ALICE GANDA (Nee DOWORORWA)
versus
EDWARD GANDA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 22, 25, 30 July & 16 December 2024

N Mugiya, for the plaintiff
M Chakandida, for the defendant

TSANGA J:

The parties in this divorce action lived as husband and wife in an unregistered customary law union from 1998, ultimately formally registering their marriage in 2010. They have six children between them of whom only two are still minors. Issues of custody, access and maintenance are agreed between the parties. What has brought the parties to trial are disputes over how certain immovable property should be shared, as identified in their pre-trial conference minute. These issues are:

a. Whether or not house No. 10790 Mapako 2 Chinhoyi is matrimonial property subject to sharing?

b. Whether or not Plot No.3 Chiridza Farm and the mine are subject for distribution.

c. If the answers in (a) and (b) above are in the affirmative, what is the equitable sharing ratio between the parties?

At the trial, the plaintiff distilled the dispute as being primarily centred on Stand 10790 Mapako 2, which she said has always been hers and which she had since donated to a Trust named Preppe Trust on 6 April 2021. The beneficiaries are her children. The Trust was formed in 2020 and the donation was a few months before the divorce summons were issued in September 2023. Regarding the acquisition of stand 10790 Mapako 2, her evidence was that she had her own savings of US$4000.00 and had bought the stand from one Viyazhi Faxon Mavhura. She had also sold a stand being stand No 6009 Rusununguko, which property she

said she had also acquired in 2005 in her name. That stand had been sold to one Keith Mapfumo in 2014 to develop stand 10790 Mapako 2.

Her testimony was that Plot 3 Chiridza farm is a farm allocated to her husband by the state. She had nonetheless contributed to developments on the farm. The nature of her contributions were not elaborated apart from stating that the farm has a four-roomed house, a borehole and solar panels. She told the court that the defendant currently stays there with another wife.

In cross-examination, she clarified that when they started staying together they were renting premises in Cold Stream Chinhoyi. They had then moved to Stand 6009 Rusununguko / Chikonohono in 2005 having been allocated the stand by Seven Heroes Cooperative of which she said she was a member as was her husband. As for the mine which was put as an issue in the joint pre-trial minute, she denied awareness of the existence of any mine.

In her closing submissions, plaintiff's main thrust was that she was free to dispose stand 10790Mapako 2 as it was owned by her. Having donated the property to Preppe Trust by the time the divorce summons were issued, she submitted that it could not be regarded as her asset. She also wants half the farm and if that is not possible as it is a government farm, her prayer is to be awarded a John Deere tractor or US$15 000.00 as the value of developments that she contributed to on the farm.

The defendant's evidence and submissions

The defendant's distilled narrative was that stand 10790 Mapako 2 is their matrimonial home subject to sharing at a ratio of 50:50. They had acquired it after realising that the Rusununguko stand, which was a mere 193sqm, was no longer big enough for their family. The defendant knew a friend who owned stand 10790 who had sold the stand to them. They had then developed that property as their matrimonial home.

He also explained how the Rusununguko stand in the first instance, which was the source of funding stand 10790 Mapako 2, had come to be registered in her name only. Whilst customarily married to the plaintiff, he also had an unregistered customary law union with one Nyadziso Gozheni with whom he did not have any children and who he did not want to later lay claim to the stand. It was for this reason that the parties had agreed to put the Rusununguko property into the plaintiff's name. He said he had acquired that stand in 2001 as one of the members of the management committee. The cession of the Rusununguko stand from Seven Heroes Cooperative to the plaintiff had, however, only been done in her name in 2014 on the same day the property was transferred to its buyer Keith Mapfumo. He explained that as

Chairperson to the then Cooperative he deemed it better that the cession not be done in his name.

As for the US$4000.00 she said she had saved up to acquire 10790 Mapako 2, his version was that he had in fact given her that money to go and pay for that stand and that she had come back with a receipt in the form of an affidavit from the seller. He emphasised that the plaintiff is a homemaker and has been so at all times. That stand was purchased in 2010. He disputed that the property had been donated to a Trust, as he was not part of it, and, that if this was done; it had been behind his back. Regarding the ownership of Stand 10790 Mapako 2, he said he had given instructions to his lawyer that all town properties were to be in his wife's name. Though stand 10790 Mapako 2 was bought from Viyazhi Faxon Mavhura in 2010, it was only registered in the name of the plaintiff in 2020. Essentially therefore the defendant wants the Mapako property to be shared 50-50.

