

TENDAI MATARE
versus
ROSELINE ROSA RUFARO MATARE (nee Nyanhete)

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 13 May 2023 & 23 July 2024

Divorce Action

A Matarutse, for the applicant
Defendant in person

WAMAMBO J: This matter came by way of trial action.

The parties were married on 5 December 1998 under the then Marriage Act [*Chapter 5:11*] now [*Chapter 5:17*].

Plaintiff's evidence was that he moved out from where he was residing with defendant as he saw no reason to stay, for defendant was adulterous and the two were no longer living as husband and wife.

Defendant on the other refuted the allegation of adultery. She is however agreeable to a decree of divorce being granted.

There is only one issue that stands to be resolved namely whether or not Stand Number 6033 Westlea, Harare is matrimonial property. If so how should it be distributed between the parties. The other issue that has been resolved in defendant's favour is the distribution of the movable property. Plaintiff concedes that defendant should be awarded all the parties movable property.

In the opening address counsel for the plaintiff properly captured the issue for resolution.

The plaintiff testified. He produced the Marriage Certificate between the parties as Exhibit 'A' and a Memorandum of Agreement as Exhibit 'B'.

These were the only exhibits produced in the course of the trial.

Plaintiff's evidence on the relevant sole issue to be resolved was as follows:

The property in dispute namely House Number 6033 Westlea, Harare (hereinafter called the property) is owned by his maternal aunt Naume Kamhiripiri (Naume). Naume died in 2005 and the property is being managed by his mother. Naume's estate is still to be registered. He resided with defendant at the property from 1997 to 2014 before moving away. He started residing at the property after he had faced difficulties finding a place to stay until he requested to reside at the property. Naume was a cotton farmer residing in Gokwe.

The property consists of a completed cottage and a main house at roof level. He gave detailed evidence of how the house was built and who resides at the property. Defendant is one of the occupants of the house and she does not pay rent like the other occupants. He is currently residing at his mother's house.

In cross-examination he testified to being offered a number of stands but being unable to raise the capital to pay for them.

He stood his ground and insisted that the property was never his and thus does not qualify as matrimonial property.

Judith Manjere testified in plaintiff's case. She is his maternal aunt. She testified to the following effect.

To her knowledge plaintiff and defendant reside at the property. They have been resident at the property for so long a period that their children were born while they were residing at the property.

The property's owner is Naume who bore no children.

Defendant was the sole witness in her case. She gave detailed evidence. It was her evidence that the plaintiff and her applied for a stand in Naume's name but the couple would pay for it. Her view is that her husband was convinced by members of a new church he attended that she was committing adultery. Further that she should go back to her parents' home while he marries a woman from the new church. She named the new church as one of the "Postori" churches.

His testimony was that her husband is trying to find ways to prejudice her. She worked hard in the construction of the house.

A number of factors seem to have militated against the defendant. She assisted to some extent in the building of the property. She resided thereat for a considerable period of time. Even

when her husband decided to go and stay at his mother's house she remained at the property paying no rent while the other occupants did so. She relaxed, being of the view that the property belonged to her and her husband. She didn't think much of the fact that the name that held rights in the property was that of her husband's aunt Naume Kamhiripiri.

I do not believe her version that the property was registered in Naume's name only because she was elderly and the City Council policy at the time favoured the old as opposed to the young. I do not believe her because the property is registered in Naume's name and remains so registered. Naume died in 2005 and her name has not been removed to make way for her and her husband's names as the true owners of the house. The house has not title deeds up to now.

Exhibit 'B' buttresses the fact that Naume is the purchaser of the property from the City of Harare. Naume signed on Exhibit 'B' as the purchaser. The plaintiff and defendant are not part of Exhibit 'B'.

The evidence of plaintiff was honest. He described the developments leading to his and the wife's stay at the property. He was not alone but was supported by Exhibit 'B' and the testimony of his maternal aunt Judith Manjere (Judith). The testimony of Judith had a ring of truth to it. It did not sound rehearsed in favour of the plaintiff. She was candid about how plaintiff, wife and children started to reside at the property.

Her evidence reflects that she was not even aware that plaintiff was no longer residing at the property. Like the plaintiff her evidence was that the property was purchased by Naume and was never owned by plaintiff. I believe her evidence as well as that of plaintiff.

Defendant's evidence runs contrary to the plaintiff and his witness. Her evidence is not supported by Exhibit 'B' or the probabilities.

She has failed to prove that the property belongs to the plaintiff.

Section 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] reads as follows:

“7 Division of assets and maintenance orders:

(1) Subject to this section, in granting a decree of divorce judicial separation or nullify of marriage or at any time thereafter, an appropriate court may make an order with regard to –

(a) the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to another ...”

It is clear that what stands to be distributed are the assets of the spouses. Reference was made loosely to matrimonial property wherein it should correctly be referred to as assets of the

spouses as per the Matrimonial Causes Act [*Chapter 5:13*]. Property belonging to a third party does not amount to an asset of the parties and as such is not distributable.

The parties have demonstrated that their marriage has irretrievably broken down with no prospects of restoration. A decree of divorce stands to be granted.

I have found that House Number 6033 Westlea, Harare is not an asset of the spouses and is thus not distributable.

In the result I order as follows:

- 1) A decree of divorce be and is hereby granted.
- 2) The defendant is awarded as her sole and exclusive property all the movable property acquired during the marriage.
- 3) House Number 633 Westlea, Harare is not part of the matrimonial estate.
- 4) Each party shall bear its own costs.

Pundu and Company, plaintiff's legal practitioners
The defendant, in person