

BEKEZELA MOYO

Versus

NDUMISO MOYO

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 10 FEBRUARY 2022 AND 10 MARCH 2022

Civil Action

B. Dube, for the plaintiff

Defendant in person

MAKONESE J: The facts of this matter are rather unusual. The plaintiff and the defendant were firstly married in 1996 in terms of the Marriage Act (Chapter 5; 11). The marriage was blessed with three children namely; Johnson Moyo (male) (born on 4 February 1991), Ndumiso Moyo (male) (born on 22 November 1994) and Nobukhosi Moyo (female) (born 22 October 1999). During the subsistence of the marriage the parties acquired two immovable properties, being Stand number 72173 Lobengula West, Bulawayo and Stand 14584 Ihlosi Road, Selbourne Park, Bulawayo. In the course of the marriage the defendant left for the United Kingdom where he took up residence for 15 years. This led to a lack of communication between the parties. Plaintiff filed for divorce in 2007. A decree of divorce was granted by this court on 31st July 2008. In terms of the order for divorce plaintiff was awarded custody of all the children of the marriage. All the children are now majors. Amongst other things plaintiff was awarded as her sole and exclusive property stand 14584 Ihlosi Road, Selbourne Park, Bulawayo. (hereinafter referred to as the “Selbourne property”

Defendant was awarded as his sole and exclusive property stand 72173 Lobengula West, Bulawayo.(hereinafter referred to as the “Lobengula property”)

In 2016 the defendant returned to Zimbabwe on a visit and persuaded the plaintiff to re-marry. The parties re-married in terms of the Marriage Act (Chapter 5:11) on the 19th of January 2016. Soon after the second marriage problems developed and plaintiff filed for divorce on the 17th of November 2017. Plaintiff complained that the marriage relationship had irretrievably broken down and the parties never in fact lived together as husband and wife after the solemnization of the marriage. The plaintiff claimed for a decree of divorce on the grounds of irretrievable breakdown arising from irreconcilable differences with the defendant.

Defendant entered appearance to defend. In his plea he conceded that the marriage relationship had indeed broken down. He averred that the marriage broke down because plaintiff had lost all love and affection for him and had conducted herself in a cruel and violent manner towards him. Defendant claimed a share in the Selbourne Park property arguing that he had contributed towards the maintenance, repair and “upgrading” of the house. The plaintiff maintained that the Selbourne Park property was not subject to distribution as it was her sole and exclusive property. The plaintiff pointed out that the Selbourne Park house was subject to the divorce that was finalized under HC 669/07 and that the defendant was in that divorce action awarded as his sole and exclusive property the Lobengula property. The plaintiff was shocked by the sudden turn of events. The matter proceeded to trial.

ISSUE FOR DETERMINATION

At a pre-trial conference held before a Judge in chambers the sole issue for determination was recorded as whether or not the immovable property known as 14584 Ihlosi Road, Selbourne Park, Bulawayo, is liable for distribution in terms of section 7 of the matrimonial houses Act (Chapter 5:13).

ONUS OF PROOF

It is settled law that in civil claims;

- (a) The onus or burden of proof lies squarely on the shoulders of he who alleges and advances a cause of action.
- (b) The person claiming must adduce sufficient evidence to prove his or her case on a balance of probabilities.
- (c) The defendant was required to prove that the Selbourne property was subject to division

PLAINTIFF'S EVIDENCE

The plaintiff led evidence to the effect that stand 14584 Ihlosi Road, Selbourne Park, is her sole and exclusive property. Plaintiff testified that the house was acquired by her before the 2016 marriage (the second marriage) and that as such the house cannot be considered as matrimonial property subject to distribution. Plaintiff tendered as proof that the property was hers a copy of a divorce order dated 21st July 2008. This much was not controverted by the defendant. The order by the court expressly shows that plaintiff has rights over the property as a sole and exclusive owner. The order clearly shows that amongst other movable shared between the parties, the defendant was awarded exclusive rights in stand 72173 Lobengula West Bulawayo. Plaintiff testified that she single handedly raised her

children at the Selbourne property inspite of several financial challenges. The defendant was away in the United Kingdom from November 2002 up until 2016.

Plaintiff testified that she constructed the house in Selbourne Park on her own, and made other improvements with her hard earned money. A cottage was erected on the stand and some tenants are in occupation of the same. Plaintiff stated that she has no other home except the Selbourne property. On the defendant's return from overseas in 2016, he persuaded her to re-marry. She fell for it. As soon as the parties had acquired marriage certificate, defendant announced that what he had desired had happened. Defendant indicated that it was not possible for the plaintiff to exclusively own the Selbourne Park. After a period of 3 months from the date of the marriage all hell broke loose. Defendant stated that he wanted to go back to the United Kingdom. Defendant took all the children to South Africa. Defendant and the children took to drinking and abused hard drugs. Defendant returned to Zimbabwe after a few months and things only got worse. Defendant became close to the children. They drank together and smoked dagga together. Two of the children of the marriage are currently suffering from mental illness as a result of drug and substance abuse. The problem persists and the defendant is unwilling or unable to resolve the mental problems afflicting the children. The defendant has chased the plaintiff from the Selbourne property. Plaintiff has sought refuge at her mother's house in Lobengula. Plaintiff has lost all her dignity as she is forced to depend on hand-outs from her mother. She has been deprived of her home by the defendant. Plaintiff decided to institute these divorce proceedings in order to bring an end the constant abuse and violence directed at her by the defendant. The defendant has constantly threatened the plaintiff by alleging that he is a co-owner of the Selbourne property. In her evidence plaintiff maintained that it was not just and equitable for the defendant to lay claim against a property that was distributed by this Court