He also told the court that he resides at Chiridza farm, which is about 100 kilometres from Chinhoyi. He had left everything relating to the house in Chinhoyi to the plaintiff. He explained that the farm is a government farm and cannot be shared in the manner the plaintiff wants.

As for the mine, he insisted that the mine exists which he gave to his wife, and that she in turn runs it with her sister as MaMoyo Mining Syndicate. That was all that he said about the mine.

When asked in cross-examination which of the two properties, the Mapako stand or the farm has greater value, he stated that they are at par. However, he regards the farm as his workplace. In his closing submissions, he indicated that apart from sharing the Mapako 2 property 50:50 he also wants a share of the mine.

Analysis

Generally speaking a spouse in whose name property is registered can do what they want with it although a court can intervene where it is of the view that the disposal or sale was not genuine but meant to defeat the other spouse's cause. This principle is captured in cases such as *Muswere v Makanza & Ors* 2004 (2) ZLR 262 (H) *Issac Sithole* v *Lucia Sithole* HH 674/14 and *Chikuni* v *Mavhiyo* HH 21/20. In addition, a property may be registered in the name of one spouse and yet in reality it can still be shared as part of doing justice between the spouses. See s 7 (1) (a) of the Matrimonial Causes Act. The factual circumstances are determinative. The defendant relies on the wide discretion given to the court by s 7(1) (a) in distributing assets

of the spouses regardless of the fact that an asset may be registered in the name of one spouse only. What the court looks at are the assets of spouses and not matrimonial property. See *Gonye* v *Gonye* 2009 (1) ZLR 232 (S)

The defendant, as gleaned from his own evidence made a conscious decision to have the property registered in his wife's name although in reality it was their joint home. Stand 10790 Mapako 2 was there after donated to a Trust by the plaintiff a few months before the institution of divorce proceedings. The Trust itself is legally registered in terms of the legal requirements. It is therefore not a sham trust. As explained in the South African case of *Van Zyl NO* v *Kaye NO & Ors* 2014 (4) SA 452:

> Holding that a trust is a sham is essentially a finding of fact. Inherent in any determination that a trust is a sham must be a finding that the requirements for the establishment of a trust were not met, or that the appearance of having met them was in reality a dissimulation.

The defendant's legal argument is that the donation to the Trust is unperfected in that the necessary steps have not been taken to transfer the property into the Trust. The argument that the donated property remains in her name does not mean that the donation is not valid. The trustees who represent the beneficiaries can claim transfer on behalf of the beneficiaries since personal rights arise from the donation. As held in *Chipo Goto v Shadreck Tsuro No. & Ors SC 40/24*

> "Legal rights and obligations are created upon the creation of the donation agreement. Such rights are enforceable and cannot be taken away without lawful basis. Delivery of the donated property can occur at any time after the contract of donation has been entered into. Delivery does not affect the validity of the donation but simply completes the transaction".

Therefore the fact that the property has not yet been transferred into the Trust does not invalidate the donation. Whilst the Trust itself is not a sham and whilst the property is yet to be transferred into the Trust, the key issue is whether there has been an abuse of the trust form to avoid the obligation of sharing the matrimonial home. In doing justice between parties, this court has to be satisfied that placing an asset unilaterally in a Trust does not defeat any just entitlements that the other spouse may have had to the property.In other words, should the Trust be pierced in the manner explained in *Van Zyl* v *Kaye NO* as follows:

> "Going behind the trust form (or 'piercing its veneer', as the concept is sometimes described) essentially represents the provision by a court of an equitable remedy to a third party affected by an unconscionable abuse of the trust form. It is a remedy that will be afforded in suitable or appropriate cases."

Such action nonetheless accepts that the Trust exists and that the asset is one of the trust. In a matrimonial action such as this, the value of an asset would be taken into account in distributing property fairly between the parties even if the asset itself remains in the Trust.

Having heard the evidence of the parties, I am convinced that the defendant's articulation of how the stand 10790 Mapako came to be in the plaintiff's name was more convincing. As Chairperson of the Cooperative he would indeed have had the greater chance of the two of being allocated the Rusununguko stand. Further, he had a tangible explanation as to why they had then put the property in plaintiff's name. He had also put the Mapako 2 property into her name as a decision to have the urban property in her name. As a farmer, he would also have had the means to raise the US$4000.00 which he said he gave her for the Mapako 2 property. The plaintiff did not give any explanation as to her source of income generation other than that she had saved the money. The defendant's assertion that she is a housewife was not challenged. The plaintiff did not deny that she is a homemaker or house wife.

