

REGGIENALD TANGIRAI
versus
THERESA HAZVINEYI TANGIRAI

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 4, 5, 8 June & 5 September 2012 & 28 February 2013

FAMILY LAW COURT

Trial Cause

T. Kanengoni, for the Plaintiff
T. Machiridza, for the Defendant

GUVAVA J: The parties were married in terms of the Marriage Act [*Cap 5:11*] on 30 May 1998. The marriage was blessed with four minor children Melanie Munashe Tangirai (born 18 February 1999), Malvin Tinashe Tangirai (born 24 January 2003), Cerise Vongaishe Tangirai (born 20 March 2004) and Denise Tangirai (born 2 March 2007). Following certain unhappy differences the parties separated in 2008. They have not lived together as husband and wife since that date. Upon separation the plaintiff remained with the custody of the three eldest children whilst defendant retained custody of the youngest child. On 4 January 2011 the plaintiff issued summons out of this court seeking a decree of divorce, custody of the three minor children already in his custody and distribution of the parties' matrimonial assets. The defendant whilst admitting that the marriage had broken down counter-claimed for custody of all the minor children, maintenance in the sum of US\$200 per month for herself and US\$100 per child per month, and an equitable share of their matrimonial property.

Following a Pre - Trial Conference before a judge in chambers the parties filed a Joint Pre-Trial Conference Minute wherein they agreed that their marriage had irretrievably broken down. They also agreed that they were each entitled to a stand in Dema.

Six issues were referred to trial and these were as follows:

1. Whether or not the marriage has broken down?
2. Which party should be granted custody of the minor children?
3. What rights of access should the non- custodian parent enjoy?

4. What maintenance should the non-custodial parent pay towards the minor children?
5. Whether or not defendant is entitled to post divorce maintenance and if so the quantum thereof.
6. What would constitute just and equitable distribution of matrimonial property?

It seems to me that the first issue is not an issue for determination by this court as the parties are agreed that the marriage has broken down. There is clear evidence that the marriage has broken down as they have been living apart for a period in excess of four years. In the case of *Ncube v Ncube* 1993 (1) ZLR 39 (S) KORSAN JA held that where the parties are agreed that the marriage has broken down it is not necessary for the court to enquire into the cause of the breakdown as divorce is now based on the no fault concept. I will therefore deal only with the five remaining issues.

The plaintiff gave evidence and testified that he resides at house number 1990 Unit L in Chitungwiza which is rented accommodation. He is employed at Chrystal Sweets (Pvt) Ltd as a quality assurance officer. He testified that when he married the defendant she was employed as a till operator at a shop in Chitungwiza. She then stopped working after their first child as she had had a disagreement with her employer. They had four children during their marriage. He explained that during the time they were living together they had marital problems such that the marriage broke down and they separated in July 2008. The plaintiff stated that he wanted to be awarded the following property:

- (a) stand No 2231 Unit N Seke, Chitungwiza,
- (b) Mazda B2500 pick-up truck,
- (c) one metal TV stand,
- (d) 24 inch LG television set,
- (e) Phillips DVD player,
- (f) 3 door wardrobe,
- (g) a refrigerator, and
- (h) Building materials.

He stated that he should be awarded the property as he acquired it prior to his marriage to the defendant. He also stated that defendant made no direct contributions to property acquired after the marriage as she was not employed. He explained that he acquired the pick-up truck from proceeds that he received from a Lancer Mtsubishi motor vehicle that he purchased before he married the defendant. As this money was not enough he received a loan from his

employer which he topped up to purchase the B2500. He testified that he repaid the loan on his own without the assistance of the defendant.

The plaintiff also stated that he should be awarded the building materials as he acquired them without the assistance of the defendant. He stated that he purchased 10 000 bricks, window frames and a French door after he received a loan from his employer.

Stand 22321 Unit N Seke was acquired in 2002. Plaintiff told the court that in 1993 he was employed by Blue Ribbon Foods. As part of the company's employee retention scheme he registered with Chitungwiza Municipality. When he was allocated the stand in 2002 his employer had to guarantee the loan as he did not earn enough money to purchase the stand. He stated that the property is an undeveloped stand and should not be awarded to their children as they did not have the money develop it or to pay Municipal charges. It had already accrued debts from non-payment of rates. In the event that the property is allocated to him he would develop the stand whereas the defendant had stated that she was not prepared to contribute to its development.

In regard to the two stands in Dema, he stated that stand 385 is registered in his name and stand 811 is registered in the defendant's name. He would like to be awarded the stand in his name whilst defendant is awarded the stand in her name.

