FELINE MHANGAMI (NEE MATSHALAGA)
versus
ABEL MHANGAMI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 1, 4 & 10 June & 23 September 2021

Civil Trial

S Mupindu, for plaintiff
M Masimba, for defendant

[1] TSANGA J: The parties herein were married in 1989 so theirs was notably a lengthy marriage. They had four children, all of whom are now majors. What is disputed herein as part of their divorce is whether a named property should constitute the pool of assets to be divided and in the case of another of the properties, the issue is the divisional principle that ought to be applied. Among the disputed properties is a house in Budiriro, namely stand number 1217 which was acquired in 1997 in the husband's name at a time when they were already married. The wife who is the plaintiff herein wants 50% of this asset. Her husband disagrees that it is theirs for sharing. He says although it is indeed registered in his name, he acquired this house for his mother and not as part of their own assets as asserted by his wife.

[2] The parties also acquired a house in Marlborough, namely, subdivision C of Lots A and B called Adylinn of Bluffhill. It is registered in both their names and is the matrimonial home. The plaintiff says she is entitled to 50% of its value upon this divorce as her half share. The defendant, on the other hand, says she should only be given 10% for her indirect contributions as she did not contribute financially to its acquisition.

[3] The specific issues referred to trial are therefore formulated thus:

1. Whether or not stand number 1217 in Budiriro is a matrimonial asset belonging to both spouses
2. Whether or not it should be awarded to the defendant.

3. Whether or not both properties should be sold and the proceeds shared equally amongst both parties.

The evidence

[4] The plaintiff's evidence was that they married on the 23rd of December 1989. Sometime in 1997, her husband acquired the Budiriro stand from his friend, one Mr Mazvidziwa. At that time, his parents and her mother were staying with them. It was after plaintiff's father-in-law died that she said they decided that her mother in-law should go and stay in Budiriro. That way, other family members would be free to visit her freely in her own space. That being the case according to the plaintiff, the Budiriro house was never at any time donated to her mother-in-law whom she maintained was aware at all times that the house did not belong to her. It had simply been availed to her so that she could live somewhere more conducive for her well-being in every respect. If the house had been donated to her mother-in-law, the plaintiff said the latter would have mentioned it since they always spoke.

[5] At the time the property was acquired the plaintiff said she was working as a nurse. Her husband was a business man. They pooled their salaries together. She emphasised throughout her evidence the complementary nature of their roles during marriage, even if as head of the house, her husband was the one who decided what their money should buy. She further explained that she had never seen any need to keep receipts to prove her own contributions because that is not how they operated as a family. All operations were for the family unit and there were no disputes about finances. If the Budiriro property was acquired for his mother, she had not been told. Her mother-in-law had passed on in 2019. She was unable to comment on the allegation that her late mother-in-law had given the property to one of her grandsons, called Roderick. As far as she knew, Roderick, who is one of her two stepsons, stays at the farm. To her knowledge, there are currently lodgers staying in the Budiriro house and her husband takes the proceeds from the rentals as he is unemployed.

[6] Regarding the sharing of property on divorce, she further told the court that she had initially wanted the defendant to get the Budiriro house and for her to be awarded the Marlborough house. The Marlborough property had been acquired in 1995 and registered in both their names. It was their matrimonial home. However, she had since reconsidered the situation and what she now wanted was for both properties to be sold and the proceeds to be shared equally.

[7] She explained that her shift towards this more equitable sharing formula was spurred by her Christian beliefs. Also, since the woman whom her husband was effectively now with was her niece, (being her own brother's daughter) she did not want her to suffer. Moreover, she respected her husband's decision to move on but as she emphasized, that decision also has consequences such as the reality that their property now has to be shared.

The defendant's evidence

[8] The defendant's evidence too was that indeed he had initially brought in his then aging parents to live with them in 1996. There was no one to live with them in the rural areas. However, the setup of having his mother and his wife under the same roof was according to him, not a happy one as they were constant quarrels in the kitchen between them. It was this that spurred him to find a place for his mother. Since he was running a business, he had the money to acquire a stand. He told his wife then that he had bought a stand and had thereafter developed it with his mother as its ultimate beneficiary in mind. Up until it was completed his wife did not even know where the stand was. He also explained that in fact at the time that he bought this particular property, contrary to her testimony, his wife was not in paid employment. She had been fired in 1993 from her job as a nurse for going on strike. Up until 1997 when she eventually got another nursing job, it had been his sole responsibility to look after the family financially and to send their children to school.

