

PETER MAHATI
versus
NYASHA NYAREENDA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 28 July, 27 October & 19 December 2022

Pre-Trial Conference: Matrimonial Action

Mr K Masasire, for the plaintiff
Mr T Tabana, for the defendant

MUCHAWA J: The parties were married to each other at Harare on 30 April 2016 in terms of the Marriage Act [*Chapter 5:11*] and the marriage still subsists. Their marriage was blessed with two minor children; Ryan Tashinga Mahati born on 4 August 2009 and Rene Glenroy Takunda Mahati born on 3 February 2018. During the subsistence of the marriage the parties acquired the following property;

1. House number 20426 CABS Budiro, Harare
2. Toyota Avensis motor vehicle registration number AEO 1660
3. Household goods and effects

The plaintiff issued summons seeking a decree of divorce on the grounds of irretrievable breakdown of marriage, custody of the minor children and award of the house and motor vehicle as his sole property with the defendant being awarded the household goods and effects.

The action was opposed, with the defendant insisting that the marriage had not irretrievably broken down. She added that the parties had also acquired an immovable property, stand 7734, Stoneridge, Harare. She prayed for custody of the minor children, that plaintiff pays maintenance and exercises reasonable access. For the division of property she proposed that she be awarded CABS Budiro House, the motor vehicle and all household goods and effects whilst the plaintiff was awarded the Stoneridge property.

When the parties appeared for a pre-trial conference, they requested more time to engage with a view to finding settlement. At a joint pre-trial conference between the parties, they were able to iron out most of the issues. They agreed as follows;

1. That the marriage had irretrievably broken down and that the court, if so inclined, should grant a decree of divorce;
2. That custody of the minor children, Ryan Tashinga Mahati born on 4 August 2009 and Rene Glenroy Takunda Mahati born on 3 February 2018 be awarded to the defendant
3. That the plaintiff be given the right of exercising access to the minor children on alternative weekends and half of the school holidays;
4. That the plaintiff shall pay RTGS\$ 25 000.00 per child, per month as maintenance until they reach 18 years of age or
5. That the plaintiff shall pay school fees and bus fares for the minor children
6. That the plaintiff shall pay medical aid for the minor children
7. That the plaintiff shall buy clothes twice a year for the minor children
8. That the plaintiff shall buy school uniforms for the minor children once every year.
9. It appears the parties also agreed that the Stoneridge property was no longer available as an asset of the parties.

Two issues remained outstanding and these were captured as follows;

- a. Whether or not House number 20426 CABS, Budiriro, Harare and the Toyota Avensis Registration No AEO form part of the assets of the spouses as envisaged by the Matrimonial Causes Act, [*Chapter 5:13*]
- b. If the above is yes, what is the equitable distribution of the property to the parties?

The parties further agreed that there was no need to refer the matter to trial and opted to file submissions and have the Court decide the matter on the papers. The plaintiff's submissions were filed on 10 of August 2022 whilst the defendant's submissions were filed on 31 of August 2022. On 6 September 2022, a request was put to the plaintiff to provide clearer copies of pages 34 to 45 of the record. These were only provided after the 27 of October 2022.

I deal with the outstanding issues below.

Whether or not House number 20426 CABS, Budiro, Harare and the Toyota Avensis Registration No AEO form part of the assets of the spouses as envisaged by the Matrimonial Causes Act, [Chapter 5:13]

The plaintiff's case is that the immovable property is under mortgage bond which started in January 2020 and runs until 2045 which was secured through the plaintiff's employer without any participation from the defendant. The plaintiff says he has not yet fully paid for the house and to date he has paid only 10% of the mortgage repayment. It is averred that there was no spousal guarantee on the facility.

Furthermore, it is submitted that the plaintiff is the only one servicing the mortgage loan and there is no title deed issued in his favour yet until the property is fully paid for and only then can ownership be passed. It was stated that in the event that the plaintiff fails to pay or dies before paying the full purchase price or gets dismissed from work, the employer can repossess the house and resell it to another purchaser.

The same averments were made in relation to the motor vehicle except that the motor vehicle was bought under a staff motor vehicle loan scheme secured in January 2017 and expiring in October 2022. The registration book to the motor vehicle was alleged to have been already handed down to the plaintiff.

The defendant's submissions are anchored on the provisions of the Matrimonial Causes Act. Reference was made to s 7(1) (a) to argue that the property in issue constitutes the assets, of the parties subject to distribution. Further reference was made to the case of *Gonye v Gonye* 2009 (1) ZLR 232 (S) to urge the court to approach this matter to consider the assets of the spouses as opposed to matrimonial property. Such property was said to include assets owned by the spouses individually and jointly at the time of dissolution of the marriage. See also *Manyoni v Manyoni* HH 4/16. The case of *Field v Field nee Parham* HH 68/21 was cited as one in which the court ruled that property under mortgage was part of the assets of the spouses, notwithstanding the fact that the parties contributed unequally towards the acquiring of the property. It was argued that the immovable property and motor vehicle therefore fell for distribution under the Matrimonial Causes Act.

Section 7(1)(a) of the Matrimonial Causes Act provides as follows;

“Division of assets and maintenance orders

(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—
(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other”

In *Gonye v Gonye supra*, the court had occasion to deal with the above provision. Honourable MALABA JA (as he then was), stated as follows;

“It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an Order with regard to the division, apportionment or distribution of “the assets of the spouses including an Order that any asset be transferred from one spouse to the other”. The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of the broad discretion.

