1.MUSWERE GODFREY
versus
GETRUDE RUDO MAKANZA

2.GETRUDE RUDO MAKANZA
versus
GODFREY MUSWERE
and
SAMUEL MAKANZA
and
DIDYMUS KABAIRA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 3 November 2004

Opposed Applications

Mr *T Biti*, for the applicant
Mr *Guwuriro*, for the respondent.

MAKARAU J: At the hearing of the above matters, I granted consolidation of the hearing of the two applications as they involve the same subject matter and are to be resolved by the application of the same legal principle. After hearing counsel, I granted the application in case no HC 6217/03 and dismissed the application under case no HC 8678/03 with costs and indicated that my reasons would follow. These they are.

The facts common to both applications may be summarised as follows:

Doctor and Mrs Makanza married in 1973 and the marriage subsists although there are unhappy differences between the two. During the subsistence of the marriage, the parties purchased a piece of land commonly known as No 5 Best Close Mutare, (the property). The property was registered in the sole name of Dr Makanza. The parties took occupation of the property and it would appear that they established it as the matrimonial residence although the papers before me do not clearly state this. Nothing turns on whether the property is the matrimonial residence or not.

On 25 October 2002, Dr Makanza sold the property to one Godfrey Muswere, the applicant in the first application. After the purchase price had been paid in full, ownership was transferred to the applicant who now holds a Deed of Transfer in respect of the property. Dr Makanza left the property and relocated to Nyanga, his rural home, where he invited Mrs

Makanza to join him. She turned down the invitation on the grounds that she is still employed in Mutare and cannot conceivably commute to and from work from Nyanga. She also refused to vacate the property in favour of Godfrey Muswere alleging that she should have been consulted and should have given her consent prior to the sale of the property, as she is a co owner by virtue of her marriage to Dr Makanza and by virtue of her direct and indirect contribution towards the acquisition of the property. She further alleged that the property had been sold at a low price in an effort to defraud her of her entitlement to her true share in the property.

It is in my view pertinent to note at this stage that although relations between the two are strained, there are no divorce proceedings pending or contemplated.

The applicant filed the first application, seeking an order ejecting Mrs Makanza and for the payment of holding over damages at the rate of $50 000-00 per month from 31 May 2002 to date of eviction. In turn, Mrs Makanza filed her own application, seeking an order that the sale and subsequent transfer to the applicant be set aside and that she be declared and registered as co owner of the property.

In my view, the issue central to the resolution of both applications is the legal relation of a wife to property registered in the sole name of her husband. This issue has dogged this court for decades and has posed difficulties for this court. (See the remarks of MCNALLY JA in *Muzanenhamo and Another v Katanga* 1991 (1) ZLR 182 (SC)).

It is my view that this issue has caused problems for the courts because the law in place is unsatisfactory and palpably unjust. I am of the further view that the law relating to the rights of a wife to the property registered in her husband's sole name reveals a yawning gap between the law of property and the common law of husband and wife with the former failing to recognise the rights that the latter gives to spouses i*nter ser.*

Under our law of property, the right of ownership over property of whatever nature confers the most complete and comprehensive control one can have over property. The right of an owner of land for instance, to sell that land is almost untrammeled, it being subject only to the conditions in the deed conferring title and any other real rights over the property that the owner may have caused to be registered against his or her title to the land. It is also a cornerstone of the law of property that ownership of land is proved by way of registration of title. Thus, whoever has his or her name endorsed on the deed conveying title is at law prima facie recognised as the owner of the land with the most complete and comprehensive control over that land.

The individualistic approach and clear cut principles of property law are not realistic in a marriage which is the union of two people and in most cases, the merging of their wealth generation capacities for mutual benefit. It is not uncommon for married couples to jointly acquire

property during the subsistence of the marriage. It is further not uncommon for married couples to jointly acquire land in unclear, unstated and undefined ratios of contribution towards that acquisition. It is further not uncommon as occurred in this matter, that the land will be registered in the name of one of the spouses, usually but not exclusively, the husband and head of the family. Thus in marriage, even where the parties are married without executing an ante-nuptial contract creating community of estate, it is common parlance to refer to property acquired during the marriage as "joint" property while the marriage subsists. Upon the termination of such a marriage through either divorce or death, the principles of both family law and the law of inheritance recognise the joint matrimonial estate, which is then distributed as between the spouses regardless of whose name appeared on the deed conferring title to the land or property.

