NGEDWA MUPAKO
versus
ELIZABETH MUPAKO (NEE TOM)

HIGH COURT OF ZIMBABWE
TSANGA J & MAXWELL J
HARARE, 4 October 2022 & 26 April 2023

Civil Appeal

J Wood, for the appellant
R T Muzonzini, for the respondent

TSANGA J: This appeal is against the lower court's decision in the distribution of matrimonial property following the dissolution of a registered customary law marriage. The parties married in 1989 and had been living separately as husband and wife since 2011. Whilst divorce proceedings commenced in 2015, their matter was finalized in 2021. The order granted by the court handed down on 8 November 2021 reads as follows:

"1. A decree of divorce be and is hereby granted.

2. The movable property is to be sold in execution and the net proceeds shared equally between the parties.
3. The immovable property being Stand 27, Block 3799, Old Windsor, Ruwa, is hereby apportioned in the ratio 2:3 between the plaintiff and the defendant respectively, with the defendant having the option of buying out the plaintiff within a period of sixty days. The property is hereby ordered to be evaluated by an evaluator agreed to by the parties failing which the clerk of court will assign an evaluator for the parties.
4. The immovable property being Stand 2147, Old Tafara is hereby apportioned in equal shares between the parties at the ratio of 1:1 with the option of each party buying out the other within a period of 60 days from the date of this order.

(i) The properties in para 3 and 4 are to be evaluated within 30 days of the granting of this order by an evaluator agreed to by the parties' failure of which the clerk of court will assign an evaluator for the parties.
(ii) The plaintiff and the defendant are to meet the costs of evaluation in equal shares.

(iii) Each party is to bear its own costs. ‘

The appellant is the respondent's now former husband. He was the defendant in the court below.

PROCEEDINGS IN THE COURT *A QUO*

Regarding the movable property which the court said should be sold by the appellant and the proceeds shared equally, the plaintiff in her declaration had listed the items to include general household items such as beds, wardrobes, television, cooker, desks chairs among others. The record, however, shows that both the husband and the wife abandoned the claim to the household movable property.

In her declaration the respondent had also laid claim to her share of farm animals at the appellant's rural home. She wanted 11 cattle, 10 goats, 30 pigs, 11 guinea fowls and 18 chickens representing her half share of the animals at the farm. In her oral evidence she had told the court she had no idea how many were still there. In the event of them having been sold she had laid claim to her share of their value.

His submission was that these animals were no longer in existence. All had perished either through natural causes or theft at the hands of their former employee. The court, however, was not satisfied that he was telling the truth that no animals currently existed as the cattle card for example appeared to have three very different year dates. He had also disputed the number of animals that were ever on the farm. Whilst noting in the judgment that the respondent's version on the livestock was more probable, the court's conclusion on this issue was as follows:

> "The court noted that Defendant could have benefited from the livestock and other movable property belonging to the parties. However the proof was not tendered to the court. There is no corroborative evidence from other witnesses or documentary evidence which the court can rely on."

It was against the above reality that the court had ordered that the unspecified movable property be sold and shared between the parties.

Turning to the Ruwa property described as Stand 27 Block 3799 Old Windsor Ruwa, it was not in dispute that the appellant acquired the property as a vacant stand without the knowledge of his wife some time in 2001. She had, however, found out about it. It was not in dispute that she

has been working outside the country. Her evidence was that after the acquisition of the stand and it lying dormant, they had decided to develop the property in 2007. Her further evidence, which the appellant disputed, was that she had executed a power of attorney in his favour, authorising him to be a signatory to her account so he could withdraw money for the construction of the house. That power of attorney had indeed been produced as evidence in the lower court. What was not placed before the court was the actual evidence of the withdrawals from her account made on the strength of the power of attorney. But an explanation had been tendered for this failure, it being that with the effluxion of time the bank had since destroyed those records which it only keeps for a period of ten years.

As to the tune of her contribution towards the construction of the home, her averment was that she had contributed 100% to the endeavour. The lower court found her evidence credible as to her contribution to the construction of the house on the property and came to the conclusion that the property fell into the category of "their property" thereby allocating her a share of 40%.

