

SHEILLAH CHIRONGOMA (NEE KUNAKA)

Versus

FARAI CHIRONGOMA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 18 JULY 2018 AND 4 APRIL 2019

Civil Trial

I. R. Mafirakureva for the plaintiff
D. Ncube for the defendant

TAKUVA J: Plaintiff issued summons claiming against the defendant a decree of divorce and ancillary relief.

The parties were married on the 21st of December 1990 in terms of the Marriage Act (Chapter 5:11) and the same still subsists. During the subsistence of their marriage, the parties were blessed with three children who have all since attained the age of majority. The parties have agreed to the distribution of their movable property leaving the sole issue for determination by this court as whether or not the plaintiff is entitled to 50% share of the matrimonial property being 7833 Lotus Drive, Highmount, Bulawayo.

Facts that are common cause

- (a) That the marriage between the parties of 27 years to date, has irretrievably broken down;
- (b) That the title of the property is in both names with each party having equal shares to the property
- (c) That both parties contributed towards the education of their three (3) children with two of them having completed their University education whilst the last born is at the University of Pretoria;

- (d) That the two (2) other properties that the defendant alleges that the plaintiff benefitted from are not at law owned by the plaintiff;
- (e) That defendant is a 50% shareholder in Progressive Marketing (Pvt) Ltd which company owns immovable property being a town house in Bulawayo Central Business District.

Bearing in mind the sole issue *in casu*, I proceed to state the law. The starting point is s7(1) of the Matrimonial Causes Act [Chapter 5:13] which provides that in granting a decree of divorce, judicial separation or nullity of a marriage, a court may make an order dividing, apportioning or distributing the assets of the spouses.

Subsection (4) provides that:

- “7(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 or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and every 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 use 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 spouse and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

In *Ncube v Ncube* 1993(1) ZLR (S) it was held per KORSAH JA with McNALLY JA and EBRAHIM JA concurring that –

“It is true that joint owners of property own each and every part of the property equally and therefore with equal shares in the value of the property. But when property comes to be apportioned or distributed under s7 of the Act, even though the spouses may be joint-owners of the property, the Act confers on a court of law, in the interest of justice, equity and fair play, power to take part of a spouse’s share in property jointly owned to give to the other spouse if, by so doing, it could place the spouses in the position they would have been in had a normal marriage relationship continued between them.”

Quite clearly, this court is imbued with powers to take from one spouse and award the other despite the joint ownership of the property. At page 48 of the judgment in the *Ncube* case, the Supreme Court made the following observation;

“A matter of some pertinence which tends to be overlooked when a distribution of the assets of the spouses falls for consideration is the income earning capacity, assets and other financial resources which each spouse has or is likely to have in the foreseeable future. It was common cause that both parties were in gainful employment. The appellant undoubtedly has acquired more assets than the respondent since their separation. The real consideration is: would it be fair and equitable to allow the appellant, in addition to her ownership of her two immovable properties, one of which is far more valuable than the Napier Avenue property, to retain her half share in the Napier Avenue property, or to order that her half share in that property be transferred to the respondent?” On the basis of the evidence, the court chose the latter result.

However, *in casu*, the facts are materially different in that the plaintiff does not own any other property apart from the property in issue although she owns 40% shares in Relief Guard

(Pvt) Ltd t/a Favour Driving School. The two properties allegedly owned by the plaintiff actually belong to her children. The 1st property is owned by her own children from a previous marriage while the other is registered in the 3 children of the parties' marriage. This is common cause and the defendant said he has no problems with this arrangement.

Plaintiff's evidence

Her testimony in relation to the immovable properties is as follows. Before she got married to the defendant, she obtained a loan that she used to purchase a house in Paddonhurst, Bulawayo. She transferred the house to her daughters with her late husband. Later, she secured another loan which she used to purchase a second house. This house is registered in the names of the three children born with the defendant. At the time she married defendant, plaintiff was employed as a bank official for almost 32 years. When she married defendant the bank loan in respect of the 1st property was almost paid up. She paid off what she termed "a small balance" without defendant's assistance. The same applied to her second loan.