[9] As for the Budiriro property, when construction was complete his mother had moved there as intended. He insisted that his wife knew at all times that the property was never bought for them personally but that it was bought for his mother. His explanation was that the house could not be put in his mother's name at the time because she was too old to run around in pursuit of title deeds at various offices. He explained in cross examination that it is his son who is staying in the house and not tenants as alleged by the plaintiff.

[10] As for the matrimonial home in Marlborough, he vehemently challenged his wife's quest for 50% on the basis that her demand was simply motivated by the fact that she had nothing to lose from getting such a percentage. In his case, on other hand, he had everything to lose having been the major financier of the acquisition of that property. It was his "life's sweat" as he put it. Moreover, he emphasised that even though their children are now adults, they still need a home to come to. He was also of the view that his wife was being misled by others in asking for a 50% share of the Marlborough house when it was in fact inheritance for

their children. His offer of 10% of the value of the Marlborough was in his view, a fair percentage which was equal to her contribution. He emphasised that this percentage would "cover everything". In his words, "she played a role as a mother and deserves to be applauded". He further highlighted that the law would not have served justice if he is ordered to pay her 50%.

[11] In cross examination, he admitted that the Marlborough house is in both their names. He explained that he had decided at the time this property was acquired that it should be in both their names to protect her in the eventuality of him dying before her. He said he wanted to protect because at the time property grabbing by relatives was still rife. He had reasoned then that if any relatives tried to take the property they would have had to contend with the Title Deeds.

THE LEGAL POSITION

[12] Section 26 of our Constitution of Zimbabwe[1] deals with marriage. Therein, it espouses the principle of "equality of rights and obligations of spouses during marriage and at its dissolution". Section 56 also lays down equality and non-discrimination as fundamental rights. Discrimination is prohibited on grounds such as custom, culture, sex and gender among others. Furthermore, in interpreting the provisions on fundamental rights and freedoms, s 46 also requires the courts to take into account international law and all treaties and conventions to which Zimbabwe is a party. Zimbabwe is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration of Human Rights; the Covenant of Civil and Political Rights; and the African Chartered on Human Rights and its Protocol on the rights of women. All these instruments contain provisions on men and women's status within the family. As such the principles out laid in these instruments with respect to marriage and family are crucial considerations in dissolution of marriage.

[13] On marriage, Article 16 (c) of CEDAW[2] for example stipulates equality in marriage and at its dissolution as a fundamental principle. Article 5 of CEDAW also requires States to actively address stereotypes on roles of both men and women that impede equality. As another example the Protocol to the African Charter on Human and People's Rights on the

[1] Amendment (No 20) Act 2013
[2] See Art 16 (1) (c) and (h) of CEDAW and also CEDAW General Recommendation No 21 on Equality in Marriage and Family Relations

rights of women also requires State parties in its article V1, to ensure that women and men enjoy equal rights and are regarded **as equal partners** in marriage. The net effect is that there is bedrock of principles both constitutionally and from obligations under international treaties that are of relevance. As part of State machinery, courts are therefore enjoined to ensure that the treatment of both men and women in law and in private life accords with the principles of equality and justice when it comes to marriage.

[14] In addition, the Matrimonial Causes Act [*Chapter 5:13*] in s 7(4) in particular, lays out the considerations that the courts must consider in the exercise of their discretion as to how property is to be distributed upon divorce. These include factors such as the income earning capacity of the spouses; financial needs, obligations and responsibilities; standard of living, age, physical and mental condition of each spouse; direct and indirect contributions, value of pensions and gratuities; and the duration of the marriage.

Section 7(3) (c) is also important. That section as a whole provides as follows:

> "(3) **The power of an appropriate court to make an order in terms of paragraph (*a*) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage**—
> (*a*) by way of an inheritance; or
> (*b*) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
> (*c*) **in any manner and which have particular sentimental value to the spouse concerned.** ***(My emphasis)"***

[15] In the case of *Usayi* v *Usayi* 2003 (1) ZLR 684 (S), the Supreme Court addressed squarely this issue of women's so called lack of direct contribution to the acquisition of the matrimonial home. The appeal in that case was against the granting of a 50% share of the sale price of a matrimonial home. Appellant's argument was that the lower court had erred in granting the wife such a percentage as she had not contributed to the acquisition of the property. The appellant, her husband, had offered her a 15% share. In that case, the court regarded as unsound, the appellant's submissions of lack of direct contributions by the wife in the acquisition of the matrimonial home. This was on the basis that s7 (4) of the Matrimonial Causes' Act in particular speaks of direct and indirect contributions, both of which should be considered. Justice ZIYAMBI JA as she then was explained the immense value of indirect contributions thus:

