PEPUKAI MUSARIRI

versus

MUSIWA MUTAVAYI

and

BLESSING JIMMY KUPARA

and

NORTON TOWN COUNCIL

and

REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

MUSAKWA J

HARARE, 12 June 2009 and 21 October 2010

Family Law Court

Civil Trial

Mr *C. Chipere*, for plaintiff

Mr *Mhlolo*, for first and second defendants

MUSAKWA J: Following the plaintiff's and the first defendant's divorce in the Magistrate's court at Norton, they were both awarded equal shares in house number 4334 CABS, Ngoni, Norton. The first defendant subsequently sold the house to the second defendant.

The plaintiff is seeking an order nullifying the agreement of sale that was concluded between the first and the second defendants or alternatively, that the agreement is valid only in respect of the first defendant's half share. On the other hand the second defendant, apart from

contesting this action also filed a counter-claim in which she is seeking the plaintiff's eviction from the premises as well as the payment of holding over damages.

The plaintiff and the defendant had been married for twelve years. Upon their divorce in 2006 the court ordered as follows-

"1…….

2…….

3. That distribution of property be shared as follows:

i. Plaintiff to get 50% of the matrimonial home No 4334 Cabs Norton…….

ii. ……..

4. ……."

The plaintiff testified that she only got to know that the house had been sold after she was served with a notice of eviction by the second defendant in March 2007. She denied ever making arrangements for her share of the proceeds of the sale to be deposited in her sister in-law's account. It was her testimony that the first defendant used to deposit money for her use into that account when he was working in Bulawayo. This evidence was meant to explain how the first defendant got details of the account. The plaintiff also conceded that the house was registered in the first defendant's name.

Mable Dominica Tudu, the plaintiff's sister in-law confirmed that she is the holder of a bank account with ZB Bank, Angwa Street branch. She stated that she had no idea how the money was deposited into her account. She also had no knowledge of how the first defendant got details of her bank account. However, she confirmed that in 1994 the first defendant used to deposit money meant for the plaintiff in her account. She had last communicated with the first defendant between 1999 and 2000.

The plaintiff is said to have subsequently informed her that the first defendant had deposited money into her account. This was in September 2008. Although she queried why the money had not been paid directly to the plaintiff she did not verify with the bank. She said she

did not check with the bank because of the prevailing hyperinflation and the fact that she used to receive money form her brothers who were based in South Africa. However, the remittances from her brothers were not done on a monthly basis. She could not detail the amounts she used to receive from her brothers.

The first defendant testified to the effect that following their divorce he consulted on the sale of the property. This culminated in the second defendant being secured as a buyer. He subsequently went with the second defendant to view the house and found the plaintiff present. The plaintiff is said to have expressed her displeasure and this was on 19 February 2007.

The plaintiff refused to go to the agent's office as she said the house was not for sale. A selling price of Z$30 000 000 was agreed upon. After the money had been deposited into his account the first defendant withdrew the agent's commission. Thereafter he showed the plaintiff the balance. The plaintiff made her calculations and came up with a figure of Z$13 887 500 as being her share.

The first defendant advised the plaintiff that he could only transfer her share electronically. He even suggested that the plaintiff open an account with Beverley Building Society in Norton but she declined as she said the process was cumbersome. The plaintiff then called her sister in-law in the first defendant's presence and was given an account number. The first defendant asked the plaintiff to clarify with her sister in-law which names she was using. That is when the plaintiff was told to use the name Tudu. Since the bank's branch was not indicated another phone call was made and the branch was given as Angwa Street. On 26 February 2007 the first defendant drove to Harare and made the transfer from Beverley Building Society. Thereafter he agreed with the plaintiff to vacate the house by 13 April 2007.

The first defendant was later advised that the account into which he made the transfer was erroneous. He went to the bank to verify the details and noted the anomaly. A second transfer was then made on 7 March 2007. The new account number was furnished to him by the plaintiff. He also stated that he advised the plaintiff that he had deposited the money into her sister in-law's account.

