BRIAN KASHANGURA
versus
GILLIETT SARUDZAI KASHANGURA (NEE MOTSI)

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 11, 16, 17, 18, 19 September 4, 9 October and 28 November 2013.

Civil Trial

T Mureriwa for the plaintiff.
B Mugogo for the defendant.

UCHENA J. The plaintiff and the defendant purportedly customarily married each other in 1997 or 1998. The customary union was not valid as the plaintiff was still married to another woman in terms of the Marriages Act [*Cap 5;11*]. The plaintiff's wife died in April or may of 2001 immediately after which the plaintiff and the defendant separated as the plaintiff's family alleged the defendant had caused the plaintiff's former wife to commit suicide. She threw herself on to a railway line and was crushed to death by a train. The plaintiff and the defendant resumed their customary union in June 2002 after the plaintiff had paid the defendant's mother compensation for the insults the plaintiff's young brother had haled at her. They on 28 February 2009 upgraded their customary union to a civil marriage.

They happily stayed together until the plaintiff fell ill and was hospitalised. While he was in hospital things started degenerating. The plaintiff alleges the defendant started plundering their company Forest Security. He came back home on a wheel chair and had to be bedridden in the bedroom from which he started hearing male voices conversing with his wife in the living room. He also discovered that the Security Company he had registered in the name of BRENDON their son had been tempered with. His name had been removed from being a director and had been replaced by that of the defendant's boyfriend. He could not

take this lightly. He left the matrimonial home to go and stay at company premises, where he was being looked after by a nurse aid. He sued for divorce and ancillary relief.

The parties entered into a Deed of Settlement in which they, agreed that their marriage has irretrievably broken down. They agreed on the distribution of the movables. They agreed that the defendant should be awarded custody of their minor child Brendon Kashangura born on 19 February 1999, subject to the plaintiff having reasonable access to the minor child. They agreed that the defendant shall institute maintenance proceedings in the Maintenance Court for the maintenance of Brendon Kashangura. They consented to an interim order which required the defendant to contribute US$250 per month towards Brendon's school fees, whilst he remained at Peter House. They further agreed that the White Cliffe property was not matrimonial property as its ownership by the plaintiff had been affected by the Supreme Court judgment which held that the land had not been properly acquired by the state.

The only dispute to be decided by this Court is on the distribution of No 2214 Mabelreign Township. The defendant claims that it is her sole property which she bought by way of a swop with a Houghton Park property she had bought in 2001 when she was on separation with the plaintiff, for which she was granted a loan by her employer. The plaintiff does not dispute that the defendant was assisted by her employer to acquire the property, but alleges that he effected improvements on both properties and contributed indirectly while she repaid the loan.

The defendant admits that she and the plaintiff effected improvements to the matrimonial home for which she offered him 50% of the value of the improvements. The plaintiff wants 50% of the value of the matrimonial home.

It is not in dispute that the parties prospered during the subsistence of the married. The plaintiff took three packages from his former employers which he ploughed into family use. He used his last package to form and establish Forest Security the Company which substantially raised their standard of living. Their son and defendant's daughter from a previous union and plaintiff's daughter from a previous union started going to elite private schools being sponsored by profits from that company.

I have no doubt in my mind that the plaintiff made substantial improvements to the family's standard of living. He also made improvements to the matrimonial home believing that it was going to be their matrimonial home for life. He according to the defendant's sister treated the defendant's daughter from a previous union as his own. He according to the

defendant would give his car to the defendant's daughter to drive herself and the plaintiff's daughter to school. He even sponsored the defendant's sister's son's primary and university education. He must have believed that their union was for life.

The duration of their union is not common cause. The plaintiff said he paid the defendant's bride price in 1997. The defendant says it was in 1998. The difference is not material. It leaves the duration of their cohabitation and marriage at plus minus 15 years. The plaintiff started the relationship, with a serious commitment. He by 1998 was paying school fees for the defendant's sister's son.

