

MORRIS NYAMADZAWO
versus
ELIZABETH NYAMADZAWO NEE CHIKWIRO

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 27 June, 25 July, 12 September & 19 December 2022

Civil Trial – Divorce

Mr A Masango, for the plaintiff
Ms C Mahlangu, for the defendant

MUCHAWA J: The plaintiff and the defendant were married in Harare on 10 June 2009 in terms of the Marriages Act [*Chapter 5:11*]. Prior to that, the parties were in a customary union the rituals of which were performed in or about December 1997. The parties have four children together as follows;

1. Laura Natasha born 19 July 1998;
2. Vimbainashe born 30 January 2003;
3. Anopaishe born 1 August 2010; and
4. Morris Taonanyasha born 18 January 2013.

Only the last two children are still minors to date.

On 16 September 2020, the plaintiff issued out summons in which the following relief was sought;

- i. A decree of divorce
- ii. That defendant be awarded custody of the minor children
- iii. That plaintiff pays maintenance for each of the minor children in the sum of US\$20.00 until they reach the age of majority or become self- supporting, whichever should occur first

- iv. That plaintiff shall have access to the minor children every last weekend of each month and every first two weeks of each school holiday
- v. That defendant be awarded a Nissan X trail vehicle registration number AEI 6330
- vi. That defendant be awarded Stand Number 29925 Unit L Extension Seke Chitungwiza
- vii. That plaintiff be awarded Stand Number 4395 Budiro 2, Harare
- viii. That plaintiff be awarded an ice cream making machine
- ix. That plaintiff be awarded a Honda Fit (non- runner) registration number ADE 1604
- x. That the defendant be awarded all household property at Stand 4395 Budiro 2, Harare.
- xi. That there be no order as to costs.

On 22 July 2022, the parties filed a consent paper resolving most of the issues. They agreed on the following;

- a. That a decree of divorce be granted on the grounds of irretrievable breakdown of the marriage
- b. That the plaintiff be awarded the Honda Fit (non- runner) motor vehicle registration number ADE 1604
- c. That the defendant be awarded the Nissan X trail vehicle registration number AEI 6330, the ice cream making machine and all household property at Stand 4395 Budiro 2 Harare
- d. That defendant shall have custody of the minor children and plaintiff shall have access every last weekend of the month from 18:00 hours on a Friday to 18:00 hours on a Sunday and two weeks during the school holidays and during public holidays and by mutual agreement
- e. That plaintiff shall pay maintenance for the two minor children at the rate of US \$60.00 per child, payable at the prevailing foreign exchange rate, until the children attain the age of 18 years or become self-supporting, whichever occurs first.

Only one issue remained outstanding and was referred to trial. It relates to the distribution of the two immovable properties. The question is how the following immovable properties are to be distributed;

1. Stand number 4395 Budiro 2, Harare, held under deed of transfer 11314/02 in the plaintiff's name
2. Stand number 29925 Unit L, Seke Chitungwiza held through a cession in favour of the defendant.

It is the plaintiff's case that each party should be awarded the house registered in their name. On the other hand, the defendant's prayer is that she be awarded the Chitungwiza property as her sole and exclusive property, whilst she gets a 50% share in the Budiro property.

The Plaintiff's Evidence

The plaintiff's evidence was that he has been married to the defendant for about 20 years but their marriage was solemnized in 2009. He confirmed that two immovable properties are held by the parties as set out above. The Budiro house was acquired in 2001 through a mortgage loan secured by the plaintiff from his employer whilst the Chitungwiza one was acquired by the defendant in 2010 through a mortgage loan from the same employer she was then working for, NSSA. The plaintiff worked for NSSA from November 1994 to February 2017 when he retired. His evidence was that in 2001 when the Budiro stand was bought, the defendant was not yet working and the stand was developed from 2002 to 2007 and further developments were done based on further mortgage loans from NSSA in his name. He stated that they had first built a two roomed temporary structure but now there was a main house, fully developed with tiles and ceiling put in. He says that he has been solely responsible for servicing the mortgage loans from his salary and when he retired he paid off a lumpsum of US\$14 000.00 from his pension leaving a balance of US\$ 10 000.00, an amount the defendant notified him she had paid off in order that NSSA would not repossess the house for failure to clear the loan repayment.

He stated too that upon separation in 2017, the defendant and the children remained staying at the Budiro property and she was letting out some of the rooms. The Chitungwiza property was said to be occupied by tenants and that the defendant was collecting rentals from it. According to the plaintiff, the two properties are not very different in sizes and value. The Budiro house is said to be 8 roomed whilst the Chitungwiza one is 7 roomed and both have precast walls and gates.

