

TUTSIRAI ALEC MAGOMO
versus
MARIA MAGOMO (Nee Ndonga)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 May and 24 November, 2011

FAMILY COURT

Trial

T Machiridza, for the plaintiff
The defendant in person

CHITAKUNYE J: The plaintiff and defendant were joined in holy matrimony on 4 January 2000 in terms of the Marriages Act, [*Cap 5:11*].

Both parties are domiciled in Zimbabwe.

Their marriage was blessed with two children. The first child was born on 3 October 1993 and the second child was born on 11 May 1998. The parties had initially married under customary law in 1992.

After a period of about 15 years living together the plaintiff sued for divorce alleging that the marriage had irretrievably broken down in that:-

- The plaintiff and defendant have not lived as husband and wife for more than 12 months immediately preceding the filing of this action on 2 October 2009;
- The defendant has continuously denied the plaintiff of his conjugal rights;
- The defendant has improperly associated with other men in the presence of his children;
- The defendant has lost love and affection for the plaintiff; and
- The parties have become generally incompatible.

As a result the plaintiff prayed for:-

1. A decree of divorce to be granted in his favor;

2. Custody of the two children of the marriage;
3. 90% share of the immovable property, being Stand No. 12359 Kuwadzana Extension, Harare.

As for movable property he proffered an annexure of how he felt the property should be shared.

The defendant in her plea did not deny that the marriage had irretrievably broken down. She however denied that she was seeing other men. She said it is the plaintiff who had lost love and affection for her.

The defendant filed a counter claim in which she claimed for:-

1. Custody of the two minor children; and
2. A share of the matrimonial property according to her schedule.

On the immovable property she indicated that there were in fact two immovable properties; that is, House No. 12359 Kuwadzana Extension and House No. 4634 Tynwald. Both properties are in Harare. The defendant claimed a 40% share in each of the immovable property.

At a pre-trial conference the following issues were referred for trial-

1. Whether or not the marriage has irretrievably broken down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship.
2. Whether or not it is in the best interests of the two minor children to stay in the custody of the plaintiff.
3. Whether if custody is awarded to the defendant, plaintiff should pay contributory maintenance and the quantum thereof.
4. How is the immovable property, being stand No. 12359 Kuwadzana Extension, Harare and the following movable property being room divider, DVD, Television Set to be distributed between the parties.

When the parties appeared before me for trial on 24 May 2011 they had apparently resolved some of the above issues.

Counsel for the plaintiff submitted that the parties had now agreed on all the issues save for issue number 4 on the immovable property. On movables the dispute remained on two items only namely the room divider and a television set.

Apparently the parties had already shared the rest of the movable property as no order was now being sought on the distribution of that property.

According to counsel the parties agreed that:-

1. Their marriage had irretrievably broken down;
2. That the plaintiff be awarded custody of Prosper Brian Magomo whilst defendant is awarded custody of Malvin Magomo; and
3. On maintenance, the parties agreed that the plaintiff will pay all school fees and that there will not be monthly monetary payment.

The defendant confirmed that they had indeed agreed on the above issues as submitted by the plaintiff's counsel. On the question of the room divider and the television set, the defendant conceded that since the plaintiff had sold the room divider she will accept the television set that the plaintiff was offering her. That therefore left the issue of the equitable distribution of the immovable property, namely house no.12359 Kuwadzana Extension, Harare as the only contested issue.

The plaintiff gave evidence after which the defendant testified. The plaintiff's evidence was to the effect that he started living with the defendant as husband and wife in 1992 under a customary law union. Thus when their two minor children were born in 1993 and 1998 they were already husband and wife in terms of customary law.

On 4 January 2000 their marriage was solemnized in terms of the Marriages Act [*Cap 5:11*]. That marriage still subsists. The matrimonial house in question was acquired when they were living together as husband and wife.

Though in his pleadings the plaintiff had offered the defendant a 10% share, in his evidence in court he upped the offer to 15%.

The plaintiff argued that he is the one who applied for the property from the City of Harare. When he was allocated the property it needed to be developed. In 1996 he applied for and obtained a mortgage bond for the development of the property from a building society. It was whilst applying for a mortgage bond that he said he decided to

include the defendant's names as joint owner. He did this so that in the event of his death before repayments were complete, the defendant would be able to continue with the repayments. As fortune would have it he paid up the loan in good time.

The plaintiff's main reason for offering the defendant 15% only is because he is the one who bought the property and single handedly paid for its development. He argued that that direct contribution entitles him to a share of 85%. He went on to say that he was offering the defendant 15% for her role as his wife who cooked for him, washed for him and took care of their children and did other household chores. She was never employed during the period of their marriage and so never had a direct financial contribution towards the purchase and development of the immovable property in question.

The defendant on the other hand contended that she deserved a greater share than what was being offered. She testified that in 1996 when the property was acquired she was employed at Harare Hospital. Before that she had been a cross border trader. After she stopped working at Harare Hospital she started running a poultry project at home.

It was her evidence that the house was initially four roomed. In the period 1997 to 1998 the plaintiff was in the Democratic Republic of Congo on duty. It was during that period that the house was extended with the addition of four more rooms. She is the one who saw to it that the extension was done. She cooked for the builders, sourced for the building material and supervised the builders.

The defendant admitted that most of the money for the extension came from the plaintiff. After the extension of the house as a couple they bought a stand in Tynwald which unfortunately the plaintiff sold without her knowledge or consent.

In the years 2007 to 2008 she was staying at their communal home whereat she built another house which they intended to have electrified.

It was the defendant's evidence that in the light of all the contributions she made, an award of a 40% share in the matrimonial home would be appropriate.

The defendant was however unable to substantiate most of her income generating activities. She could not explain why she had not alluded to them in her pleadings.

