

DOREEN TAMBUDZAI MURANGARI (NEE USHAMBWA)
versus
KEVIN JOHN MUCHAZONDIDA MURANGARI

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 8 & 21 November 2023 & 11 March 2024

CIVIL TRIAL

Mr *T Machaka*, for the plaintiff
Ms *F C Mutingwende*, for the defendant

MUCHAWA J: The plaintiff issued summons claiming a decree of divorce and ancillary relief. The claim was opposed. The parties contracted a civil marriage under the then Marriage Act [*Chapter 5:11*] at Harare on 2 September 1995. The court's jurisdiction is premised on the fact that the defendant is a Zimbabwean citizen who is domiciled in Zimbabwe.

The marriage was blessed with two children: Nashe Murangari (born on 9 August 1996) and Namatai Murangari (born on 29 July 2005). Both children are now majors. The parties are agreed that the marriage relationship has irretrievably broken down beyond salvaging.

During the subsistence of the marriage, the parties acquired movable property whose distribution has been settled between them. In addition, they acquired the following immovable properties:

- (i) Lot 31 of Lot 3 of Stand 201 Gatooma Township of Railway Farm 9 being a portion of Cherry Bank measuring 1 .9659 hectares.
- (ii) Stand 578 Goodhope Township of Lot 6 Goodhope measuring 2523 square metres.
- (iii) A property in Bulawayo and another in Norton which were already disposed of and are no longer in issue.

The only issue for determination at trial was put as follows:

“What is a fair and equitable distribution of the immovable asset of the parties being Stand 578 Goodhope Township of Lot 6 of Goodhope measuring 2523 square metres and held under Deed of Transfer 8972/2005?”

This was so because the parties agreed that Plot 31 Cherry Bank, Kadoma would be sold, and each party would get 50% of the net proceeds of the sale. At the trial each party gave evidence on their own behalf. No other witnesses were called.

The Plaintiff's Case

The plaintiff gave evidence confirming the agreed issues as set out above. On the issue in dispute, she confirmed that the title deed to the Goodhope property is in both their names, as had been the practice with all their immovable properties as she had faith in the success of her marriage.

The Goodhope property is said to be sitting on approximately 2 500 square metres and the developments therein are a fully constructed servant's quarters and a main house still under construction. The main house provides for 5 bedrooms but only 4 have been completed with 1 being used as a lounge. The title deed was tendered in evidence as was the marriage certificate. The plaintiff indicated that the Goodhope property is their matrimonial home, but she moved out on 12 April 2022 as they were no longer living in peace. It is the defendant who is currently living there. The eldest child is now employed and is living with plaintiff's sister whilst the younger child is residing in the United States of America and living with plaintiff's friend.

According to the plaintiff, a deposit for the Goodhope property was paid in 2001 when they were living in the United States of America where they had relocated to in 1999. Her mother who had visited was given USD 4 500.00 from the plaintiff's savings for the deposit. She further stated that it was her friend who helped her identify the property.

Furthermore, the plaintiff averred that she had singlehandedly purchased the property. Though both her and the defendant were working in America, she said that the defendant would waste all his money on beer, and she lived like a widow. Regarding the developments on the property, it was the plaintiff's evidence that they returned from America in 2012 and were housed at her sister's place until 2019. They only managed to commence building in 2015. All that time they stayed rent – free at her sister's place. The developments are said to have been financed through a loan secured from CABS and this went into the foundation. Though the defendant was purportedly employed, she claims that he never brought any money home.

A bank statement from CABS was tendered in evidence which shows the deductions made for repayment of the mortgage loan from the plaintiff's salary. An example is the amount of \$ 647 – 41 deducted on 30 April 2018. These deductions are said to have been monthly.

Further reference was made of a purchase of building material on 28 April 2018 at Union Hardware Msasa as reflecting in the same bank statement. Additional evidence in the form of receipts for building materials from different suppliers was also tendered as appears on p 3 to 66 of the supplementary bundle of documents.

The plaintiff says they got help from her sister in the purchase of roofing tiles and two transfers were made from FNB. Reference was made to p 69 of the Supplementary bundle of documents. Consequently, she said they owe her sister in respect of this.

