

RUTENDO LEAH MUTUMHE
versus
CALLISTUS MUFARO MUTUMHE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 6 February 2025 & 24 March 2025

TRIAL

F G Gijima for the Plaintiff
OC Nyamapfene for the Defendant

MAXWELL J:

BACKGROUND

The Plaintiff and Defendant were married on 3 January 2007 under the then Marriage Act [*Chapter 5:11*] now the Marriages Act [*Chapter 5:17*]. No children were born out of this union. On 23 November 2021, the Plaintiff sued out summons claiming a decree of divorce and ancillary relief. In her declaration, she stated that the marriage between the parties has irretrievably broken down, and there are no reasonable prospects of restoration of a normal marriage relationship. She proposed that movable properties including the motor vehicle bought during the subsistence of the marriage be sold and the proceeds be shared equally. She also proposed that the immovable properties being certain piece of land situate in the district of Salisbury called Stand 1869 Chadcombe Township of Stand 1888 Chadcombe Township held under Deed of Transfer Number 1623/2010 and a stand in Tynwald be shared equally amongst the parties.

In his plea, the Defendant accused the Plaintiff of having an extramarital affair. He confirmed that the Plaintiff contributed directly to the acquisition of the immovable properties. He averred that the matrimonial property was acquired using a loan facility from their employer, CBZ Bank Limited. He further pointed out that the motor vehicle was brought using a personal motor vehicle loan from the employer and he was the one servicing the loan. He prayed that he be given the option to buy out the Plaintiff's share within 90 days of the valuation by the valuer appointed by the Registrar and failure of which the property be sold to the best advantage of the parties and the proceeds be shared equally.

On 27 February 2024, the Plaintiff sought an amendment to her summons. She proposed that she be given the first option to buy out the Defendant's half share in the property within 3

months and if she fails then the Defendant be given the second option. In the event of his failure to buy her out then the property be sold on the open market to the best advantage of the parties. She also proposed that the motor vehicle should be valued and sold and the proceeds therefrom be shared equally.

The Defendant filed a plea and counter claim to the amended summons insisting on his prayer that he be given the 1st option to buy out the Plaintiff. He proposed that the period within which to buy out the Plaintiff's half share be reduced to 30 days from the date of valuation by the valuer appointed by the Registrar and that he be awarded a 100% share in the motor vehicle.

PRE-TRIAL CONFERENCE

On 2 October 2024, a Joint Pre-Trial Conference was held. The parties agreed that a decree of divorce be granted, that the Defendant will pay to the Plaintiff the sum of US \$ 3 500,00 being half share of the Tynwald property and that there be just and equitable share of the household movables. The following issues were referred to trial;

- (a) How the matrimonial immovable property known as Stand 1869 Chadcombe Township of Stand 1888 Chadcombe Township jointly held by the parties should be shared.
- (b) How the motor vehicle, Toyota RAV 4 vehicle should be shared.

CASE MANAGEMENT MEETING

The parties' legal practitioners attended a case management before the commencement of the trial. The Case Management redefined the issues for trial as follows:

- (a) Who must be given the first option to buy out another's share in the property?
- (b) How the motor vehicle should be shared?

At the case management meeting the Plaintiff's legal practitioner sought leave to adduce new evidence to the effect that the Plaintiff had been retrenched on the 31st of January 2025 and that she was now pregnant and the Defendant did not author her pregnancy.

TRIAL

PLAINTIFF'S CASE

The Plaintiff gave the following evidence. She married the Defendant in 2007 and no children were born of this marriage. She confirmed that the matrimonial home is jointly owned. She confirmed that they agreed on the sharing of the Tynwald immovable property. She submitted that she is entitled to purchase the Defendant's 50% share of the Chadcombe property because they had initially agreed with the Defendant not to sell the property but to subdivide and the Defendant be given the 1st chance to choose from the subdivided stands in the interest of fairness.

The Plaintiff further stated that both parties contributed to the purchase of the property in a better location instead of each one buying their own separate properties. She requested that she be given the first option to buy out the Defendant since the Defendant refused the idea of subdivision. The Plaintiff also mentioned that she was retrenched on 31 January 2025 and no longer has a source of income.