The plaintiff claimed to have contributed in the development of the Chitungwiza property by helping in the installation of electricity. He confirmed that the defendant contributed to the development of the Budiro property by putting in the gate sometime in 2013. He also said that as husband and wife they would pool resources and agree on how to use them and it was difficult to separate and record the defendant's contributions to the household.

The plaintiff accepted that the defendant was running a flea market before her employment at NSSA and they took the proceeds therefrom and could have applied them to the buying of bricks and cement for the first temporary structure they erected in 2002. The defendant's assertion that she had fitted some burglar bars to the house in Budiro was refuted by the plaintiff who claims to have bought material from ZISCO and Willowvale using a loan he got from NSSA for the burglar bars.

In the plaintiff's opinion, it would not be fair and equitable for the defendant to get 50% of the Budiro property whilst retaining the Chitungwiza property as her sole property as he would be left without a house. Emphasis was placed on the fact that since 2017 when the plaintiff moved out of the Budiro property, the defendant has been collecting rentals from the rooms let out and also from the Chitungwiza property. It was pointed out too that the defendant had received the bulk of the immovable property in terms of the consent paper signed by the parties.

Under cross examination, it was put to the plaintiff that the defendant was also involved in cross border trading, over and above the flea market, before she got formally employed in 2007. He professed ignorance of the defendant going of the country to source products for sale.

Plaintiff conceded under cross examination that there was a Chiweshe rural home where they set up an irrigation system and built a cottage. He however said he had personally secured a loan to put the irrigation system in and had solely built the cottage. He could not conclusively deny that the defendant cement and bricks for a durawall for the Budiro property, saying he could not recall since they did not keep a record as their marriage was not a business transaction and he expected the defendant as his wife to contribute.

Whilst accepting the defendant's payment of US\$ 9 900.00 for clearing the loan for the Budiro house, the plaintiff said that for the rest of the payments reflected as bank transfers from the defendant's account, he had in fact given her cash in *lieu* of such swipe payments.

Overall, the plaintiff accepted that the defendant had made direct contributions on the Budiro property in purchasing the gate, the building of the cottage and the durawall. He also accepted that the defendant had contributed to the development of the Chiweshe property though he contributed more. Whereas the Budiro property had been acquired as a vacant stand, it was accepted that the Chitungwiza property was partly built up. The plaintiff said that he contributed monetarily to the electrification of the Chitungwiza property and would run around with the builders. He could not remember the amount he contributed and claimed that he could not access the proof of his contribution which was at Budiro in the defendant's possession. It was also accepted that though the loan for the Budiro house had been paid off, what remained was bond cancellation only whilst the defendant was still servicing the Chitungwiza mortgage loan.

In his estimation, the value of the Budiro house was placed at US\$ 45 000.00 to US\$ 50 000.00 whilst the Chitungwiza property was put at US\$ 40 000.00 and US\$ 45 000.00. No evaluation of the property was tendered. He could not provide the stand size for the Chitungwiza property but the Budiro one is stated as 374 square metres in the title deeds.

The plaintiff accepted that the defendant has been the primary care-giver for him and their four children as expected of any wife and that she continues with that role in the plaintiff's absence.

The plaintiff rounded off the period of the marriage to twenty years seeking to underplay the duration of the marriage yet a simple calculation shows that if they started staying together in terms of the customary law union in 1997 which was later solemnized in 2009, they have been married for twenty five years. He was unable to provide details of his contribution to the Chitungwiza property

Defendant's Evidence

I will only highlight the defendant's evidence which is at variance with that led by the plaintiff. The plaintiff explained that from 1997, she generated income by engaging in local buying and reselling of goods until she got a passport and would engage in cross border trading by buying goods from South Africa and Zambia and running a flea market. She stated that from these proceeds she contributed ZAR 2 100.00 towards the construction of the cottage around 2001. In 2003 she said that she stopped running the flea market and was focusing on cooking for the builders at Budiro. In 2005 she says she was formally employed at NSSA on a contract job

and thereafter she worked for a different company before being permanently employed at NSSA in 2007.

The defendant explained that she had put in only some of the burglar bars at the Budiro property after a break-in at the house and plaintiff was responsible for the rest of the burglar bars. Regarding the durawall at Budiro, the defendant detailed how she bought 10 000 bricks for this and the plaintiff then paid the builders who erected the precast wall. She clarified that they had both contributed to the cement. On the gate, she clarified that she used the money she got as an education refund at work, to buy the gate.

On the payments towards clearing the Budiro housing loan, the defendant stated that she would pay the amounts showing in exhibit 6.1 to 6.5 on record pages 79 to 83 at the NSSA Finance Office using her bank card by swiping. These receipts are alleged not to be all as some were burnt and what is available is what she recovered from work. The bank statement on record pages 71 to 76 bears testimony to defendant's evidence. This is exhibit 7. The defendant denied that the plaintiff gave her any cash in *lieu* of such payments.

