

MOSES MUSHANGIDZE
and
STELLA MUSHANGIDZE (NEE CHIDZENGA)

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 10 & 27 October 2023

Civil Trial – Divorce

Mr *C H Gunje*, for the plaintiff
Ms *V C Maramba*, for the defendant

MUCHAWA J: The plaintiff and the defendant are husband and wife who were married in terms of the then Marriage Act [*Chapter 5:11*] on 22 November 2005. Two children were born to their marriage and only one is still a minor, namely Selmah Kupakwashe Mushangidze born on 9 May 2012. The parties are agreed that their marriage has irretrievably broken down to the extent that there are no prospects of restoration of the marriage relationship to its normal state. They are agreed too that custody of the minor child should be retained by the respondent with the plaintiff exercising access rights the last weekend of every month. The parties also settled how their movable property is to be distributed.

Upon referral to trial, the issues to be decided were agreed to be as follows:

1. Whether or not No. 4672 Manyame Park Chitungwiza constitutes matrimonial property? If so, whether the defendant is entitled to receive a share from this property?
2. Whether the defendant made any improvements to the property, and if so, is she entitled to recover the costs of such improvements to No. 4672 Manyame Park, Chitungwiza?
3. What is the fair and equitable distribution Ushewokunze,shewokunze , Chitungwiza as between the plaintiff and the defendant, if any?
4. What is the fair amount of maintenance for the minor child Selmah Kupakwashe Mushangidze born on 9 May 2012?

I heard the parties and reserved my judgment. The plaintiff waived the right to address the court in closing whilst the defendant filed her closing submissions on 12 October 2023.

The Plaintiff's Case

The plaintiff was the only witness who gave evidence in his case. His testimony was as follows: He got officially married to the defendant in 2005 but does not remember when they got customarily married. He estimated it must have been some two or three years before. Two children were born to their marriage. The Manyame Park property was a gift he received in his individual capacity from his brother, one Lovemore Edward Makuwaza on 26 January 2006. The said Lovemore Makuwaza built this house from 2001 as shown by the building inspection, building progress and certification documents until he gave the gift to the plaintiff. He did not pay anything for the house as shown by the cession document from the Chitungwiza Municipality. After the gift was given, the plaintiff, defendant, and their daughter Serthaniah Panashe were certified to occupy the Manyame property. He alleges that the defendant signed as a witness to the Chitungwiza Municipality certificate of occupation and cession agreement. The plaintiff's case is simply that because this was a gift to him, the Manyame property should not be distributed, and it should be awarded to him.

On the Ushewokunze property, the plaintiff averred that though this property is registered in the defendant's name, it is matrimonial property which they acquired through a cooperative which defendant is affiliated to and they were paying subscriptions together. He however could not remember the name of the cooperative but simply said its for teachers neither could he remember the amounts which he contributed. He hazarded a guess by saying the defendant is affiliated to ZIMTA or ARTUZ. He believes that the property was bought in 2005 as a vacant stand and thereafter they built a two roomed cottage. The main house has since been built and is five roomed, complete, roofed, and electrified and they sunk a borehole.

Regarding his contributions to the development of the Ushewokunze stand, the plaintiff averred that he sold his T 35 motor vehicle and realised the equivalent of US \$6 000.00 which was channelled to the building of the property. The defendant is said to have secured a loan and managed to buy only fifteen bags of cement. The plaintiff claims to have single handedly constructed the cottage whilst they pooled resources for the main house. The plaintiff claims to have paid \$80.00 for installation of a borehole at the rate of \$10.00 per metre. Though the plaintiff had not claimed a share in the Ushewokunze property in his declaration, he said that he had since changed his mind from consenting to giving her that property and he now wants 50% share of the value of the property. Under cross examination he explained that he wants his fraction from Ushewokunze to be set off against the Manyame Park claim of the defendant.

It was the plaintiff's evidence that at the material time he was involved in the business of selling motor spares. Upon being quizzed by the court on how much income was generated from the business, the plaintiff says it was not lucrative and they got just enough to live on. He also said that he used to own a T 35 motor vehicle which would be hired to transport bales from Mvurwi to Harare. This was sold as stated above.

