

KUMURAI CHIKWAVA
versus
GRACE CHIKWAVA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 21, 25 & 28 October 2024 & 14 January 2025

Civil Trial

S M Masarirevhu, for the plaintiff
S Chava, for the defendant

TSANGA J:

The dispute before the court is about sharing of matrimonial property on divorce. The plaintiff, Kumurai Chikwava, is a retired medical doctor with a sizeable property folio in his name. The defendant, Grace Chikwava, is a retired nurse by profession. She too owns immovable property in her name from having worked for a number of years in the United Kingdom. The plaintiff and defendant married formally in 1976. They have four adult children. He is 79 years old, having been born on the 17th of June 1945. She is 74 years old, having been born on 20 August 1950. He issued summons on the 1st of February 2023 for divorce in which he listed the following immovable property as being registered solely in his name:

1. S G Rocklands –Beatrice (12 acres acquired in 1979).
2. Gorali (Chikwawa) Farm- Beatrice (acquired in 1984).
3. Stand number 117 Glen Norah B, Harare.
4. 1019 3rd Ave Park Town, Harare.
5. Stand 15A 6th Avenue, Park Town, Harare.

He also listed Stand No 1-47 Porter Road, Waterfalls, Harare, that he referred to separately as the matrimonial home. It too is in his name.

He itemised the following as property acquired by the defendant.

1. Stand No 1481 Picnick Park Waterfalls

2. Stand No 1465 Picnick Park Waterfalls

He did not wish to lay any claim to his wife's property. The essence of his proposal in his declaration was that save for the matrimonial home, Stand no 1-47 Porter Road Waterfalls, which at the time he was willing to surrender to the defendant, he should keep all the other immovable registered in his name. His rationale was that they had an understanding throughout their marriage that each would acquire their assets separately. It is that understanding which he wished to be honoured.

In her plea, the defendant denied any such arrangement. Instead, she laid claim to the following properties registered in the plaintiff's name on the grounds of having played a critical role in their acquisition.

1. S G Rocklands –Beatrice 12 acres acquired in 1979
2. Stand 15 A 6th Ave Park Town Harare
3. Stand no 1-47 Porter Road Waterfalls

In other words, though titled in the plaintiff's name she considered them marital property. She also wanted the household goods. She further wanted a share of one hundred (100) cattle from his Gorali farm. Materially in her plea she was happy for him to have Gorali farm and listed the property that he could have as the following:

1. Gorali (Chikwava) farm Beatrice
2. Stand number 117 Glen Norah B
3. 1019 3rd Ave Park Town Harare
4. Park Town property Washington. (This is how she described that fourth property)

I list what was in their pleadings for the reason that at the pre-trial conference, it appears the dispute broke wide open as both shifted from their pleadings in terms of what they were willing to let the other have. The parties did not amend their pleadings. In addition to the property he had listed which is in his name, the plaintiff now wanted to retain the matrimonial home despite having said in his declaration that the defendant could have this.

On the defendant's part, in addition to the plaintiff's property that she had laid claim to as indicated, she now spread her desires to include half of Gorali Farm, in addition to the one hundred cattle. The parties did however reach agreement on the sharing of specified

immovable and movable properties, which need not detain the court since the parties agreed to those. The issues referred to trial are as outlined in their joint PTC minute as follows:

Issues referred to trial

1. Whether the plaintiff should be awarded the following:
 - i) S G Rocklands –Beatrice (12 acres)
 - ii) Stand 15A 6th Ave Park Town, Harare
 - iii) Stand no 1-47 Porter Road, Waterfalls, Harare
 - iv) Goralı (Chikwava) Farm, Beatrice
 - v) 500 cattle

2. Whether or not the defendant should be awarded the following:
 - i) S G Rocklands –Beatrice 12 acres
 - ii) Stand 15A 6th Ave Park Town Harare
 - iii) Stand No 1- 47 Porter Road, Waterfalls, Harare
 - iv) Half share Goralı (Chikwava) farm Beatrice
 - v) 100 cattle