The defendant confirmed that they had built a bedroom at the rural home and installed an irrigation system. She also pointed out that they also have an A1 farm which the plaintiff is utilizing where she had been involved tending to the fields before she got employed. Though the defendant confirmed that the plaintiff indeed got a loan to install the irrigation system, she averred that she was supporting the plaintiff whilst the loan was being serviced.

On the state of the Chitungwiza property when she acquired it, the defendant said that it was just a structure with a roof but un-plastered, with no floors, toilets and doors. She got this structure from a loan from her employer and the developments were made using top ups to the housing loan which she was still paying and remained un-cleared. She averred that no one had assisted her in clearing the said loans.

In explaining the plaintiff's allegation that he had paid for the electrification at the Chitungwiza house, the defendant said she had in fact received loan money from work for this which the plaintiff had diverted as he required more cash to pay for a vehicle at Beitbridge and he thereafter repaid her by paying for the electricity and she still had to service the work loan so she in fact paid for the electrification of the house.

The defendant's evidence is that the Chitungwiza property is much smaller in size as it is 200 square metres whilst the Budiro property is much bigger at 374 square metres. She explained that due to the smaller stand size, the Chitungwiza property has smaller rooms. She says she has put a solar geyser in the Budiro property and there is a well yet the Chitungwiza well collapsed.

In summary her evidence is that she contributed solely and continues to do so to the Chitungwiza property and contributed both directly and indirectly to the Budiro property.

The defendant also pointed out that the children go to school in Budiro and should not be dislodged to Chitungwiza particularly for the one in Grade 6. It was the defendant's further evidence that the Plaintiff has not been consistently and adequately maintaining the children hence she had to let out some of the rooms at Budiro in order to meet the children's needs and augment the rentals from Chitungwiza.

Under cross examination, the defendant confirmed that the amount she contributed to the cottage was not enough to complete it and the plaintiff also contributed. Though pressed to admit that the plaintiff would give her cash in lieu of the amounts she swiped at NSSA, the defendant insisted that the plaintiff never reimbursed her. The defendant disputed that the two properties have more or less the same value and pointed out that whereas the Budiro property has title deeds, the Chitungwiza one has a cession and there are costs involved to finally get title deeds.

In giving her evidence, the defendant did not exaggerate her contributions and credited the plaintiff for his contributions. She also provided details about the circumstances surrounding her contributions and remained unshaken under cross examination.

The Law

I start by laying out the applicable law in matters of this nature relating to distribution of matrimonial property upon divorce. Section 7 (1) and (4) of the Matrimonial Causes Act, [Chapter 5:13] 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;

- (4) 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.”

I wish to start with the income earning capacity, assets and other financial resources which the two parties have or are likely to have in the foreseeable future. The defendant continues to be employed at NSSA and was awarded the ice cream making machine which could be employed for income generation. On the other hand, the plaintiff is engaged in farming at both the rural home in Chiweshe where an irrigation system was installed enabling him to farm all year round. Additionally, he has an A1 farm on which the farming activities can be extended.

The only financial obligation the plaintiff will have is the maintenance of the two minor children of the marriage at the agreed amount of US\$60. 00 per month, per child and his own maintenance. On the other hand, the defendant has to maintain all the four children whom she lives with as none is yet self- supporting, her own sustenance and serving the loan repayment for the Chitungwiza property. The rentals she collects from the Chitungwiza property and some rooms in Budiro are employed towards the children’s maintenance.

In terms of the standard of living of the family, it is clear that the Budiro house is of a better standard as it has bigger rooms, is on a bigger stand and has a water well and geyser. In the light of the water challenges in both Harare and Chitungwiza, this puts the Budiro property way above the Chitungwiza one.

There is a minor child who is in grade 6 whose school is in Budiro whose education would be disrupted by any move to Chitungwiza. Both parties are fairly young and not in any special physical or mental condition.

In terms of contributions to the acquisition of both properties, it is clear from the evidence that the defendant made a clearly proved contribution of US\$ 11 100.00 if the receipts admitted as exhibits 6.1 to 6.5 and exhibit 5 and the one on record page 78 are taken into account. Though no monetary amounts were put, it is also admitted that she bought the gate for the Budiriro property. Her evidence about her purchase of bricks for the durawall, contribution to the building of the temporary structure and the installation of the burglar bars, also points to an increase on her direct contributions to the development of the Budiriro property. Her evidence on this was more credible as it was detailed and not exaggerated. If one has regard to the estimated value of the Budiriro property given by the Plaintiff as US\$ 45 000.00 to US\$ 50 000.00, her direct contribution comes to 25% even before taking the other direct contributions into account.