The plaintiff says he cannot afford to contribute the US\$80.00 maintenance that is claimed for the minor child, Selmah. He says that he is not gainfully employed and is currently doing vending of drinks in a pushcart, and he realises an average of US\$110.00 per month. He also says he gets an additional US\$70.00 from rentals at the Manyame Park house of two rooms. His own expenses were said to be US\$80.00 for rent, US\$30.00 to US\$35.00 for food, therefore he can only manage to pay US\$50.00 per month as maintenance and not US\$80.00 as claimed by the defendant.

The Defendant's Case

The defendant claims that the two got customarily married in 1999 and not two or three years before 2005.

The defendant's testimony is that the Manyame Park property is matrimonial property as this is where they stayed after buying the vacant stand from Lovemore Makuwaza and developing it to its current state. She disputes that Lovemore Makuwaza is a relative of her husband and says that she has never met him at any family gathering. She only knows him as an employee of Chitungwiza Municipality who disguised a sale as a gift to evade the policy implications with his employer. She claims to have been present when the purchase price of \$36 000.00 was paid in cash to the said Lovemore Makuwaza. According to her, no sale agreement was signed in furtherance of the alleged disguise.

The defendant further stated that though she was not formally employed in the early years of her marriage, she was engaged in a peanut butter making and selling business from which she realised about \$100.00 per month as well as a sewing business from which she realised between \$80.00 to \$100.00 per month. She then went to a teacher training college from 2005 to 2008 but continued with her businesses. This is said to have assisted in running the household and meeting daily expenses. She accepts that it was the plaintiff who used his money to buy the stand and she contributed to the improvements. She pointed to indirect contributions related to taking care of the plaintiff and children of the marriage. Her own direct contributions to the improvements on the Manyame Park house are said to be from when she completed her teacher training after 2008 and the building of the house was done. She listed

her contributions as tiling the floors, fitting of interior cupboards, plastering of precast wall, designing of walls, and putting glitters and a mirror to the fireplace. Pictures of the alleged improvements were tendered as well as quotations. The defendant does not wish to have this house shared. She is claiming USD 5 000.00 which she says equates to her direct contributions to the developments on the Manyame Park house.

The plaintiff did not deny the defendant's alleged improvements but said that they were mere modifications done to suit their taste. He said that the money contributed by the defendant came from teaching extra lessons from two rooms of the house and a garage which she converted into classrooms. On her part, the defendant said it was illegal to teach extra lessons and the money came from her salary and some cross border trading.

The defendant denied having signed any documents at the Chitungwiza Municipality as alleged by the plaintiff, disowned the signatures, and pointed out how the signatures are extremely different from her own. The defendant claims to have first seen the Chitungwiza Municipality documents in 2021 when the divorce proceedings were instituted.

Regarding the Ushewokunze property, the defendant says that she bought it from Saturday Retreat Crest Breeders and not from a cooperative at the total price of US\$2 136,00. This money was allegedly deducted from her salary and would reflect on her payslip. The agreement of sale was tendered as proof that the defendant is the one who bought the stand. It was denied that the plaintiff gave the defendant any money to pay for the stand. She accepted, however, that the plaintiff constructed the two roomed cottage intending to use it for his business. Denied too was the fact that the plaintiff gave the defendant US\$80.00 for installation of a borehole. According to her, no borehole installation costs US\$80.00. She says she relies on her salary as a teacher wherein she realises about US\$168.00 and buying and selling of school wear and stationery which gives her about US\$150.00 per month.

The defendant said that she singlehandedly built the main house at Ushewokunze through buying and selling and her salary. She wants the house wholly awarded to her.