The Plaintiff's evidence

He emphasised that they were estranged throughout most of their married life and did not share finances. This was especially so after she accused him of free loading from the groceries which she was buying when they lived at St Theresa's Missions hospital in 1977. Regarding Goralı farm which he acquired in 1984 and which the defendant wants shared in half, the plaintiff's testimony was that the defendant never wanted him to buy that farm. She did not in fact attend the opening ceremony of the farm when he held one. He said there was not a single structure there that the defendant had contributed to putting up. From the time he acquired the farm they had faced hiccups. She had in fact tried to leave him. He had opposed their separation because the children were still young. Moreover, she had gone away to the United Kingdom in 2002 for what he said was nearly ten years. He had continued with his hospital business and running the farm. He estimated the time they lived separately to be in overall approximately fifteen years since she would also go to spend time with their children who live overseas. When she had come back from the United Kingdom, they had resumed

staying together up until 2016 when he said he started experiencing night attacks, which he would not experience when he was alone.

As for stand 15A 6th Ave Park Town, Harare, he acquired this in 1991 and converted it to a hospital with maternity facilities. According to him, the defendant had never set foot there as the property was acquired for medical purposes to convert it into a surgery. Stand no 1-47 Porter Road Waterfalls had been acquired by him in 1980 whilst S G Rocklands –Beatrice 12 had been acquired in 1979. This latter property he described as still undeveloped apart from a grinding mill and a farmhouse. He told the court that they did not have a matrimonial home as the nature of his job was such that they moved to various places across the country and would be provided with accommodation. He therefore regarded Stand No 1- 47 Porter Road, Waterfalls, Harare as his alone.

He emphasised that by not wanting property that she bought herself to be shared, the defendant was simply following the principle that they had agreed to of each to their own separate property. As regards her claim for one hundred cattle, again he said she had contributed nothing and was not entitled to any.

In cross-examination, he acknowledged that she was a nurse. He also told the court in cross-examination that his wife's family had in fact given him her younger sister as a second wife because she was not interested in the farm. They had sired two children before he separated from her in 1985. He also agreed that a school had been built at Gorali farm.

The defendant's evidence

She told the court that she resides at No. 1-47 Porter Road Waterfalls as the matrimonial home and that she was surprised to learn that this property was in his name only as had become clear to her in court when he produced the title deeds. As for S G Rocklands –Beatrice plot she was the one who had found it being advertised in the newspapers and he had paid the deposit. The outstanding balance was also paid by him from surgeries that she was managing for him when he was in the United Kingdom doing his Masters. She disputed his evidence that the plot is vacant and said there are out buildings which are being rented out. The rentals are collected by the plaintiff.

She also explained that when the plaintiff left to do his Master's degree in the United Kingdom, she was the one who had run his surgery that he had at the time in Chitungwiza. As evidence, she produced letters that the plaintiff wrote to her in which he would often give instructions as to how she should deal with the surgery monies. She described 15A 6th Ave

Park Town as the house they were staying in at one time and had helped source bricks for its development. She had also looked for cement.

As for Gorali farm, she had identified it whilst the plaintiff was in the United Kingdom and he had told her to go and see the estate agent. Money from the surgeries that she was helping to manage had been used as well as other monies obtained from his work. She denied that she had ever approached the court for separation but clarified that she had approached the court for maintenance instead as he had locked her out. As for her sojourn in the United Kingdom, this was from May 2001 to November 2008 although she would occasionally come home. She said the plaintiff had pressured her to return and work for their pension.

She had purchased a lorry and used it for errands at the farm. She had also assisted with diesel coupons whilst over-seas. On her return, she resided mainly at the farm and helped manage the farm since the plaintiff would only go there weekends. She had only moved away from the farm in 2021 when the plaintiff directed her to come and stay in town at Stand 1 -47 Porter Road, Waterfalls. She disputed that they separated in 2016.

