

NETTY MUTAMBA
versus
SIMON MUTAMBA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 25 November 2019 & 12 December 2019

Court Application

R.K.H. Mapondera, for the applicant
W. Chivaura, for the respondent

MANZUNZU J: This is a court application to vary a consent paper which was incorporated into an order of court. The applicant prays for an order in the following terms:

“It is ordered that:

- (i) The application be and is hereby granted.
- (ii) The decree of divorce be and is hereby varied in respect of the sharing of property as follows:
The immovable property House No. 30 11th Avenue, Morningside Mutare held under Deed of Transfer No. 10916/2001 in Respondent’s name be awarded to the Applicant as her sole and exclusive property.
- (iii) The Respondent shall pay costs of suit on an attorney-client scale if he opposes this Court Application.”

The parties were divorced on 20 November 2014 under HC 10293/12 when TSANGA J issued the following order.

“It is ordered that:

1. A decree of divorce be and is hereby granted
2. Custody of the minor child Blessing Mutamba (born 23 November 1996) be and is hereby granted to the defendant with the plaintiff exercising reasonable access to the minor child every alternative school holidays.
3. The consent paper signed by the parties and annexed to this order shall regulate the issues of maintenance and access to the minor children and the proprietary rights of the parties.
4. Each party shall bear its own costs.”

The applicant was the plaintiff and the respondent was the defendant in that case.

The relevant part of the consent paper para 4 (ii) (d) reads:

“House No 30, 11th Avenue Morningside, Mutare shall be sold on granting of this order and the parties shall share the net proceeds on 50-50 basis.

The parties shall agree on an Estate Agent to sell the property to the best advantage with the proceeds of the sale to be sent in equal halves to each parties legal practitioners upon successful completion of transfer. In the event that the parties fail to agree on an estate agent then the Registrar of the High Court shall appoint an Estate Agent from his panel of registered agents to carry out the sale.

The Defendant shall surrender the title deeds of the property to the conveyancers appointed by the agent upon demand to do so”.

The applicant signed the consent paper on 3 December 2013 with the respondent signing on 4 March 2014. Despite the signing of the consent paper on the dates aforesaid the applicant and respondent then signed deed of donation in respect to the property on 23 September 2014 and 2 October 2014. I recite hereunder their deeds of donation:

“I, the undersigned Simon Mutamba (I.I. N 63-642817 Z42) do hereby irrevocably donate all my interest, right, and Title over an immovable property known as House No. 30, 11th Avenue, Morningside, Mutare to my children being:

- (a) Barbara Mutamba
and
- (b) Blessing Mutamba
in equal and undivided shares.

I am making this donation to my children well aware that the Order in High Court per the Consent Paper between myself and Netty Mutamba (Nee Mutasa) will be obtained with a different position. My intention now to donate this particular property to my children will take precedence over that previous position in the Consent Paper.

I also make the donation on condition that the said Netty Mutamba (Nee Mutasa) also donates her interest right and Title to the same children over the same property.”

“I, the undersigned Netty Mutamba (Nee Mutasa) (I.D. No. 22-126708T42) do hereby irrevocably donate all my interest, rights and title over an immovable property known as House No. 30, 1th Avenue, Morningside, Mutare to my children being:

- (a) Barbara Mutamba
and
- (b) Blessing Mutamba
in equal and undivided shares.

I am making this donation to my children well aware that the Order in High Court per the Consent Paper between myself and Simon Mutamba (ID No. 63-642817Z42) will be obtained with a different position. My intention now to donate this particular property to my children will take precedence over that previous position in the consent paper.

I also make the donation that the said Simon Mutamba also donates his interest, right and title to the same children over the same property”.

The deeds of donation were signed before the decree of divorce on 20 November 2014 which incorporated the consent paper as part of the order.

The donation is at variance with the consent paper on the property.

However, the issue of the donation is a non-issue because the application is not premised on the donation. The respondent revoked the donation. What the applicant seeks to enforce is not the donation but rather a variation of the consent paper not in line with the donation.

Before I deal with the merits of this case in detail let me address the point *in limine* raised by the respondent. The respondent alleged that what applicant attached to her application does not meet the requirements of an affidavit. It was said the name and designation of the Commissioner of Oaths was missing. The document was said to be scanned. The respondent went further to classify the document as fraudulent as he casts aspersions that the applicant who is based in Ireland could not have been in Zimbabwe when the affidavit was signed by the Commissioner of Oaths. Counsels hotly argued over the issue of whether there was a proper affidavit. The court's copy shows that it is original and was signed by the applicant before a Commissioner of Oaths on 29 March 2019. Apart from the signature I do not know of any law which says the Commissioner of Oaths must also state his name. There is an official stamp which identifies the person who commissioned the document as the Officer In-Charge Administration at CID Headquarters. There is an extra certifying stamp which, in my view, does not vitiate an otherwise valid affidavit.

Of substance though is whether the applicant appeared before the Commissioner of Oaths and took oath before signing. The respondent suggests she was not in Zimbabwe on 29 March 2019.