As for the Southlea property described as Stand 7254, it was not in dispute that the respondent equally acquired this stand without the knowledge of her husband. The record shows that she presented various explanations on this property. In responding to the defendant's counterclaim in reconvention on page 102 she said the stand was meant for their daughter and was pending title registration in her name. Then in being cross examined at the hearing she said she had not mentioned the property because there had been a double allocation and she was supposed to be given another stand. (See page 26 of the record). In her summary of evidence in preparation for the trial she had stated that the appellant who was the one resident in Zimbabwe had failed to keep the instalment payments up to date and the stand had been forfeited. In being cross examined, she had said that the reallocated stand is there but had not yet been shown to her by Odar Consortium who sold the stand to her. The court concluded as follows:

> "Pertaining to the Southlea property it is apparent that it is not fully paid up and there is no contribution from the defendant whether directly or indirectly. It falls into the category of her property."

There was also a property in Tafara which as the order above shows the parties were ordered to share equally. It is not the subject matter of any dispute in this appeal. In the case of all

the allotted properties both were given 60 days to buy out the other. The court did not say what would happen in the event of failure by either to effect a buyout.

Stemming from the above proceedings and outcome in the court *a quo*, the grounds of appeal are as follows:

1. That the court was biased towards the respondent.
2. The court misdirected itself in ordering the sale in execution of unidentified movable assets.
3. The court misdirected itself in granting respondent a share of the Ruwa property more particularly in:
    a. Finding the property was "their" property.
    b. Finding the respondent had contributed to the construction despite the absence of evidence of any such contribution.
    c. Speculating on the extent of the contribution.
    d. Finding that the parties had moved into the property together when respondent was working outside the country.
    e. In failing to find the appellant had taken care of the property since their separation in 2011 which the court found to have taken place some 11 years before the trial.
    f. In failing to attach significance to the fact that the respondent was purchasing property for herself without the appellant's knowledge even before the Ruwa property was under construction.
4. The court *a quo* erred in granting the respondent more than a nominal share of the property and in failing to give the appellant an equivalent share of the Southlea Park property.
5. The court erred in fixing 60 days as the period within which the one party should buy out the other out of a property and failing to determine what would happen if they failed to do so.

Notably whilst the appellant appeals against the court's order on movables in the relief sought he merely seeks a rewording to indicate that the movable property "which is to be identified by the defendant" be sold in execution. Regarding the Ruwa property his prayer is that it be awarded to him or alternatively that the respondent be awarded only a 10% share. Regard the Southlea property his prayer is that it be retained by the respondent or alternatively he be awarded a 10% share. As for the time frame in buying out the other he seeks that the time period be extended

to 180 from the date of the appeal failing which it is to be sold by an estate agent agreed to by the parties and the net proceeds divided equally between them in the shares sought.

THE SUBMISSIONS BY THE PARTIES

Regarding the first, third and fourth grounds of appeal the evidence of bias was said by appellant's counsel to emanate from the unjustified findings of credibility on the part of the respondent by the court regarding her contributions to the Ruwa property. In the absence of records, the figure of 40% as being her share of the property was said to be a mere thumb suck. The respondent was also said to have been untruthful on the Southlea property and yet the court turned a blind eye to the fact that she was trying to conceal the existence of that property. In particular Mrs *Woods* drew attention to pp 221- 222 of the record being email exchanges between the respondent and her lawyer in which the lawyer said the best position would be to deny purchasing the stand. She also pointed to the fact that the respondent gave eclectic statements on the exact situation regarding the property. Also, despite accepting that she had not finished paying for it the court had still regarded it as her property. Furthermore, whilst the court accepted that the bank may indeed have destroyed records pertaining to alleged withdrawals, she argued that the respondent would at least have had her own bank statements from the bank which she failed to produce in support of her contribution to the Ruwa property. Moreover, when she visited Zimbabwe she was not staying at the property. All in all her submission was that the property should have been regarded as his particularly as theirs was hardly a normal marriage relationship. They had been married for 27 years but had been separated for 11 of those years. Having been given half of the value of the property in Tafara and 40% of the Ruwa property the argument was that she should not have been given 40 % of the value of the Ruwa property since in reality the appellant admitted that she does have the Southlea property. She also argued that the rejection by the court of appellant's explanation of the demise of the livestock had been unfair.

Regarding the second ground of appeal, appellant's counsel also emphasized that the movable property to be sold had not been identified and that this was a misdirection as a sale in execution cannot be of unidentified property. Regarding the fifth ground of appeal, the order of

the court a quo was the time frame for the buyout was said to be too short and the order did not state what would happen in the event of the buyout not being exercised within the 60 days.

