

WILBERT MAPOMBERE  
vs  
BEAUTY MAPOMBERE

HIGH COURT OF ZIMBABWE  
BLACKIE J  
HARARE, 30 November 2000 and 24 April 2002

Mr. *Hondora* for the Applicant  
Mr. *Mazonda* for the Respondent

BLACKIE J: The applicant and the respondent were formerly married to each other. They are now divorced. In this application the applicant claims the right to transfer to the three children of the marriage the rights to a house, owned by the Mutare Municipality and presently occupied by the respondent in terms of an agreement of lease, with option to buy, in her name. The respondent opposes the application. She says all rights in the agreement with the Mutare Municipality are vested in her and that the applicant has no right to dispose of those rights. She counterclaims for the payment of \$142 026 .50 which, she says, is money due to her in terms of the divorce settlement between the parties but unlawfully withheld by the applicant pending the determination of this application.

In respect of the relief claimed by the applicant, it is common cause that the house was leased from the Mutare Municipality while the parties were still married.

The applicant says that he is entitled to dispose of the rights in the lease (a) because it was always the intention and the understanding of the parties that the house was his and the initial deposit for the lease and all payments subsequently due in respect of it and for improvements to the property have been made by him; (b) that it was initially, and unknown to him, registered in the name of the respondent (either by duplicity or ignorance on the part of the respondent) when he could not attend the registration proceedings for the lease; and (c) because, and in any event, subsequent to the divorce between the parties, the respondent agreed that the property should be transferred to the eldest son of the marriage subject to a life usufruct on the property in her favour. He says that, because the respondent is now afraid that the eldest son may dispose of the property, he has agreed that the property should be registered in the name of all three of their children.

The respondent says that the rights to the house are hers. The applicant gave the house to her as a gift during the marriage. She denies entering into any agreement after the divorce whereby the rights would be transferred to their eldest son or any other agreement with the applicant affecting the house.

There are a number of apparent conflicts of fact contained in the papers. Notwithstanding these conflicts, the applicant pursues his claim to the relief sought. The conflicts, he submits, are illusory and the probabilities so wholly on his side that the court can and should determine this application on the papers rather than send it to trial.

The probabilities to which the applicant refers are the failure of the respondent to mention her right to the house when she applied to be assisted *in forma pauperis* to defend the divorce proceedings brought against her by the applicant, her failure to claim the rights to the house at the time of the divorce, the exclusion of any mention of the house from the settlement of property rights agreed between the parties and incorporated into the order of divorce, the failure of the respondent to object to the letters of confirmation sent to her by the applicant's legal practitioner following the post divorce agreement concerning the house. There was, he says, no claim by the respondent to the gift of the rights in the house to her in her pleading in the divorce action, no claim that the property was a gift to her in her pretrial statement of case, no claim to it in the settlement of property matters preceding the divorce and no claim to it, other than to a life usufruct in it, in the post divorce agreement. The claim that he donated the rights in the house to her only appeared, he says, when he instituted these proceedings to confirm and enforce the post divorce agreement concerning the disposal of the house.

There are conflicts of fact in this case contained in affidavits filed by the parties. However, this is a case where the court should take the robust approach advocated in *Zimbabwe Bonded Fiberglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC) to resolve those conflicts of fact and accept the submissions by the applicant concerning the probabilities in this case. The reasons for this approach are as follows. In addition to failing to make any denial to the applicant's claims to the property during the entire divorce proceedings and to mention her claimed ownership of the house when she applied to be defended *in forma pauperis*, the respondent has also failed to deny a number of significant points made by the applicant in these proceedings that support his claim. In particular, the respondent has not denied that the applicant made the entire contribution to

the purchase of the property, paid for all the improvements to it (including those made after the divorce) and that the rental for the property, while occupied by a tenant, was paid to the applicant. Further, the respondent has given no explanation for her failure to respond to and to deny the contents of the letters sent to her by the applicant's legal practitioners which sought to confirm the post divorce agreement alleged by the applicant. Accordingly, the applicant succeeds in respect of the principle relief claimed by him

In respect of the respondent's counterclaim for the payment of \$142 026.50, the applicant does not dispute either the respondent's right to the money or the quantum claimed by her.

There remains the question of costs. The applicant has succeeded in the establishing his title to the rights to the house. He has conceded that the money he has withheld from the respondent is due to her. He has not claimed any right to withhold that money. He merely says that when he heard that the rights to the property were registered in the name of the respondent rather than himself he 'instructed (his) legal practitioners to withhold the balance of the (money) due to her from the sale of the former matrimonial home'. That withholding of the money, even if possibly understandable, was unlawful. In the result the fairest result in regard to costs is to make no order.

The following order is granted:

1. The rights to the immoveable property being house P118A Dangumvura, Mutare be transferred to Ngonidzashe Paul Kama Mapombere, born on 26<sup>th</sup> September 1981, Primrose Idah Mwarombereni Mapombere, born on 5<sup>th</sup> September 1993 and Ngaatendwe Lilyosa Mapombere, born on 3<sup>rd</sup> April 1994 and a usufruct registered on the property in favour of the Respondent for her lifetime.
2. The sum of \$142 026 due to the respondent in terms of the agreement entered into between the parties in Case No 4502/96 be paid to the respondent with immediate effect.
3. There is no order as to costs.