

NASSAH MUKOMBERANWA  
versus  
VIVIAN MOKOMBERANWA

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 25, 26 and 27 March, 2 April 2009 and 1 July 2010

FAMILY LAW COURT  
Divorce Action

*D. Moyo*, for the plaintiff  
Mr *Dzvetero*, for the defendant

MUSAKWA J: One usually expects that once a married couple agrees to end their relationship premised on irretrievable breakdown, then they ought to come to a settlement in respect of some if not all ancillary issues. There appears to have been acrimony that militated against that in the present matter, such that the court has to parcel out mundane items like knives.

The parties having agreed that the marriage relationship had irretrievably broken down, the issues referred to trial were-

- a) Who should be granted custody of the minor children.
- b) Whether property listed in the plaintiff's declaration was acquired during subsistence of the marriage and if so, whether it constitutes matrimonial property.
- c) What constitutes an equitable distribution of the matrimonial estate.

At the commencement of trial the parties' legal practitioners agreed that the following immovable property constitutes matrimonial property-

- a) 27 Skymaster Drive, New Ridgeview, Belvedere

- b) 4792 Dzivaresekwa Extension.
- c) 7782 Cold Comfort, Tynwald South.
- d) 22468 Unit L, Chitungwiza.

The above properties are to be valued and sold by private treaty, with the parties sharing the proceeds equally. What remained in contention was 7859 Belvedere West, Harare and 1334 Norton Township, Galloway, Norton. However, if such property falls within the matrimonial domain, then it should be treated like the first category. The other issue was whether the defendant is entitled to a half share in Transelectrical (Private) Limited. There was also the issue of division of some movables. Some of the issues regarding movables got resolved as the plaintiff testified.

The plaintiff testified that he qualified as an electrical engineer in 1987. He then worked for several companies before he ventured into private enterprise. This led to the incorporation of Transelectrical (Private) Limited in 1995. At the time of trial the company was said to have ceased operations owing to the prevailing economic environment.

There are two children born during the marriage, a girl now aged 13 years and a boy aged 11 years. They were attending school at Louis Mt Batten Primary School.

By mutual consent of the parties the defendant went to the United Kingdom in 2002. According to the plaintiff their daughter was then four years whilst the boy was two years. He thus raised the children on his own. He was assisted by his nephew and a maid. The defendant was supposed to be away for six months but she only returned in 2006.

When the defendant left the country the plaintiff was in the process of building the Ridgeview house which had reached roof level. The defendant was then contributing towards a scheme dubbed "Pay For Your Own House." The house in question is in Dzivaresekwa Extension.

The defendant moved out the Ridgeview home in 2008. She went away with the children. The plaintiff said he had subsequently seen the children only for one week during the first term of 2009.

The defendant does cross-border trade whereby she travels to South Africa and Mozambique. According to the plaintiff she is out of the country for two weeks every month. In addition she was said to have a Malawian and Zimbabwean passport. She was also said to have two birth certificates relating to her which are in different names. In essence, the plaintiff's contention was that this is proof of the defendant's unreliability as a suitable custodian for their children.

On movables the plaintiff testified that there is a Nissan double cab which is registered under Transelectrical (Private) Limited, a Toyota Corolla, a Pajero and Ford Transit. The Toyota Corolla and Pajero are with the defendant. He claimed that he be awarded the Toyota Corolla whilst the defendant gets the Pajero. The Ford Transit should be sold and the proceeds shared equally between them.

On the household goods that are in contention, the plaintiff testified that the electric stove was purchased before they got married. Under cross-examination he agreed that it be awarded to the defendant. The defendant later testified that the stove had only one functional plate. She countered that it be awarded to the defendant who can repair it since he is an electrical engineer.