She further pointed out that the Defendant is still employed and still has access to mortgages and other loans. She also stated that she is now pregnant though the pregnancy was not authored by the Defendant and she has an attachment of over ten years with the property. She requested to be given first option to buy out the Defendant over a period of six months or three months. She also requested that the motor vehicle be valued, and the proceeds be shared equally because she played a role in taking care of the Defendant, supporting the Defendant and contributed towards payment of utility expenses and groceries.

Under cross-examination she stated that she is now 39 years old and has been working as an assistant custom relations manager before retrenchment which was news that came a week before the trial. She alleged that she suffered abuse from the Defendant to the extent that she reported the case to Msasa Project. She mentioned that she did not access the motor vehicle loan facility because they had agreed with the Defendant that there was no need for her to apply for it.

DEFENDANT'S CASE

Defendant's evidence was that he is a joint owner of the matrimonial property. He testified that they acquired the property through a mortgage facility availed to them by their employer. He pointed out that both of them are not staying at the matrimonial home as they are deployed out of Harare. He indicated that he is the one who is paying

for the expenses and maintenance of the property. He further explained that the Plaintiff has moved on with her life since she is now pregnant. He stated that they used to be given monthly groceries by their employer and the Plaintiff was not contributing towards the utility expenses at the house. The Defendant submitted that he was servicing the motor vehicle alone until the vehicle was involved in an accident

He mentioned that when he bought the Toyota RAV4, he sold another vehicle he had acquired prior to the marriage. He then applied for a loan from his employer to cover the remaining balance of the purchase price, which was between US \$ 12, 000 and US \$13,000. His evidence was that the proceeds from the sale of that motor vehicle contributed a greater portion towards the purchase price of the Toyota RAV 4 motor vehicle. He offered to buy out the Plaintiff's half share within 30 days of the date of valuation.

During cross-examination, the Defendant acknowledged that the Plaintiff was retrenched. He further explained that he would not understand why the Plaintiff would want to stay at the house, given that she is now pregnant by another man. He pointed out that he suffered a lot due to the Plaintiff's infidelity and he does not want to remain bound to the Plaintiff for a further period. He submitted that it was just and equitable that he be given the first option to buy out the Plaintiff's share in the matrimonial home.

THE LAW

Section 7 of the Matrimonial Causes Act [*Chapter 5:13*], (the Act) guides the court in considering the distribution of the assets of the spouses during divorce action. The term, "the assets of the spouses" was defined in the case of *Gonye vs Gonye* 2009 (1) ZLR 39 (S) as clearly intended to have assets owned by the spouses individually (his/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 asset.

In subsection 4 of section 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 to the family and any other domestic duties;
- (e) the direct and indirect contribution made by each spouse to 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 of the marriage;
- (g) the duration of the marriage; ...”

The Act further directs that in distributing the assets, the court shall endeavour 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.

In determining a just and equitable distribution of matrimonial assets, the court must exercise its discretion by considering all the relevant circumstances of the case. In the case of *Shenje v Shenje* 2001 (2) ZLR 160 (H) at 163E-F Gillespie J stated that;

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all circumstances of the case. A number of more important, more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantages, to the extent they are not inevitable, of becoming divorced.”

ANALYSIS

In ascertaining which party to award the first option to buy out the other the court is guided by the principles set out in Section 7 of the Matrimonial Causes Act. The parties have been married for eighteen years. During trial, the parties advised the court that they have savings which they have been making. It was the Plaintiff’s evidence that she is likely to get a lump sum retrenchment package which will add to her savings and she will be in a better position to buy out the Defendant

On the other hand, the Defendant’s evidence established that the Plaintiff has a capacity to purchase another property if the Defendant buys her share of the property. Both parties’ evidence was to the effect that each one of them is more suitable to have the first option to buy out the other party’s share. As endorsed in *Shonhayi Denhere v Mutsa Denhere (Nee Marange)* SC51/17 , and originally expressed in *Watchel v Watchel* [1973] 1 All ER 829 (CA) at page 842, “ in all these cases it is necessary at the end to view the situation and see if the proposals meet the justice of the case.”

It was not in dispute that both parties contributed equally to the acquisition of the matrimonial property. The property is jointly owned. The evidence presented by the parties shows that they financed the purchase of the immovable property through acquiring loans from their employers. The fact that the Plaintiff is now expecting a child should not be considered in her favor, as the pregnancy is not out of this marriage. It is common cause that the parties have been living under the same roof enjoying equal rights to the immovable property. Both parties expressed that they each hold sentimental value to the property but for different reasons.