Maintenance of the two children of the marriage was said to fall on her. Serthania Panashe who is 23 years old is said to be epileptic and has special needs and is largely dependent on the defendant though she is a major. She cannot continuously attend school and has been put to repeat Form 3. She is only claiming maintenance for the minor child Selmah in the amount of US\$80.00. This will cater for school fees of US\$35.00 per term, US\$20.00 of uniforms per term, US\$20.00 per month for food and US\$15.00 per month for transport to school and airtime bundles. The school fees invoice was tendered as evidence as were

quotations for uniforms. There was proof that the minor child is a dependant on the defendant's medical aid and she said she pays US\$10 per month for this. The plaintiff is alleged not to be paying any maintenance at the moment after persuading the defendant to withdraw a claim she had lodged in the courts. He is said to have even lodged a claim for spousal maintenance against the defendant.

The defendant denied the plaintiff's alleged income. The rentals from Manyame Park were said to be a total of US\$160.00 at US\$80.00 per room. She also averred that the plaintiff is still doing the motor spares business as some of the clients still call her. Whilst accepting that the plaintiff sold the T 35 motor vehicle, she claimed that the plaintiff was not paid and was following up the purchaser and questioned why he had not produced proof of the sale and receipt of money.

Analysis of Evidence

The plaintiff tried to downplay the length of marriage between the parties by saying that the customary marriage came into being some two or three years shy of 22 November 2005. This would place the customary union inception in 2002 or 2003. The defendant was not cross examined on her claim that the marriage in fact commenced in 1999. The defendant's version of events is in line with the plaintiff's own explanation that the defendant eloped when she was pregnant, and he then paid the customary token. The child Serthania whom she was pregnant of, is now 23 years old. It is therefore a fact that the parties started to live together as husband and wife in 1999. The plaintiff was not candid about the length of the marriage.

The plaintiff's version of events about the Manyame Park house being a gift is incredible. That a brother, who was then explained as a first cousin upon the court's probing, would buy a stand, build it, and then donate in exchange for absolutely nothing is unbelievable. The defendant's version is more plausible, that this was a Council employee who disguised a sale as a donation. The fact that he was able to facilitate the generation of relevant documentation therefore was easy. If this was a brother to the plaintiff, it should have been easy for him to come and give evidence in this case confirming the donation. A mere perusal of the agreement of sale of the Ushewokunze property and the marriage certificate supports the defendant's version that the Chitungwiza Municipality documents were not signed by her as a witness. It does not even require the usual handwriting expert to ascertain this. The issue of whether she signed is only relevant in respect of putting the plaintiff's credibility in issue.

It appears to me that the defendant denied having generated extra cash from extra lessons because this is an unlawful practice. She may very well have engaged in this, and it simply goes to show that she had multiple streams of income.

The defendant did not hesitate to acknowledge the plaintiff's contributions in the purchase of the Manyame Park property and that he solely built the two roomed cottage in Ushewokunze. The plaintiff did not provide an indication of the cost of this structure to assist the court but simply said it must be set off against the defendant's claim.

The plaintiff was unsure of the date of purchase of the Ushewokunze property, he had no idea about how it was bought, and from whom. He could not quantify his own contributions. I accept the defendant's version that save for the cottage, the defendant single-handedly bought and developed this property.

The plaintiff was not candid about his source of income during the subsistence of the marriage. He chose to say what was convenient and said that he did not have a motor spares business but accepted it had been registered at some point and the defendant was a director. This business was alleged not to have had enough capital and only generated enough for the family to live on. No amounts were related to even from the hiring of the T 35 motor vehicle. His denial of the motor spares business continuing even at a small scale cannot be accepted. He did not point to any other constant source of income which he had.

The plaintiff underplayed the direct and indirect contributions of the defendant to the acquisition of the matrimonial assets and sought to say that whatever she did, they did together to modify the Manyame Park house to their taste. Unlike the defendant he failed to acknowledge that she was involved in a peanut butter and sewing business, then became a teacher and has continued to be enterprising. The fact that he even lodged a claim for spousal maintenance against the defendant shows that he knows that even though her salary is not much, and she has responsibilities of looking after and providing for the children, she is enterprising.