> "How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and therein 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 how can one say as is often remarked: "throughout the marriage she was a housewife. She never worked?" In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of 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".[3]

[16] In *Mhora v Mhora* SC 89/20 the Supreme Court also upheld the award by the High Court to a wife of a 50% share of an immovable property which was registered in her husband's name. This was pursuant to a divorce. The husband had submitted that he acquired the matrimonial property without any direct contribution from her whilst the wife had argued that their roles were in fact complementary. The court had this to say on indirect contributions:

> "Indirect contributions encompasses much more than the performance of domestic duties. It encompasses all aspects of a spouse's role in the life of the other spouse and their children in the day to day running of a family".

As stated therein, it is a crucial factor in determining the needs and contributions of the parties on divorce. It is safe to say our courts at the highest level have continued to embrace this transformative approach of different but equal with even greater emphasis regarding such roles

[17] This thrust by the courts towards according financial and non-financial contributions the same weight in marriage is thus in line with not just constitutional but also international obligations on equality during marriage and at its dissolution. Women just as men must enjoy substantive equality at the dissolution of a marriage. Once a matter finds itself in court for resolution, principles of fairness and justice in terms of the law become central considerations. Whilst courts have articulated and embraced a framework of equality that is also based on difference in resolving disputes centred on non-financial contribution, it remains evident mainly though not exclusively from male litigants, that their perceptions of fairness continue to be shaped by more rigid ideas of family and gender roles that tend to devalue the gendered roles of women.

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[3] *Usayi v Usayi* supra at p 688 A –D

[18] The thrust taken by our courts in cases such as *Usayi* and *Mhora* therefore fundamentally contributes to shifting such mind-sets by fostering an understanding of equality that also appreciates this principle as difference with men as opposed to sameness. Women, in other words simply work at different jobs within the family. Women's activities in family life may be different from those of men but they are just as equally critical for the survival of society.

At the same time, it is crucial to appreciate that even with very strong leanings towards 50-50 sharing in resolving matrimonial property disputes, our Supreme Court has steered clear of pronouncing bright line rules by emphasising the need for an individualised approach in each case. In *Mhora v Mhora* Uchena JA with the others consenting put it thus:

> "However, it must be borne in mind that each case must be dealt with according to its own circumstances and merit".

Thus, judicial discretion remains a guiding principle, allowing for factual variations in terms of what is equal. The present approach towards property distribution on divorce within our jurisdiction can therefore be best described as a hybrid one. It embraces equality in line with the thrust of the 2013 Constitution and obligations under international treaties whilst at the same time accommodating individualised considerations guided by the Matrimonial Causes Act. Such an approach does not at all water down the ethos of equality but simply allows the courts to reach a conclusion on equality that is informed by the circumstances of a case since these may often differ in the real world.

FACTUAL ANALYSIS

The Budiriro House

[19] The issue, to recapitulate, is whether the plaintiff has just as equal a beneficial interest in this house as her husband in whom the property is in reality registered, or, whether this court should accept his explanation that this particular asset was bought for his mother and was only in his name out of expediency. At divorce all the assets of the spouses are as a starting point put on the table in accordance with the Matrimonial Causes Act. (See *Gonye* v *Gonye* 2009 (1) ZLR 39 SC and *Lock* v *Lock* SC51/20. Since the Budiriro house is an asset registered in the husband' name what this court is enjoined to do by the Matrimonial Causes Act is to consider all assets of the spouses. As explained in the case of *Takafuma* v *Takafuma* 1994 (2) ZLR 103 SC the court then sorts out those assets into "his", "hers" and "theirs" and

uses these categories to make adjustments where deemed necessary once the category of property marked "theirs" has been distributed. The objective is to place the parties in the position they would have been in had the marriage continued.

[20] With regards s 7 (3) of the Matrimonial Causes Act, the Budiriro house is notably not separate property in the sense of having been acquired through a gift or inheritance but rather in the sense that it was acquired in a manner and for purposes which give it sentimental value to the defendant. He definitely acquired it for his mother and this fact is bolstered in my view by the irrefutable evidence led that she lived in the house from the outset of its completion and for well over 20 years thereafter up until she died. It was not at all an asset that the parties, as husband and wife, ever benefited from at all during their marriage. The fact that his mother lived in the house from the very first day it was completed and that the house had been acquired especially for her purposes gives this house a particular sentimental value for the defendant as contemplated in s 7 (3) (c) of the Matrimonial Causes Act. Whilst the plaintiff said her mother-in-law would have advised her if the house had been given to her, there was no indication from plaintiff's own evidence that her mother-in-law was ever told that she was merely exercising a life usufruct over the house when she moved in. In any event, with a civil marriage being out of community of property, our law does not prevent a spouse from owning property in their own name. The facts in each particular case are important to understand in deciding whether such property should be shared.