There is also a gas stove which the plaintiff claimed he purchased from Makro despite the defendant's opposition. He said they had never used it as the defendant did not like it. On generators, the plaintiff stated that they belong to Transelectrical. He agreed that the dstv decoder be awarded to the defendant. In fact he agreed that the defendant be awarded two of the three decoders and a 14 inch color television set. Although he confirmed that there are six cameras, he was willing to give the defendant only one, an Olympus. The defendant was said to have taken away the Technics radio whilst he remained with the Sony radio. He also wants

the defendant to return the dressing table as it is part of the bedroom suite. On kitchen utensils the defendant was said to have moved out with most of them.

In respect of the immovable property the plaintiff testified that upon the defendant's return they held a family meeting on 6 July 2006. At that meeting the defendant admitted that she had purchased some properties without the plaintiff's knowledge. These included the Belvedere West stand and the Norton stand. The plaintiff stated that he was not even aware that the Belvedere West stand had been disposed of. He also stated that the Unit 'L' property and the Norton stand were acquired through the defendant's brother in whose name s they are registered. The defendant's brother is Munyaradzi Muguti. The plaintiff was adamant that the plaintiff's brother could not afford to purchase these properties as he was not employed. He further contended that the defendant's share in the Ridgeview property should be diminished proportionate to her interest in these two properties.

The plaintiff also stated that if he is not awarded custody he should be granted access twice a month during weekends and during half of each school holiday.

The plaintiff's nephew, Noah Nyamupinda also testified. His testimony corroborated that of the plaintiff regarding how he took care of the children during the defendant's absence. Part of the evidence also dwelt on the fights that he witnessed between the plaintiff and the defendant.

The defendant testified that she commenced residing with the plaintiff in 1995 before the marriage in 1996. When she went to the United Kingdom the air ticket was funded by the plaintiff's friend. She subsequently repaid the loan. She explained that the plaintiff borrowed funds to complete roofing of the Ridgeview house. Upon request from the plaintiff she remitted some funds for repaying the loan. She explained that she would provide money to someone in the United Kingdom and that person would transfer money in local currency into the plaintiff's C.B.Z account. She also provided funds for the family's subsistence.

She confirmed that she took the children to her mother's house on account of the differences she was experiencing with the plaintiff. For example, she said eggs are kept in the bedroom by the plaintiff. The mealie- meal was rationed out in a five litre container. Keys to the pantry were kept by the plaintiff's niece. Since the time she moved out the plaintiff had not followed up on the children. She had no problem if custody was granted to the plaintiff although she claimed to be a better parent. She confirmed that she goes out of the country once a month since she operates a stall at Mupedzanhamo flea market. She stated that she realized about US\$400 per week.

The defendant also confirmed having differences with the plaintiff and his niece. She obtained a peace order against the plaintiff. The children's school performance was affected. She talked to the deputy school head who suggested that they go for counseling. The plaintiff was said to have declined to participate. As a result she went to Connect. She produced a letter from Connect who recommended that the children be enrolled at boarding school.

On the movables the defendant claimed that the plaintiff locked away a slow cooker, steamer, food processor, bread maker and electric frying pan in the study. There were also two sets of stainless steel knives. She wanted a set of stainless steel knives, the steamer, slow cooker and food processor. On vehicles she wants the Pajero and Corolla as she has been using them.

Regarding cameras, the defendant stated that she wants three out of the six available. Since the plaintiff was insisting on all bedroom items she demanded to be awarded the dining room suite.

She maintained that the Norton property belongs to her brother. She further explained that she happened to have the building plan for the property since the person who drew it was based in the United Kingdom. The Belvedere West stand was purchased in 2003. She could not develop it because of some legal dispute and she decided to sell it. She used the proceeds for her sustenance and the balance to start her flea market business.

