

MOSES MANYERUKE
versus
TAFADZWA MANYERUKE (nee SAUNGWEME)

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 22 and 24 March 2016 and 7 July 2016

Civil trial (Family)

M D Hungwe, for the plaintiff
Defendant in person

MWAYERA J: The plaintiff and the defendant were civilly married to each other on 5 August 2000. The marriage relationship was blessed with three minor children. As from January 2011 to the day of trial 24 May 2016 the parties were not living as husband and wife. The plaintiff issued summons for divorce and ancillary issues on 7 May 2013. The defendant filed an appearance to defend and subsequent pleadings thereto. At pre-trial conference the parties came out with a joint pre-trial conference minute. The parties referred for trial only one issue namely “what constitutes a just and equitable distribution of house No 9 Kuwadza Road, Zengeza 3 Chitungwiza”. The parties agreed that their marriage had irretrievably broken down. They further agreed that the defendant be the custodian parent of the 3 minor children and that the plaintiff was to continue paying maintenance as per the existing magistrate court order. Further the parties agreed on reasonable access.

The parties also agreed on sharing their movable property. From the evidence adduced it is not in dispute that the immovable property which the plaintiff suggests sharing ratio of 80%:20% in favour of the plaintiff is the parties’s matrimonial home. It is common cause the property was purchased by proceeds from sale of the plaintiff’s flat which the latter acquired before marriage. It is apparent that the plaintiff made a direct contribution to the acquisition of the property while the defendant made an indirect contribution. The defendant as a wife and mother, took care of the house and the general cleanliness. She also when employed assisted with the upkeep of the family. It is not in dispute that from 2007 to 2010

the plaintiff was undertaking studies while the defendant was fending for the family. At some stage in the marriage the plaintiff lost his employment and the defendant took care of the household. In so far as the plaintiff is concerned it is common knowledge that he made both direct and indirect contribution. The purchase was from proceeds of sale of his flat and that direct deductions were made from his salary for loan repayment. Worth noting in this case is the fact that both parties are professionals and were working during the marriage. None of the parties is desirous of being given post-divorce spousal maintenance.

The contested issue of sharing of the matrimonial home was not compromised the plaintiff's offer of 20% was not accepted by the defendant who suggested 50% sharing. The court in dealing with the division of matrimonial assets has wide discretion from the reading of s 7 of the Matrimonial Causes Act [*Chapter 5:15*].

Section 7 (1) reads

“Subject to this section in granting divorce, judicial separation or nullity of marriage or at anytime thereafter, an appropriate court may make an order with regard to:

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

“(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all circumstances of the case including the following-

(a) the income earning capacity, assets and the financial resources which each spouse and child has or is likely to have in foreseeable future.

(b) the financial needs, obligation and responsibilities which each spouse and child has a are likely to have ain foreseeable future .

(c)

(d)

(e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and carrying out other domestic duties.

(f)

(g) the duration of marriage and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continues between the parties.” (underlining my emphasis)

From the wording of s 7 and guidelines therein upon considering sharing of property at dissolution of marriage the court is enjoined in its exercise of discretion to look at the wide spectrum of factors. Assets registered in one spouse's name can actually in appropriate circumstances be transferred to the other. What is central in division of property at dissolution of marriage is what is just and equitable division of the property. Both direct and indirect contributions fall into consideration. See *Usayi v Usayi, Shenje v Shenje* 2001 (2) ZLR 160, *Mutengwa v Mutengwa* 2010 (1) ZLR 311 and *Augustine Mutizwa v Jarisayi Madzima* HH611/15.

The underpinning principle being that both the plaintiff and the defendant during the subsistence of marriage made direct or indirect contributions to the wellbeing of the family and each played a respective role as husband and wife and also as father and mother. *In casu* for a period of 11 years they both contributed into the relationship materially, financially and emotionally. The parties assumed equivalent though different roles and duties for the benefit of their marriage and household. There is no justification in seeking to underplay the respective roles. The plaintiff, and the defendant playing different but complementary roles acquired their matrimonial assets inclusive of the matrimonial home in contention. The matrimonial home falls for distribution as outlined in s 7 of the Matrimonial Causes Act [Chapter 5:13]. See also *Gonye v Gonye* 2009 (1) ZLR 232 where Malaba JA (as he then was) clearly outlined what property falls for distribution in a divorce matter. In this case the plaintiff suggested he be awarded 80% while the defendant gets 20% on the basis that the rate of his contribution was higher than that of the defendant. From the circumstances of this case given the periods the defendant was working while the plaintiff was not working and that both contributions brought together made the household be. There is therefore no basis warranting such disproportional sharing as suggested by the plaintiff.

The distribution of property ought to ensure that the parties are in as much as it is practically possible placed in a position they would have been had the marriage subsisted.

The Constitution is the supreme law of this country and it lucidly propagates that spouses owe each other a duty of care during marriage and at dissolution occasioned by death or divorce.

Section 26 of the Constitution is instructive, it states:

“The State must take appropriate measures to ensure that

- (a)
- (b)
- (c) There is equality of rights and obligations of spouses during marriage and at its dissolution,
- (d) In the event of dissolution of a marriage whether through death or divorce, provision is made for the necessary protection of any children or spouses.”

Given the notion of equality on rights and obligations it is only in exceptional circumstances where justice demands that distribution pattern be altered to reflect otherwise. In the circumstances of this case there is no basis and justification for departing from equitable distribution. The circumstances call for 50% sharing of the immovable property.

The parties having agreed on all other issues except the sharing of the matrimonial home. The following order is made. It is ordered that:

1. A decree of divorce be and is hereby granted.
2. The custody of Ruvarashe Manyeruke born 13 July 2001, Anotidaishe Manyeruke born 17 April 2003 and Anesuishe manyeruke born on 3 February 2005 be and is hereby awarded to the defendant.
3. The plaintiff be and is hereby awarded reasonable access by arrangement of the parties on alternative weekends and school holidays.
4. The maintenance of the three minor children named in para (2) above be regulated by the existing Maintenance Order in the Magistrate Court M486/11 as subsequently varied by that Honourable Court.
5. The movable property be shared as agreed by the parties and as outlined in para 7 of the plaintiff's declaration filed of record.
6. The matrimonial home stand number 9 Kuwadzana Road, Zengeza 3, Chitungwiza shall be shared equally between the parties with the plaintiff being awarded 50% share and the defendant is awarded the other 50% share.
7. The property shall be evaluated by an independent evaluator appointed by the Registrar of High Court within 30 days of this order.
8. The evaluation costs shall be borne by the parties at the rate of 50% each.
9. The parties have an option to buy each other out within a period of 6 months from the date of this order.
10. In the event of the parties failing to buy each other out the property shall be sold at open market to the best advantage by an estate agent appointed by the Registrar of the High Court within 30 days from the date of failure by the parties to buy each other out and the proceeds therefrom shall be shared at the rate of 50% each after payment of all sale transaction costs.
11. Each party shall bear its costs.

Kadzere, Hungwe & Mandevere, plaintiff's legal practitioners