She acknowledged that during her stay in the United Kingdom she had raised funds and purchased properties here. She considered it her own property as the plaintiff had told her that she was no longer wanted at the Chikwavas. She denied that her money was only for herself, as she made sure that the children had everything that they needed. She also stated that they had always done things together and considered her contributions significant in managing construction projects. In cross examination she said she would work formally as a nurse and stop according to the plaintiff's demands. When he went to the United Kingdom in the early 1980s for studies for example, he had ordered her to stop working.

Plaintiff's second witness was Arnold Chitimbe who confirmed that he knew the couple long before he started working for them in 2013. They used to buy calves from Constantia farm where he was working. In particular, the defendant would come for the purchases. He worked for them for six and a half years and left in 2019. He confirmed that the defendant was indeed staying at the farm during the period he worked for them. The defendant supervised his work. She was still there when he left in 2019. He confirmed that a school was built at the farm in 2015-2016. He and other workers were, however, paid by the plaintiff who would come mainly on Sundays.

The defendant's third witness was Bevlyn Murandu who started working as a nurse aide for the couple in 1998 at their surgery in Park Town. She would assist the defendant in the maternity section. In 2001 she was transferred to the farm where there was also a surgery

eventually leaving in 2019. She also told the court that the defendant would stay at the farm and that their children would come over the holidays. She told the court that Goralí farm has shops, a school a surgery, houses and pigsties as well as a school amongst its infrastructure. She clarified to the court that most developments on the farm were done between 2002 to 2004.

Legal and factual analysis

The Matrimonial Causes Act [*Chapter 5:13*] in s 7 (4) enjoins the court to take into account the income earning capacity and assets which each spouse has or is likely to have in the foreseeable future. Also considered are their financial obligations in the present and in the future. Their standard of living, age, physical and mental wellbeing are all critical considerations. Of significance to the lived realities of many spouses, both direct and indirect contributions by way of looking after the family are a vital balancing consideration when it comes to the exercise of the court's discretion in the distribution of property on divorce. The value of any pension or benefit that each is likely to receive also counts. Finally, the duration of the marriage cannot be ignored by the court. The court is enjoined to examine all factors outlined in that section.

As stated in *Muzongoni v Muzongondi* S-66-17:

“The discretion enjoyed by the court under s 7 is extremely wide and a court should be loath to fetter that discretion. In such exercise, every factor referred to in s 7(4) is important in the determination of the disposition of the matrimonial estate. Weight should be placed on all the factors such that the exercise of discretion should not appear to be based on any one factor to the exclusion of others. In the exercise of its discretion, it is important that the court not lose sight of the overriding principle enshrined in the provisions, that at the end of the day the court is enjoined to ensure that in its disposition of the matter, it is bound to achieve equity between the parties.”

With regard to the use of the term assets of the spouses in the Matrimonial Causes Act, in *Gonye v Gonye* 2009 (1) ZLR 232 MALABA JA, as he then was, held on behalf of the bench that:

“The concept “the assets of the spouses” is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.”

In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) the assistive formula for sharing property on divorce was outlined as follows:

“In dividing up the assets the court must not simply lump all property together and then divide it up in as fair a way as possible. The correct approach is first to sort out the property into three

lots, which may be termed "his", "hers" and "theirs". Then the court should concentrate on the lot marked "theirs". It must apportion this lot using the criteria set out in s 7(1) of the Matrimonial Causes Act 33 of 1985. It must then allocate to the husband the items marked "his", plus an appropriate share of the items marked "theirs". It must then go through the same process in relation to the wife. Having completed this exercise, the court must finally look at the overall result and again, applying the criteria set out in s 7(1) of the Act, consider whether the objective has been achieved of placing the parties in the position they would have been in had the marriage continued, insofar as this is reasonably practicable and just, having regard to the conduct of the spouses."

