

MARGARET CHIKOTO
versus
ELISHA MADANHA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 21, 22 January, 11 July, 2016 and 23 March, 2017

Divorce action

T. Chiminya, for plaintiff
M. W. Sengweni, for the defendant

CHITAKUNYE J: The defendant married the plaintiff in terms of customary law in 1992. On 24 August 1995 their marriage was solemnised in terms of the Marriage Act, [*Chapter 5:11*]. The marriage still subsists. The marriage was not blessed with any children.

On 24 May 2013, the plaintiff sued the defendant for a decree of divorce and other ancillary relief.

The plaintiff alleged that the marriage has irretrievably broken down such that there were no prospects of restoration to a normal marriage relationship in that the defendant was physically, verbally and economically abusive. In the circumstances she has lost love and affection for the defendant.

She further alleged that during the subsistence of the marriage the parties acquired both immovable and movable assets. In paragraph 7 of her declaration the plaintiff suggested that the assets acquired during the subsistence of the marriage be distributed as follows:

1. For the plaintiff:
 - a) Stand 6578 Dzivarasekwa Extension Phase 2 and all household goods
 - b) Stand number 286393 Ruwa, Harare
 - c) 50% share of the rural home at Ullly Farm, Hwedza and household goods therein
 - d) 7 cows and 1 goat
 - e) Mazda pick-up truck
 - f) Generator
 - g) Water pump
 - h) Household goods

2. For the defendant:
 - a) 50% share of the Uly Farm in Hwedza
 - b) 6 cows and 1 goat
 - c) Farm implements.

The defendant denied ever being abusive to the plaintiff. He also disputed the manner of distributing the assets of the spouses as suggested in paragraph 7 of the plaintiff's declaration.

At a pre-trial conference held on 13 May 2015 parties agreed that:

1. The marriage has irretrievably broken down;
2. All the movable assets at Uly Farm, Hwedza shall be awarded to the defendant excluding cattle. These comprised:
 - a) Gas stove
 - b) Sofas
 - c) Bed
 - d) Bookshelf
 - e) Blankets
 - f) Pot moulding machine
 - g) 10 boxes of tiles
 - h) Wardrobe
 - i) TV Samsung 21 inch
 - j) Solar panel
3. The parties agreed that the plaintiff be awarded the following assets:
 - a) 4 plate stove
 - b) Wall unit
 - c) Dining room suite
 - d) Kitchen unit
 - e) Display unit
 - f) Kitchen utensils.

The issues referred to trial were as follows:

1. Whether or not the plaintiff should be awarded Stand number 6578 Dzivarasekwa extension phase 2?

2. Whether or not the plaintiff should be awarded the stand in Ruwa?

Though only Stand 6578 Dzivarasekwa and the Ruwa stand were mentioned in the issues referred to trial, it was apparent from pleadings and the evidence led that the issue of the rural home at Uly Farm and Cattle had also not been resolved.

The distribution of assets of the spouses at the dissolution of the marriage is governed by section 7 of the Matrimonial Causes Act, [*Chapter 5:13*].

Section 7 subsection (4)(a) – (g) outlines some of the factors to be considered in the distribution of assets of the spouses. Court is enjoined to consider all the circumstances of the case and endeavour to place the spouses in the position they would have been in had a normal marriage relationship continued.

The court has wide discretion regarding the distribution of the assets. See *Takafuma v Takafuma* 1994(2) ZLR 103(S) and *Gonye v Gonye* 2009(1) ZLR232(S).

It is important to bear in mind the nature and extent of the discretion enjoyed by court in assessing evidence adduced by the parties.

In casu, the plaintiff gave evidence and called two witnesses. Thereafter the defendant gave evidence and called no other witness.

The plaintiff's evidence was to the effect that she was staying with her aunt and sister at Porta farm after they had been relocated to that farm by the Government. Her aunt and sister encouraged her to erect her own shack so that she would be considered for allocation of residential stands in her own right. She thus erected her shack made of plastics. She duly applied for a stand in her own right. At that time she was in love with the defendant.

The defendant was residing in Epworth and would frequent Porta farm to see a relative who had also been moved to Porta farm. When plaintiff and defendant married in 1992, the defendant moved to stay at Porta Farm with the Plaintiff.

