

JEREMIAH KATSAMBA
versus
LAINAH KATSAMBA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 3 February and 26 February 2014

Trial Cause

E.L Mvere, for the plaintiff
No appearance for the defendant

TSANGA J: This is a divorce action in which the dispute for resolution before the court in finalising the divorce revolves around a single crucial asset – the matrimonial home. It is not that the parties are averse to sharing. They are not. Figuratively speaking the court does not have to “bang any heads together” for the parties to see sense in sharing. It is not even the percentage allocation which is at stake since both parties have come before the court embracing the spirit of *‘hunhu/ubuntu’* at least within reasonable measure. This is exemplified by their agreement even amidst ventilations and robust challenges of each one’s contribution, that they should each have a fifty percent share of the value of this asset.

Being that as it may, what shapes the dispute before me is the question of timing in the disposal of this asset. The plaintiff, the husband in this matter, presses for an immediate sale and sharing of proceeds from the disposal of the matrimonial home. His reasons relate to his immediate personal and changed circumstances that have stemmed from the irretrievable breakdown of the marriage. On the other hand the defendant, the wife and custodial parent and hence the primary care taker of the couple’s two minor children, insists on suspending the sale until the children reach the age of 18 or are self-supporting whichever is sooner. Her reasoning and interests are relational to the children rather than personal. As a mother and primary caretaker, her principal concern is that the sale would leave the children homeless and without a reliable source of income for their support. This is against the reality that the plaintiff has failed to abide by an existing maintenance order despite her vigorous efforts at its enforcement. She has thus resorted to making ends meet by letting out two of the five rooms in the matrimonial home to tenants.

The major issue for trial is thus whether the sale should be staved off with the intention that the defendant and the children remain occupying the house until the children turn 18. Ultimately the dispute also boils down to the question of what constitutes justice in family settings where a divorced couple is likely to maintain very different roles and responsibilities in looking after the children. The defendant had initially sought maintenance for herself as another trial issue but had abandoned this aspect at the time of the trial.

The facts

The parties contracted a civil marriage under the Marriage Act [*Cap* 5:11] in 1999. Two children were born of their marriage. Firstly, Bliss Munashe Katsamba, born on 12 July 1999 who is currently 14 years old. Secondly, Tinashe Tyrod Katsamba born on 16 August 2005 who is accordingly aged 9 at present.

The parties' marriage certificate tendered as Exhibit No. 1 records their Bridegroom's name as Jeremiah Mutsamba. He explained that on obtaining his National Identity card his name was recorded as Katsamba instead of Mutsamba. He has since then been using Katsamba. The marriage certificate was indeed endorsed in by the Registrar General of marriages to read Jeremiah Katsamba in 2007.

Both parties agree that the marriage has irretrievably broken down. In his evidence in chief, the plaintiff stated that the parties have not been living together for the last four years. In happier times, the parties acquired the property in question, known as stand 9047 Nyamahuru, in Dangamvura Township in Mutare. This property was acquired as a vacant stand. Using proceeds from his employment at BP Service Station, he said he managed to erect a 5 roomed house largely from his own contributions as his wife was not in paid employment. Plaintiff handed in as Exhibit No2 his agreement of sale with the City of Mutare from whom he purchased the Stand in question. He was nonetheless clear that he sought a 50-50 allotment of any sale proceeds from the immovable property. He also explained that since their separation, the defendant has been living in the matrimonial home with the minor children. He confirmed that tenants have been sharing the house and that his wife has been receiving the proceeds.

With regards to selling the house when the younger child turns 18, he stated that this would work to his prejudice. This would be so since his intention is to build another house so as to have somewhere to stay, particularly in his dotting years. This was an eventuality which he saw as looming in the not too distant horizon. He feared that he would be too old to embark on the endeavour of building another house, were he to wait until the younger of their two children attains 18. Worse still, he worried that he might be dead by the time this eventuality comes to pass. Compounding the need for an immediate sale, he put forward the further argument that he is not employed and needs some income. He highlighted that he does part time jobs as a driver. This, in essence, was his version of his lived reality to date.

