

TAVENGWA CHIKWATURE
versus
OLIVE MAHUNGONETA MUSUNGA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 16-17 February, 17 May, 20 June 2023 & 8 February 2024

Civil Trial

C Tawanda, for the plaintiff
B Mugariri, for the defendant

MAXWELL J

BACKGROUND

On 10 May 2014 plaintiff and defendant were married in terms of the then Marriage Act [*Chapter 5:11*], now the Marriages Act [*Chapter 5:17*]. The marriage was blessed with three minor children, Jayden Chikwature, born on 22 May 2012, Joshua Liam Chikwature, born on 12 January 2017 and Jordan Seth Chikwature, born on 8 November 2019. On 11 January 2022 plaintiff issued out summons claiming a decree of divorce and ancillary relief. In his Declaration, plaintiff stated that the marriage relationship between the parties has irretrievably broken down to the extent that there is no reasonable prospect for the restoration of a normal marriage relationship. He proposed the distribution of the movable property acquired by the parties during the subsistence of their marriage and that custody of the minor children be awarded to the defendant with him being granted reasonable access every alternate weekend and the first two weeks of each school holiday. He proposed that he continues paying school fees at Dudley Hall Primary School or at any other equivalent school. He proposed that he would pay Z\$8250.00 per child per month as maintenance and would retain all minor children on the First Mutual Medical Aid Amber Plan and Nyaradzo Funeral Policy.

Defendant gave notice and entered her appearance to defend. In her plea she disputed that the marriage has broken down irretrievably. She pointed out that she still loves the plaintiff and has not lost any love or affection for him. She agreed with the proposed distribution of their movable property and indicated that the parties jointly acquired an immovable property,

being stand number 21577 Darwendale View Phase 1, Norton during the subsistence of the marriage. She proposed that the property be registered in the names of the 3 minor children in equal shares. She also demanded that plaintiff be ordered to complete construction of the house on the said stand and that she be granted a life usufruct to stay on the property. She agreed to have custody of the minor children and proposed that defendant pays \$100.00 per month per child as maintenance until each child attains the age of 18 years or becomes self-sufficient whichever occurs first. She also agreed that plaintiff retains all minor children on the First Mutual Medical Aid Amber Plan and Nyaradzo Funeral Policy.

PRE-TRIAL CONFERENCE

A Pre-Trial Conference was held and the following issues were referred to trial; -

1. Whether or not the property Stand No 21577 Darwendale View Phase 1 Norton registered under Tavengwa Chikwature Family Trust forms part of the matrimonial property? If so, what is a fair and equitable distribution of the property?
2. Whether or not the parties should contribute to the maintenance of the minor children, if so, the extent thereof.
3. Whether or not defendant will continue residing at Stand No 21577 Darwendale View Phase 1 Norton until the minor children namely Jayden, Joshua and Seth Chikwature reach the age of majority or until she remarries whichever occurs first.

TRIAL

Plaintiff testified in the following manner. Defendant said she is tired of the marriage so there is no possibility of retrieving the marriage. She is surrounded by suitors and she said she is not ready to be with him. During the subsistence of the marriage he paid for a stand through Dairiboard Trust but has not been allocated the stand. The parties acquired stand number 21577 Darwendale View Phase 1, Norton in 2015 and that is where defendant is residing. There is also a stand in Westlea but there is a possibility of being removed therefrom. Stand number 21577 Darwendale View Phase 1, Norton was initially bought under his name but he intended to put it in a family trust. The family trust was registered in 2022 and the property was transferred thereto. The beneficiaries of the trust are the three minor children. Defendant was not aware of the purchase of the property. She was neither consulted nor made a witness to the agreement. The property was paid for through funds from a salary-based loan from Barclays Bank and borrowings from an aunt and cousin. Defendant did not contribute anything towards the purchase of the property. There was always a gardener who came three

times a week and a maid to cater for the children. Defendant's wifely chores were close to none as in 2018 he was in Malawi and in 2019 he was in Chipinge whilst defendant was in Norton. He has always provided for her welfare and the welfare of the children whilst defendant pursued her agendas of being a traditionalist. She consulted sangomas and traditional healers and has always been involved in rituals in the house, sewing traditional regalia and meditation which was detrimental to health. As the sole owner of the property and the founding member of the family trust, he nominated the trustees, choosing people who would take care of the needs of the minor children, people who had contributed financially to the acquisition of the property to a certain extent. He wanted his children to have an inheritance which would not change ownership or of which they could not be dispossessed.