Later when local government officials came with a list of those people who were to be moved to Dzivarasekwa, the plaintiff's name was on that list. She was asked if she was married to which she confirmed. This is how the defendant and herself were relocated to Dzivarasekwa where they lived in a cabin for sometime before being allocated the Stand in question.

It was her evidence that she opted to have the stand in the defendant's name as her husband and head of the family.

After being allocated that stand she raised the money for the construction of the house, engaged a builder and bought all the building materials on her own.

Though at the start of their marriage the defendant was employed as a general hand at Harare Polytechnic College, he squandered his money on gambling and alcohol. He would virtually come home with no money.

The plaintiff further testified that the defendant's conduct was such that he would ask for money from her and if she did not give him, he would assault her. He would at times make her sleep outside the house.

Despite this abuse and financial irresponsibility on the part of the defendant, the plaintiff said that she persisted with her business of selling hardware at her market stall at Mbare in order to raise money for the construction of the family house. Though she wished the defendant could assist financially this was not forthcoming.

The plaintiff's evidence on this was supported by her aunt, Janet Chikoto, and her elder sister, Sheilla Chikoto. These two witnesses confirmed the circumstances that led to them squatting at Porta farm, together with the plaintiff, after they had been evacuated from Epworth by the Government. Porta farm was a transit camp where they were awaiting relocation to other areas. As plaintiff had attained majority status they encouraged her to put up her own structure so that she would be considered for relocation in her own right. This, the plaintiff did and registered for stands like any other adult squatters were doing. When the local government officials came with a list of those to be moved to Dzivarasekwa, the plaintiff's name was on that list.

They confirmed that by the time the plaintiff moved to Dzivarasekwa she had married the defendant and so the two of them moved to Dzivarasekwa to live in a cabin. As far as these two witnesses were concerned the plaintiff was hard working firstly as a tailor and later operating a hardware market stall at Mbare Musika. The plaintiff would also do cross border trading.

Though the witnesses did not know the minute details of how the plaintiff and the defendant managed their marital monetary issues, they were nevertheless, of the view that the plaintiff contributed a lot. Whilst not discounting the defendant's contribution they confirmed that the defendant was into gambling and alcohol to an extent that the plaintiff was always complaining about such conduct and the abuse she was suffering at the hands of the defendant.

On the other hand, the defendant's evidence on how the Dzivarasekwa stand was acquired was to the effect that that stand was allocated to him and not to the plaintiff. It was thus his stand. He testified that whilst he was employed at Harare Polytechnic College he joined a government housing scheme meant for civil servants. He was contributing about \$150.00 per month towards that scheme. It was through this scheme that he was allocated the stand in question.

The defendant was, however, unable to tender any documentary evidence of such a scheme or even proof of his contributions towards such a scheme. No evidence was also tendered to confirm the fact that this Stand was allocated to him due to his membership of such a scheme. The only document he tendered was his payslip which showed a deduction towards ZIGEU Housing Scheme. He, however, said this was not the scheme in question. The ZIGEU scheme faltered and they lost their money.

The defendant indicated that he used to visit his relative who had been evacuated to Porta farm. He was also in love with the plaintiff though he used to stay in Epworth. He would thus frequent Porta farm. Upon getting married to the plaintiff he moved to Porta farm and started staying with the plaintiff in a shack. Thereafter they were relocated to Dzivarasekwa where they firstly lived in a cabin before moving to the stand they were allocated.

I am of the view that considering the circumstances under which the Dzivarasekwa stand was acquired, it is probable that the property was acquired in the manner described by the plaintiff. At some point the defendant in fact admitted that the Dzivarasekwa housing scheme had been intended for homeless people who had been evacuated to Porta farm by the government. Those are the people the government was hard pressed to relocate to better locations.

As regards resources for construction, there is no doubt in my mind that plaintiff played a pivotal role. The defendant, in his evidence, did not deny that the plaintiff was industrious. He indicated that whilst he was employed at Harare polytechnic the plaintiff was operating two market stalls at Mbare Musika. When he lost his employment he joined the plaintiff in operating one of the market stalls. He further confirmed that the plaintiff would engage in cross border trading. She would go to buy and sell wares in such countries as South Africa, Botswana and Zambia.