Counsel for the respondent Ms *Muzonzini* submitted that the appellant was alleging bias because the outcome was simply not as he had hoped. Regarding the sale of movables, her submission was that the appellant was challenging the distribution of property he refused to disclose. As for the Ruwa property, she argued that there was nothing in the evidence that showed that he was entitled to the whole property. Turning to the Southlea property, she maintained that there was nothing to distribute given the ongoing issues with the sellers regarding that property. As for the time frame for selling the property, this was argued to be reasonable on the grounds that the case commenced in 2015.

ANALYSIS

Grounds 1, 3 and 4: Bias in the distribution of the Ruwa and Southlea Properties

The first, third and fourth grounds of appeal fall to be considered together in the sense that the bias alleged in the first ground of appeal is said to essentially emanate from the decisions that form the third and fourth grounds of appeal. The third ground of appeal alleges bias in the distribution of the Ruwa property whilst the fourth ground alleges error in granting her more than a nominal share whilst not giving the appellant a share of the Southlea property.

> *"*Bias in the sense of judicial bias has been said to mean 'a departure from the standard of even handed justice which the law requires from those who occupy judicial office'…what the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be manifest to all those who are concerned in the trial and its outcome,……"

This definition has been quoted with approval in cases such as *Mcmillan and Ors* v *Provincial Magistrate Harare* 2004 (1) ZLR 17 (H) at p 20G-21B; *Stella Nhari* v *Zimbabwe Allied Banking Group Limited* SC 6/20; and *Samuel Kufandada* v *Assistant Commissioner Wilson Marecha* HB184/22.

In this instance the displeasure with the court is that it described and treated the Ruwa property as theirs. It was not in dispute that he acquired the stand without his wife's knowledge.

The starting point regarding the Ruwa property is that since it was registered in his name, he therefore he had real rights to it. In other words, its description ought to have been that it was "his" prior to any tempering with it. However, as stated in *Takafuma* v *Takafuma* 1994(2) ZLR 103(S) a court can decide how much of a full share can be taken away from a full owner in apportioning assets on divorce in order to do justice between the parties depending on the circumstances of the case. Whilst this appeal court agrees that the description of the property ought to have been that it was "his" since he held real rights to it, however, it is less inclined to find error in the court's final decision in granting the respondent a 40% share value in it since there were contextual reasons for arriving at that conclusion. These rested on the finding that whilst the appellant had acquired the property as a vacant stand registered in his name, the respondent on the other hand had contributed to the development of that property through her financial contributions in constructing the house. In essence the court justified taking away ownership of 40% from him because of its finding that the respondent had contributed to the actual development of the property. The descriptive error in regarding the property as theirs does not take away the right of the court to take away a share of it where justified even if the property is "his".

As for the alleged basis in arriving at that 40 % contributory share as a thumb-suck figure, the respondent's averment was that she had contributed 100% to the development of that property. To support her claim, she had certainly provided a power of attorney in favour of the appellant authorising him to withdraw funds from her account. His signature was on it. The power of attorney also coincided with the period of construction or development of the property in 2007 it having been vacant for several years following its acquisition. No evidence had been placed before the court to rebut the evidence that the power of attorney had indeed been given. If indeed it was not his signature one would have expected that he would have brought in a hand writing expert to prove that the power of attorney was a forgery. Notably the power of attorney indeed coincided with the period of construction of the house on the stand. The court's finding of a 40 % entitlement to that property was premised on the respondent's submission that she had contributed 100% to the improvements.

Appellant raises the issue that even if the respondent's bank was unable to avail records due to a time lapse the respondent ought to have produced her own bank records. The trial was

taking place some fifteen years later so it is indeed very possible that she too would not have those records. Whilst the respondent had not produced banks statements to show withdrawal, the lower court found that she had rendered a plausible explanation from her failure to do so.

Notably the appellant himself did not produce evidence that he was solely responsible for the construction from his own funds to counter the averment by the respondent that she had funded the construction. It was ultimately therefore a question of credibility as to who the court believed. The judgement deals at length with the defendant's lack of credibility on almost every aspect of property sharing. Issues of credibility are the province of the trial court.

> "The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion."

See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (SC) *at* p *670.*

This is certainly not one of those cases where it can be said that the court's findings lacked logic especially when the appellant was not an honest witness. There is no merit in the ground of appeal that the court was biased or that it erred in the manner it dealt with the Ruwa property.