Mr Mureriwa for the plaintiff relying on the case of *Usayi* v *Usayi* 2003 (1) ZLR 684 SC and the provisions of s 7 (4) of the Matrimonial Causes Act urged the court to grant the plaintiff a 50% share of the matrimonial home. *Mr Mugogo* for the defendant submitted that the property is the defendant's and can therefore not be distributed. His submission is not supported by case law and the provisions of s 7 (1) (a) and s 7 (4) of the Matrimonial Causes Act [*Cap 5;13*]. In the *Usayi* case (supra) ZIYAMBI JA at pages 687 H to 688D, said;

> "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 percent of the sale price. Having regard to the provisions of s 7 (4) of the Act, this submission is unsound. The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night, nurse for her husband and children? How can one place a 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 a home, and the creation of an atmosphere therein from which both husband and children can function to the best of their ability? In the light of these many and various duties, how can one say, as is often remarked: "throughout the marriage she was a house wife. 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 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".

I agree with ZIYAMBI JA'S incisive observation on the rolls played by the spouses in a home which add to the comfort of the spouses and the children. These duties also add to the value of assets which belong to the other spouse justifying the distribution of such assets to the other spouse.

In this case there is no doubt that the defendant bought the house. It is registered in her name. It is also not in dispute that the plaintiff, made their stay in that house comfortable. He bought a truck which he used to ferry water to the house on a daily basis, until he sank a borehole at the house to provide water to the place they called home. He provided transport for their children who had the luxury of driving themselves to school. He through the establishment of a Security Company from his package enabled the family to move up the social ladder, and the children to learn at elite private schools. He even went beyond the immediate family to caring for the defendant's sister's children. He made other improvements to the matrimonial home and provided comfort to the family. Some of these things can not be quantified in monetary terms. This shows the extend, to which he was prepared to go in caring for the defendant and the children. He clearly was prepared to give to his family all he could without holding back anything from them. I am aware that the defendant also contributed in caring for the family but it seems to me that the plaintiff distinguished himself by giving selfless service to the family. Section 7 (4) (*e*) provides that the court in assessing the award to be granted to a spouse should take into consideration " 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." The contribution to be considered need not be towards the acquisition of the asset to be distributed. The statute clearly says what has to be considered is the spouses' contributions to the family. The contribution to the family justifies the distribution of what can be called his hers or theirs. Section 7 (1) (a) of the Matrimonial Causes Act, provides for the making of an order with regard to "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". It therefore does not matter that the asset is registered in one spouse's name, or was acquired by that spouse. The court is empowered to distribute the assets of the spouses, and can order that any asset be transferred from one spouse to the other.

In the case of *Gonye* v *Gonye* 2009 (1) ZLR 232 (SC) @ 237 B to D MALABA JA (as he then was) clearly spelt out what property can be distributed when he said;

> "The terms used are the "assets of the parties" and not "matrimonial property". It is important to bear in mind the concept used, because the adoption of the concept "matrimonial property" often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept "assets of the spouses"

> is clearly intended to have assets owned by the spouses individually (his or hers or jointly (theirs at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets."

This Supreme Court decision put to an end the confusion caused by the concept "matrimonial property", which is not found in s 7 (1) (a) of the Matrimonial causes Act. In the circumstances the defendant's defence of being the owner of No 2214 Mabelreign Township is not a bar to its being divided between her and the plaintiff. The plaintiff is clearly entitled to a share of the matrimonial home No 2214 Mabelreign Township.

In the *Usayi* case (supra) the court allowed a 50-50 distribution, because the marriage had subsisted for 44 years. They had started living together 9 years before they solemnised their marriage which thereafter subsisted for 35 years. That cannot be said of the plaintiff and defendant's co-habitation and marriage which at most subsisted for 15 years. That must have the effect of reducing the share to be awarded to the plaintiff. The plaintiff however contributed directly and indirectly towards improvements to the property in dispute, and providing for the family which puts him in a better position than the respondent in the *Usayi* case. That must increase the share to be awarded to him in spite of the shorter duration of their marriage.

The provisions of s 7 (4) (a) to (g) relied on by *Mr Mureriwa* reads as follows;

> (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."

The parties' future earning capacities seems deem. The plaintiff is severely incapacitated. He is unlikely to manage any meaningful business. He is a trained Security Officer. Those duties call for physical fitness which he no longer has. At their PTC the parties agreed to wind down the operations of their Company, leaving the plaintiff without any source of income. The defendant though an experienced lawyer may find it difficult to find employment because of the bad publicity she suffered during the fraud trial she faced at the instance of the plaintiff. Her only option seems to be to start her own Law Firm which may initially be affected by the above mentioned publicity. She however will certainly be better off in future than the defendant. This calls for a substantial award to the plaintiff.