Plaintiff claims to have made most of the payments directly or she would give defendant the money to go and make purchases and pay. Over and above paying for the developments at the house, the plaintiff pointed to school fees payments for the children and claimed to have single handedly shouldered these and even stationery. Even in this, the defendant was said to have done nothing including even failing to buy a pencil. From p 75-78 of the supplementary bundle are school fees receipts for the first child. Evidence on p 128- 135 was tendered to show that even though Nashe is a major, she is still maintaining him. On p 128 is proof of payment of medical bills and on p 129 payment for legal services.

She tendered proof of monthly upkeep for Namatai who is in America. On p 139 is proof of payment for a phone bill and on p 140 US\$300 was sent for upkeep and on p 143 US \$ 3900 was sent for September upkeep.

The plaintiff is a pharmacist. She said the defendant is self-employed and sells motor vehicles, among other things. Her major responsibilities were spelt out as taking care of the children and herself. Her proposal regarding the sharing of the Goodhope property is that she gets 80% and defendant gets 20%. This she feels is very generous on her part as defendant did not contribute anything.

What came out of cross examination is that the parties have been married for 27 years. Whilst conceding that on paper they have equal rights to the property, the plaintiff feels that given the circumstances of the purchase and development of the property it would be a miscarriage of justice for the defendant to walk away with an equal share.

The Kadoma property was said to have been bought from the plaintiff's sole savings. It was explained further that the defendant's drinking in America resulted in his identify documents and driver's license being confiscated as a result of conviction for drunken driving both in North Carolina and Atlanta and in the end he could no longer work and she had to shoulder the burden of taking care of him and the children .

The plaintiff accepted that in America they had had a joint account for a very short period early in their stay, but this was stopped as the defendant was no longer bringing money home. This arrangement was alleged not to have lasted even for a year. The plaintiff refuted that the Goodhope property was bought using the joint account proceeds.

In explaining why she had agreed to the defendant getting 50% of the Kadoma property the plaintiff said that she is not hard hearted and is empathetic. A further revelation was that the Bulawayo property had been sold upon their return from America for \$20 000.00 with the plans to use the proceeds to start construction at the Goodhope property but the defendant had squandered the whole amount.

The only property the defendant was alleged to have contributed to its purchase was said to be the Norton property. The plaintiff denied any knowledge of the defendant being into construction by profession. She stated that both of them had been involved in designing the Goodhope house and thereafter she paid the architect for it. She accepted that during the development of the Goodhope property, the defendant would be on site and in 2019 he started staying in 1 room on site before the plastering and plumbing as they were planning on moving into the house.

The plaintiff went on to explain that the defendant was on site to manage and supervise the building works and would initially be tasked to buy materials, but he proved unfaithful with money as he would cut deals with contractors, exaggerate figures and lie about materials running out. In the end she says that she took it upon herself to do the purchasing. She denied that the defendant financed the purchasing of any materials.

The Defendant's Case

The defendant confirmed that the only issue for determination by this court relates to the distribution of the Goodhope property. He claims that this property was bought by both through money invested in their joint CABS account here in Zimbabwe even though they were then staying in America.

His testimony was that they had a joint account in America which they operated for a very long time, and it was still operational when they bought the Goodhope property. In explaining why both names are registered on the Goodhope property, the defendant said that he handled all their immovable property purchases and registered them in both their names to protect his wife and safeguard her and his family in the case of his death.

In explaining why, the plaintiff's version of events is different the defendant said that she has taken this stance because he disappointed her in the marriage by engaging in extra marital affairs contrary to their church roles as elders.

The defendant denied that the plaintiff had single handedly bought all the building materials. On the mortgage loan from CABS, he said this was applied for through the plaintiff as she was in formal employment, but the loan was in both their names.

Regarding his sources of income, the defendant said that he does a lot of marketing and selling products and one area he is involved in is construction. His knowledge of the construction industry was attributed to his work at John Barrow and Partners consulting Engineers and then Makro Engineers. He was however not an engineer but was in the marketing department. This proximity to engineers is alleged to have made him well versed in construction and he claims to have used such expertise to design the Goodhope house. Earlier on, he said that he had even built a pharmacy for the plaintiff using the same expertise. Because of this he averred that he had been designing and managing projects for most of his life.

Regarding the Goodhope project, he said that after designing the house he then took it to someone at City Council who knows by – laws. He claimed to have run around buying building materials and managing the work done by the contractor.