Now, in determining the issues it is well established that the best interests of the child determine which parent can be awarded custody. Counsel for the plaintiff cited the case of *Zvorwadza v Zvorwadza* 1996 (1) Z.L.R 404 (SC). In that case the parties agreed to divorce as well as that custody of one of the children be awarded to appellant. Custody of two other children as well as other matters remained in contention. By the time the matter went to trial one of the children had attained majority age. Custody of the other child was then awarded to respondent. The trial court had among other things reasoned that custody of older boys should be awarded to the father. MUCHECHETERE J.A had this to say at pp 409-410:

“The learned judge misdirected himself on the matter. For it is proper to canvass the views of the minor children on their preference when the court is considering the best interests of the children. It would have been much more preferable in a case such as the present one, where the infant in question is of sufficient age and intelligence to be questioned on the matter, and where both parents cannot be said to be irresponsible. See *Clark v Clark* 1939 (1) PH B29 (SR) where, in a judicial separation, Blakeway J awarded custody of the minor child to the husband. One of the reasons why custody was granted to the husband was because the minor child had said that he wanted to remain with his father and that he was afraid of his mother. In *Siyaya v Siyaya* 1958 (2) PH B17 (C), where Rosenow J awarded custody in accordance with the preference of the children, it was held that:

"The interests of the children could not be measured purely in terms of superior accommodation and amenities. A child required, above all, care and affection. The court had been influenced particularly, in coming to a decision, by the preference shown by the children themselves. Although the applicant might not be able to offer as much luxury and comfort as they would have with (the) respondent, there was the evidence that she was able to look properly after them, and the five youngest children themselves would be happier if in the meantime they were allowed to remain in the care of the party for whom they themselves had shown a preference ..."

The first thing to note in the present matter is that both parties may be able to provide financially for the children. Both may also be able to help with the children's school work. That the plaintiff was able to take care of the children cannot be given more prominence than other factors. It is common cause that the parties had agreed on the defendant's sojourn in the diaspora although the plaintiff was not happy with her extended stay. That the plaintiff is

disabled is not a factor as he was able to look after the children during the defendant's four year absence.

One other aspect worth considering is the plaintiff's attitude towards the children as revealed by the evidence. It was stated by the defendant that he keeps some food items in the bedroom and shares out the mealie-meal. When the defendant took away the children the plaintiff did not follow up. This evidence was not challenged by the plaintiff. The defendant further stated that the children's school performance was affected and she talked to the deputy head who recommended that the parties seek counseling. The defendant went to Connect. The plaintiff was said to have declined to avail himself for counseling. The defendant appeared more forthcoming as she said she also wanted to know where she was failing. Had the plaintiff availed himself for counseling the court could have benefited from the report that would have been prepared in as far as suitability of the parties as custodians is concerned.

Much was made of the defendant's unsuitability for custodianship on the basis of her dishonesty. The copies of the defendant's birth certificates produced by the plaintiff show that they were obtained in 1968 and 1979. The births were registered by the defendant's mother. In the circumstances one cannot make much of the issue

The defendant also did not deny using two different passports. She explained that whilst she was in the United Kingdom she obtained a Malawian passport in order to enhance her chances of securing more jobs in order to boost her earnings. Whilst her conduct fell foul of Zimbabwean law that cannot disqualify her from being awarded custody. Her dishonest conduct does not make her an unfit parent. To the contrary, her conduct on parenting since her return from abroad does not exhibit any signs that might militate against an award of custody.

On the sharing of assets the starting point is to note the provisions of the Matrimonial Causes Act [*Cap 5:13*] of which s 7 (1) provides that-

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).....”

However, in making an order in terms of the above provision, the court is enjoined to also take into consideration subsection (4) which states that-

“(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 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.”

At the commencement of the proceedings both counsels confirmed that the parties were contesting the division of some of the movables. These turned out to be cameras, cutlery, furniture and some machinery. The plaintiff made concessions in respect of some of the items

although he was adamant in respect of some. For example, he insisted that the defendant was only entitled to one camera out of the six without justifying that position. In making an award the court will take into account the provisions of s 7 (1) of the Act and use its discretion accordingly.