From the evidence in chief and cross examination of the parties I am of the view that the defendant did not have meaningful direct contribution. She however had

immense indirect contribution especially during the period the house was being extended and the plaintiff was outside the country. It is also clear that their marriage lasted for about 17 years. During that period the defendant dutifully performed her role as a wife and provided the necessary comfort to the plaintiff.

It is common cause that the immovable property in question is registered in the joint names of the parties. That registration has its own bearing on the approach to the issue of distribution of that property. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at p 105H to 106B McNALLY JA said that:

“The registration of rights in immovable property in terms of the Deeds Registry Act [*Cap 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.”

At p 107D-G the honorable judge went on to quote with approval the words of KORSAH JA in *Ncube v Ncube* SC 6/93 wherein at p 11 of the cyclostyled judgment the learned judge said, of a situation where property is registered in joint names though one of the parties had not contributed financially-

“It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money’s worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property.

The proper approach is to accord her her share of that property and then, taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered, in the exercise of its discretion, to order that any asset be transferred from one spouse to the other.”

In *casu* by virtue of registration in joint names, the parties owned a half share each of the value of the jointly owned property. One spouse’s share can only be tampered with where the justice and equity of the case demanded it.

In deciding on what would be a just and equitable distribution of the property s 7(1) (a) of the Matrimonial Causes Act, [*Cap 5:13*] states 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 the division of, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other;..”

Subsection (4) of section 7 thereafter provides that:-

“In making an order in terms of subs (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;
- (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 endeavor 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 parties.”

The above factors must be given appropriate weight in deciding what share to award the defendant. The weight to attach to each factor may vary from case to case. What is important is for parties to address their minds to all the factors that are relevant in their case. Unfortunately in this case not much effort was made in that regard. Parties seemed to believe that only direct contribution was of paramount importance yet in a number of decided cases indirect contribution and other factors, cited above, have led to spouses being awarded substantial shares in this court.

For instance in *Sithole v Sithole & Anor* HB14/94 court held that even if a wife made only indirect contributions, she cannot leave empty handed merely because she did not

contribute financially towards the acquisition and development of the matrimonial home. The wife in that case was awarded a 40% share.

In *Muteke v Muteke* SC 88/94 court considered primarily the wife's needs and expectations in awarding her a substantial share.

In *Usayi v Usayi* 2003 (1) ZLR 684(S) the Supreme Court, in upholding a High Court decision to award a 50% share to a non-working housewife of many years held that:

“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 to 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 the routine and sometimes boring duties attendant 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 the 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 performance 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.”

In that case the parties had been married for about 35 years. It should be evident that the longer the duration of a marriage the more difficult it becomes to deny a meaningful share of matrimonial estate to a so called non working wife or spouse.

In *casu* the parties had been married for about 17 years which is quite long. During that period they had acquired and developed their matrimonial home. That home is in fact registered in both parties' names. This in my view signifies that at the time the parties viewed the home as theirs as a couple in equal terms. It was neither the plaintiff's house nor the defendant's house but their house jointly. As has already been alluded to the fact of registration in joint names gave each party a half share in the property.

In *Takafuma v Takafuma* 1994 (*supra*) court made it clear that such property should be considered as ‘their’ property on a 50/50 basis. The half share of a spouse should only be taken away where there is justification. Such justification would include evidence of the parties' respective contributions towards its purchase both directly and indirectly, the inequality that would result if the parties' shares were not tampered with

regarding what each party would go out of the marriage with considering their contribution and duration of the marriage.

In *casu* there is only one immovable property. It is in that property that each of the spouses looked at as their life investment. It is my view that taking into account the contributions both direct and indirect by the parties this is an appropriate case to take part of the defendant's half share and award it to the plaintiff. How much to take away is no easy task. Both parties deserve a shelter over their heads. Whatever is taken away must not leave the defendant with only a token of a share. I am of the view that a reduction of the defendant's share by 15 % would meet the justice of the case.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. The plaintiff is hereby awarded custody of Prosper Brian Magomo, born on 3 October 1993.
3. The defendant is hereby awarded custody of the minor child Malvin Magomo, born on 11 May 1998.
4. The plaintiff is hereby granted reasonable rights of access to the minor child Malvin Magomo during school holidays upon notice to the defendant.
5. The plaintiff shall pay school fees for the minor child Malvin Magomo.
6. The defendant is hereby awarded the Television Set as her sole and exclusive property.
7. On the immovable property
 - (a) The plaintiff is awarded 65% share of the value of the matrimonial property namely Stand No. 12359 Kuwadzana Extension, Harare.
 - (b) The defendant is hereby awarded a 35% share of the value of the said matrimonial property.
8. The plaintiff is hereby granted the option to buy out the defendant in respect of her share in Stand No. 12359 Kuwadzana Extension, Harare.
9. The parties shall agree on the value of the property within 21 days of the date of receipt of this order. If the parties fail to agree on the value, they shall appoint a mutually agreed evaluator to evaluate the property within 14 days from the period

- in (8) above. If the parties fail to agree on an evaluator, the Registrar of the High Court is hereby directed to appoint an independent evaluator from his panel of evaluators to evaluate the property. The plaintiff shall bear the costs of such evaluation.
10. The plaintiff shall pay out the defendant her 35% share in value within six (6) months from the date of receipt of the evaluation report unless the parties agree otherwise. Should the plaintiff fail to pay the defendant's share in full within the stipulated period the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the registrar of the High Court and the net proceeds therefrom shall be shared in the ratio 65:35 as per the award for each party.
11. Each party shall bear their own costs of suit.

Manase & Manase, plaintiff's legal practitioners
Defendant, a self actor.