The terms used are the “assets of the spouses” and not “matrimonial property”. It is important to bear in mind the concept used because the adoption of the concept “matrimonial property” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise. The concept “the assets of the spouses” is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.”

The plaintiff *in casu* wants this court to believe that because the house and motor car are encumbered, then they are not subject to distribution as they are not his but belong to the employer until they are fully paid up. This position is not sustainable at law. The plaintiff has just made bald averments in support of his position. He has not pointed the court to any of the documents on record in support of the assertions made. The document on p 34 of record shows that on the 18 of February 2020, the plaintiff was allocated a core house being stand number 20426 under CABS in Budiriro by the City of Harare. He was advised to approach the District office together with his spouse for the administrative process which was laid out to him. The sale of the land to the plaintiff was premised on the fact that the plaintiff had entered into an agreement with CABS for the purchase of the land and improvements thereon. The plaintiff had applied for and been granted a loan by CABS for such purchase which was secured by the registration of a mortgage bond. The stand would be transferred to the plaintiff who was the

purchaser, once the purchase price for the land, which was set at \$195.50 was paid and the rest of the terms met. This was duly paid.

A sale agreement was subsequently executed with CABS, see pp 41 to 45 of record. The agreement acknowledges that stand 20426 was allocated to the plaintiff. CABS then sold the developments and improvements it had made on the stand. Transfer of the stand from City of Harare to the plaintiff was to be done within 14 days of being requested to do so by the conveyancers. The plaintiff was entitled to occupation of the property upon payment of the full purchase price. The plaintiff and his family have been in occupation because the full purchase price was paid through a loan advanced by CABS. What remains is clearance of the mortgage bond registered against the immovable property.

The involvement of conveyancers makes it clear that a title deed is available for this property, as is the registration of a mortgage bond. Such title is clearly held in the names of the plaintiff. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) makes explicit what this means at law. It states as follows;

“The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of "real right" in s 2 of the Act. The real right of ownership, or *jus in re propria*, is "the sum total of all the possible rights in a thing" - see Wille's Principles of South African Law 8 ed p 255.”

This makes clear that the Budiro CABS house is an asset of the spouses, as is the motor vehicle, whose loan has now been paid off.

Cases such as *Lupu v Lupu* 2000 (1) ZLR 120 (SC) also make clear that our courts have long considered properties under mortgage bond as assets of the spouses. Following the dissolution of the marriage, the parties agreed to split the mortgage bond into two and, with the concurrence of the building society concerned, two separate mortgage bond accounts were created, one in the appellant's name in respect of the sum of \$70 000 and the other in the respondent's name in respect of the sum of \$98 000. Thereafter, for about twenty months, each party paid his/her monthly instalment into his/her account without any complaint. The respondent was the registered owner of the property in question.

In *Manyoni v Manyoni* HH 4/16, the court held as follows;

“It is clear from the wording of the matrimonial clauses act that matrimonial assets include almost everything the spouses acquired and accumulated during their marriage. It does not matter whether the property is in one spouse’s name. All matrimonial assets fall for distribution and sharing.”

From the above it is clear that both House number 20426 CABS, Budiro, Harare and the Toyota Avensis Registration No AEO form part of the assets of the spouses as envisaged by the Matrimonial Causes Act, [*Chapter 5:13*]

What is an equitable distribution of the property of the spouses?

The guiding statutory provision for the task of achieving a fair and equitable distribution of the property is s 7(4) of the Matrimonial Causes Act. It provides thus;

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

- (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
 - (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
 - (d) the age and physical and mental condition of each spouse and child;
 - (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 any other domestic duties;
 - (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
 - (g) the duration of the 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 continued between the spouses.”

The plaintiff’s summary of evidence barely touches on these facts. I do not have before me the income earning capacity of the parties, a breakdown and value of the household goods and effects being offered to the defendant and the value of the motor vehicle. I also do not have the value of the immovable property at the moment nor the value of the improvements allegedly made by the defendant to the property. All these, among others are important facts which should be interrogated so as to preside over the matter judiciously. In the submissions filed by the

defendant, it is stated that the court should give due weight to the value of the properties. How do I do this without such evidence of the values as at the date of distribution of same? They are clearly no longer valued at the price at which they were bought. For instance, the defendant says she is willing to service the mortgage, but no evidence is available of her earning capacity.

The submissions filed by the parties are not evidence. I require the parties to file affidavits of evidence, together with any supporting documentation they may have, which address the various factors set out in s 7(4) of the Matrimonial Causes Act, and any other factors they may deem relevant. This should be filed within fourteen days of receipt of this ruling. Thereafter, I will be in a better position to determine on a fair and equitable distribution of the assets of the parties.

I accordingly make the following ruling;

1. House number 20426 CABS, Budiro, Harare and the Toyota Avensis Registration No AEO form part of the assets of the spouses as envisaged by the Matrimonial Causes Act, [Chapter 5:13]
2. The parties are directed to file their affidavits of evidence in support of their proposals for the distribution of the immovable and movable assets of the spouses, within 14 days of this order.

Musoni Masasire Law Chambers, Plaintiff's Legal Practitioners
Tabana and Marwa, Defendant's Legal Practitioners.