The defendant also sought a division of assets belonging to Transelectrical (Private) Limited. The plaintiff's evidence was that this company was incorporated in 1995 before he got married to the defendant. He has a fifty percent share. Apart from the claim that the plaintiff used some of the company's assets like the Nissan motor vehicle and generator, there was no evidence on which the court could conclude that it is a family business. The court was not urged to pierce the corporate veil in order to determine whether the plaintiff was solely in control of the company. No documentation was produced to show who the directors of the company are. I will therefore proceed on the basis that the company is a separate legal entity and that assets that are registered in its name are not subject to distribution. That means the generators and the Nissan motor vehicle will not be shared between the parties. At the time of trial the plaintiff told the court that the company was not operating and that is why some of the company's assets were being kept at home. I will therefore not consider whether the defendant is entitled to that portion of the plaintiff's shares in the company. In any event no evidence was led on what the plaintiff's share in the dormant company amounted to.

Regarding motor vehicles, if one disregards the Nissan Hardbody that is registered in Transelectrical (Private) Limited there are three motor vehicles for distribution. In my view it would be fair that the defendant retains the Mitsubishi Pajero whilst the plaintiff gets the Toyota Corolla. The Ford Transit shall be sold, with the parties sharing the proceeds equally.

As regards the immovable properties, the proper approach is to apply what was stated in *Takafuma v Takafuma* 1994 (2) Z.L.R. 103 (SC. In that case McNALLY J.A. had this to say at pp 105-106:

“ The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property

together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term "his", "hers", and "theirs". Then it will concentrate on the third lot marked "theirs". It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked "his", plus the appropriate share of the items marked "theirs". And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, "as The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of "real right" in s 2 of the Act. The real right of ownership, or *jus in re propria*, is "the sum total of all the possible rights in a thing" - see Wille's Principles of South African Law 8 ed p 255.

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually "his" or "hers". E far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ..."

It is common cause that out of the immovable properties, only the Ridgeview house is registered in the plaintiff's name. The rest of the properties are either in the defendant's name or that of her nominee or that transfer of title had not taken place. It was not disputed that the defendant purchased all the immovable properties during the course of marriage without the plaintiff's knowledge. In 2003 she purchased stand 7859 Belvedere West which she subsequently sold without the plaintiff's knowledge. She admitted in evidence that she used part of the proceeds to start her business.

Although the defendant claimed that the Norton stand belongs to her brother, the probabilities that she used her brother as a front are very high. In the first place the brother unaccountably failed to attend court to testify as the defendant's witness on the issue. There was also evidence to the effect that the defendant was in possession of building plans for the stand. The court was not furnished with proof of purchase of the stand to show who purchased it.

To demonstrate the defendant's stealth the plaintiff produced an agreement of sale in relation to stand 22468 Unit 'L' Seke which was entered into by Munyaradzi Muguti on behalf of the defendant. Part of the agreement reads as follows:

"1. That the stand No 22468, Unit 'L', Seke, Chitungwiza shall be ceded to Munyaradzi Muguti as if he is the real owner (purchaser) thereof.

2. In the event that there is a dispute between Vivian and Munyaradzi resulting in Munyaradzi refusing to cede right, interests and title in this stand to the real purchaser namely Vivian Mukomberanwa, Walter Makwili shall not be liable to Vivian Muguti in any way i.e. either to provide another property nor to refund the purchase price."

Therefore in making a distribution in terms of the Act the court will take into account the defendant's interest in the Norton property as well as the admitted fact that she benefited from the disposal of the Belvedere property to the detriment of the plaintiff.

