

MARTIN DZARAMBA
versus
ANTONIA DZARAMBA (Nee Marimazhira)

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 17 and 27 November 2015, 4 and 14 January 2016

Trial Cause (Family)

B Makuwisa, for the plaintiff
C Warara, for the defendant

MWAYERA J: After about 35 years of marriage the plaintiff issued summons for divorce and ancillary issues in July 2014. The parties contracted a civil marriage on 28 August 1979. The defendant entered appearance to defend and subsequent pleadings thereto. At pre-trial conference the parties identified issues for referral to trial as follows:

1. Whether or not the marriage between the parties has irretrievably broken down.
2. What should be equitable distribution of the parties' immovable property.
3. Whether or not maintenance should be awarded to the defendant and if so the quantum thereof.

At the hearing, the parties agreed that their marriage had irretrievably broken down since they were not staying as husband and wife for a period in excess of 5 years. The court was left to grapple with two issues namely, sharing matrimonial property and whether or not defendant should be awarded post-divorce spousal maintenance.

The plaintiff in his evidence was amenable to 50 % sharing of the only immovable property owned by the couple; that is house no. 4969 Unit C, Kugarara Road, Chitungwiza. The defendant, on the other hand, maintained that she ought to be awarded 100 % share of the house. The defendant produced a bundle of documents inclusive of receipts for which she purchased building materials to extend the house in question. It was abundantly clear from both the plaintiff

and the defendant that when they acquired the property, it was because of their marital status that they were offered the residence. It is also common cause that the plaintiff was gainfully employed as a cross boarder truck driver. The house ownership was offered in his name by the local authority. The extension was done at a time when the defendant was at home. The defendant did not strictly challenge the evidence of the plaintiff that he would give her the money to facilitate the development. The defendant handled all the transactions, understandably because of the plaintiff's nature of job. The defendant was on the ground as a full time house working wife. It was clear from the parties' evidence that they both contributed directly and indirectly to the acquisition and enhancement of the property in question. The defendant called in one witness Josephine Magobeya, a neighbor. She confirmed the defendant was always on the ground and that the plaintiff would come and go as a truck driver. Her evidence did not change the complexion of the matter as she did not know the day to day affairs of the parties.

At the end of it all, the house in question is the only property that falls for division, apportionment and distribution. Division, distribution and apportionment of property at divorce is governed by s 7 of the Matrimonial Causes Act [*Chapter 5: 13*] (hereinafter referred to as the Act). The Act furnishes broad guidelines for deciding what is fair in the circumstances of the case. The exercise involves balancing the divorcing couple's conflicting interests so as to make an equitable distribution such that one spouse is not disadvantaged. The court has wide discretion based on relevant factors aimed at achieving a reasonable, practical and just division of property. In order to come up with a just and fair property order, the court has to endeavour as far as it is practically possible to ensure that the spouses are put in a position which they would have been had the marriage subsisted. As correctly observed in *Nyoka v Kamabara* HC 1486/06:

“... a balance should be struck such that one spouse is not enriched.”

I would add on and say a balance should be struck such that one spouse is not enriched to the detriment of the other spouse. See also *Shenje v Shenje* 2001 (2) ZLR 160, *Usayi v Usayi* 2003 (1) ZLR 684, *Chigunde v Chigunde* HC 4476/13. What sticks out prominently in all these cases is the need for the court, in exercise of its discretion, to look at a wide spectrum of factors such as the length of the marriage, the contributions, the earning capacity of the parties, the ages of the parties, the physical and mental condition of either of the spouses, the future needs of the

spouse and current status of the parties. The list is in-exhaustive but what is central is the need to come up with a fair, reasonable and just order in the circumstances.

The constitution of Zimbabwe has reaffirmed the position in the Matrimonial Causes Act and has confirmed the trends taken by our courts in dealing with proprietary issues upon divorce. Section 26 on marriages states:

“The state must take appropriate measures to ensure that

- (a)
- (b)
- (c) There is equality of rights and obligations of spouses during marriage and at its dissolution and
- (d) In the event of dissolution a marriage whether through death or divorce, provision is made for necessary protection of children and spouses.”