With regards to the minor children he stated that he has looking after the children on his own since the defendant left in 2008. He stated that he was also responsible for the children when the defendant was still staying with him. The eldest child was now at a boarding school. In 2009 the defendant left the country and went to Botswana and returned in 2010. She left the youngest child who was in her custody in the rural areas with her parents. Plaintiff states that the last child is now different from her siblings because she has not had access to good schools. It was his prayer that he be awarded custody of all four children whilst defendant has access on alternative weekends and school holidays.

The plaintiff stated that defendant has been looking after herself since 2008 and there is no reason why he should maintain her now. He also states that he only earns a salary of US\$610 and cannot afford to maintain the defendant and the children in the amounts claimed. He stated that in the event that custody is awarded to the defendant he offers an amount of US\$30 per month per child in addition to paying all their school related expenses.

The defendant told the court that she resides at stand 2189 Unit N Chitungwiza with her sister. She chronicled the problems that she and the plaintiff had and the efforts she had made to reconcile with the plaintiff. She confirmed that she had tried to use the traditional methods

and the pastor at her church. However these all failed and they separated in July 2008 after the plaintiff chased her out of the house. They have not lived together as husband and wife since then. I will not dwell on this evidence as it is quite apparent during the trial that the marriage between the parties has broken down.

The defendant testified that she wanted custody of the all the children. She stated that in 2008 she approached Zimbabwe Women Lawyers Association (ZWLA) with a view to getting custody of the children. After discussions with the plaintiff they agreed on her getting access to the three minor children who had remained with the plaintiff. She told the court that she should get custody of the children as they are neglected by the plaintiff. When they visit her they always come with old clothes. At times the children also pass by her house when they come from school looking for food as they will be hungry. She however said sometimes she is not at home as she is in the business of buying and selling goods. She confirmed that the children attend school in town except for Melanie who is now at boarding school and the youngest who is in her custody who attends crèche in the area. Defendant stated that Denise attends a local crèche because although plaintiff had offered to pay for the crèche fees he had stated that defendant would have to meet the transport costs. As she didn't have the money the child ended up attending a local crèche. Defendant stated that if she was awarded custody of the children she would grant plaintiff access on alternative weekends and school holidays.

On maintenance defendant stated that she was claiming US\$200 per month for herself and US\$100 per month for each of the children. When she got married the plaintiff she was employed at Manyere Mini Market as a till operator. After the birth of their first child plaintiff indicated that he did not want her to work so that she would look after the children. She opened a tuckshop and would sell goods from home to raise money for the family. The tuckshop was destroyed by the Municipality following operation Murambatsvina. She testified that she wanted to be maintained by the plaintiff because when they got married they had agreed that plaintiff would go to school first and after he had completed his degree she would also go to school. After he had qualified she never went to school although she had passed five "O" levels subjects.

She broke down her requirements as US\$100 for medical expenses, US \$50 for clothes and toiletries and US\$50 for her hair.

With regards to the children she broke down their requirements as follows:\$150 for rent, \$40 for electricity and water, \$20 for airtime, \$150 for groceries, \$100 for the maid, \$50 for clothes, \$50 for entertainment and \$50 for incidentals. She stated that he total amount

required for the children per month added up to \$590. She said that if the plaintiff paid the \$400 they required she would meet the difference.

With regards to her claim for the property she testified that she wanted the B2500 sold and the proceeds shared equally as she had assisted him in paying back the loan. At the time the loan for the truck was being deducted from the plaintiff's salary she was operating the tuckshop and therefore supplementing the family's income. She also stated that she wanted the television awarded to the person who would get custody of the children. She stated that she was not claiming the building materials because she wants the house to be built. In 2004 a cottage with three rooms was constructed on the stand. When the cottage was constructed she was at home with the pregnancy of their third child. She contributed indirectly by assisting the builders. Tenants are staying on the stand and are paying rent to the plaintiff. She stated that she would want the property registered in the names of the four children.

In assessing the evidence it was my view that the plaintiff gave his evidence well. He came across as a person who was genuinely concerned about the well-being of his family especially his children. Although I did not believe him on the level of contribution by the defendant towards the upkeep of the household I however took the view that her contribution being mainly indirect may have been difficult for him to quantify. In his submissions to the court he stated with regard to the moveable property that he be awarded the motor vehicle, refrigerator, television and the wardrobe and indicated that the rest of the property should be awarded to the defendant.

The defendant on the other hand did not impress as a good witness. She seemed not to have the interest of the children at heart. The impression portrayed by her evidence was that she was bent on "fixing" the plaintiff probably because of the breakdown of their marriage. The claim for maintenance especially for herself was exaggerated and not well thought out. In her submissions she even backtracked on evidence she had given in court and claimed a 50% of all the property including moveables whereas in court she had stated that the television should be awarded to the party who is granted custody of the minor children. She had also stated that the building materials should be used to build the stand so that it benefits the children.