In his opinion, a fair and equitable distribution of the Goodhope property would be for each party to get 50 %. Under cross examination, the defendant revealed that he recently got a job in a consultancy company involved in construction and his role is to develop properties. Alongside this he said he sells cars. He however did not produce any proof of his earnings and explained it was because he had just been recently engaged formally.

When questioned about the lack of evidence to prove his financial contributions to the purchase and development the Goodhope property, he said he did not have because all this happened a long time ago. All he pointed to were the plaintiff's bank statements.

His role in the development of the property was that he was the project manager daily and would pay contractors. When pressed, he conceded that this means that he was not working anywhere else. When it was put to him that it therefore meant that the plaintiff was the only one bringing an income home, he then backtracked and said he had continued to sell products. A further concession was that reading of the plaintiff's bank statement and receipts tendered established that she largely financed the project. He however said they had both contributed differently but equally.

The absence of any documentary evidence was explained away to be because of the plaintiff having collected the receipts before issuing summons. The defendant's attention was drawn to the fact that the plaintiff had left most of the movable property to him and he responded that he had not paid attention to that.

His lack of participation in paying the children's school fees and their ongoing maintenance was explained away as an arrangement they had as plaintiff had a work benefit covering school fees as she was formally employed.

Despite the plaintiff's evidence of contributing towards the older child's medical and legal expenses, the defendant said that he disputed this as the child is employed and is a major. He accepted that the plaintiff does send money to Namatai who is in America but claimed that he too sends some money since his formal employment. However, no proof was produced. His attention was drawn to the fact that at the time of the issuing out of the summons he had first proposed to pay \$ 50 maintenance for Namatai which he then reduced to \$ 30. He explained that at the time he had no money after investing all he had in the development of the Goodhope property. Despite the low offer, he is said to have never honoured his promise, yet he drives a Mercedes Benz vehicle. His stance was that he has been a very present father.

When the court requested that he runs through his employment history one of the things that came out is that between 2013 and 2017 he was engaged by a consultancy firm which was running projects in Malawi and there was a lot of travel. The house construction is alleged to have started in 2015 and the defendant said he was involved in managing this on a day-to-day basis. Construction was said to have continued until 2020 but he continued buying and selling stands and vehicles.

The joint account in America was said to have operated from 1999 to 2002 and closed due to bank charges. Most of their properties are said to have been bought by 2003. When asked to put an estimated value to the Goodhope property, the defendant put it at US \$200 000.00. For his services as a project manager, he put the value of US\$ 60 000.00.

Analysis of Evidence

The plaintiff was unshaken in given her evidence which was backed by documentary evidence in the form of the bank statement and receipts as well as receipts for school fees payments for the children. She did not exaggerate her contributions as she acknowledged the earlier contributions of the defendant in the purchase of the Norton property. Her allegations of the defendant's drinking problems, infidelity and squandering of the proceeds of the Bulawayo property sale were not rebutted.

The defendant himself did finally accept that the plaintiff did most of the financing and though their contributions were different, they were equal. The defendant had no supportive documentary evidence to back up any of his claims. Whilst he claimed to have construction expertise, his claim to fame is only based on having worked in the marketing departments of engineering firms. This is inadequate to establish expertise. He could equally claim to have expertise in the pharmacy field as he said he once sold pharmaceutical products. His evidence was inconsistent. On the one hand he said that he managed the building project on a day-to-

day basis. Whilst on the other he was working for a consultancy firm which took him out a lot to Malawi. How could he be in two places at the same time? How could he have been bringing in enough to finance the building project from his side hustle when he was fully invested on a day-to-day basis in this project. The defendant's evidence was largely incredible.

It appears that at the start of the marriage the parties were looking forward to living happily ever after and intended to contribute equally to their estate. In their definition of roles, the defendant may very well have managed the purchasing of properties. There was just one problem, they stopped pulling efforts together despite registering their properties in both names. The evidence shows that the defendant stopped pulling his weight towards the common goal. Excessive alcohol consumption and infidelity came in the way.

The question I have to decide is: "what is a fair and equitable distribution of the property in issue in the circumstances of this case?"

The Law

The division of assets consequent to a divorce is governed by s 7 of the Matrimonial Causes Act, [*Chapter 5:13*] herein after referred to as the Act. Section 7(1)(a) of the Act states that:

'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;
- Subsection (4) of s 7 then enjoins the appropriate court to consider all the circumstances of the case in the exercise of its discretion in this regard by stating that:-

'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 is 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 by each spouse to the family, including contributions made by looking after the house 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 the children in

the position they would have been in a normal marriage relationship continued between the spouses.”