Defendant's cross examination of the plaintiff challenged his depiction of her as a house wife who sat on her laurels during the marriage. She brought out her work as a cross border trader, an activity which she said the plaintiff frowned upon and stopped her from pursuing after the marriage. Equally significant, was her emphasis of how her domestic work kept the cogs of the family machinery running. Given the agreement by both parties regarding parity of proceeds, these ventilations by both parties were perhaps necessary for each to off load but did not alter this aspect of their consensus.

Defendant also challenged the plaintiff on his claim of being largely unemployed. She stated that he has a car which he uses as a taxi which was bought during the subsistence of the marriage. Defendant's explanation was that he no longer owned that car as it was on a rent to buy and was repossessed when he failed to meet the payment targets. However, since no firm evidence was placed before the court to confirm plaintiff's assertion that this vehicle was repossessed, I shall assume he does have the car which he uses as a taxi as his means of support.

The issue of maintenance was also raised in cross examination amidst objections by plaintiff's counsel that this was an issue that the parties had already agreed will be governed by the existing maintenance order. I will return to this issue at some length in the judgment. Plaintiff conceded that he is not paying maintenance, claiming defendant's hostile attitude

whenever he gives the children groceries as one of the reasons for not doing so. His claim was that he will be protecting the children from being assaulted.

In her own evidence, the defendant emphasised that if the house is sold the children will have no means of survival given that the plaintiff is in breach of the maintenance order. She informed the court that from the time he left the family in November 2010 to the time she officially claimed maintenance from the Magistrate's Court in February 2012, plaintiff had not provided support for the children's upkeep. He paid briefly in 2012 but throughout the whole of 2013 and up to the time of the trial in January 2014 he has not paid. The maintenance order given by the Magistrate's Court is for \$50 per month for both children.

She informed the court that she struggles with unpaid electricity bills, with school needs and general upkeep of the children. She also highlighted her endeavours to augment her income by working on farms and as a domestic worker. She said that she uses the money from the two lodgers to pay school fees for the children. She emphasised that as the plaintiff has already shown his unwillingness to pay maintenance, undue hardship would ensue for the children because she would not be able to pay rent whilst at the same time using her proceeds to support the children. Her stance was that she would be better off receiving the money from rentals and remaining in the house with the two children. Given the difficulties she has encountered in enforcing the maintenance order, she indicated that she was even willing for it to be cancelled since it is serving no useful purpose. Regarding enforcement, her account was that whilst warrants of arrest have been issued against plaintiff, he has never been arrested. She espoused little faith that the sale of the house would morph the plaintiff into a "maintenance abiding" parent given his nonchalant attitude thus far. She also revealed that plaintiff has since met someone else with whom he is living in the low density suburb of Greenside and that he has already fathered another child. Her assessment was that the plaintiff cannot be that poor if he is residing in a low density suburb and also if he can afford a lawyer when she herself had come to court as a self-actor because she genuinely cannot afford to engage counsel. The above was in essence her narration of her reality.

In his closing arguments, Mr Mvere, counsel for plaintiff, emphasised that the defendant should follow the procedures for enforcing maintenance given and that there are repercussions for failure to pay. He also stressed the fact that if property is sold she will receive her half share. He further contended that she can pay \$100 a month for alternative accommodation. The plaintiff, he reasoned, would be able to meet his arrear maintenance from the proceeds of the sale of the house since his liquidity situation would greatly improve where the sale to be effected. The essence of his argument was that there are remedies for the fears that the defendant has raised.