In determining this matter I will deal with each of the issues raised by the parties.

CUSTODY OF THE MINOR CHILDREN

In making an award for custody upon divorce the court must be guided by the best interests of the minor children. This power is granted to the court in terms of s 10 (1) of the

Matrimonial Causes Act [*Cap 5:13*]. The provision mandates the court to conduct an inquiry and commit children of the marriage into the custody of the parent best suited to have such custody.

The Supreme Court in the case of *Hackim v Hackim* 1988 (2) ZLR 61 defined what is meant by the term best interest of the child. In determining what is the best interest of a minor the court is enjoined to consider all the circumstances and every aspect of the child's upbringing that is age, sex, health, education, religious needs, social and financial position of each parent and his and her character, temperament and behaviour towards the minor child. (see also *Chitongo v Chitongo* 2000 (1) ZLR 76.)

It is not in dispute that the defendant has not had custody of three elder of the children since she left the matrimonial home in 2008. From that period to date the plaintiff has had custody of the three eldest children whilst the defendant has had the custody of the youngest child. The plaintiff has thus effectively looked after these children for over four years without the assistance of the defendant. The eldest child now attends boarding school whilst the other two are day scholars. From the evidence led it was not in dispute that they attend good schools and appear to be doing well in school. The youngest child who has been in the custody of the defendant appears not to have fared as well as the older siblings. The child was primarily in the custody of the grand parents in the rural areas whilst the defendant was in Botswana. The question which presents itself is whether it is in the best interest of these children to be removed from the plaintiff and given to the defendant. Whist this court accepts the version by the defendant that she was evicted from the family home by the plaintiff without the children she has not done anything to try and secure the custody of the three eldest children. In terms of s 5 of the Guardianship of Minors Act she could have approached any court for their custody as the law recognizes that the mother is the best parent to have custody of the children upon separation. In her evidence it has remained largely unclear why she decided to leave them in the custody of the plaintiff.

In my view this was based on an acceptance by the defendant that the plaintiff was a good father and was looking after the children well. I did not believe the defendant when she stated that she did not seek custody because she did not have the resources to look after the children because if she had claimed custody at that point ZWLA would have advised her of her right to claim maintenance.

In the case of *Mutetwa v Mutetwa* 1993 (1) ZLR 176 (SC) it was held that a father can only get custody of children if he can show that that it would be in the best interest of the

children that he should have custody. In examining the best interest of the minor children in this matter I am inclined to find that custody should be awarded to the plaintiff. He has shown that he has the best interest of the children at heart. He has given them a stable home and a good education in the best schools within his means. I have not seen the same commitment from the defendant.

The defendant stated in her evidence that she is a cross boarder trader and travels out of the country from time to time to order goods for resale. The problem that arises when she is away will in my view continue to present itself because the children are day scholars and will need to attend school on a daily basis. The defendant stated that if she was awarded custody of the children they would go to school by bus. The plaintiff on the other hand does not travel and drives the children to school when he goes to work in the mornings. Whilst there is nothing wrong in children going to school by bus it is patently obvious that they would be more comfortable if they were driven to school.

In my view the best interest of the children would be secured by placing them in the custody of the plaintiff and granting the defendant access to the children during weekends and school holidays. The children will go to school in relative comfort without the stress of waking up very early in order to be certain of getting a bus to school. In this way the children will continue to get the best of care from both parents as the defendant can arrange her business trips in such a way that she is available when the children come to be with her. Melanie who is now an adolescent will also have an opportunity to get guidance and counsel from the defendant during school holidays when she is not at school. The youngest child will also grow up with her siblings and avoid separating them from each other. I will, in the order that I make award the defendant generous access since they reside in Chitungwiza so that she can have a close relationship with her children.

MAINTENANCE

I have determined that custody of the children should be awarded to the plaintiff. it is therefore not necessary for this court to consider the issue of maintenance for the minor children as the plaintiff was not claiming maintenance from the defendant. The issue before me is thus whether the defendant is entitled to any maintenance from the plaintiff.

Under common law spouses are under a reciprocal duty to support each other. My understanding of this duty is that it arises where a spouse shows that they are not in a position to maintain themselves and therefore need assistance from their former spouse. The spouse

claiming maintenance must satisfy the court that they are unable to look after themselves and require assistance from their former spouse. This position comes out clearly in the case of *Chamba v Chamba* 1992 (2) ZLR 197 where the court stated as follows

“Marriage can no longer be seen as providing women a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.”

