

PAUL SIMANGO
v
MARTHA SIMANGO

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GOWORA JA
HARARE, SEPTEMBER 20, 2013**

T.K. Hove, for the appellant

F. Mahere, for the respondent

GWAUNZA JA: At the end of the hearing in this case, we dismissed the appeal with no order as to costs and indicated that the reasons for the judgment would follow. These are the reasons.

The appellant appeals against the judgment of the High Court, Harare, which was handed down on 20 May 2010. The court *a quo* granted a decree of divorce, as well as other relief. While the parties reached settlement on a number of issues before the trial *a quo*, they failed to do so with respect to the manner of distribution of the following;

- i) some movable assets, including two motor vehicles and two refrigerators; and
- ii) two immovable properties

In respect of these items of property, the court *a quo* made orders to the following effect;

- i) that all moveable assets including the Daihatsu Move vehicle be awarded to the respondent *in casu* save that she was to choose one of the functional refrigerators and hand over the other one to the appellant;
- ii) that both parties be awarded an equal share (50%) of the property known as No. 17170 Sable Street, Borrowdale, and
- iii) that the respondent be awarded 95% and the appellant 5%, of the property (a flat) known as No. 3 Selmont Gardens.

The court *a quo* further ordered that the respondent be given the right to remain in occupation of Stand No. 17170 Sable Street, Borrowdale, until the minor child of the marriage, Dennis Tawanda Simango, attained majority age. Upon this event, the respondent was given the right to buy out the appellant's share, failing which that option was to be given to the appellant.

The appellant charges that in making the awards it did in respect of the property referred to above, the court *a quo* erred in the main by not taking into account his direct and indirect contribution to the acquisition of such property.

He accordingly prays that he be awarded;

- a) 50% of the value of the parties' movable assets,
- b) the Daihatsu Move, Registration No. AAG 752,
- c) 70% of the value of Stand 17170 Sable Street, Borrowdale, Harare, which was the parties' matrimonial home, and

- d) 50% of the value of Flat No. 3 Selmont Gardens, 228 Samora Machel Avenue, Harare.

Before considering the appellant's grounds of appeal in detail, it is pertinent to note that in arriving at the various awards that it made in terms of s 7 of the Matrimonial Causes Act {*Cap 5:13*}, ("The Act"), the court *a quo* used its discretion. It is in this respect correctly argued for the respondent that it is a firmly entrenched principle of our law that the discretion exercised by a trial court in dividing property in terms of s 7 of the Act cannot be interfered with on appeal unless the trial court exercised the discretion erroneously, acted on a wrong principle, mistook facts or did not take into account some relevant consideration. Indeed, in *Shenje v Shenje* (2001 (2) ZLR 160) the same principle was emphasised differently as follows;

"... All in all, the legislation gives the courts a very broad discretion to achieve the fairest possible settlement. There are only a few limits on the court's power to distribute property..."

See also *Hatendi v Hatendi* (2001 (2) ZLR 530 SC)

In *Ncube v Ncube* (1993 (1)39 (S) at 40H-41A) the point was stressed that;

"... in circumstances where factors exist that are not easily quantifiable in terms of money, the determination of the strict property rights of each spouse is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion."

Indirect contribution in the context of the Act, in my view, would fall into the category described in this excerpt.

With this background on the relevant law and principles, I will now consider the appellant's grounds of appeal in relation to the items of property whose distribution he challenges.

1. MOVABLE ASSETS, INCLUDING THE DAIHATSU MOVE

The only moveable assets that the court *a quo* specifically mentioned and considered were a Nissan Sunny vehicle, the Daihatsu Move and two refrigerators. In respect of the latter the learned judge stated at page 8 of his judgment;

“In respect of household goods the only contested items are the two refrigerators.”

As for the two vehicles, the learned judge analysed the evidence before him and gave the reasons for his determination as follows:

“As regards the movables, the documentary evidence before the court shows that the Nissan Sunny vehicle was acquired by defendant through a loan from her employer. It would not constitute her property until the loan was discharged. It is therefore not subject to distribution. As for the Daihatsu Move, the documentary evidence shows that the defendant received a substantial retrenchment package from the Reserve Bank in 2004. She invested the money with Highveld Financial Services. She subsequently applied for holiday travel allowance. When the vehicle was imported, she paid for the duty from funds from her Agribank account and in this case she accessed the account through the Agribank branch at Beitbridge. Taking into account that the defendant played a more significant role in the vehicle's acquisition and the fact that she is going to be awarded custody of the minor child, it is only fair that the Daihatsu Move be awarded to her.”

The appellant has not specifically challenged the court *a quo*'s finding and determination in regard to the Nissan Sunny vehicle. He has possibly included such challenge in his claim for 50% of the value of all the parties' moveable assets. He argues that the court *a quo* misdirected itself in awarding all moveable assets except for one refrigerator, to the respondent, thus disregarding his own contribution to the acquisition of such assets.