Turning to the failure to share the Southlea property which the court labelled as "hers" the issue is whether any value of it ought to have been taken away from her in the same manner that the court did with the Ruwa property. There is a distinction between the two properties which explains the court's handling of the properties. The Ruwa property was bought by the appellant as a vacant stand and the court's finding was that the respondent definitely contributed significantly to the improvements. Bearing in mind that the purchase was by the appellant, he retained the greater share of 60%. The Southlea property at the time the trial was concluded was yet to be transferred as a vacant stand. The court found that she presently holds no title amidst the disputes to be sorted out with the sellers of that property.

Whilst the respondent's lawyer at the time of pleading may have plotted a denial of the Southlea property, the record shows that this was not the case at the trial. What is not in dispute is that at the trial she fully admitted to having purchased the property even though she had not yet

taken full ownership of the stand in question. Indeed, there were a number of explanations regarding the property but it does not mean they were not true or mutually exclusive of each other.

But even if she had held title at the time of the trial, it would have made no difference to the final outcome in the distribution of the property. This is because the Ruwa property, by the time of divorce, was now a developed property to which court's finding was that she had made very significant contributions to its development. The court gave her 40% for her contributions. Bearing in mind that the appellant had acquired the stand, he got the larger share because of that appreciation that he was the purchaser of the stand.

In this instance the stand was yet to be transferred and in any case the respondent will be the one responsible for its development without the appellant's input. On that basis there is a clear distinction as to why the court ordered a sharing of the Ruwa property and why it could not do so with respect to the Southlea property since the appellant contributed nothing to it. The court was dealing with a developed piece of land in the appellant's case as opposed to an undeveloped stand in the respondent's case which has not yet even been transferred. It was not available for distribution. The fourth ground therefore equally lacks merit and is dismissed.

Ground 2: Sale of unidentified property

It would be difficult to execute the judgment with the movables in question not having been specified clearly. In any event, the reality as captured in the lower court's judgment is that both parties abandoned their respective claims to the household movable property. The court was also clear that it could not deal conclusively with the issue of livestock for lack of evidence. The issue of household movables became a non-issue for decision once the court itself had acknowledged in its judgment that both parties abandoned their claims against the other. Respondent as plaintiff was clear that the appellant can have everything. The respondent who works in the diaspora was no longer interested in it on account that the property which the appellant had been using in the decade since their separation in 2011 was in storage in a cabin with no roof. It had been affected by the weather. Whilst divorce summons were issued in 2015 their divorce was finalized in 2021. The appellant equally had no interest in it and said the property and she too could have it.

For the avoidance of doubt the order should simply reflect that the appellant is to have the household movables that are in his possession.

Ground 5: Reasonableness of the buyout time frame

Turning to the time frame for buying each other out, the divorce had been pending since 2015 and it was known by then to the appellant what the respondent was laying claim to vis a vis the immovable properties. Given that the order stated that the property was to be evaluated within one month and then gave the parties two months to buy the other out, it cannot be said that in the overall context, the time frame was unreasonable. As to what would happen in the event of the failure to buy each other out, it stands to reason that where the court has allocated the property in specified ratios and neither the parties can buy the other out, then that property is to be sold and the proceeds shared pro rata as per the court's allocation. For the avoidance of doubt the order of the court below can be corrected to reflect that reality.

In the circumstances:

1. The appeal succeeds in part with each party paying their own costs.
2. The order of the court *a quo* is corrected and substituted to read as follows:
    i) A decree of divorce be and is hereby granted.
    ii) The appellant is granted the household movable property in his possession.
    iii) The immovable property being Stand 27, Block 3799, Old Windsor, Ruwa, is hereby apportioned in the ratio 2:3 between the plaintiff and the defendant respectively, with the defendant having the option of buying out the plaintiff within a period of sixty days. The property is hereby ordered to be evaluated by an evaluator agreed to by the parties failing which the clerk of court will assign an evaluator for the parties.
    iv) The immovable property being Stand 2147, Old Tafara is hereby apportioned in equal shares between the parties at the ratio of I:1 with the option of each party buying out the other within a period of 60 days from the date of this order.
    v) The properties in paragraphs ii) and iii) are to be evaluated within 30 days of the granting of this order by an evaluator agreed to by the parties' failure of which the clerk of court will assign an evaluator for the parties.
    vi) The plaintiff and the defendant are to meet the costs of evaluation in equal shares.

vii) In the event of the parties failing to buy each other out the properties in paragraph ii) and iii) shall be sold on the open market and the proceeds shared between the parties in the stipulated proportions.

viii) Each party is to bear its own costs.

TSANGA J:……

MAXWELL J, agrees:……

Dhlakama B Attorneys, appellant's legal practitioners
Coghlan Welsh and Guest, respondent's legal practitioners