

OPPAH NTULI

Versus

MILTON MABANDLA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J & TAKUVA J
BULAWAYO 23 FEBRUARY AND 2 JULY 2015

Civil Appeal

T. Zishiri for appellant
Advocate L. Nkomo for the respondent

TAKUVA J: This is an appeal against the decision of a magistrate sitting at Gweru. The contentious portion of that judgment states:

“The immovable property, house number 4913 Mkoba 15 is hereby awarded to the plaintiff. The defendant is hereby awarded a 25% share of the current value of the matrimonial house. In order to arrive at that figure the parties can seek the services of an evaluator. ...”

Aggrieved by this ruling, appellant appealed to this court on the following grounds:

- “1. The court *a quo* erred in awarding the appellant a mere 25% of the parties’ matrimonial home being number 4913 Mkoba 15, Gweru.
2. By this award, the court *a quo* essentially misdirected itself by down-playing and undermining appellant’s contribution to the parties’ marriage.
3. The court *a quo* erred by failing to adequately cater for the welfare of the minor child who will need accommodation until he is 18 years old or is self supporting whichever shall occur sooner ...”

Appellant prayed that the immovable property be awarded to the parties’ in equal shares. At the hearing of the appeal it was submitted that the child who was a minor in 2008 is now 20 years old. Consequently the 3rd ground of appeal falls away leaving the sole issue for determination being whether the court erred in awarding the appellant 25% of the value of the former matrimonial home?

The facts are that the parties met sometime in December 1973 and had their first child in 1976. The respondent paid part of the “lobola” before he joined the liberation struggle. At the end of the liberation struggle, respondent returned home and the parties continued to live together at the appellant’s parent’s home in Luveve, Bulawayo. Sometime in 1983 the respondent got employed by the National Railways of Zimbabwe where he worked for close to 15 years.

In 1993 the parties acquired their matrimonial home being number 4913 Mkoba 15 Gweru. The appellant made both direct and indirect contributions to its acquisition and extension. Later in 1996 the parties registered their customary union. This marriage was eventually terminated on the 18th of November 2008. The parties had lived together for 32 years and the marriage was blessed with four children namely,

1. Lizwe Mabandla (born 9 September 1976)
2. Sigondiso Mabandla (born 1st November 1982)
3. Senkosi Mabandla (born 1st November 1982)
4. Sony Mabandla (born 23rd November 1995)

The parties consented to the division of movable assets and the only issue for determination was that of the immovable property being number 4913 Mkoba 15, Gweru. At the conclusion of the hearing the magistrate awarded a 75% share of the immovable property to the respondent and gave the appellant 25% share in the property, prompting the appellant to appeal to this court on grounds already stated.

The law applicable in the division of matrimonial assets on divorce is to be found in section 7 (1) (4) of the Matrimonial Causes Act Chapter 5:13.

Section 7 (1) states:

“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;
- (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”

Subsection (4) of section 7 states;

- “(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 and 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.”

It is trite that the division of assets pursuant to section 7 (1) of the Matrimonial Causes Act (*supra*) is a theoretical exercise in which the courts are given a wide discretion. That discretion cannot be interfered with on appeal unless;

- (a) the trial court exercised the discretion erroneously; or
- (b) if it acted on a wrong principle; or
- (c) if it allowed extraneously or irrelevant matters to guide or affect it, or
- (d) if it mistook the facts or did not take into account some relevant consideration – see *Hatendi v Hatendi* 2001 (2) ZLR 530 (S); *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 40H – 41A; *Takafuma v Takafuma* 1994 (2) ZLR 103 (S)

In casu, a close reading of the magistrate's judgment reveals that he exercised his discretion erroneously in that he did not make any findings of fact on the contentious issue of the division of the matrimonial home. He did not give reasons or justify his award. He simply plucked those figures from the air. It is trite that failure to give reasons for a decision is a misdirection entitling an appellate court to interfere with the exercise of discretion by a lower court.

For this reason, this court is at large as regards the division of the matrimonial home. The evidence which was accepted by the court *a quo* is to the effect that the appellant contributed directly and indirectly to the acquisition of the house. It should be noted that indirect and intangible contributions cannot be proved by way of receipts and quotations because they are not easily quantifiable in terms of money.

However, as regards direct contribution the appellant stated on pages 28 – 9 of the record that;

- “Q - When did you acquire the house in question?
A - In 1992
Q - How was it acquired?
A - I used to go outside the country where I would sell my goods. I would contribute food and buying of burglar bars and would contribute financially towards construction of the house.
Q - Is it your evidence that you financially contributed towards the purchase of the house?
A - Yes ...
Q - Be specific to the role you played in acquiring this property and towards its extension?
A - This house was registered in Milton's name at Founders Mortgage which was deducting from his pay slip (sic). During that period I would go to Botswana to sell some goods after selling goods I would get about P700 – P800 and would buy food stuffs for family and pay fees for the children. During its extension Milton was not present I was alone, I would clean, cook for builders, go to Botswana to sell goods.
Q - You mentioned building materials?
A - Yes
Q - Was that for extensions of the house?

- A - Yes, when Milton used to delay paying the builders I would in turn pay my own money.
- Q - Now that you are divorcing what share do you want from this house?
- A - I wish to get 50% share of the property.” (my emphasis)

This evidence was corroborated by the fact that appellant brought her old passports to prove that she used to be a cross-border trader. She also stated that apart from her trips to Botswana, she also went to South Africa selling bed spreads and jerseys. Further she said in 2001 she went to “Britain where she worked for 13 hours per day for 10 months”.

It was also not in dispute that at the time of purchase the property was a two roomed house and that at the time of divorce it had 8 rooms. Quite obviously, the addition of 6 rooms increased the value of the house tremendously. The appellant contributed immensely to this improvement and this contribution should translate to an adequate share of the property upon the dissolution of the marriage.

In conclusion, one is tempted to repeat what the Supreme Court stated while awarding a 50% share to a housewife in *Usayi v Usayi* 2003 (1) ZLR 684 (S) namely;

“It is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as wife, mother, counselor, domestic worker, house-keeper and day and night nurse for her husband and children. It is not possible to place a monetary value on the love, thoughtfulness and attention to detail that she put into all the routine and sometimes boring duties attended on keeping a household running smoothly and a husband and children happy nor can one measure in monetary terms the creation of a home and an atmosphere from which both husband and children can function to the best of their ability. In light of these many and various duties one cannot say, as is often remarked “throughout the marriage she was a housewife, she never worked.” It is precisely because no monetary value can be placed on the performances of these duties that the Act speaks of the direct and 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 ... the proper approach is to presume that in the majority of marriages the spouses assume equivalent, though different duties which are equally beneficial to the welfare of the family.”

In casu, it is common cause that the respondent was away from home for long periods of time leaving the upbringing of the four children to the appellant. All the children are now adults with three having acquired professional qualifications.

For these reasons, it will not be just and fair to award appellant a 25% share of the matrimonial home.

Accordingly, it is ordered that;

1. The appeal succeeds with costs
2. The magistrate's order is set aside. In its place is substituted the following:
"The immovable property being stand number 4913 Mkoba 15, Gweru be awarded to the parties in equal shares".

Kamocha J I agree

Garikayi & Company c/o James, Moyo-Majwabu & Nyoni, appellant's legal practitioners
Danziger & Partners, respondent's legal practitioners