As regards the purchase of the house in dispute, she said they acquired a residential stand which they jointly developed using their resources. She produced cheques in her bundle of documents as proof of her direct contribution towards the construction of the house. Some of the cheques were made directly payable to the Bulawayo City Council for the purchase price. It was her further evidence that she directly contributed towards tiling and carpeting of the house by buying tiles and carpets from Tile and Carpet Centre, Bulawayo. The receipts show payments made between 2010 and 2011 totaling US\$5 397,36.

Also between January 1992 and April 1993, plaintiff made direct payments using cheques to the defendant totaling US\$11 350,00. According to her she would occasionally give defendant cash. In short she said she made direct financial contributions and indirect contributions as a mother to her children and wife to the defendant. The two of them jointly contributed to the household expenses with defendant paying school fees for the children while she would buy clothes and food. However, she solely footed bills for two children's college fees in Germany and Pretoria, South Africa.

Plaintiff said defendant obtained resources from their joint sources and bought two stands which defendant registered in the name of a company he co-owns with his friend. The company now owns a factory and a house, which property plaintiff said she is not interested in sharing. Plaintiff confirmed that she survives on income generated from her driving school business. The plaintiff closed her case without calling any other witness.

In my view the areas of disagreement between plaintiff and defendant are very narrow. They are agreed that the property was acquired during the subsistence of their marriage. Plaintiff's evidence that she directly and indirectly contributed to the acquisition of the property is credible. Defendant agrees but disputes the extent.

Defendant's evidence

Defendant a company director at Progressive Marketing (Pvt) Ltd strongly objected to the equal sharing of the house with plaintiff because in his own view "her contribution was minimal". He claimed to have "assisted" plaintiff in paying off her bank loan in respect of the house in Paddenhurst. Asked why he included plaintiff's name in the Title Deed if her contribution was minimal, defendant said he was unduly misled by plaintiff's paternal uncle to include her name in the title. He denied that the cheques produced by plaintiff as exhibit 1 had anything to do with the purchase of the stand on which the house in question was constructed. According to him, although the cheques were issued in 1992, which happens to be the same year he purchased the stand he was solely responsible for its purchase.

As regards the two properties bought by the plaintiff, he admitted that he did not contribute financially but was quick to point out that while plaintiff was paying her loans, he was solely responsible for the family needs including paying school fees at Christian Brothers College and Convent High Schools. He also insisted that company property was purchased using "company profits" and not "matrimonial resources". Defendant conceded that the only improvement on the Highmount property is a solar geyser that he had installed after the plaintiff left. Further, defendant admitted that he solely paid approximately half of their 3rd born child's college fees at the University of Pretoria because plaintiff insisted on enrolling her at that

institution. Defendant conceded that the house in question is matrimonial property registered in both their names although he maintained that he only included her name in order to enhance his chances of securing a bank loan which never was.

Under cross-examination he admitted that he did not produce any documentary evidence to prove the extent of his contribution. It was also put to him that in his plea he did not dispute plaintiff's contribution but based his argument on her other properties. He admitted that the other properties do not belong to the plaintiff since ownership was transferred to the children in 1998 and 2000. In defendant's view, it is "unusual" to donate property to children. Finally defendant said Progressive Marketing currently owns one town house which they use as offices. The stand was disposed of sometime back. Defendant closed his case.

As indicated above, defendant agrees with the material aspects of plaintiff's evidence. All he says is whatever plaintiff contributed amounts to 20% of the value of the house. Defendant failed to prove on a balance of probabilities that plaintiff was what he termed "a beneficial owner of the two houses". It was not put to her in cross-examination that she has any residual rights to the two properties. In any event defendant accepted that at law, these properties do not belong to her. She cannot do as she pleases with those houses. Defendant's contention that plaintiff must be awarded 20% because she is the beneficial owner of the two houses can be raised with equal force in respect of the Parklands house belonging to his children with plaintiff.

It must be noted that the facts *in casu* are distinguishable from those in the *Ncube* case *supra* where in addition to the jointly owned property, appellant owned two other properties one of which was more valuable than the matrimonial property.