The defendant's documents in support of her expenses incurred at the Manyame Park house improvements are mere quotations which are from October 2022 and are of little value in proving the expenses she incurred from 2008. The pictures too simply prove the state of the house but do not prove she was solely responsible for these. Her case is however assisted by the plaintiff's assertion that she was just modifying the house using resources from the extra lessons conducted by the defendant in the same house. He even went as far as saying that she can remove the fitted cupboards as he does not want them.

Overall, I found the defendant to be a credible witness whilst the plaintiff fell short in a few respects as pointed out.

What is the fair and equitable distribution of the immovable properties of the parties?

The first four issues listed by the parties in the joint pre-trial conference minute are really calling on me to decide what would be a fair and equitable distribution of the two immovable properties. I however need to first settle whether the Manyame Park property falls for distribution. I believe it does. Counsel seems to have wasted energy on classifying the Manyame Park property as not “matrimonial property.” That is clearly not the question. This issue was already settled. Even if the property was “his” as it was allegedly solely donated to him, it is an asset of the spouses and it falls for distribution.

As aptly noted by MALABA JA (as he then was) in *Gonye v Gonye* 2009 (1) ZLR 232 at p 236H to 237B:

“It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an order with regard to the division, apportionment or distribution of ‘assets of the spouses’ including an order that any asset be transferred from one spouse to the other.’ The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of broad discretion...

The terms used are the ‘assets of the spouses’ and not matrimonial property. It is important to bear in mind the concept used, because the adoption of the concept ‘matrimonial property’ often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment, or distribution exercise. The concept ‘assets of the spouses’ is 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 regards to the division, apportionment or distribution of such assets.” (My emphasis)

The wide discretion must of course be exercised judicially taking into account the circumstances of each case. The object of the exercise must be to place the spouses in the position they would have been in had a normal marriage relationship continued between them.

In an effort to achieve this object court has demanded of spouses to be candid with court in respect of their assets individually and jointly.”

The law in matters of this nature relating to distribution of matrimonial property upon divorce is s 7 (1) and (4) of the Matrimonial Causes Act, [*Chapter 5:13*] which provides as follows:

“Division of assets and maintenance orders

(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—

(a) the division, apportionment or 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 subsection (1) an appropriate court shall 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;

and in so doing the court shall endeavour as far as is 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.”

The parties herein were married for a total of 24 years if regard is had to the customary law union from 1999. Their income earning capacity from their evidence shows that the plaintiff did not have any constant source of income as he said that his motor spares business was not lucrative and now he is only a drinks vendor. On the other hand, the defendant was an enterprising woman involved in income generating activities from the very beginning and then qualifying and working as a teacher and continuing to have multiple streams of income.

Both parties need accommodation in the future. Though the plaintiff has an obligation to maintain the minor child, he is currently not doing this. The defendant has shouldered the maintenance of the minor child alone and also that of their 23-year-old child who has special needs due to her epileptic condition and she is still enrolled in Form 3. The minor child is only 11 years old and in grade 5. Both need to continue in school.

The plaintiff directly contributed to the acquisition of the Manyame Park property as well as the building of the Ushewokunze cottage. The defendant directly contributed to the purchase of the Ushewokunze property and listed improvements on the Manyame Park property. She further indirectly contributed to the Manyame Park property as mother and wife by taking care of the plaintiff and the children and attending to domestic chores. The value to be placed on this was laid out in the case of *Usayi v Usayi* SC 11/03 wherein the court opined on the valuation of indirect contributions as follows:

“How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and therein an atmosphere from which both husband and children can function to the best of their ability?”

Clearly, if both direct and indirect contributions are considered, the defendant’s contributions are immense.

In the exercise of my wide discretion, I am convinced that it would be fair and equitable if each party retains the house currently held in their name. There is no basis for the plaintiff to retain the Manyame Park property and still get 50% of the Ushewokunze property. Since each party contributed to the development of the other and I have not been given adequate proof thereof of such improvements except an acknowledgement that they happened, I am constrained to award as claimed by the defendant. I note however that the defendant and the children were used to the standard of life where the house is fitted with modern amenities which were not said to exist in the Ushewokunze property which has no running water, and they have to rely on open wells from neighbours. The plaintiff had initially offered to pay US\$2 000.00 to the defendant without even claiming a share in the Ushewokunze property. In my opinion an order that he pays US\$3 000.00 to the defendant would be fitting to meet the justice of this case as it will assist the defendant put in some of the amenities that are in the Manyame Park house at her new abode in Ushewokunze and somewhat maintain the standard of living she and the children were accustomed to .