and awarded to her back in July 2008. The defendant has manipulated her. Plaintiff pleads that the Selbourne property be awarded to her upon the granting of a decree of divorce.

The plaintiff gave her evidence well and was found to be a credible witness. Her evidence was not discredited under cross-examination.

DEFENDANT'S EVIDENCE

The defendant gave evidence in support of his claims. He alleged that he contributed towards the construction of the Selbourne property. Defendant narrated how he met and fell in love with the plaintiff in 1989. Defendant testified in great detail about the first marriage and did not seem to appreciate that this matter was about the dissolution of the second marriage. Defendant dismally failed to show how much he had contributed towards the improvements at the Selbourne property. Defendant admitted that he was out of the country in the United Kingdom for more than 15 years. During that period plaintiff had single-handedly raised the children and made improvements to the Selbourne property. When it was put to him that in 2008 the court had awarded him stand 72173 Lobengula West as his sole and exclusive property, defendant brushed this aside and contended that the house belonged to his father. The court notes that this did not make much sense as the court would not have awarded defendant property belonging to someone else.

Defendant did admit that he had a drug problem. He did not dispute the fact that two of his children suffer from mental illness resulting from drug and substance abuse. The defendant did not dispute that he chased the plaintiff from the Selbourne property.

Defendant was not an impressive witness. He was no credible and his demeanor was poor.

ANALYSIS OF THE EVIDENCE

The plaintiff led evidence to prove that she was married to the defendant on 19th January 2016. The marriage still subsists. Plaintiff established that this was the second marriage to the defendant having married at first in 1996 before getting divorced in July 2008. In terms of the divorce order under case number HC 669/07 the plaintiff was awarded the Selbourne property, whilst defendant awarded the Lobengula property. Defendant's claims that he was divorced in the first marriage without his knowledge is clearly false. Defendant's assertions that he sent money for school fees for the children and that he contributed towards the construction of the house in Selbourne Park is false and misleading. The defendant did not adduce any evidence to support his claims.

THE LAW

It is trite law that in civil litigation the standard of proof is satisfied on a balance of probabilities. This is indeed so elementary that it requires no citation or authority. It is also trite that courts only make findings of fact or conclusions based on credible and cogent evidence. Where the standard of proof has not been met that is the end of the road for a party whose version is not supported by the evidence on record. The defendant has failed to support his version. In this jurisdiction the approach adopted in the distribution of matrimonial assets upon the granting of a decree of divorce has been laid down in a long line of cases. See: *Takapfuma v Takapfuma* 1994 (2) ZLR 103 (S) and *Gonye v Gonye* SC-15-09.

This matter is peculiar in that the parties were first married in 1996. This court dissolved the first marriage in 2008 and distributed the movable and immovable assets of the parties. The defendant left Zimbabwe for a period of 15 years. Upon his return he invited the plaintiff to enter into a second marriage in 2016. Defendant tricked the plaintiff. The

marriage relationship did not last. It could not last. Plaintiff discovered that she had been lured by the defendant who proclaimed soon after the marriage that he had “*accomplished his mission.*” The defendant entered into the second marriage solely for the purpose of claiming a share in the of the Selbourne property. Defendant does not deny that the Lobengula property was awarded to him. His explanation is that the house belongs to his father. This cannot be true. No evidence was placed before the court to prove this assertion.

DISPOSITION

I am satisfied that plaintiff proved her case on a balance of probabilities. The defendant cannot have a second bite of the cherry by claiming a stake in the house in Selbourne Park. Defendant received his share of the immovable property in the divorce order granted on 21st July 2008. This cannot allow the defendant to deprive the plaintiff of property lawfully awarded to her by this court.

In the result, the following order

1. A decree of divorce is granted.
2. The defendant’s counter claim for a distribution of the property known as stand 14584 Ihlosi Road, Selbourne Park, Bulawayo be and is hereby dismissed.
3. The property known as stand 14584 Ihlosi Road, Selbourne Park, Bulawayo be and is hereby declared to be the sole and exclusive property of the plaintiff by virtue of an order of this court dated 21st July 2008 which remains extant.
4. The defendant is ordered to pay the costs of suit.

Mabundu and Ndlovu Law Chambers, plaintiff’s legal practitioners