The defendant on the other hand, closed her arguments by reemphasising the difficulty of going after the plaintiff for maintenance and the significance of her remaining in the house in the interests of her children. She also stressed that the house is a small, simple house in the high density suburbs, not likely to fetch much in the sense of meaningfully liquidating either of them. She stressed that she would not even be able to build an informal structure given the reality of the financial burdens she is already faced with. Moreover, her share would go towards the upkeep of the children whilst his would go towards the support of his new family.

The applicable laws and principles

The division of property on divorce is governed by s7 of the Matrimonial Causes Act [Cap 5:13]. Section 7(4) is pertinent to the issues raised in this matter and states as follows:

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

- a) the income earning capacity, assets and other financial resources which each spouse and child has is likely to have in the foreseeable future
- b) the financial needs, obligations and responsibilities which each spouse and child 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 or child
- e).....
- f).....

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 approach to division of property on divorce in the Matrimonial Causes Act is essentially evaluative. The considerations to be taken into account are both adult and child centred. Among the check list of factors to be examined by the court in exercising its evaluative discretion, are issues such as income earning capacity, financial needs, obligations and responsibilities, as they are likely to affect each spouse and child for the foreseeable future. Section 7(4) (b) on future financial obligations and responsibilities especially aims at ensuring that arrangements take into account children's future needs before a divorce is finalised.

Child rearing and caring duties and responsibilities continue to be experienced differently by men and women in the face of rather laboured progress towards dismantling stereotypical gendered roles. On divorce, more often than not, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them. Thus where a wife as in this case, has performed the child rearing and caring role, relying largely on financial support from her husband, the reality of continuing such obligations post separation, without adequate support, can be particularly detrimental for the physical and mental wellbeing of the spouse and children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food, clothing education and health care are met. In addition to time and emotional devotion that these responsibilities require, the bottom line is that they need an assured source of income.

Whilst an immediate partnership approach in the division of the matrimonial home especially as pressed for by the plaintiff, with each spouse getting 50% of the value of the house may appear just and equitable between the divorcing spouses, the very nature of the obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater disadvantage compared to the husband. This is more so where she has to factor in accommodation- an indispensable need for the custodial parent. The house in question is a high density house and whatever it is likely to fetch will indeed undoubtedly be modest. The plaintiff would not be able to acquire another house on her half share. Even if she uses the proceeds for rentals, currently shouldering as she does the overall responsibilities for all the children's needs in her real world, will mean that proceeds would soon be dissipated.

In terms of income earning capacity, assets and other financial resources which each spouse and child has is likely to have in the foreseeable future, the plaintiff has indicated that he relies on part time driving jobs. Since he has stopped paying maintenance, the assumption

is that whatever he makes is now going towards supporting his new family. In defendant's case, income from lodgers is her primary source of income. Whilst she sometimes works as a domestic worker and also does seasonal work on farms, these are fields of employment largely dominated by women and they traditionally attract less than optimum wages. The children are currently aged 14 and 9 and are still far from being self-supporting.

Turning to the financial needs, obligations and responsibilities which each spouse and child is likely to have in the foreseeable future, both parties have already experienced shifts major shifts in their living arrangements. The reality is that one more home has been created but certainly not without its challenges for the family left behind. For the plaintiff, the reorganising of the living arrangements resulting from his leaving the matrimonial home has clearly left him unable to support two households as evidenced by his neglect to pay child support for his two children.

Whilst the needs of children are factored into divorce proceedings particular by way of custody and maintenance arrangements, they are not essentially the decisive factor in terms of how property is shared. Much tends to centre on how property was acquired, who owns what and what can be termed as joint property. All the while the court uses its evaluative discretion on how much equity to give a spouse or whether to transfer an asset from one spouse to another. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC); *Ncube v Ncube* (1) ZLR 39 (SC). In this case since the parties are agreed on equity, the formulae in these cases is not what is at stake and needs no application.