The plaintiff is saddled with high future obligations and needs. He has to finance his medication and pay a nurse aid. These are expenses he has to meet for his survival. He cannot avoid nor postpone meeting them. They ensure his survival. This must be taken into consideration in distributing No 2214 Mabelreign Township. The defendant cannot abandon the plaintiff through divorce. She must through the distribution contribute towards his survival.

The parties' standard of living has fallen. It cannot be sustained through distribution. They have to settle for what they can afford. It is no longer possible no matter how hard the court tries to put them back to their former standard of living. I must however do my best to leave each party in the circumstance he or she would have been had a normal marriage continued between them. They would both have continued to be accommodated at No 2214 Mabelreign. The house must therefore give them a new start although at a much lower level of the social strata.

The physical condition of the plaintiff calls for serious consideration. He cannot move without the assistance of walking aids and someone to start him off. This increases the cost of

his daily living. That will be considered in determining the share to be awarded to him. It has the effect of increasing what has to be awarded to him.

The plaintiff will lose the benefit he would have enjoyed from the defendant's package if their marriage had continued. The defendant told the court that she is still to be paid part of her package including the purchase of a motor vehicle she is entitled to purchase from her former employer. Once a decree of divorce is granted the plaintiff will not be able to claim a share of these benefits. That again must be taken into consideration in the distribution of the matrimonial home. That loss must be compensated through the award. It would be unfair and unjust for the defendant to have benefitted from the plaintiff's packages,, but deny the plaintiff a chance to benefit from her package.

Section 7 (4) ends by requiring the court to " 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." Serious marital misconduct was alleged against the defendant, which she did not comment on till she closed her case. The plaintiff said he could hear male voices in their living room while he was bedridden in the bedroom. He said these were voices of the defendant's boyfriends. He alleged that the company he had registered in the name of their son was tempered with when he was in hospital. His name was replaced by that of defendant's boyfriend. These are allegations the defendant should have responded to if they were not true. Her silence lends credence to them. They must be considered as the reason which caused the breakdown of the marriage, and the fall in their standard of living. In attempting as far as I can to place them in the position they would have been had their marriage continued I have to increase the plaintiff's share as the injured party.

After taking all these factors into consideration I am satisfied that the plaintiff should be awarded a 40% share of the value of No 2214 Mabelreign Township. The issue of the minor child's maintenance shall be determined by the Maintenance Court as was agreed by the parties in their Deed of Settlement.

The plaintiff is entitled to recover his costs from the defendant. The law applicable is clear and should have guided the defendant on the correct approach to sharing the property in dispute. The defendant is a legal practitioner who should have known that the Supreme Court and this court have ruled against the defence she proffered.

In the result I order as follows;

1 That a decree of divorce be and is hereby granted.

2 That custody of the minor child Brendon Kashangura born on 19 February 1999, be and is hereby awarded to the defendant.

3 The plaintiff shall have the minor child for visitation during each alternate school holiday and long weekends, and parties may where circumstances demand otherwise make other appropriate visitation agreements from time to time.

4 In addition to the movable assets already in the plaintiff's control, the defendant shall give to the plaintiff the following, the Forest Security Secretarial safe, The Forest Security Secretarial Filing Cabinet Locker, and two small wardrobes at the matrimonial home.

5 That defendant shall institute proceedings in the Maintenance Court for purposes of an assessment and decision regarding the maintenance of the minor child Brendon Kashangura born on 19 February 1999.

6 The matrimonial home No 2214 Mabelreign Township shall be valued by a Valuer to be appointed by the parties, within 14 days of this order failing which the Registrar of the High Court shall appoint such Valuer within 14 days of the parties failure to do so.

7 The value of the matrimonial home No 2214 Mabelreign Township, shall be shared between the parties at the rate of 40% for the plaintiff and 60% for the defendant.

8 The parties shall contribute towards the cost of valuation according to their pro-rata shares of the property.

9 The defendant shall buy out the plaintiff's share within (4) four months of the date of the valuation report, failing which the property shall be sold by an Estate Agent to be appointed by the parties within 14 days of the defendant's failure to buy out the plaintiff's share, failing which the Registrar shall within 14 days of the parties' failure to do so, appoint the Estate Agent whose Commission shall be paid by the parties according to their pro rata shares in the property.

10 The defendant shall pay the plaintiff's costs.

Messers Scanlen & Holderness, plaintiff's legal practitioners.
Messers Sinyoro and Partners defendant's legal practitioners.