

PRICCILAR MUFAMBI (nee VENGESAI)
versus
TAVONGA MUFAMBI

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 07 October 2016 & 14 June 2017

Civil Trial

In person, for the plaintiff
In person, for the defendant

NDEWERE J: The background of this case is that, the plaintiff got divorced from a previous marriage on 14 June, 2012. As part of the divorce settlement, she was awarded Stand 430, Westwood. On 8 December, 2012, she married the defendant. On 13 March, 2013, the couple had a child; Tanyaradzwa Mufambi.

On 29 July, 2013, the plaintiff and her two minor children obtained title to stand 430, Westwood Township as evidenced by the Deed of Grant granted by the Registrar of Deeds on 29 July, 2013 in Harare. So from 29 July, 2013, the plaintiff Priccillar Vengesai and a minor child from her previous marriage, Primal-Musara Lubombo (born 21 June, 2007) and a minor child born from the marriage in dispute, Tanyaradzwa Mufambi (born 13 March, 2013), became co-owners of stand 430, Westwood Township.

On 5 December 2014, the plaintiff issued summons for divorce and ancillary relief.

On 22 January 2015, the defendant filed his plea. He contested the divorce, saying the marriage had not broken down. He also claimed a share of stand 430 Westwood. Strictly speaking, the defendant should have filed a counter-claim, claiming a share of stand 430 Westwood. He did not do so. He simply stated his claim in the plea.

The parties later engaged each other during pre-trial discussions and resolved all the other issues. In a joint pre-trial minute dated 15 November, 2015, they put down distribution of stand 430 Westwood and post-divorce maintenance for the defendant as the only issues for trial.

The plaintiff said the registration of stand 430 in favour of her and the two minor children was done during the subsistence of her marriage to the defendant and with his knowledge and blessings. Although defendant disputed knowing about the transfer, he accepted that the stand now belonged to three people. This means that the defendant's claim in his plea was erroneous from the outset in that he claimed fifty per cent of stand 430 whereas his claim was now limited to a claim from the one third share of stand 430, Westwood. Since he admits in his plea that the stand was acquired before he married the plaintiff and was partly developed, his claim is further reduced by a deduction of the value of the ground and improvements already done.

He said he contributed to the development up to ninety five per cent completion therefore his claim is further reduced by the deduction of another five percent from the value of the developments at completion.

The defendant's claim therefore ought to have been of fifty per cent of the one third share of the plaintiff less the value of the ground and improvements already done and less the five percent of improvements he admittedly did not participate in. It was erroneous for him to claim fifty percent of the whole stand 430 when that stand was now co-owned by two other people. Those two other people are minors and if he intended to claim from them as well he ought to have followed Rule 249 of the High Court Rules and applied for the appointment of curators ad litem for each of them to represent their interests and after that he ought to have joined the minors as parties to his divorce proceedings. He did not do so, hence the court's conclusion that his claim of 50 per cent of the whole stand was erroneous from the outset. It cannot succeed.

In his closing submissions he reduced the percentage to forty percent. The same arguments against the fifty percent apply to the forty percent.

As regards a claim from his wife's share, defendant was required to show proof of his contribution, both directly and indirectly; to the improvements on the stand, in order to succeed in getting a share.

The plaintiff's evidence was that she started constructing the house on stand 430 in February, 2012, before she married the defendant. She said when she married the defendant; the

house was at window level. She said bricks and cement to construct up roof level had already been bought prior to marrying the defendant.

After the marriage, the plaintiff said the defendant did not contribute anything. She said he earned little as a security officer and had to pay maintenance for his 2 children from a previous marriage, fund his studies with UNISA as well as pay for his own living expenses as he was working in Mutare and living there while she worked and lived in Harare. She said to prove his financial incapacity to assist in the development, he was even failing to pay \$50-00 maintenance for their minor child in terms of a court order and had accumulated arrear maintenance leading to a warrant of arrest being issued against him. Her evidence was that she constructed the house on her own from the proceeds of her salary which went up considerably when she became the chamber secretary for Chitungwiza Municipality. She produced proof of her salary as exh 4. She said in addition, in October 2013 she obtained a loan from FBC of \$10 000-00 to finance the construction and she serviced the loan on her own. She produced the loan documents as exh 7.

She said in addition to her employment, she got contracted as a part-time lecturer at the Zimbabwe Institute of Legal Studies from February, 2014 to 30 November, 2014 and she earned \$850-00 per month. She produced the appointment offer as exh 6.