It was accepted by the plaintiff that the defendant indirectly contributed in her role as a wife and mother to their children. She made it clear that she would cook, clean, nurse, cook for the builders, secure the building materials and work at the farm.

The plaintiff did not manage to show any direct or indirect contributions to the Chitungwiza property. His assertion of having paid for the electrification was refuted and the defendant showed that her own mother was on the ground attending to any builders or contractors. To date, the defendant is still personally servicing the Chitungwiza loan repayment.

In *Usayi v Usayi* 2003(1) ZLR 684 (S) the Supreme Court in upholding a High Court decision to award a 50% share to a non-working housewife of many years held that:-

“It is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as a wife, mother, counselor, domestic worker, house keeper, and day and night nurse for her husband and children. It is not possible to place a monetary value on the love, thoughtfulness and attention to detail that she put into the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy; nor can one measure in monetary terms the creation of a home and an atmosphere from which both husband and children can function to the best of their ability. In the light of these many and various duties, one cannot say, as is often remarked: ‘throughout the marriage she was a housewife. She never worked.’ It is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the ‘direct and 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.’”

The role of this court is set out in the case of *Gonye v Gonye* SC 15/09

“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.”

I was referred to the case of *Kumirai v Kumirai* HH 17/06 by Plaintiff’s counsel and urged to consider that this is a case where, because the parties worked for the same employer and both got loans from the employer to each buy a house, I should just award to each party the house in their name and may be give a cash adjustment to the party with a lesser value property. That case is clearly distinguishable from this one. *In casu*, only the Budiriro property has a title deed, both parties contributed to the development and acquisition of the Budiriro property yet the defendant has and continues to solely pay for and develop the Chitungwiza property. The defendant contributed both directly and indirectly.

In *Sithole v Sithole & Anor* HB 14/94 court held that even if a wife made only indirect contributions, she cannot leave empty-handed merely because she did not contribute financially towards the acquisition and development of the matrimonial home. The wife in that case was awarded a 40% share.

In *Muteke v Muteke* (S) 88/94 the wife made no direct financial contribution except as a housewife but court awarded her a substantial share. The court in that case considered primarily her needs and expectations rather than her contributions.

Given all the circumstances discussed above in this case, it is my finding that what is fair and equitable is to award the Chitungwiza property to the defendant as her sole property and award her a 40% share in the Budiriro property.

Accordingly the following order is made;

1. A decree of divorce be and is hereby granted on the grounds of irretrievable breakdown of the marriage.
2. The defendant shall have custody of the minor children, Anopaishe Nyamadzawo (born 1 August 2010) and Morris Tawananyasha Nyamadzawo (born 18 January 2013) until they attain the age of 18 or become self- supporting, whichever should occur first.

3. The plaintiff shall have access of the minor children every last weekend of the month from 18:00 hours on a Friday to 18:00 hours on a Sunday and two weeks during the school holidays and during public holidays and by mutual agreement
4. The plaintiff shall pay maintenance for the two minor children at the rate of US \$60.00 per child, per month, payable at the prevailing foreign exchange rate, until the children attain the age of 18 years or become self-supporting, whichever occurs first.
5. The movable property is distributed as follows;
 - a. The plaintiff is awarded the Honda Fit (non- runner) motor vehicle registration number ADE 1604
 - b. The defendant is awarded the Nissan X trail vehicle registration number AEI 6330, the ice cream making machine and all household property at Stand 4395 Budiro 2 Harare
6. The immovable property is distributed as follows;
 - a. The defendant is hereby awarded as her sole and exclusive property, the property known as Stand number 29925 Unit L, Seke Chitungwiza.
 - b. The Plaintiff is hereby awarded a 60% share and defendant a 40% share of the immovable property known as Stand number 4395 Budiro 2, Harare.
 - c. The Plaintiff is awarded the right to buy out the defendant her share of the property.
 - d. The property shall be valued by an evaluator appointed by the Registrar from his list within fourteen days from this order.
 - e. The Plaintiff shall pay the Defendant her 40% share in the property within two months of the date of valuation of the property
 - f. In the event that the Plaintiff fails to buy out the defendant in terms of this order, the property shall be sold at the best advantage through a registered estate agent and the parties shall be paid their shares from the net proceeds.
 - g. The plaintiff shall pay 60% of the cost of the evaluation whilst the defendant pays 40%.

Muronda Malinga Masango Legal Practice, plaintiff's legal practitioners
Ruzvidzo & Mahlangu Attorneys, defendant's legal practitioners