[21] Given the factual circumstances, I do not believe this asset should be divided up between the divorcing spouses. There is also no evidence that it was ever treated as a family resource and neither was there any effort by the defendant any time to convey 50% ownership to his wife in the event that something happened to him in the same manner that he had rationalised with the Marlborough property. The parties had acquired the Marlborough house jointly and in both names precisely because the defendant understood at the time as he put it, that inheritance laws (which have since changed) would have been disfavourable to his wife. Yet if the Budiriro property had indeed been intended as a family asset, these concerns did not spur him to do the same. The explanation would lie in that he truly viewed this house as his mothers' even if it was in his name for reasons he explained. There is absolutely no doubt that it is a house that *de facto* was his mother's. The division of the Budiriro property

as "theirs" would be improper under the circumstances in that it was never acquired as such. Its sentimental value to the defendant, given the circumstances of its acquisition and the use to which it was put were succinctly put before this court by the defendant. He is free to carry through her wishes as to what she wanted done with that property without hindrance.

The Marlborough House

[22] The matrimonial home in this instance was registered in both names which reflected a common intention to share as emerged from the evidence led. Our case law is clear on the import of a party holding a 50% share. As articulated in *Chapeyama* v *Chapeyama* 2000 (2) ZLR 175 (SC) the registration of a property in the names of husband and wife confers real rights in the property.

[23] Defendant's argument in resisting giving the plaintiff her 50% share of the matrimonial home is founded on the wage gap between what he contributed and what she contributed at the time. Her nurturing investments were biological but as already captured in the case law referred to above, it does not mean this work was valueless or that it should be accorded less value.

[24] Defendant's argument that the asset is for their children also cannot hold. If the parties had wanted to exercise this option of giving the property to their children or placing it in a Trust, they could have done so by consent. The Matrimonial Causes Act in s 7(5) recognises written agreements by consent in the resolution of property distribution on divorce.

> "In granting a decree of divorce, judicial separation or nullity of marriage an appropriate court may, **in accordance with a written agreement between the parties**, make an order with regard to the matters referred to in paragraphs (*a*) and (*b*) of subsection (1)."

[25] Where parties are not in agreement as to how assets should be handled then s 7 (1) (a) comes into play.

> **7. 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;

[26] Furthermore, the children in this instance are all majors and can chart their own paths in life. A divorcing spouse cannot be denied her right to assets which she is entitled to and

which she needs to start a new life simply because one spouse requires the other spouse's needs to be subservient to his own legacy considerations. Divorce, of necessity, brings about fundamental changes in the parties' lives. Needs are prioritized by the courts because each party has to craft new beginnings. There is absolutely no justification here for refusing to accord each party their 50% share in the Marlborough property. Theirs was a long marriage. It will not be easy to start afresh but that is the reality that they will have to make do with their share of the matrimonial home. As the plaintiff correctly summarized, divorce comes with the consequences of property sharing.

[27] In the circumstances the following order is granted.

1. A decree of divorce be and is hereby granted.
2. The plaintiff be and is hereby granted a 50 percent of the immovable property, namely subdivision C of Lots A and B called Adylinn of Bluffhill.
3. The defendant is awarded his 50 percent share in the said immovable property.
4. The immovable property shall be valued by an independent Valuator appointed by the Registrar of the High Court from the list of Valuators within 30 days of this order.
5. The parties shall meet the cost of valuation in equal proportion.
6. Each party is hereby granted the option to buy out the other's share in the immovable property within three months from the date of receipt of the valuation report.
7. In the event that the plaintiff fails to buy out the defendant, or, the defendant fails to buy out the plaintiff within three months or such longer time as the parties may agree to in writing, the property shall be sold to best advantage by an Estate Agent mutually agreed to by the parties and in the event that they fail to agree, by one appointed by the Registrar of the High Court.
8. The net proceeds, after deducting the Estate Agents fees and other attendant costs, shall be shared in the 50-50 ratio set out above.
9. Each party shall bear its own costs.

Mupindu Legal Practitioners: Plaintiffs Legal practitioners
Legal Aid Directorate: Defendant's legal practitioners