Christina Mazuru testified on how she concluded the agreement of sale with the first defendant and how payment of the purchase price was done. She also explained that she visited the property in question in order to view it. She saw the plaintiff and they exchanged greetings. Thereafter she proceeded to view the house. After making payment she gave the first defendant up to the end of March to vacate the property. According to her she did not consider the purchase price low because when she enquired from the bank teller how much had been deposited by her daughter, she was referred to the bank manager.

Before the second defendant assumed occupation of the property she was served with summons issued by the plaintiff from Norton Magistrates' Court. She and the first defendant attended court where the plaintiff's case was dismissed. It would appear that the plaintiff had sought an interdict to stop the sale of the house but that was *fait accompli*.

It was during the second defendant's cross-examination that she disclosed entering into the agreement of sale on behalf of his daughter. The daughter, Blessing Jimmy Kupara is based outside the country.

Counsel for plaintiff's written submissions make no reference to any case law. This does not assist the court in resolving any legal issues. Counsel cannot limit their addresses to a discussion of the facts without applying relevant authorities to the facts.

On the other hand counsel for defendants submitted that the rights between the plaintiff and the first defendant are personal rights which cannot bind third parties. In this respect reference was made to the cases of *Muzanenhamo and Another v Katanga and Others* 1991 ZLR 182 (S) as well as *National Planning Bank Ltd v Ainsworth* (1965) 2 All ER 472, (1985) AC 485.

It was further submitted that it is not good enough for the plaintiff to claim that she has a right to the property as a former spouse of the first defendant or that the second defendant had knowledge that she had an interest in the property. There has to be proof that the property was sold in order to defeat the plaintiff's rights or that it was not sold for value to the second defendant. In this respect reference was made to the cases of *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261 and *Maponga v Maponga* 2004 (1) ZLR 63 (H).

There is a plethora of authorities regarding the rights of a wife to a house that constitutes matrimonial property. A great number of such authorities have criticized the law as it is heavily tipped in favour of the husband where the property is solely registered in his name. By far the majority of such decisions are by MAKARAU J.P (as she then was) and amongst them are *Mapaonga v Maponga* supra, *Chivise v Dimbwi* 2004 (1) ZLR 12 (H), *Philemon Munomurwa Semwayo and Esther Semwayo v Charles Chatara and Rega Chatara* HH 48-07 and Muswere *v Makanza* HH 16-05. Whilst upholding precedent as enunciated in *Muzanenhamo*'s case MAKARAU J.P had this to say in *Maponga*'s case at p 69-

"It is hoped that a future court will venture to suggest that the bedrock upon which the principles that govern the rights of wives to matrimonial property is outdated and that the principles have long outlived their mediaeval purposes.

I am shackled to the mediaeval chains by precedent."

In *Muzanenhamo and Another v Katanga and Others* supra the parties were estranged. Prior to the filing for divorce by the wife, the husband sold the matrimonial home that was registered in his name to the appellants. The appellants sought to enforce the agreement but that application was dismissed by the High Court. On appeal the decision of the High Court was set aside. In upholding the appeal McNALLY J.A had this to say at pp 185-188-

"Perhaps one can begin by reminding oneself that ownership and possession are two different things. A landlord owns, a tenant possesses. Possession by the tenant does not prevent the landlord from selling. The purchaser may take ownership subject to the lease. Ownership and possession may reside in two different people simultaneously. I appreciate that the wife is not a tenant. But her position is closer to that of tenant than to that of owner.

It is important therefore to determine the nature of Mrs Katanga's right in the property.

She does not claim ownership. She claims two things. First, a right of occupation based on the spoliation order and alternatively on her right as a wife to occupy the matrimonial home. Second, a right to claim transfer of the stand to herself in the division of matrimonial assets on divorce, by virtue of the provision of s 7 of the Matrimonial Causes Act, 33 of 1985.