She produced some cash sale receipts for material she bought in person and paid for; reflecting amounts of \$892-50, \$1 600-00 and \$150-00 in February 2015; as exh 8 C. For roofing. She produced acknowledgment documents from City Roofing for amounts of \$7 000-00 and \$2 000-000 in January, 2015, \$1 500-00 in April 2015, \$1 800-00 in February 2015 as exh 8 (d). She produced the payment for electrical connections as exh 8 (e). She produced three other receipts for \$560-00, \$280 and \$145-00 for cement from Bros Trade Hardware for the period from 31 October, 12 November and 13 November, 2014. She said she could not find the rest of the receipts.

With regard to the defendant's post-divorce maintenance claim, the plaintiff said she could not maintain him because she was no longer employed herself. She produced a letter of dismissal from Chitungwiza Municipality dated 16 November 2015, exh 5, as proof. The letter indicated that the dismissal was with immediate effect; from 28 August, 2015, the date of her

suspension. She also said the defendant was well able to maintain himself as he had always done from his salary as a security officer of \$480-00 - \$500-00 per month.

As far as indirect contribution was concerned, the plaintiff said she did not get any from the defendant. She said he was not even physically present most of the time because he was working in Mutare while she was in Harare. She said when he got time off he would visit his ex-wife in Bulawayo whom he was having an affair with. She said instead of giving her moral support, he used to discourage her from working on the project, preferring to get money from her to spend on his children from the previous marriage and other extended family members.

The plaintiff closed her case after her evidence.

The defendant began his case by abandoning his claim for post-divorce maintenance. In his evidence, he admitted that stand 430 was already there and partly constructed when he married the plaintiff. He admitted that she earned more than he did, but he said he also got a lot of benefits from his job as a security officer for a diamond mine. He did not disclose the benefits and hinted that they were probably illegal. He confirmed working in Mutare. He said sometimes he worked three weeks and got six days off, other times he worked one month and got two weeks off.

He said they started living together in June 2012 and that is when their minor child was conceived. He said construction started in his presence soon after they married and it continued up to when the house got completed. He admitted that some finishing touches were done after he stopped living with the plaintiff therefore he did not contribute to those.

During cross examination, the defendant was asked how he contributed towards the construction of the house. He said he contributed financially and as head of the family. When he was asked how much he contributed, he said he did not have a figure because he had never planned to divorce. He admitted that he earned \$450-00 at the time. He admitted that he had to comply with a \$120-00 maintenance order and that he was studying with UNISA, paying fees of \$700-00 per six months. He admitted that there were extended family contributions which were all done by the plaintiff, therefore he could not indicate how much they were.

He admitted that registration of the stand in the plaintiff's and children's names was done during the course of the marriage.

The defendant said he had no proof whatsoever of what he contributed towards the development of the stand and closed his case.

In analysing the case before it, the court noted that it is common cause that the stand had already been acquired and some improvements had started and other materials bought. It is also common cause that the property was now owned by three people, leaving the plaintiff with just a one third share. During the trial, the defendant accepted that his claim was limited to a claim from the plaintiff's one third share.

The court considered the evidence adduced during the trial. It noted that on one hand there was plaintiff's testimony supported by documentary proof showing her contribution to the development of the stand as detailed in her evidence. On the other hand, the defendant testified that he had no proof whatsoever of what he contributed. How then can defendant's claim of a share from the plaintiff's one third share succeed? Courts work on evidence. The defendant is the one who was claiming to have contributed to the development; yet he brought no shred of evidence to confirm his contribution. The plaintiff who is already a co-owner by virtue of registration and need not prove anything is the one who brought several documents as proof that she is the one who did the developments.

The defendant's claim for a share of the plaintiff's one third share of the property therefore cannot succeed.

In her closing submissions, the plaintiff indicated that the issue of maintenance and custody for the minor child of the marriage, Tanyaradzwa Mufambi had already been dealt with by the Magistrate Court under case numbers MS 811/15 and CCC 300/16, respectively. This means the only outstanding issue was that of divorce and distribution of the immovable property.. It is therefore ordered as follows;

- (i) That a decree of divorce between the plaintiff and the defendant be and is hereby granted.
- (ii) That the defendant's claim for a share in stand 430 Westwood, Salisbury be and is hereby dismissed.
- (iii) That defendant shall pay costs of suit.