In this instance, there is no third lot that falls into "theirs" by virtue of such property being jointly registered. There are only two categories for consideration that is his and hers.

In this case before me the parties have been married for at least forty seven years. The important point is that whilst the parties separated for whatever actual length of time it was, theirs was a voluntary separation for whatever reasons that had made living together untenable at the time. They did reconcile. The vinculum of marriage therefore remained even if there were periods when strictly speaking they were not working or living in partnership.

Given their ages, they can both safely be said to be advanced in age. She is retired and has been away from formal employment since 2008 when she returned from the United Kingdom where she worked as a nurse. The plaintiff says doctors never retire. He owns surgeries. Although she is said to be letting out her own property, the exact nature of this income stream was not elucidated given that she told the court her children are developing the properties. They will both continue to have obligations in their old age regarding expenses such as water, electricity, food and medical care for themselves. Their children are majors. He being a medical doctor and she having been a nurse their standard of living has been high or at least very comfortable.

It is against the backdrop of all the above considerations that this court must engage with the core issues of whether it is necessary at all in this case as permitted by s 7 (1) (a) of the Matrimonial Causes Act, to transfer any asset from the plaintiff to the defendant. What is beyond the distributive arm of the court in terms of s 7 (3) of the Matrimonial Causes Act are only those assets which are proved to have been acquired by a spouse whether before or during marriage by way of inheritance. Also excluded is property, which according to custom is supposed to be held by a spouse personally. Property that has sentimental value is equally off limits otherwise all other property is within reach even if the title is on one spouse's name only. Plaintiff's claim to all the property he acquired and which is in his name is fundamentally based on the fact that he has title. Secondly, it is based on financial considerations that he was the principal bread earner. However, s 7 (2) which allows the court to transfer property from one

spouse to another regardless of the fact that it may be registered in one spouse's name only, vitally guides the court that marriage is not in the form of an individual enterprise. It is a partnership whilst it lasts and on its dissolution.

As explained in *Fadzayi Usayi v Leonard Usayi* SC 22/24:

“The sooner married couples realise that marriage is not a business arrangement where they come together in matrimony for convenience to acquire property separately while keeping receipts and other documents for future use in court, the better for everyone. The courts recognise that parties come together in Holy Matrimony for their common good and the good of their children. It is both the direct and indirect input of the spouses which leads to property acquisition.”

In reaching an equitable decision, s 7 (4) (e) is also profoundly critical in so far as it permits considerations of direct and indirect contributions so that due credit is given where necessary.

For the court, whilst it is the case that all factors outlined in s 7 (4) of the Matrimonial Causes Act matter, it is significantly the analysis of those direct and indirect contributions in relation to a property in question that determine whether it took on the character of matrimonial property despite being in the name of one spouse only. It is safe to say that where one party has title, but there has either been some financial contribution from the other spouse or, alternatively, there has been some mingling of an asset with indirect contributions from the other spouse, an asset takes on the character of a marital asset as opposed to being a sole asset of a spouse. This element of intermingling is the significant impact of direct and indirect contributions on property owned by one spouse against which each case is looked in relation to the totality of its factual spectrum. Title alone does not exclude a claim.

Turning to the property that the defendant lays claim to from the plaintiff as referred to trial in the pre-trial conference minute, S G Rocklands (Beatrice) is a 12-acre plot, which the plaintiff acquired in 1979. It is the very first property acquired. It is not the defendant's argument that she contributed financially but rather that she identified the property in the newspaper and the plaintiff purchased it. She said though they put a grinding mill whilst he said it is still largely undeveloped, she said that it generates income as there are buildings being let. It is a source of income presently benefitting the plaintiff only. I see no reason why she would lie that it generates income as she in fact lays claim to the property and did so in her plea. I will return to this property later.