What is the appropriate maintenance to be paid by the plaintiff in respect of the minor child Selmah Kupakwashe Mushangidze?

The question of whether the plaintiff should pay US\$50.00 or US\$80.00 as maintenance for the minor child, should never, in my opinion, have come to trial.

The amount of maintenance payable by each parent is determined by their respective means and resources. In computing the actual figure, the court must make a value judgment based on the income and assets of the parties. See *Barrass v Barrass* 1978 RLR 384.

Both parties must furnish the court with information regarding earnings, income, savings, other resources, together with their monthly expenses. The court then must balance these and assess the amount of maintenance payable. Section 6 (4) of the Maintenance Act [*Chapter 5:09*] enjoins a court to have regard to the general standard of living of the responsible

person and the dependant, including their social status; the means of the responsible person and the dependant; the number of persons to be supported; and whether the dependant or any of his parents are able to work and if so whether it is desirable that they should do so.

From my analysis of the evidence, I have already made a finding that the plaintiff was not candid with the court on his earnings and sought to hide that he still runs the motor spares business. He did not provide any proof of his alleged earnings from vending. Other than himself, he has no other dependants. To date, he has not taken his responsibility of maintaining the minor child and has left the defendant to solely shoulder this. In addition, the defendant has to continue to maintain their 23-year-old child who has special needs and still send her to school. With the award of the Manyame Park house to the plaintiff, his rent expenses will be a thing of the past and he will be able to meet the amount claimed by the defendant and even go beyond this if he takes his responsibilities seriously.

It is my finding therefore that the plaintiff should pay the amount of US\$80.00 per month as maintenance for the minor child until she turns 18 or becomes self-supporting, whichever occurs first.

Disposition

Accordingly, it is ordered that:

1. A decree of divorce, be and is hereby granted.
2. Custody of the minor child, Selmah Kupakwashe Mushangidze (born on 9 May 2012) be and is hereby granted to the defendant.
3. The plaintiff will exercise access to the minor child Selmah Kupakwashe Mushangidze (born on 9 May 2012), every last weekend of the month in consultation with the defendant as to the child's availability due to school commitments.
4. The plaintiff pays maintenance for Selmah Kupakwashe Mushangidze (born on 9 May 2012) at the amount of US\$80.00 or its RTGS equivalent, per month until the minor child attains the age of 18 years or becomes self-supporting, whichever should occur first.
5. The following movable property is awarded to the defendant:
 - i. Honda Aria motor vehicle registration number ADX 8559
 - ii. Dressing table
 - iii. Headboard
 - iv. Sofas
 - v. Coffee table

- vi. Dining chairs
 - vii. Yellow corner side chairs
 - viii. Centre carpet
 - ix. Kitchen utensils
 - x. Deep freezer
 - xi. Two plate gas stove
 - xii. Chest of drawers
 - xiii. Wardrobe
 - xiv. Inner garment cabinet
 - xv. Sleeping bed
 - xvi. Shoe rack
6. The following movable property is awarded to the plaintiff:
- i. Old wardrobe
 - ii. Old sleeping bed (white)
 - iii. Old fridge
 - iv. Old table
 - v. Old display
 - vi. Old shoe rack and other smaller items
7. The plaintiff is awarded house number 4672 Manyame Park, Chitungwiza, which is already registered in his names, as his sole and exclusive property.
8. The plaintiff shall pay the defendant the amount of USD 3.000 within ninety days of this order.
9. The defendant is awarded house number 4520 Yard Side, Ushewokunze, Chitungwiza, which is already registered in her names, as her sole and exclusive property.
10. There is no order as to costs.