In this case the defendant has been looking after herself since she left the matrimonial home in 2008. She is still young and is not disabled in any way. She earns a reasonable income of US\$150 from her activities as a cross boarder trader. Whilst it is apparent that the plaintiff earns a salary of US\$610 which is considerably more than that of the defendant I consider the fact that from that sum he has to look after his own needs as well as those of the children. An examination her requirements for maintenance as set out in her evidence does not give the impression that she needs money for her upkeep. She clearly wants money for her beautification and that is not the purpose for which maintenance is solely awarded especially when it is claimed as against a salary of \$600 which is supposed to also look after four minor children. The claim for \$100 per month for medical expenses was not explained at all. The defendant does not say whether she has a peculiar medical condition which would require her to need such a large sum of money for medical bills every month.

In my view therefore the defendant has not established a basis upon which this court should award her maintenance post divorce.

DIVISION OF PROPERTY

In making an award of matrimonial property the court is enjoined to apply the principles set out in s 7 (1) of the Matrimonial Causes Act [*Cap5:13.*] This provision gives the court very wide discretion in regards to sharing and distribution of matrimonial property. (see *Gonye v Gonye* SC 15/09)

The defendant has claimed a 50% share of the immoveable property on the basis that she contributed indirectly to its acquisition and development. The plaintiff on the other hand submits that defendant is not entitled to a share of this stand since he has already agreed to her getting the Dema stand and her contribution to the acquisition of this stand was indirect. In my view however the plaintiff's submission is not the proper approach to take. The stand in Dema was in the defendant's name. It was already hers and the plaintiff would have had great difficulty in making out a case to deprive her of that property.(see *Takafuma v Takafuma* 1994 (2) ZLR 103)

In making an award in respect to the Chitungwiza stand however, the court must take into account that the defendant did make an indirect contribution to its acquisition and development. Although the defendant was unemployed she contributed considerably as a wife, mother, counsellor, housekeeper and day and night nurse for the family. In the ten years she was married to the plaintiff she had four children which is not an easy task. She was a wife and mother and ensured that plaintiff had her support to get his degree. In the case of *Usayi v Usayi* 2003 (1) ZLR 685 ZIYAMBI JA said such contributions cannot be quantified in monetary terms.

In my view the defendant is entitled to a 50 % share of this property. In view of the sentiments expressed by the defendant that she would like the property preserved for the children of the marriage I will give the plaintiff an opportunity to buy out the defendant of her share.

The defendant also claimed a 50 % share of the value of the sale of the motor vehicle. In considering this claim I am of the view that the motor vehicle should be retained by the plaintiff. In making this award I have considered that I have awarded custody of the four children to the plaintiff. The children attend school in town which is 25 km away from where they reside. In my view it would be more comfortable for the children to be driven to school in the morning. In this way they will not arrive at school tired and stressed due to transport problems.

The defendant also stated that she would not claim the television but that it should be awarded to the parent who is awarded custody of the children. She also stated in her evidence that she would not claim the building material so that it is used for the development of the Chitungwiza property. I will therefore not make an award in respect to these items.

Having made the above findings I thus make the following order:

1. A decree of divorce is hereby granted.
2. Custody of the minor children Melanie Munashe Tangirai (born 18 February 1999), Malvin Tinashe Tangirai (born 24 January 2003), Cerese Vongaishe Tangirai (born 20 March 2004) and Denise Tangirai (born 2 March 2007) is hereby awarded to the plaintiff.
3. The defendant is awarded access to the minor children every weekend from Friday after school and half of all school holidays.
4. The plaintiff is awarded the moveable property set out in annexure A of the order and the defendant is awarded the property set out in annexure B.
5. The plaintiff is awarded stand 385 Dema Township as his sole and exclusive property.

6. The defendant is awarded stand 811Dema Township as her sole and exclusive property.
7. The defendant is hereby awarded a 50% share of stand 2231 Unit N, Seke Chitungwiza.
 - (a) The plaintiff is granted the right to buy out the defendant's 50 % share of the property.
 - (b) The property shall be evaluated by a valuer from the Registrars list of valuers within 30 days of the grant of this Order.
 - (c) The plaintiff shall pay out the defendant her 50% share of the property within 90 days reckoned from the date upon which he is served with the valuation report.
 - (d) In the event that the plaintiff fails to pay out the defendant of her 50% share as set out in this Order the property shall be sold at best advantage and the parties shall share the net proceeds equally.
 - (e) The parties shall pay for the cost of valuation equally.
8. Each party shall bear their own costs.

Munangati & Associates, Plaintiff's Legal Practitioners
Manase & Manase, Defendant's Legal Practitioners