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Judgment No. S.C. 28/02
Civil Appeal No. 110/01

MOSES CHIMBWANDA v IRENE CHIMBWANDA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA
HARARE, FEBRUARY 14 & MAY 16, 2002

R Chipendo, for the appellant

The respondent in person

ZIYAMBI JA: The appellant issued summons in the High Court for the following relief:

"a] A decree of divorce;

b] Dissolution of property in accordance with paragraph 8 above;

c] Custody of the minor child;

d] Costs of suit."

On 11 April 2001 the High Court gave judgment in favour of the respondent and issued the following order:

"It is ordered that –

1. A decree of divorce is granted;

2. The property known as stand no. 39 Mukuvisi Drive, Msasa Park, Harare, is granted to the defendant.

3. The property known as stand no. 2311 Rogers Mangena Street, Ruwa, shall be sold and the net proceeds shared equally between the parties.

4. As regards the movable property owned by the parties –

   (a) the plaintiff is granted the Ford Laser motor vehicle, half the lounge suite, the double bed and headboard, the dressing table and the wardrobe;

   (b) the defendant is granted all the other movable property, including any cattle which she alleges are in the communal area."

At the trial only the issue of the division of the matrimonial property remained for resolution as the minor child had by then attained majority and it was common cause that the marriage had broken down irretrievably.

The appellant appeals against the judgment of the High Court on two grounds, namely that the trial court should have found the appellant, and not the respondent, to be the credible witness; and, that the distribution of the immovable property could "hardly be described as just and fair". It was submitted that each of the parties ought to have been awarded one property as his/her exclusive share of the matrimonial property.

Briefly, the facts are that the parties were married in November 1982. The respondent is an ex-combatant and was, at the time of her marriage, in receipt of a disability pension from the War Victims Compensation Fund ("the Fund"). It was common cause at the trial that during the subsistence of the marriage the parties acquired three immovable properties, namely stand no. 4279 Warren Park D, ("the Warren Park house"), a stand at Ruwa, ("the Ruwa house") and a stand in Msasa Park ("the Msasa Park house"). The Warren Park house was sold in 1999. The Ruwa

house was registered in the respondent's name and the Msasa Park house registered in their joint names.

The appellant's evidence was to the effect that he is employed by Air Zimbabwe as a security assistant. He and Irene had bought all the properties together. The Ruwa house was registered in Irene's name because it was bought through her employer. He had paid for most of the materials used to construct the cottage and house on the stand. It was he who had decided on the purchase of the Msasa Park house and they had each contributed half of the deposit while the instalments were paid by a stop order on his account with a building society. The value of the Ruwa house was $850 000 while that of the Msasa Park house was $800 000. He felt that Irene should keep the Ruwa house and he should be awarded the Msasa Park house.

The evidence given by the respondent, and which the trial court believed, was that she is physically disabled and when the parties were married in 1982 she did not anticipate that the respondent would say that he no longer loved her and wanted a divorce. Thus, when they built the houses, she thought they were doing so as security for the rest of their lives together and had used all the money which she got from the Fund to pay for the houses. The Warren Park house was bought by the respondent in 1982 through a scheme entered into between the City of Harare and ZANU (PF) employees, of which the respondent was one. She paid the required deposit and, in 1993, paid off the balance of $7 600 using a sum of $15 000 which she obtained from the Fund. She then, in the same year, bought another property in Ruwa for which she paid, from her own savings, a deposit of $7 000. The appellant

had shown no interest when she told him of the purchase. I quote from the judgment of the trial court:

> "… in 1987 she had received a further $50 000. In 1995 she commuted her disability pension and was paid $97 000 and then a further $66 000 from the Fund. Some of that money was used to buy the Msasa Park house and the balance was used to pay for the building of the cottage and house at Ruwa. She had paid an initial deposit of $45 000 for the Msasa Park house and then she had paid two further deposits of $25 000 each. She had then paid a connection fee of $5 000."

The purchase price of the Msasa Park house was $150 000 and a mortgage bond had to be taken out for payment of the balance. The mortgage instalments were $1 497 which she asked the appellant to pay without any success. I quote again from the judgment of the trial court:

> "They then decided to pay the rents received from the lodgers in the Ruwa house into Moses' building society account in order to provide for the monthly loan repayments. Because Moses defaulted in the monthly repayments the building society had threatened to foreclose and sell the Msasa Park house. She had to pay the building society $70 000, using the money she had received from the sale of the Warren Park house."

I turn now to deal with the grounds of appeal

1. THE CREDIBILITY OF THE WITNESSES

It is trite in our law that an appellate court will not as a rule interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them. See *Hughes v Graniteside Holdings (Pvt) Ltd* SC-13-84. The exception to this rule is where there has been a misdirection, or a mistake of fact, or where the basis on which the court *a quo* reached its decision was wrong. No misdirection or mistake of fact has been

alleged, nor is any apparent on the record. In addition, it has not been alleged or shown that the basis on which the trial court arrived at its decision was wrong.

In any event, a reading of the record leads me to the same conclusion as that reached by the trial court. The evidence of the respondent reads well and accords with the probabilities of the matter. The same cannot be said of the appellant's evidence.

2. THE DIVISION OF THE MATRIMONIAL PROPERTY

At page 6 of the judgment the learned judge remarked as follows:

> "Where there is any conflict in their evidence I am inclined to believe Irene rather than Moses. It seems clear that Irene paid more money towards the purchase of the stands at Ruwa and Msasa Park. She received considerable sums of money from the Fund in respect of her disability and her status as an ex-combatant. She used the money she got from the Fund to invest in immovable property. It seems to me that the money she received from the Fund should be treated in the same way as an inheritance and should therefore be excluded from the assets that are to be apportioned between the parties. It is not possible to make an accurate assessment of the total amounts she received from the Fund and then ascertain how the money was spent. However, in apportioning the matrimonial property I will adopt the principle that Irene must be given credit for the moneys she brought into the marriage as a result of what she got from the Fund.
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> The Ruwa house is registered in Irene's name whereas the Msasa Park house is registered in the names of both Moses and Irene. However, the Msasa Park house is where the parties were living. It was the matrimonial home. It would clearly be more convenient and economic for Irene to be able to continue living there with her son. Accordingly I will order that she be given the Msasa Park house. As regards the Ruwa house, Moses and Irene will each be given a half share therein. In making this apportionment I am following the principle outlined earlier."

In my view, having regard to the circumstances of this case and the respective contributions made by the parties, the approach taken by the learned judge cannot be faulted.

It is accordingly my view that the appeal is without merit and it is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

Gambe & Associates, appellant's legal practitioners