The reasoning of the court *a quo* on the matter of the two motor vehicles, including the evidence it relied on and the legal principles applied in reaching the determination it made on these vehicles, is well articulated in the excerpt of its judgment cited above. Against this sound reasoning, I do not find merit in the appellant's submission that the principle of fairness was flouted when the court made the awards it did in respect of the two motor vehicles. The appellant in any case does not charge that the court *a quo* applied a wrong principle of law, took into account irrelevant factors nor exercised its discretion improperly.

As already stressed above, these averments and substantiation thereof, are relevant to a determination of whether or not this court will interfere with what in fact would have been the exercise of a wide discretion enjoyed by the court *a quo* in matters of this nature.

Regarding the rest of the parties' moveable assets, it is evident from the evidence before the court that the appellant did not claim 50% of the value thereof. He is only doing so now, on appeal. This is something that, procedurally and as a matter of law, he should not do.

As can be seen from Annexure "B" to his Declaration, the appellant claimed 8 specific items of movable assets, and listed almost double that number of items, as those that he wished to be awarded to the respondent. Even though the values of the various items of property are not indicated, it is safe to assume upon a *prima facie* view, that what the appellant claimed did not constitute 50% of the value of the combined movable assets. In any case, in the joint pre-trial conference minute, it is stated that the plaintiff, by consent of both parties, was to take one 4 plate Superior stove. The respondent was to take the bulk of the movable assets, amounting to some fifteen (15) items. The pre-trial conference minute shows that only the moveable items listed below were contested;

- (i) the two motor vehicles
- (ii) 1 DC Radio with speakers
- (iii) 1 home entertainment Radio and
- (iv) 2 refrigerators

The learned judge *a quo* specifically dealt with the two motor vehicles, as outlined above, as well as the two refrigerators. While the CD radio with speakers and the home entertainment radio were not specifically mentioned by the court *a quo*, its order in relation to the moveable assets can only be read to suggest that these two items of property were added to the list of items which, by consent of the parties, were to be awarded to the respondent. It has already been mentioned that, in arriving at the awards that he made, the learned judge *a quo* exercised his discretion consequent upon an assessment of the evidence placed before him. The appellant not having shown that such discretion was improperly exercised, I find he has accordingly not proved a case for this court to interfere with such discretion. Regard in this respect is must be had to the fact that the court *a quo* was not presented with, nor did it consider, a claim that the appellant now attempts to make on appeal, for 50% of the value of the all the parties' moveable assets.

In the premises, I do not find that the learned judge *a quo* exercised his discretion erroneously in arriving at the awards that he made with regard to the parties' moveable assets.

This ground of appeal is accordingly dismissed.

2. STAND 17170 SABLE STREET, BORROWDALE, HARARE

The appellant submits that by awarding to each of the parties a 50% share in this property, which was the matrimonial home, the court *a quo* erred as it had placed no weight on the fact that his direct contribution to the acquisition of the property was “substantially greater” than the respondent’s. The appellant also takes issue with the court’s order to the effect that the respondent be allowed to reside in the matrimonial home until the minor child of the marriage attains 18 years, after which the respondent would be given the right of first refusal thereof.

The appellant elaborates on these grounds of appeal, in his heads of argument.

He argues;

- (i) that the appellant contributed more than the respondent because his financial position was better than hers;
- (ii) that it was the appellant who took the effort to apply for the stand in question, to the City of Harare, and proceeded thereafter to pay the necessary deposit using his own resources, and;
- (iii) that the respondent’s contribution which was subsequent to the event in (ii) above, took the form of “improvements” to the property.

The appellant, as already indicated, accordingly seeks an order that he be awarded 70% and the respondent 30% of the value of the property, with the right of first refusal being granted to him.

At page 6 of his judgment, the learned judge *a quo* gave the reasons for the order that he made in respect of this property as follows;

“In accordance with the case of *Takafuma v Takafuma (supra)*, the starting point is that the Borrowdale property is jointly owned by the parties. Although the plaintiff claimed a greater share on account of a greater contribution, he did not proffer evidence to prove that. Each party testified on the nature of contributions they made in respect of the development of the stand without tendering actual receipts on the payments made. The court’s overall assessment is that none(*sic*) of the parties is entitled to a greater share than the other. Therefore this property will be apportioned equally to both parties, with defendant being given the right to remain in occupation until the younger child attains majority status. Thereafter the defendant shall buy out plaintiff’s share failing which that option will be given to plaintiff.”

It is evident from the above that the learned judge *a quo*, contrary to the assertion made by the appellant in his heads of argument, took guidance from the case of *Takafuma v Takafuma, 1994(2)ZLR 103 (S)*. The learned judge, in taking the starting point in accordance with *Takafuma v Takafuma (supra)* in effect started from the premise that each party owned a 50% share in the property in question. The submission is correctly made for the respondent that as a registered joint owner of the property, she had a real right to a half share in the Borrowdale property, even in circumstances where she might have made no direct contribution to its acquisition. This point is articulated eloquently in *Ncube v Ncube s-6-93* where the learned judge had this to say.

“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 Napia 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.”