In a bid to bolster his own contribution to the family resources the defendant testified that he placed a stop order in favour of his wife so as to assist her in her business operations.

Unfortunately the stop order reflected on the payslip did not show that it was in favour of the plaintiff. The plaintiff had, in fact, categorically denied receipt of any such money.

Though the defendant contended that he was the one who played a key role in the construction of the house at Dzivarasekwa, he was unable to proffer any tangible proof of such contribution. The plaintiff, on the other hand, tendered some receipts in her name which the defendant could not deny.

Clearly therefore even on the construction of the house the defendant virtually had no tangible evidence of his contribution serve for his word of mouth.

Though the contributions towards the purchase and development of the Dzivarasekwa Stand tilted heavily in favour of the plaintiff, sight will not be lost of the duration of the marriage and plaintiff's own concession that defendant did contribute as a husband albeit she wished he could have done more had he not be so irresponsible with his finances. Other factors such as the conduct of the defendant towards the plaintiff and his irresponsible attitude towards family finances cannot be ignored. The needs and expectations of the parties *vis-a-vis* this property will also be considered. Clearly both expected to continue living in this property. Unfortunately it will not be possible for both of them to continue living in the same house after divorce, one will have to make way for the other failing of which the property will be disposed to enable each one to realise their allotted share in the property.

On the Ruwa Stand, it appears common cause that the first stand the couple acquired was in their joint names. When they lost on that stand, they acquired the current stand in phase two. This is the one the plaintiff said was in her sole name. The plaintiff stated that she put it in her name because of the defendant's failure to directly contribute towards the purchase of the previous stand.

Both parties agreed that this property was acquired during the subsistence of their marriage and so though in the plaintiff's name, it has to be considered as a property acquired by the parties. There is, however, some unclear aspects on the identification of this Stand. In her declaration the plaintiff identified it as Stand No. 286393 Ruwa. The defendant in his plea referred to it in the same way. However, in her evidence the plaintiff tendered receipts as exhibits D and E showing the Stand No. as 13928 and a statement of account dated 12 /01/2001 showing the stand number as 13751. That discrepancy did not, however, digress from the common position that the initial stand the parties acquired was lost and there was a second stand that the plaintiff said was in her name. The defendant said that he believed it was in their joint names but as he was not the one who was attending to the issues of the

stands he seemed to concede that the plaintiff may have registered it in her sole name. It was clear that the parties were *ad idem* that there is only one stand in Ruwa and that is the stand to be distributed.

I am of the view that this Stand should be awarded to plaintiff.

The communal home is the last immovable property. The plaintiff indicated that it was through her effort that she secured this property as the defendant had dismally failed to acquire the stand. Each time he went to the rural areas he would squander or misuse the money intended for the stand and would not put much effort in seeking such a property. It was on realising this that the plaintiff later went and, with defendant's parents as witnesses, she acquired that property. Though the plaintiff said that she paid about \$4000-00 (Zim\$), it was not clear as to whom she paid that money as this was land allocated to persons during the land reform programme. It may as well be that she bought it from someone who had no use for it despite having been allocated the property by the government. As neither party tendered proof of registered rights in this piece of land I will take it is the A1 Model scheme where persons are merely given occupation permits over 6 hectares of land.

The plaintiff stated that as this property is located in the defendant's home area it should be retained by the defendant. The defendant on his part indicated that he has been farming on this piece of land and so he can continue. The defendant's retention of the piece of land without being asked to compensate plaintiff will however be taken into account on other properties.

Section 14 of the Agricultural Land Settlement (Permit Terms and Conditions) Regulations, 2014, (Statutory Instrument 53 of 2014) gives recognition of spouse's rights in cases of dissolution of marriage where the spouses were holders of a settlement permit. *In casu*, though the parties did not specially allude to such permit it is clear to me that as the Uly Farm stand is an A1 settlement, the plaintiff would in terms of the s 14 be entitled to some compensation. That will however be taken care of by the award of the Ruwa stand to the plaintiff.