The reason why the plaintiff put the property in a Trust for the children is that she indeed did not want the defendant to have a share of it. However, it is important to also recognise that donating the property to the children through a trust, is itself not unusual where divorce is contemplated or in divorce proceedings. In this case the defendant, however, says the trust formation was not a mutual decision. Against the backdrop that the defendant already has yet another woman who is said to be staying with him at the farm, plaintiff's action in the trust formation and donating the property to her own offspring was explicable even though it was meant to avoid the property falling under the umbrella of an asset of the spouses. After all, she has six children with him some of whom are still minors so protecting the property she acquired with him for the benefit of her own children would have been crucial to her. The donation having been done just a few months before filing for divorce suggests that a permanent split was envisaged and its consequences fully contemplated. I am inclined to agree though with the plaintiff that the defendant could have challenged the donation if he was seriously unhappy with it but he did not. Nonetheless that does not detract from the finding that the reason for donating the property to Trust at the point at which it was done was to avoid its consideration as an asset of the spouses upon a contemplated divorce.

The fact that the assets of the spouses at the time consisted of the Mapako 2 stand registered in her name and developments on Plot 3 Chiridza farm allocated to the defendant lends some resolution to the dispute. This is particularly in the face of the defendants own

assertion that he regards the properties as being at par in value. The properties could be evaluated to ascertain their value but without the assertion on parity in value having been challenged by the plaintiff and her counsel, it would put the parties to unnecessary expense in what appears to be fairly modest assets.

Since in redistributing property between the spouses, the value of the asset can be taken into account even whilst the asset itself remains a Trust asset[1], stand 10790 Mapako 2 property represents her fair share of the matrimonial assets, the fact that she chose to donate the property is her choice. What is fair to both parties is that the property should be taken into account as constituting her share of the matrimonial assets. There is no need, however, to derive the Trust of the asset that was donated to it.

The defendant on the other hand was allocated by the state Plot 3 Chiridza farm, which he runs. The farm generates income. It has a dwelling. Even though his marriage is monogamous, he already has another wife there. It is home to him. As highlighted, the defendant himself is the one who told this court that in terms of value he puts both properties at par in terms of how things currently stand. If indeed the two properties were indeed of similar value in my view, the result would be the same if he were allowed to retain full interests in the farm against the backdrop that she has already put the Mapako 2 property, which was in her name in a Trust for the children.

Even if Plot 3 Chiridza farm the land is state land, still it cannot be ignored for purposes of deciding what is fair and just to take into account that it is a beneficial asset to the defendant. Granted in a divorce it is the value of improvements that the court takes into account where one spouse claims a share of those improvements. See *Chombo v Chombo* SC 41/18. It does not make sense for the plaintiff to insist that she had rights to the Mapako 2 property and could do what she wanted with it because it was in her name and then not to recognise the defendant's entitlement to the developments on the farm under the same vein. No evidence was led on the tractor which she claims in her closing submissions or proof the value of her improvements. There was no meaningful evidence led on the mine for this court to also make any useful intervention. The plaintiff has sought costs on a higher scale. These were not motivated and neither had she sought costs pending divorce to show she was penury.

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[1] See Francois du Toit, *South African Trusts and the Patrimonial Consequences of Divorce: Recent Developments in South Africa*. 8 J. Civ L.Stud 2015
Accessed at http://digitalcommons.law.Isu.edu/jcls/vol8/iss/2/8

In the circumstances, it is ordered as follows:

1. A decree of divorce be and is hereby granted.
2. Custody of the two minor children Edward Ganda, born 14th March 2008 and Edgar Anesu Ganda born 5th September 2010 be and is hereby awarded to the Plaintiff as agreed between the parties.
3. The defendant shall exercise access to the two minor children as agreed every first two weeks of each school holiday.
4. The maintenance of the two minor children shall be regulated by the order of the Chinhoyi Magistrates Court under case No. 253/11.
5. Stand 10790 Mapako 2 which plaintiff donated to Preppe Trust is hereby declared to have constituted Plaintiff's share of her divorce property entitlement.
6. The defendant is awarded all improvements on Plot 3 Chiridza Farm which stands allocated to the defendant by the State.
7. The defendant shall pay plaintiff's costs on the ordinary scale.

Mugiya Law Chambers, plaintiff's legal practitioners
Chakandida & Associates, defendant's legal practitioners