Custodial parents do often raise the issue of prioritising children's needs rather than selling the matrimonial home. In the unreported case of *Mazorodze v Mazorodze* HH 245 /11 for example, the defendant's position as custodial parent was that the disposal of the property be delayed until the youngest child attained the age of 18. The court's view was that the maintenance order granted at \$300 would sufficiently cater for the needs of the children with respect to accommodation and other needs. To augment this would be the proceeds from the sale of the house. In ordering the sale of the house, the court also reasoned that this was a proper case of a clean break and a way of ensuring that the parties did not remain yoked for many years given the circumstances peculiar to their divorce.

The best interest of the child as a principle permeates our laws as they relate to children. Our new Constitution specifically incorporates children's rights within the thematic framework of the three pillars of protection, provision and participation that characterises the UN Convention on Children's Rights, to which Zimbabwe is a party. Devoting separate provisions on children rights is a clear indication of the role that the observation of children's rights is expected to have in building a just society.

Section 81 (1) (2) & (3) of the Constitution is an example of a protective provision within our Constitution. It states as follows in the relevant provisions:

"81(1) Every child, that is to say every boy and girl under the age of eighteen, has the right –

- a)
- b)
- c)
- d) to family or parental care, or to appropriate care when removed from the family environment
- e)

f) to education, health care services, nutrition and shelter

(2) A child's best interests are paramount in every matter concerning the child.

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as upper Guardian."

This section is an inherent part of the Declaration of Rights in the Constitution and is binding and non-negotiable in every respect. Moreover, in terms of s 44 of the Constitution the duty to respect fundamental rights rests not just on the state and its institutions but on every person as well. It is the duty of parents as much as the state to ensure that children have adequate education, health care, nutrition and shelter.

In terms of s 81 (3) what is in the interest of the children is clearly not entirely in the private domain of the parents. Where there is cause for the court to interject, it will. The non-payment of maintenance and the clear difficulties that the defendant has encountered in terms of enforcing the maintenance order under the Maintenance Act [*Cap* 5:09] requires this court to exercise its discretion with regards to what would be in the best interests of the children. Therefore whilst recognising that the parties have a maintenance order, it is perfectly within the rights of this court as upper guardian in granting this divorce to assess whether the best interests of the children lie in delaying the sale of the house.

In addition to the fundamental rights contained in the Declaration of Rights, s 19 (1) and (2) of the Constitution which falls under National Objectives is also another protective provisions in terms of children's rights. It is couched as follows:

"(1) The state must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.

(2) The State must adopt reasonable policies and measures, within limits of resources available to it, to ensure that children

a. Enjoy family or parental care or appropriate care when removed from their family environment

b. Have shelter, basic nutrition, health care and social services

c. Are protected from maltreatment, neglect or any form of abuse

d. Have access to appropriate education and training" (My emphasis)

Equally under National Objectives is Section 26(d) which deals with marriage and its dissolution as follows:

The State must take appropriate measures to ensure that

"d) In the event of dissolution of marriage, whether through death or divorce provision is made for the necessary protection of any children and spouses"

Section 9 of the Constitution lucidly states that the purpose of National Objectives is to guide the State and all its institutions in formulating and **implementing laws and policies** that will lead to the establishment of a more just society in which people enjoy fulfilling lives. Thus the legal system, in addition to other mechanisms is to be utilised in realisation of National Objectives. In particular the State, through the courts, is required to interpret laws and policies taking into account these National Objectives.

It is the duty of the court to ensure that the interests of the children are adequately protected before finalising a divorce order. The court cannot simply shy away from the maintenance issue on the basis that an order exists particularly when that order is not being followed. The general practice of the courts which is to ensure that the welfare of the children is adequately dealt with even where there is a consent order is elaborated fully in the case of *PL v YL* 2013 (6) SA 28 (ECG).

In the South African case of *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) for example, MOKGORO J at p 377, aptly made the following observations concerning the non-payment of maintenance where such has been ordered by the courts.

“Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for the most dependent on the law”.