As aptly noted by MALABA JA 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 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.”

I now turn to apply the law to this matter. On duration of the marriage, the parties have been married for 28 years.

During the subsistence of the marriage, the plaintiff had a more constant and regular income than the defendant. Even in America she had to shoulder the burden of the family expenses as the defendant got to a point when he was prohibited from working. Back in Zimbabwe she is working as a pharmacist. On his part, defendant has been informally employed and into buying and selling of cars, pharmaceuticals, amongst other things. He has not had a constant income as even evidenced by the offer he made for maintenance of his then minor child, which offer he was never able to honour. He did say that he did not have money then. Now the defendant says that he is formally employed by a consultancy company in construction and development of properties. He said he is still selling cars too. He must therefore have a more stable income earning capacity now. Because of his job in construction and development of properties, he will be more able to build another home for himself, unlike the plaintiff.

In terms of resources, each party will also get 50% share of the proceeds of the sale of the Kadoma property. Defendant is also retaining the bulk of the movable properties of the parties.

In the future, the plaintiff has an obligation to keep maintaining Namatai who is in America as shown by the evidence tendered. She also occasionally supports Nashe financially though both children are now majors. She also must look after herself. The defendant seems to have only himself to look after as their married life reflects that he had largely left the maintenance of the children to the plaintiff whilst he took a back seat. Though he said that he also looks after Namatai, there was no evidence tendered.

The plaintiff will be turning 52 years old this year whilst the defendant will be turning 55 years old. Both are still able to work and none presented any complaints of physical or mental ailments. They must therefore be able to continue working and taking care of their obligations.

Plaintiff’s contributions to amassing the assets of the spouses has been proved to be higher. Defendant did not rebut allegations of his having dissipated the joint estate and failing to bring his own contribution to the table. Instead, he would seek ways to get more money from the plaintiff by conniving with contractors and outright lies on cost of materials or their having run out.

Defendant was unable to bring any evidence of his own contributions save that he managed the building project on site. This was acknowledged by the plaintiff. He valued such

contribution at US\$60 000.00 whilst putting the value of the house at US\$200 000.00. This amounts to just over 30% of the value of the Goodhope house.

Having regard to all the above factors, it would be fair and equitable for the plaintiff to be awarded 70% whilst the defendant gets 30% of the Goodhope property.

Disposition

I accordingly order as follows:

1. A decree of divorce be and is hereby granted.
2. Each party shall retain as his/her sole and exclusive property, the movables in their possession.
3. The Parties' immovable property called Lot 31 of Lot 3 of Stand 201 Gatooma Township of Railway Farm 9 shall be shared equally between the parties as follows:
 - a) The parties shall agree on the value of the property within three months of the granting of this order failing which the Registrar of the High Court shall appoint a registered valuator from the list of such valutors to come up with a valuation of the property.
 - b) The parties shall share equally, the costs of the valuation.
 - c) Either party shall be given an option of buying out each other's share within three months of the parties' agreement of the value of the property or valuation by the appointed registered valuator failing which the property shall be sold to best advantage and the net proceeds thereof shall be shared equally between the parties.
 - d) If either party manages to buy out the other, then the other shall attend to signing all relevant documents for transfer of the property into the one who has bought out the other 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.
4. The Plaintiff be and is hereby awarded 70% of the immovable property called Stand 578 Goodhope Township of Lot 6 of Goodhope held under Deed of Transfer 8972/2005 and the Defendant is awarded 30% thereof and the property shall be distributed as follows:
 - a) The parties shall agree on the value of the property within three months of the granting of this order failing which the Registrar of the High Court shall appoint a registered valuator from the list of such valutors to come up with a valuation of the property.
 - b) The parties shall share proportionately, the costs of the valuation.
 - c) Either party shall be given an option of buying out the other's share within three months of the parties' agreement of the value of the property or valuation by appointed registered valuator failing which the property shall be sold to the best advantage and the net proceeds thereof shall be shared on a pro rata basis consistent with the parties' shares in the property.
 - d) If either party manages to buy out the other, then the other shall attend to signing all relevant documents for transfer of the property into the one who has bought out the other 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.
5. There shall be no order as to costs.

G Motsi Law Chamber, plaintiff's legal practitioners
Mapondera & Company, defendant's legal practitioners