In the exercise of the discretion reposed in me I am of the view that this marriage having lasted for a period of over 21 years the individual direct contribution, whilst important, may not translate to a recoup of such contributions. The needs and expectations of the parties must be recognised as important factors. Clearly each party needs shelter and something to kick-start their post divorce lives with. Each is obviously expecting a meaningful share in the Dzivarasekwa property as that is the only property that may be of

much value. The other two immovable properties may not be much of a hassle. The plaintiff would not be comfortable to go and live at Ully farm as that is in defendant's communal home area and so in terms of shelter defendant would have the two rooms and a kitchen there. The Ruwa stand is vacant with no improvements and so even if awarded to plaintiff she would need to erect improvements before she can enjoy shelter thereat.

I am of the view that the plaintiff be awarded the Ruwa property whilst defendant retains all rights and interests in the piece of land at Ully farm and the farming implements thereat.

The contentious asset is the Dzivarasekwa stand. I am of the view that taking into account the manner of acquisition and development, it is only proper that this property be distributed between the parties. Both would ordinarily expect to retain shelter at the dissolution of their marriage. The Ruwa stand is vacant with no shelter whilst the piece of land Stand at Ully farm has a 2 roomed house, a kitchen and a storeroom. The defendant will thus have shelter.

Upon a consideration of all the factor alluded to above , I am of the view that a just and equitable distribution of the Dzivarasekwa property is an order that the plaintiff be awarded 60% share in the Dzivarasekwa stand whilst defendant is awarded a 40 % share thereof. Plaintiff shall be granted the option to buy out defendant's share within a limited period of about 6 months or such longer time as the parties may agree. Should the plaintiff fail to buy out defendant the property shall be sold to best advantage and the net proceeds shared 60:40.

The last item for distribution is the herd of cattle. It was common cause that at the time of separation there were more cattle than there are now. Though parties are not agreed on the exact number of cattle at the time of separation, it is accepted that some of the cattle were given away or sold with plaintiff's consent. Those that defendant disposed of without plaintiff's consent were disputed. In the absence of proof of the exact number of cattle available at the time of dissolution, I have no option but to accept the defendant's assertion that only 5 cattle are remaining. Out of these 5 cattle, plaintiff will be awarded two whilst defendant retains three.

Accordingly y it is hereby ordered that:-

1. A decree of divorce be and is hereby granted
2. The plaintiff be and is hereby awarded the following movable property
 - a) 4 plate stove

- b) Wall unit
 - c) Dining room suite
 - d) Kitchen unit
 - e) Display unit
 - f) All kitchen utensils and
 - g) A herd of two cattle.
3. The defendant is awarded the following movable property
- a) Gas stove
 - b) Sofas
 - c) Bed
 - d) Bookshelf
 - e) Blankets
 - f) Pot moulding machine
 - g) 10 boxes of tiles
 - h) Wardrobe
 - i) TV Samsung 21 inch
 - j) Solar panel and
 - k) A herd of three cattle
4. On immovable property the plaintiff is awarded the following
- a) Stand No. 286393 Ruwa (a.k.a the Ruwa Stand) which is already in her name.
 - b) A 60% share in stand number 6578 Dzivarasekwa Extension Phase 2.
5. Whilst the defendant is awarded the following:
- a) All rights and interests that the parties have in the Communal Home/Stand at Ully Farm.
 - b) A 40% share in Stand 6578 Dzivarasekwa Extension Phase 2.
6. The parties shall within 30 days of this order appoint a mutually agreed valuer to value the Dzivarasekwa property.
7. The plaintiff shall be granted the option to buy out defendant's share in the said property within 6 months, or such longer period as the parties may agree, from the date of receipt of the valuation report. Should the plaintiff fail to buy out defendant's share within the period stated above or agreed by the parties, the property shall be sold to best advantage by an estate agent mutually agreed to by the parties. Failing

such agreement and estate agent shall be appointed for them by the registrar from his list of independent estate agents.

8. The defendant shall sign all necessary documents to effect transfer as soon as he has been paid by plaintiff, in any case, not more than 7 days upon request.
9. The cost of transfer shall be met by the parties as per their sharing ratio.
10. The cost of evaluation shall be met by the parties in terms of their sharing ratio.
11. After the sale the net proceeds shall be distributed between the parties in terms of their sharing ratio of 60:40.
12. Each party shall bear their own costs of suit.

Chiminya & Associates, plaintiff's legal practitioners
Legal Aid Directorate, defendant's legal practitioners