In casu, we have a plaintiff who was gainfully employed, wife and mother who contributed directly and indirectly to the purchase of the property which is owned in equal shares. In dealing with the issue of indirect contribution the court in *Usayi v Usayi* SC-11-03 had to say:

“*Mr Gijima*, who appeared for the appellant, was persistent in his submission that the respondent having made no financial contribution to the acquisition of the house was not entitled to an award of 50% of the sale price. Having regard to the provisions of s7(4) of the Act, his submission is unsound. The Act speaks of direct or indirect contribution. How can one quantify in monetary terms the contributions of the wife and a mother who for 39 years faithfully performed her duties as a wife, mother, counselor, domestic worker, housekeeper, day and night-nurse for her husband and children? How can one place monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of the home and therein an atmosphere from which both husband and children can function to the best of their ability? In light of these many and various duties how can one say as is often remarked throughout the marriage she was a housewife. She never worked? In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of direct and indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring of the family and any other domestic duties.”

The proper approach was also stated by Professor Ncube in his book *Family Law in Zimbabwe* at p 187 in the following words:

“Thus, the evaluation process should not seek to determine how much a house-keeper is worth in comparison with, for example, a university lecturer, nor should the process seek to determine the value of a wife’s cooking, washing, raising children as compared to say a government minister’s work. The proper approach would be 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”. See also *Takafuma v Takafuma* 1994 (2) ZLR 103; *Lavontant v Kennedy* 2000 (2) ZLR 280 (S); *Denhere v Denhere* SC-51-17.

In casu, it was established by credible evidence that plaintiff contributed both directly and indirectly. Directly in that plaintiff produced evidence of receipts and cheques of some of her financial contributions towards the acquisition of the matrimonial home. Further, plaintiff established that she contributed indirectly as a mother and wife. Her success in this regard is self evident in that the children went through high school and universities in foreign lands due to the serene and orderly atmosphere at home. In light of all this, is it fair and equitable that defendant is awarded the lion’s share of 80% while the plaintiff is awarded a paltry 20% of the value of the house? I think not.

The parties are registered joint owners of the Highmount property and hold equal shares in it. I am not persuaded by defendant's argument that he was compelled by plaintiff's paternal uncle to register the plaintiff as a joint owner of the property. This argument is unbelievable and highly improbable in that defendant impressed the court as a commercially astute businessman who appreciates the import and consequences of registering immovable property in joint names. I find that defendant voluntarily agreed to jointly register the property in their names with the full realization that such registration conveys real rights upon those in whose names the property is registered.

The defendant is a co-director in Progressive Marketing (Pvt) Ltd wherein he holds 50% shareholding. This company, on defendant's admission owns an immovable property namely, a town house. Plaintiff, on the other hand owns 40% shares in Relief Guard (Pvt) Ltd t/a Favour Driving School. The only jointly owned immovable property is the Highmount house. In that regard, it is just and equitable that each party be awarded 50% share of the Highmount matrimonial property. This will place the spouses in the position they could have been in had the marriage relationship continued.

Accordingly, it is ordered that:

1. The decree of divorce be abnd is hereby granted.
2. The parties are each awarded 50% share of the value of the property being number 7833 Lotus Drive, Highmount, Bulawayo.
 - a. If the parties cannot within 10 days agree on a valuation the Registrar shall appoint a valuator.
 - b. The valuator shall as soon as possible value the property and indicate the net value thereof.
 - c. The cost of valuation shall be paid by both parties on equal shares.
 - d. The defendant shall buy out the plaintiff within 3 months of date of the order. Defendant shall pay 50% of the net value of the property to plaintiff's legal practitioners' Trust Account.

3. If defendant fails to comply with (c) above, the property shall be sold to the best advantage of the parties by an independent estate agent and net proceeds shared equally between the parties.
4. Each party shall pay its own costs.

Messrs Moyo & Nyoni, plaintiff's legal practitioners
Job Sibanda & Associates, defendant's legal practitioners