Her right of occupation based on the spoliation order is a personal right against Mr Katanga. He was the other party in those proceedings. The Muzanenhamos were not. So it seems to me there are three questions to be answered in connection with her occupation of the stand:

1. Can the Muzanenhamos evict her in the face of the spoliation order?

2. Can the Muzanenhamos evict her in the fact of her claim to a right of occupation as a wife?

3. Can the Muzanenhamos evict her or claim transfer to themselves in the face of her claim, in the matrimonial proceedings, to transfer of the house into her name?

The first question was not dealt with in argument before us. Certainly it seems clear that the order of 16 December 1987 (the spoliation order) is not before us by way of appeal. We cannot interfere with it. Particularly we cannot, as requested, delete the word "permanently" from the order then made, however anomalous that word may be.

On the other hand there is no doubt that the spoliation order regulates rights as between Mr and Mrs Katanga. It is not an order binding as against the Muzanenhamos, who were not parties to that action. It gives Mrs Katanga no more than a personal right as against her husband.

It may be argued that the Muzanenhamos were aware of the dispute between the Katangas and knew that she would resist the sale of the house to them and any attempt to evict her. I accept that this is true, but I do not see any basis for saying that in consequence the spoliation order is binding on them.

LORD UPJOHN made this point very firmly in National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472; [1965] AC 1175 (HL) at 485G when he said:

"The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition; it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So, as a matter of broad principle, I am of the opinion that the rights of husband and wife must be regarded as purely personal inter se and that these rights as a matter of law do not affect third parties."

He made it clear that this applied whether or not the third party was aware of the dispute.

I conclude therefore that if the other problems can be overcome, the mere existence of the spoliation order is no bar to an order of eviction in favour of the Muzanenhamos.

No justice will, on the face of it, be done to her by allowing the transfer to go through. And since her attempt to stop the transfer is based on equity alone, a finding that equity is satisfied if the transfer to the Muzanenhamos takes place is fatal to her cause. It might have been different if he had been attempting to defeat her claim for relief in the matrimonial proceedings. But I do not believe that a wife can raise such a claim just because the husband is disposing of an asset. There must be some evidence that he is disposing of the asset "at undervalue to a scoundrel, the accomplice of the husband" (Chhokar v Chhokar 1984 FLR 313), or that in some way he is attempting to defeat

her just rights. In England, under their far more complex and comprehensive legislation, the test is "Am I satisfied that the disposition was made with the intention of defeating the wife's claim for financial relief?" If the answer is "no" as it must be here, the court will not stop the disposition. See generally Rayden & Jackson on Divorce Vol I, 15 ed pp 886-7 and the Noter-up to page 887.

I conclude therefore that Mrs Katanga has not shown any equitable consideration which would or should cause the court to intervene on her behalf to stop the prima facie lawful wish of Mr Katanga to sell his property to the Muzanenhamos.

Once it is accepted that there is no equitable basis for denying the husband's prima facie right to transfer the property registered in his own name, the other questions resolve themselves relatively simply.

There can be no proper basis for the Registrar of Deeds to regard the ruling of 16 December 1987 as a ruling to ownership. It is a ruling only in relation to possession or occupation and a ruling only as between Mrs Katanga and Mr Katanga. The interdict does not prohibit transfer either expressly or by necessary implication. The Registrar has, as I have said, made a report in which he simply notes that on the issuing of the rule nisi which led to the order of 16 December 1987 "an examiners caveat was noted pending determination of the case". He makes no further submissions and concludes "I have no objection to the application (by the Muzanenhamos) and I would abide by the findings of this Honourable Court ".

I turn secondly to consider whether she may have a right of occupation arising from her status as a wife. This is always a difficult problem for the courts to solve. See for example Jackson v Jackson [1971] 3 All ER 774 (CA); Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 (2) RLR 261 (A) and Owen v Owen 1968 (1) SA 480 (E).