As regards Stand 15A 6th Ave Park Town Harare, this is where there is surgery. The property was improved by building accommodation for a doctor. Her role, from her description, was to assist in sourcing the building materials for the expansion project. Again,

the major financial contributions were the plaintiff's. It is a product of his professional qualification and industry. He ran that surgery although the defendant and her third witness are to be believed when they say she assisted by working in the maternity wing there. He should keep that professionally based asset as the defendant's indirect contributions can be taken into account in other ways once all the properties are considered.

Stand no 1- 47 Porter Road Waterfalls is what she says is their matrimonial home. It is where she currently stays. The plaintiff resides at the farm. Whilst the plaintiff says they never had a matrimonial home because they hopped from town to town in his professional career, it does not mean they had no place that they called home. Materially, when he asked her to leave the farm it is to this asset that he sent her to live as their home. Critically, even in his declaration, he initially had no problems at all in giving her this property that he himself described as their matrimonial home. She should indeed keep it with the household property, as was initially his intention in his pleadings which were not amended.

Her claim to a half share of Gorali farm, which was acquired in 1984, is in the first instance based on the role that she played in managing the surgery that he had in Chitungwiza when he left for studies in the United Kingdom in the early 1980s. The money from the surgery is what had been used to acquire the farm. Her contribution was indirect in nature. She produced evidence of her managerial role in the form of correspondence between them.

Her claim is secondly based on the role that she played in running the operations there, in particular her description of how the livestock was built up, supervising workers and building the school. She also claims 100 cattle for her endeavours. As far as he co-opted her to run the farm, there was significant co-mingling in this particular asset in that she brought on her labour. Her two witnesses also corroborated her presence and role at the farm.

Significantly though, the major growth on the farm took place in the years when she was away according to her own witness. In other words, the farm flourished most at the time when she was away. The plaintiff added to the growth of that asset during that time. His individual industry over the years that she was away should not be ignored if equitable distribution is to be achieved. Even though they remained married, they were not in partnership in the sense of joint endeavours at least for the years that she was away. Whilst assets of the spouses are looked at as at the time of divorce and not the time when the parties separated, it would make little sense in looking at direct and indirect contributions to turn a completely blind eye to those periods in a marriage when there may have been no common endeavour. This is particularly so given that the partnership theme pervades the concept of marriage. It is not the

paper that forms the partnership but the union itself and how parties relate to each other within it. Tellingly she did not lay claim to Gorali farm in her pleadings but only at the pre-trial conference. What she claimed in her pleadings was a share to the cattle. In my view, equitable distribution would suggest that on balance, the plaintiff ought to retain Gorali farm.

Turning back to the SG Rocklands plot and defendant's claim for one hundred cattle, it seems only fair that the defendant should also get an asset with an income stream given the indirect contributions that she made to Gorali farm and to the surgery. Her age also necessitates that she has a steady income stream. The plaintiff has 500 cattle. A claim by the defendant of 100 cattle is not unreasonable given the length of their marriage and that at the time they voluntarily separated they had already been married for over twenty years.

In the result regarding the property under dispute, I make the following order:

1. The plaintiff is awarded the following:
 - i) Stand 15A 6th Ave Park Town, Harare
 - ii) Gorali (Chikwava) Farm Beatrice
 - iii) 400 cattle

2. The defendant is awarded the following
 - i) S G Rocklands –Beatrice 12 acres
 - ii) Stand no 1-47 Porter Road Waterfalls
 - iii) 100 cattle

3. The plaintiff shall take the necessary measures to transfer SG Rocklands Stand no 1-47 Porter Road Waterfalls to the defendant within a period of six months from the date of this order.

4. In the event that of the plaintiff's refusal to cooperate in signing transfer papers with respect to property mentioned in para 2(i) and (ii), the Sheriff of the High Court is authorised to sign the necessary papers for transfer in terms of this order.

5. The parties shall share the transfer costs.

6. Each party shall pay their own costs.

Freddy Michael Attorneys, plaintiff's legal practitioners.

Legal Resources Foundation, defendant's legal practitioners.