While the family law and law of inheritance as practiced in this jurisdiction recognise to a large extent the existence of a joint matrimonial estate, brought into being by the fact of marriage and whose distribution depends on the parties contributions both direct and indirect, the law of property does not. Thus a never-closing gap is created between family law and the law of property law with one law completely closing its eyes to the rights created by and under the other. Courts in turn then emphasise the rights acquired under property law while restraining the rights accruing under family law to the realms of family relations only.

That there is an unbridgeable gap between family law and property law can be discerned from the remarks of Lord Hodson in *National Provincial Bank Limited v Ainsworth* (1965) 2 All ER 472 when he remarked that he saw no reason why a wife's personal rights against her husband, which are derived from her status as such, should enter the field of real property so as to clog the title of an owner. The learned Law Lord was therefore confining the rights of the wife to property registered in her husband's name to the four corners of family law and did not see a reason for allowing such rights to adulterate real rights under the law of property. One can think of a number of reasons why a spouse's right to the property registered in their spouse's name should inhere in them whatever law is being applied as it is based on direct and indirect contributions to the matrimonial weal.

It is my view that the remarks of Lord Hodson are reflective of an era where the wife' gender role, as that was the spouse under the spotlight then, especially where she was not gainfully employed, was completely overlooked. Times have changed and in this jurisdiction, courts are enjoined by statute to consider the gender role of spouses when distributing matrimonial estates. The courts have since awaken to the realisation that wives who stay at home work even if there is no income directly accruing to the family from their endevours as they move from stove to washing line and back.

Despite the changing times, the above remarks by Lord Hodson still hold sway in this court. The remarks were first approved of and adopted by the Supreme Court in *Cattle-Breeders Farm (Private) Limited v Veldman* (2) 1973 (2) RLR 261 (AD) and later in *Muzanenhamo and Another v Katanga* (supra) and in *Muganga v Sakupwanya* 1996 (1) ZLR 217 (S) among other cases.

The position in our law is therefore that a wife cannot even stop her husband from selling the matrimonial home or any other immovable property registered in his sole name but forming the joint matrimonial estate. (See Muzanenhamo's case (supra)). There must be some evidence that in disposing of the property, the husband is disposing it at under value and to a scoundrel. (See *Muganga*'s case (supra).) Mere knowledge that the seller of the property is a married man who does not have the consent of his wife to dispose of the property is not enough. (See *Pretorius v Pretorius* 1948 (1) SA 250 (A).

On the basis of the above, it clearly presents itself to me as the position at law that a wife in the position of Mrs Makanza has no real right in immovable property that is registered in her husband's sole name even if she contributed directly and indirectly towards the acquisition of that property. Her rights in relation to that property are limited to what she can compel her husband to do under family law to provide her with alternative accommodation or the means to acquire alternative accommodation. Her rights, classified at law as personal against her husband only, are clearly subservient to the real rights of the husband as owner of the property.

While accepting the current position at law, I am of the firm view that the principles of family law that this court is enjoined to apply to restrict the rights of a wife to the realm of personal rights against her husband are anachronistic and have outlived their *raison d`etre*. The common law principles that govern the position of the wife *vis-a vis* matrimonial property registered in the sole name of one spouse developed in the feudal era in England when the feudal lords intended to maximise on the collection of dues and looked to the head of each household to pay these. Thus, all the property belonging to the wife was deemed to belong to the husband and could be levied for dues in the hands of the husband. The position might have been protective of wives then, but is hardly protective or cognitive of their rights now. The payment of dues to the authorities in the form of taxes of whatever nature has long been non-discriminatory on the basis of gender in our law.

It is thus my view that that there is no sound jurisprudential basis for holding that the rights that a wife has to the matrimonial estate during the lifetime of her husband have inferior content to her rights upon divorce or the death of her husband. The unintended implication of the legal position at present is the right of a wife to the matrimonial estate, as determined by the

principles of family law are inferior to the rights of her husband in the same property as determined by the principles of the law of property. Courts before me have upheld the ruling in the *Ainsworth* case for decades and thus bind me to deny relief to Mrs Makanza.

It is hoped that a future superior court will venture to hold that the bedrock upon which the rights that a wife has under family law to matrimonial property registered in the sole name of her husband rests is outdated and has long outlived its purposes.

It is for the above reasons that I made the orders I did on the turn.

Bere Brothers, applicant's legal practitioners.
M V Chizodza-Chineunye, respondent's legal practitioners.