Having on the basis of *Takafuma and Takafuma* labelled 50% of the property as “his” and the other 50% as “hers”, the learned judge *a quo*, using his discretion, concluded that the justice and equity of the case did not require the court to take away any share from one party and award it to the other. This discretion was evidently exercised on the basis of the parties’ evidence regarding their respective contributions. I find nothing in the judgment of the court *a quo* to suggest that the appellant’s role in applying for and paying deposit on, the

property in question, was not properly taken into account in assessing his overall contribution to its acquisition. No misdirection on the basis of mistaken facts or error has been alleged. I am satisfied the learned judge *a quo* properly exercised his discretion. I accordingly find that no case has been made for this court to interfere with the decision of the court *a quo* on this point. It follows from this that the appellant's claim for 70% of the value of the property, followed by a right of first refusal in his favour, is equally without merit.

The appellant further argues that the court erred by granting the respondent a right of occupation of the matrimonial home, in disregard of the fact that his contribution to the acquisition of the property was greater than the respondent's. I find this argument to be flawed in two respects. Firstly the court *a quo*'s finding was that, on the facts presented and after applying the relevant principles of law, the parties were entitled to an equal share in the property. Secondly and more to the point, the decision that the respondent should stay in the matrimonial home until the minor child attained the age of 18 years was influenced more (and properly so) by a consideration of what would best serve the interests of the minor child, than by the extent of each parties' contribution. The respondent was granted custody of the minor child and the court is enjoined to consider the best interests of the minor children of the parties in its determination of their rights to any share of the matrimonial assets. In any case the decision complained of is one that is commonly given in circumstances such as this.

I would therefore dismiss this ground of appeal.

3. **FLAT NO. 3 SELMONT GARDENS, BELVEDERE**

The learned judge *a quo* noted that the appellant had confirmed that this property was purchased by the respondent through a loan facility granted by her employer, the Reserve Bank of Zimbabwe and was registered in her name. The court found that the parties had agreed that the mortgage loan in respect of this property would be serviced through the respondent's income while the appellant's income would be used to maintain the family. The court accepted the evidence of the appellant that he also contributed towards the maintenance of the property, through the payment of levies and rates during the parties' 3 year stay at the flat. It was not in dispute that the respondent in part bought the flat in question using proceeds from the sale of another flat she had bought before she married the appellant. It is also common cause that the appellant made no direct contribution to the acquisition of this property. In awarding 5% and 95% of the value of this property to the appellant and respondent respectively, the learned judge *a quo*, after noting that he had drawn guidance from, *inter alia* the celebrated case of *Takafuma v Takafuma (supra)* reasoned as follows at page 8 of his judgment:

“... As regards number 3 Selmont Gardens, the starting point to note is that it was acquired during the subsistence of the marriage and therefore constitutes matrimonial property. However, the acquisition was solely financed by defendant *albeit* from the proceeds of an earlier property. It is in fact registered in defendant's name and would fall in the category of “hers”. Plaintiff claims a share of the property on the basis of his contribution towards its maintenance. This was basically in the form of rates, levies and telephone bills. The amount involved was not stated. The parties only stayed in the property for about three years. I would hold that the plaintiff is entitled to a share *albeit* it would be very negligible on account of his small indirect contribution. This is in accordance with s 7 (1) (a) of the Matrimonial Causes Act which provides that-

“(1) 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-

- (a) The division, apportionment of distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
- (b)

Therefore, although the flat belongs to defendant it can be subject to division by virtue of the above provision. However, in making such a decision the court must take into account the provisions of s 7 (4) ...”

After citing the provisions of s 7 (4) of the Act, the learned judge determined that in the court’s discretion, the appellant would be awarded 5%.

The appellant, while accepting that the learned judge *a quo* properly considered the principle enunciated in *Takafuma v Takafuma* (supra) argues that the court then erred by failing to give due weight to his indirect contribution to the acquisition of the property. Additionally that the award made had the result that the respondent was unjustly enriched.

The appellant does not allege that the court *a quo* applied a wrong principle in determining the apportionment of this property. The contrary is in fact suggested in his submission in relation to the court’s reliance on, *inter alia*, the case of *Takafuma v Takafuma*. Nor does the appellant argue that the trial court allowed extraneous or irrelevant factors to guide it, mistook facts or disregarded some relevant considerations. There is no dispute, and the court *a quo* properly took this into account, as to who between the parties contributed substantially and directly to the acquisition of the property in question. Nor is the indirect nature and manner of the appellant’s contribution in the short period of three (3) years that they stayed in the property, disputed.

There is, in my view, no doubt that the learned judge *a quo* took into account all the relevant facts and was guided by the correct principles in its application of s 7 of the Act, to the distribution of the property in question.

I therefore do not find that the court *a quo* exercised its discretion erroneously in making the award that it did. It follows that the appellant's submission that the respondent would be unjustly enriched, is without merit.

I would accordingly dismiss this ground of appeal.

It was for the reasons contained herein that the appeal was dismissed, with no order as to costs.

ZIYAMBI JA: I agree

GOWORA JA: I agree

T.K. Hove & Partners, appellant's legal practitioners

Mtewa & Nyambirai, respondent's legal practitioners