After all, has been said I am of the view that the Plaintiff has not been shown to be incapable of having the first option to buy out the Defendant. She is the one who approached the Court seeking relief. It has not been shown that granting the right of first option to the Plaintiff will result in a miscarriage of justice. The Plaintiff will thus be awarded the option to buy out the Defendant.

The Plaintiff's contention for seeking to be awarded 50% share of the motor vehicle is primarily because she contributed indirectly to its purchase. She stated in her evidence that her indirect contribution towards the purchase of the vehicle was that her earnings would be used to pay utility bills, groceries and other household needs. On the other hand, the Defendant submitted that the Plaintiff is not entitled to a share of the motor vehicle as he had solely taken the car loan from his employer and purchased the vehicle. He disputed the evidence by the Plaintiff that they agreed that he should take a car loan. In considering the appropriate distribution of matrimonial assets, it is vital that the court takes a holistic view of the circumstances.

In *Muwalo vs Mugunga* 2006 (1) ZLR 485 Bhunu J said that;

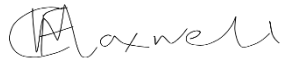
“Both parties having been employed as domestic workers their wages could not have been significantly different. They must therefore have pooled their resources together for the benefit of the common household. That being the case, it does not seem to matter who paid for what, what matters is that they were contributing to the common household...”.

In *casu* both parties were working for the same employer, they agreed that the Defendant would take out a car loan from their employer and purchase a family vehicle which is the Toyota RAV 4. Taking the evidence by both parties the court is inclined to treat the motor vehicle as “theirs” as opposed to “his”, since both parties were using their earnings for the betterment of their marriage, hence the Plaintiff is entitled to a 50% share of the value of the Toyota RAV 4 motor vehicle.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. The Defendant shall pay the Plaintiff the sum of US \$3 500,00 being half share of the purchase price of the Tynwald property.
3. The motor vehicle (Toyota RAV 4) shall be valued and the Defendant shall pay the Plaintiff 50% share within three months from the date of valuation, failure of which the motor vehicle shall be sold to the best advantage and the net proceeds be shared equally between the parties.
4. The Plaintiff be and is hereby awarded a 50% share in Stand 1869 Chadcombe Township of Stand 1888 Chadcombe Township.
5. The Defendant be and is hereby awarded a 50% share in Stand 1869 Chadcombe Township of Stand 1888 Chadcombe Township.
6. The property shall be valued by a valuer appointed by the Registrar on the list of valuers on his panel within 30 days of the order, the costs of the valuation shall be met by the parties in equal shares.
7. The Plaintiff be and is hereby granted the first option to buy out the Defendant by paying him his 50% share of the property within 3 months of the date of receipt of the valuation report, failure of which the Defendant shall be given the second option to buy out the Plaintiff's share within a further 3 months.
8. In the event that the Plaintiff succeeds in buying out the Defendant's share, the Plaintiff's legal practitioners shall attend to the conveyancing of the Defendant's 50% share into the Plaintiff's name. Likewise, if the Defendant succeeds in buying out the Plaintiff's share the Defendant's legal practitioners shall attend to the conveyancing of the Plaintiff's 50% share into the Defendant's name.
9. In the event that both parties fail to exercise their rights under paragraph [7] above the property shall be sold to best advantage by an Estate Agent appointed by the parties and the net proceeds shared equally between the parties. Should the parties fail to agree on an Estate Agent, one would be appointed by the Registrar of the High Court from the panel of registered Estate Agents within thirty days of the failure to agree.
10. In the event of a sale stated in [9] above, the parties shall sign all the necessary documents to effect the transfer of the immovable property referred to above to the purchaser failing which the Sheriff or his Deputy be and is hereby authorised to sign all documents on behalf of either party

11. Each party bears its own costs.

A handwritten signature in black ink, appearing to read "F.G. Gijima". The signature is written in a cursive style with a large initial "F" and "G".

F.G Gijima And Associates, Plaintiff's legal practitioners

Danziger And Partners Legal Practitioners, Defendant's legal practitioners