In support of the contention that the court should take into account property that has been disposed of the plaintiff's counsel cited the case of *Muganya v Sakupwanyanya* 1996 (1) Z.L.R 217 (S). In that case the house that was the subject of division during divorce proceedings had been purchased by the husband. At the time of hearing it was disclosed by the husband that he had sold the house. The wife successfully sought the joinder of the purchaser who happened to be the husband's girlfriend. Apart from the fact that the sale was fraudulent McNALLY J.A at p 219 had this to say about the wife's rights:

"It seems to me that the relief sought by Mrs Sakupwanyanya against her former husband and Miss Muganga was soundly based in law. Her rights against Mr Sakupwanyanya flow from s 7 of the Matrimonial Causes Act [Chapter 5:13]. Her rights against Miss Muganga are based on the allegation that the latter knowingly collaborated in a scheme to deprive her of her rights under the Act. If the facts are proved, the case falls squarely within the terms of the exception set out in *Muzanenhano & Anor v Katanga & Ors* 1991 (1) ZLR 182 (S), where I said at the foot of p 186 leading on to 187:

"I do not believe that a wife can raise such a claim (ie to stop him selling the matrimonial home) just because the husband is disposing of an asset. There must be some evidence that he is disposing of the asset at under-value to a scoundrel, the accomplice of the husband' (*Chhokar v Chhokar* 1984 FLR 313) or that in some way he is

attempting to defeat her just rights. In England, under their far more complex and comprehensive legislation, the test is Am I satisfied that the disposition was made with the intention of defeating the wife's claim for financial relief?"

See also Ferris v Weaven [1952] 2 All ER 237 (QB)."

The only unsatisfactory feature of the present matter is that no endeavor was made to quantify the direct and indirect contributions of the parties towards the acquisition of the properties. As regards the Ridgeview house evidence was that when the plaintiff went to the United Kingdom it had been built to window level. The defendant testified that she remitted funds for servicing the loan procured by the plaintiff for roofing the house. She also said she remitted funds that were used for the family's subsistence. No figures were mentioned. It puts the court in a difficult position to quantify the defendant's contribution.

On the other hand the same applies to the plaintiff's indirect contribution towards the acquisition of the various properties by the defendant. No figures were given regarding what he expended on the upkeep of the family so as to reconcile it with the values of the properties. To make matters worse, none of the parties made an attempt to have the properties valued. Everything was left for the court to determine.

However, what is clear is that the Ridgeview property is more valuable than any one of the other properties. No proper evidence was led regarding the state of the Unit 'L', Tynwald South as well as Dzivaresekwa Extension properties. The court does not know whether the Tynwald South and Unit 'L' properties are developed or undeveloped stands. That notwithstanding, one might hazard to say the combined value of the three properties that are registered in the defendant's name may not exceed that of the Ridgeview property. In this respect it will be proper that each party retains what is in their names. In reaching such decision I have taken into account that the defendant benefited from the disposal of the Belvedere stand and that in all probabilities she has interest in the Norton stand. This way, any interest in the Ridgeview property is thereby extinguished.

In the result it is ordered as follows-

- a) That a decree of divorce be and is hereby granted.
- b) That custody of the minor children Chiedza Muokomberanwa (born on 2 July 1997) and Tinotenda Mukomberanwa (born on 20 April 1999) be awarded to the defendant with the plaintiff having access during two weekends each month and during half of each school holiday.
- c) That the parties shall keep as their sole possessions any of the movable assets they agreed to share before trial.
- d) That in respect of the contested movables the plaintiff is awarded the following; Toyota Corolla vehicle, bedroom suite, gas stove, three cameras, one set of stainless steel knives, bread maker and electric frying pan.
- e) That in respect of the contested movables the defendant is awarded the following; three decoders, four plate stove, dining room suite, one set of stainless steel knives, Mitsubishi Pajero, steamer, slow cooker and food processor.
- f) The Ford Transit vehicle shall be sold with the parties sharing the proceeds equally.
- g) That the plaintiff be awarded number 27 Skymaster Drive, New Ridgeview, Belvedere as his sole property.
- h) That the defendant be awarded the following as her sole property- 4792 Dzivaresekwa Extension, 7782 Cold Comfort, Tynwald South and 22468 Unit L, Chitungwiza.
- i) That each party shall bear their own costs.

*Mhiribidi, Ngarava & Moyo*, the plaintiff's legal practitioners

*Antonio Mlotshwa & Company*, the defendant's legal practitioners