There is a conscious call for the court to consider the issue of equality of rights and protection of spouses and children upon divorce or death. The constitution clearly does not seek to discriminate spouses on the basis of gender. Both spouses are to be treated equally and both deserve protection. For this to be attained therefore, it is my considered view that the court in exercising its wide discretion in coming up with an order for divorce and ancillary issues, has to endeavour to as far as it is practically possible to ensure that none of the parties is disadvantaged. The court has to seek to strike a balance on the needs of the parties on what is a just and fair distribution. There is no reason for over emphasising the contribution of the parties as that would disadvantage the other party. There is, however, need for emphasis of equity and protection of the spouses and this culminates in the need to have an open mind so as to come up with a just, fair and practical division of the property. The same position is outlined on a clear reading of s 7 of the Matrimonial Causes Act

“----- the court shall endeavour as far as possible 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 defendant’s argument that she be awarded 100% because she was on the ground throughout the extension of the house cannot be sustained given the fact that the house in question is the matrimonial home. The plaintiff acquired and participated by making financial contribution towards the development of the house. The defendant also requires protection just like the plaintiff. No evidence has been placed before the court to show that the plaintiff owns

other immovable property. In the circumstances of this case, given the parties ages of 64 and 62 respectively, it is my considered view that sharing the immovable property equitably will ensure that each party is well protected and not disadvantaged.

Now turning to the outstanding issue of maintenance, the following observations are worth noting. Spouses owe each other a duty to maintain each other. The court has to consider whether the responsible person is capable of maintaining the claimant. The defendant's claim for \$2 500-00 maintenance per month is outright unreasonable and unrealistic. The plaintiff is a retired long distance truck driver. It has not been disputed he retired on medical grounds. Apart from looking frail and being visibly aged and ill, it was not disputed he lost vision of one of his eyes in an accident while at work. The plaintiff survives on NSSA (National Social Security Authority) income at the rate of \$164-00 per month. Given the health condition of the plaintiff, and the proposed sharing regime of the property, there seems to be no basis for awarding maintenance. More so when one considers the defendant is the younger of the two and she has not given any medical condition challenges. She also recounted to the court how she earns a living through tailoring and buying and selling. The defendant is in a position to sustain herself.

The constitution makes it clear that there ought to be equality of rights and obligations of spouses during marriage and at its dissolution. (underlining my emphasis). Under common law, spouses owe a reciprocal duty to support each other, provided, there is need and ability on the part of the claimant and the responsible person respectively. Maintenance is not meant to fix or gain an advantage over the other spouse. The constitution does not seek to discriminate the entitlement of protection and the notion of equality on gender basis. Either of the parties deserving of maintenance where there are means ought to be granted such maintenance. The circumstances of this case do not present the award of maintenance as reflective of a just and reasonable consideration. The plaintiff is an elderly man in need and is in no better position than the defendant who is an elderly woman in need but better placed health wise than the plaintiff. It would serve no purpose to give an order that is not capable of enforcement. In the premises the claim for maintenance by the defendant cannot be sustained.

In the result the following order is made:

It is ordered that:

1. The decree of divorce be and is hereby granted.

2. The parties are to share the immovable property House No. 44959 Unit C Kugarara Road, Chitungwiza at the rate of 50 % share each.
3. The defendant is to buy out the plaintiff within a period of 3 months of this judgment. In the event of the defendant failing to buy out the plaintiff in the specified period, the plaintiff shall buy out the defendant within 3 months of date of failure by the defendant.
4. In the event of the parties failing to buy each other out, the property shall be sold to the best advantage at open market and the proceeds thereof shall be shared equally at the rate of 50% each.
5. The property shall be evaluated by an independent evaluator appointed from the list of evaluators by the master within 3 months of date of this order.
6. The costs of evaluation shall be borne by the parties in equal proportions.
7. The application for maintenance by the defendant be and is hereby dismissed.
8. In the interim period within which facilitation of buying each other out or sale of the immovable property 44959 Unit C Kugarara Road, Chitungwiza will be occurring, the plaintiff and the defendant are entitled to each 50% share of the monthly rentals from the sitting tenants at the property.
9. Each party is to bear its own costs.

Legal Aid Directorate, plaintiff's legal practitioners
Warara & Associates, defendant's legal practitioners