It is essentially a matter of equity. The courts will intervene where, for instance, the husband sells the house as part of a policy of harassment arising out of divorce proceedings. Here that is not the case. He had been transferred to Mutare and had acquired a property there. He sought to sell the Harare property long before the divorce proceedings began. As the then Chief Justice said in the Cattle Breeders case, supra, at 267E:

> "A long line of cases seem to have laid down the proposition that even if the husband may be the defaulting party, he may eject the wife from the matrimonial home, provided he offers her suitable alternative accommodation or offers her the means of acquiring such suitable accommodation."

Here the husband has offered her half the net proceeds of the house if the sale and transfer is allowed to go through and if she vacates the property. I do not see this as a case where equitable considerations demand that she be allowed to stay on in occupation of the stand.

The final question for us to decide is whether she can prevent transfer of the property into the name of the Muzanenhamos?

It seems to me that her claim to stop transfer because of the possibility that she might succeed in obtaining transfer herself as a result of the divorce proceedings, is a shadowy claim indeed. The power of the court under s 7 of the Matrimonial Causes Act is a discretionary and equitable power. Stand 964 is not "the matrimonial home". That home was established in Mutare after the husband was transferred there and she joined him. She claims he drove her out, but nonetheless, the Mutare property had become the matrimonial home. Stand 964 is no more than a property of Mr Katanga in the proceeds of which she has a potential interest. But it is, as Mr Wernberg puts it, an interest in the nature of a mere spes, a hope. And as I have noted Mr Katanga has undertaken to let her have half the net proceeds on sale (provided she yields vacant possession). That seems to me to satisfy the criterion of equity."

Although the Magistrate's court awarded the plaintiff a half share in the matrimonial home, this did not translate into plaintiff's co-ownership of the property. The rights to the property remained with the first defendant. In other words the plaintiff and the first defendant did not proceed to have the plaintiff's interests registered against the property. The first defendant could dispose of the property without the plaintiff's consent."

In the present case there was no evidence that the property was not sold for value. The first defendant's evidence that the plaintiff worked out her share after deduction of the agent's commission was not challenged. Therefore the plaintiff was satisfied with the selling price.

The plaintiff's consent to the disposal of the property was not required. This is because she did not hold any rights to the property. The court order awarding her a half share of the property does not amount to a conferment of title to the property. The plaintiff and the second defendant should have arranged for cession or transfer of the half share to the plaintiff.

As regards the transfer of the plaintiff's share of the proceeds of sale into her sister in-law's account the first defendant's testimony that this was at the plaintiff's instance was not challenged. It is improbable that the sister in-law, Mable Dominica Tudu did not bother to verify how much money was in her account because she used to receive remittances from her brothers. In the first place Mabel Dominica Tudu did not state that she received such remittances regularly. She could not have been indifferent as not to ascertain her bank balances at any given time as she wanted this court to believe. There is proof that money due to the plaintiff was deposited into Mabel Dominica Tudu's account but for some reason the plaintiff did not access it. That cannot be blamed on the first defendant.

On the other hand the counter-claim by the second defendant is flawed in two respects. Whilst the defendant's plea was filed on 19th June 2007, the counter-claim was only filed on11th September 2009. The plaintiff's plea to the counter-claim was that it was not filed in accordance with the rules as it was filed out of time. Reference was made to Order 18 Rule 121 (1) of the High Court Rules which provides that-

"(1) A claim in reconvention shall be so described and shall be bound and filed with the defendant's plea.
(2) A claim in reconvention shall be governed *mutatis mutandis* by the rules relating to a declaration, including rules 110 and 111."

Therefore on the above rule alone the counter-claim fails. There is also the additional factor that although the counter-claim was instituted in the first defendant's name, she did not actually appear before this court. The only person who purported to testify on her behalf was her mother. However, the mother did not file any power of attorney authorizing her to represent the defendant. In any event, in her testimony the mother did not even touch on the counter-claim in question.

In the result it is ordered as follows-

a) The plaintiff's claim is hereby dismissed with costs
b) The second defendant's counter-claim is hereby dismissed with costs.

Bachi Muzawazi, plaintiff's legal practitioners
Mushonga Mutsvairo & Associates, first and second defendants' legal practitioners