In yet another example in *Burger v Burger* 2006 (4) SA 414, NTSHANGASE J addressed the issue of whether the proceeds from the sale of a house that were partly due to a spouse who had defaulted on paying maintenance could be attached. He observed that children’s maintenance rights needed to be secured and their rights to nutrition, shelter and basic health care services are basic constitutional rights. He granted an order restraining payment by the holder of the funds to the father until the children became self-supporting.

Financial arrangements and needs cannot be looked at outside existing circumstances and challenges that have already manifested themselves. In my view, given the difficulties the defendant has encountered in getting the plaintiff to pay maintenance, the sale of the house at this point would make the children’s position extremely insecure. Most likely they are already experiencing considerable stress at the thought of likely having no place to stay. But more significantly in my view, the amount of \$50.00 month awarded for the two children evidently took into account that the children already had shelter. The application was made in 2012 at a time when the plaintiff had already moved out of the house. The defendant was already making ends meet through letting part of the house to tenants. The standard of living of the family had already been radically altered by the separation at the time the maintenance claim was made. The defendant’s desire to delay the sale of the house is to enable her to continue providing shelter through an arrangement that was already in place at the time that the maintenance order was granted. In my view, it is the duty of the court to facilitate rather than hamper this process of ensuring stability in the children’s lives through an already existing arrangement, made in full knowledge of the circumstances by the court below.

Apart from the plaintiff’s assertion that \$100 a month can be used by the defendant to meet accommodation costs were the house to be sold, no particulars for the children’s proposed residence have been provided by him. It is the role of the courts to minimise eventualities such as increased risks of poverty from inadequate post-divorce support arrangements that can often be brought to bear upon children as a result of their parents’ divorce.

Both Plaintiff and defendant are aged 40 and therefore are still in the prime of their lives. The plaintiff’s fear that he will be too old to benefit from the sale of the property were he to wait until the younger child turns 18 is not a persuasive argument. He will only be 49, a respectable midlife point and hardly a doting age by any standards. He will at that time have done what could have been reasonably expected of a loving and caring parent, in terms of prioritising children’s needs as well as their best interests. His actions will also have helped to

shape his children's sense of justice and moral development in ways that may come to influence how the children behave in the future. He will still have a minor child who will benefit from his 'savings' from the delayed sale of this crucial asset which can only but increase in value.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the two minor children Bliss Munashe Katsamba, born on 12 July 1999 and Tinashe Tyrod Katsamba born on 16 August 2005 is awarded to the defendant, with plaintiff having reasonable access as agreed to by the parties.
3. The maintenance order granted by the Magistrate's Court remains binding on the parties subject to any variations that may be made by the Magistrate's Court from time to time.
4. The sale of the matrimonial property known as Stand 9047 Nyamahuru, in Dangamvura Township in Mutare registered in the plaintiff's name shall be delayed until the younger of the two minor children, namely Tinashe Tyrod Katsamba born on 16 August 2005 reaches the age of 18 or becomes self-supporting whichever is the sooner.
5. When the property is sold at the relevant time, the net proceeds shall be shared on a ratio of 50% for the plaintiff and 50% for the defendant.
6. The immovable property shall be valued by a registered estate agent after the younger of the two minor children, Tinashe Tyrod Katsamba reaches the age of 18 or becomes self-supporting, whichever is the sooner.
7. In the event that the parties fail to agree on an estate agent at the relevant time as articulated in paragraph 4, the Registrar shall appoint an estate agent from the list of valuers to conduct an evaluation of the property upon request by either party.
8. The cost of evaluation at the relevant time shall be shared equally by the parties.
9. The immovable property at the relevant time, shall be sold at the best advantage at most within 60 days of the valuation and the net proceeds shall be shared in terms of paragraph 5 of this order. (50% for plaintiff and 50 % for defendant).
10. Each party to bear their own costs of suit.

Mutungura & Partners, plaintiff's legal practitioners