so, place the spouses and child in the position they would have been in had a normal marriage relationship continued between the spouses.

Section 26 of the Constitution provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution and in the event of dissolution, provision must be made for the necessary protection of spouses. Article 16 (1) of the Universal Declaration of Human Rights (1948) provides that men and women of full age are entitled to equal rights as to marriage, during marriage and at its dissolution. This means there must be a fair and equitable division and distribution of property at the dissolution of marriage.

#### ANALYSIS

STAND NO. 631 CHIKANGA, MUTARE.

This property is registered in Plaintiff's name, having been acquired as a stand between 1983 and 1984. Plaintiff's evidence was that he acquired a loan from Beverly Building Society for the construction of the house and got title deeds in 1988. Defendant confirmed that when they married Plaintiff had the stand. Her evidence was that they developed it together, with her contributing directly and indirectly. It was not disputed that she had taken care of the family as well as a number of Plaintiff's relatives when Plaintiff was servicing the three mortgage bonds which were registered after marriage. Though Plaintiff disputed the fund-raising initiatives Defendant said she undertook to raise funds, it was not in dispute that she was a temporary teacher and subsequently upgraded to a qualified teacher. Her evidence that Plaintiff was the custodian of all family funds was not disputed. In my view, Defendant is entitled to a share of this property. In *Mhora v Mhora* SC 89/20 the Supreme Court considered that the court *a quo* took into consideration the indirect contribution made by the respondent in taking care of the family and the household through the non-financial means as well as taking care of three children of the appellant and the other wife and two of the appellant's children born out of wedlock and upheld the grant of a 50% share of the immovable property. Regrettably, in *casu*, Defendant has not asked for a share. She has not demonstrated the extent to which her contributions should determine her share of the property. Her focus was on a property that she acknowledges is registered in a third party's name. It is trite that a court cannot award that which has not been asked for. The authors Jacob and Goldrein in **Pleadings: Principles and Practice**, (Sweet & Maxwell London, 1990) at p 8-9 make remarks which are cited with approval in the judgment in *Jowel v Bramwell-Jones & Ors* 1998 (1) SA 836,898 to the following effect:

“The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the court to enter upon an enquiry

into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings... In the adversary system of litigation, therefore, it is the parties themselves who set the agenda of the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.....” (underlining for emphasis).

See also *Dube v Bushman Safaris & Another* HB 112 – 13, *Keaveney and Another v Msabuka Bus Services (Pvt) Ltd* 1996 (1) ZLR 605. The court therefore could not *mero motu* determine what share the Defendant would be entitled to. It was not part of the agenda set by the parties before it.

STAND NO. 3054 CHIKANGA 2, MUTARE.

It is common cause that this property is registered in the names of a third party. Defendant’s closing submissions urged the court to apply the approach in *Mhangami v Mhangami* HH 523/21 and allow her to retain Stand No. 3054 Chikanga 2, Mutare. That submission ignored the fact that in *Mhangami v Mhangani (supra)* one of the properties was registered in the names of both parties and the other was in the name of the husband. In *casu* the property under consideration is neither in the names of both parties nor in the name of the husband. It is neither “his”, “hers” nor “theirs”, therefore it cannot be termed an asset of the spouses. Defendant went to great lengths in explaining her contribution towards the development of this property, including stating that part of the wedding gifts were utilized. In the face of the registration of the property in a third party’s name, without a reversal of that registration, Defendant’s remedy would be to claim a refund of her contributions. She has not made a claim for the reimbursement or compensation for her contribution to the development of the property. As stated above, the court cannot award what was not asked for. Defendant is claiming that Stand No. 3054 Chikanga 2, Mutare. be awarded to her. Her claim cannot succeed.

CATTLE

In her counter claim, Defendant prayed that Plaintiff be awarded 2 cattle whilst she gets 6. This was filed in 2010. In response to the counter claim, Plaintiff indicated that 6 cattle belonged to other family members and cannot be shared. Under cross examination, Plaintiff was asked on the number of cattle available. He indicated that there were none in his name. When asked that in the counterclaim 6 were indicated and that they would have increased naturally, his response was that they had been sold to raise funds for the Defendant to go to

school. No further questions were asked after that. I take it as an admission that the cattle were utilized to pay for Defendant's education and there are none for distribution. Defendant, on the other hand, during her evidence-in-chief, firstly indicated that she was not sure how many cattle remained for her to get her fair share. She then stated that 8 were bought from wedding gifts. Later she stated that there were 13 cattle, 10 big and 3 small and that she was requesting 6. In closing submissions, she claims 8 cattle. It is trite that he who makes a positive assertion bears the onus of proving the facts so asserted. See *Nyahondo v Hokonya* 1997 (2) ZLR 457. Defendant bore the onus of proving the existence of the cattle she wants distributed. No stock card was placed before the court. Defendant failed to discharge the onus upon her. I find that there are no cattle for distribution in this case.

#### DISPOSITION

Having found that Defendant did not claim a share of Stand 631 Chikanga Phase 1, Mutare, nor compensation for her contribution to the development of stand Stand No. 3054 Chikanga 2, Mutare, I make the following order.

1. A decree of divorce be and is hereby granted.
2. Defendant's counter claim be and is hereby dismissed.
3. Each part is to bear own costs.

*Nyawo Ruzive Legal Practice*, plaintiff's legal practitioners.  
*M SMusimbe And Associates*, defendant's legal practitioners.