In her answering affidavit the applicant demonstrated with a copy of her passport and visa entry and stay in Zimbabwe from 27 to 30 March 2019. She attached the itinerary for her flight. She said she had travelled to Zimbabwe to attend a niece's wedding. For the respondent's counsel, in the face of such valid explanation, to suggest as an anomaly that her visa stated the purpose of her visit as holiday as opposed to wedding is to say the least clutching on straws.

This point *in limine* has no merit and must fail.

This application is brought in terms of s 9 as read with s 7 (2) (3) (4) of the Matrimonial Causes Act, [*Chapter 5:13*]

Section 9 reads:

“Without prejudice to the Maintenance Act, [*Chapter 5:09*], an appropriate court may, on good cause shown, vary, suspend or rescind an order made in terms of section seven, and subsections (2) (3) and (4) of the that section shall apply mutatis mutandis, in respect of any such variation suspension or rescission.”

Section 7 empowers an appropriate court to make an order for division of assets when a decree of divorce is granted. In *casu* a decree of divorce was granted and there was an order for division of the assets. The order in relation to division of assets can be varied, suspended or rescinded but only where good cause has been shown. The onus is on the one who seeks the variation, suspension or rescission to discharge on a balance of probabilities. The key words are good cause. What amounts to good cause depend on the circumstances of each case. In deciding the variation, suspension or rescission of the order the court is enjoined to consider all the circumstances of the case including those laid down in s 7 (4) of the Act.

It is not in dispute that the respondent registered a mortgage bond over the property before divorce. The applicant says at the time of signing the consent paper the respondent did not disclose the encumbrance over the property. She only got to know of the existence of a mortgage bond when she wanted to pursue the issue of the deed of donation in 2016. She learnt the property could neither be sold in line with consent paper nor transferred in line with the donations. The loan which the respondent secured using the property as security was to his own benefit. Respondent alleges he took a loan for a relative who had assisted his family during hard times. That was his mere word without proof. The applicant alleged the value of the bond exceeded value of the property – how? It was not shown.

Applicant also alleged that respondent collected rentals from the property since 2014 which fact the respondent denied. She claims she has not benefitted from the property since the year 2014 to date. Although the respondent denies this he does not say anything of significance in terms of benefit to applicant. All he could say is that he reserved the house for the family’s use each time they visited Zimbabwe. The applicant’s story is more probable that respondent collects rent for the house though she does not say how much. In a letter dated 31 January 2019 the respondent’s legal practitioners acknowledged in a letter that the respondent had paid up the mortgage bond and that respondent was ready to dispose the property in terms of the consent paper.

It is clear from the circumstances of this case that the respondent has been the sole beneficiary of the property since 2014. He used the property before divorce to secure a loan for his sole benefit. He did not disclose having mortgaged the property. He collected rentals from

the property. The applicant was prepared to compromise the situation had the respondent not gone ahead to revoke the donation for the benefit of their children. Respondent decided to revoke the donation and insist on the 50% - 50% share basis which she cannot accept. She claims the respondent has already benefited his share and claim that the property be awarded to her as her sole and exclusive property or at the very least that she gets 80% with respondent getting 20% with option to buy out his share.

I am satisfied that the applicant has shown good cause for the variation of the order. There was non-disclosure of the full facts by the respondent at time of signing the consent paper to his benefit. He has for 5 years benefited. The applicant has tried to quantify his benefit by saying the value of the bond was more than the value of the property without stating value of the property. In any event respondent cleared part of the bond after divorce. The circumstances of this case demand that it is just and equitable that the applicant be awarded 80% of the value of property and respondent 20% with option to buy out respondent.

IT IS ORDERED THAT:

1. The decree of divorce in HC 10293/12 be and is hereby varied in respect of the sharing of property as follows:
 - (i) House No. 30, 11th Avenue, Morningside Mutare Held under Deed of Transfer No 10916/2001 shall be sold on granting of this order and the parties shall share the net proceeds on 80% for the applicant with 20% for the respondent.
 - (ii) The parties shall within 30 days of this order agree on a valuer to do the valuation of the property and avail a valuation report to the parties. In the event of the parties failing to agree on the choice of the valuer, the Registrar shall appoint one from his panel.
 - (iii) The applicant is given the option to buy out the respondent's 20% share within 3 months of the date of the valuation report.
 - (iv) In the event of the applicant failing to exercise her right of option to buy out respondent, the parties shall within 30 days of the last day of the option agree on an Estate Agent to sell the property to the best advantage. In the event of the parties failing to agree on the choice of an Estate Agent, the Registrar shall appoint one from his panel of registered agents.

- (v) The defendant shall surrender the title deeds of the property to the conveyancers appointed by the agent upon demand to do so.
 - (vi) The defendant shall, when called upon, sign all documents necessary to facilitate transfer of the proper failing which the Sheriff is hereby authorised to sign such documents.
 - (vii) Costs for valuation and sale shall be met by the parties in equal shares.
3. Respondent to pay applicant's costs of suit on the ordinary scale.

Mapondera & Company, applicant's legal practitioners
Maunga and Maanda, respondent's legal practitioners