He disputed defendant's entitlement to the 50% share of the property that she claimed. He indicated that defendant has no right to demand completion of a property that she does not own. He sent defendant to a nurse aid course after which she did not seek any placement. He offered \$50.00 per child as upkeep per month, payable at the prevailing interbank rate. He proposed that as parents they had to share the children's expenses equally. He was agreeable to defendant remaining at the Norton property until the youngest child attains majority status. On being reminded that defendant was claiming US\$300 as maintenance for the minor children, he indicated that he was incapacitated to pay in United States of America dollars as he is paid in local currency of which his last earnings were ZW\$800 000.00. In his view, after divorce, defendant would be able to fend for herself as she is able bodied, with no special conditions, illness or disabilities. Defendant confessed involvement with a Mr Mangwiro, conceiving and seeking abortion on 5 December 2020. He tried to discourage her from aborting, quoting biblical references. Nevertheless, between 20 and 28 January 2021 she successfully terminated the pregnancy.

Under cross examination, he indicated that at the time of solemnizing the marriage, the parties lived in Harare but subsequently moved to Norton in September 2015. In 2016 his contract with Dairiboard Zimbabwe was terminated for three months. He worked for another company until November 2016 when his contract with Dairiboard Zimbabwe was reinstated. He disputed that the Norton property was the matrimonial home on the basis that the intention at acquisition was that it benefits the children. He was expelled from the Norton property in 2020. He tried to have defendant do a project of selling Avon products. He ended up being the one who funded it, sold products at his work place and collected money from the customers. However, some of the customers did not pay. On being challenged that the agreement of sale

for the property was back dated to 2006, he indicated that the Damofalls Sales Team had made him assume the rights of the former owner, Odias Gunha. He indicated that he registered the trust as he was the sole owner of the property. He was not aware that defendant was planning for divorce and she started pestering him for divorce in December 2021. She was incapacitated to file for divorce so he did after contacting her relatives. That was the Plaintiff's case.

Defendant testified next. The parties married customarily on 10 December 2011. They started living together in April 2012. Three minor children were born of the marriage. During the subsistence of the marriage, she was not formally employed but was a hairdresser and would do business of buying and selling things to raise money. Stand number 21577 Darwendale View Phase 1, Norton, was acquired in 2015 and it became the matrimonial home. She wanted it registered in the names of the children and that she be awarded a life usufruct on it. She contributed indirectly to the acquisition and development of the property. According to her, the Tavengwa Chikwature Family Trust was created to cheat her of her matrimonial home and there is a possibility that plaintiff will cheat the beneficiaries as well. She earns less than US\$15.00 per month from hair dressing and other activities. She wants the children to continue learning at Dudley Hall Primary School with the plaintiff bearing the responsibility of paying for their fees. In addition, he should pay \$100.00 per month per child as maintenance. Plaintiff can have access to the children on whatever terms he wants.

Under cross examination she indicated that she cannot guarantee any monetary contribution to the maintenance of the children as she is not employed. When Stand number 21577 Darwendale View Phase 1, Norton was acquired, she trusted plaintiff and allowed him to do everything for the benefit of the family. She did not insist on the property being registered in their joint names out of trust. She contributed directly and indirectly to the family welfare and expenses. For some time, she sold Avon products but had to stop due to the operating costs and the fact that some customers at plaintiff's workplace did not pay for the products they got. At one time the family was assisted by her sister when plaintiff's contract at Dairiboard was terminated. That was the defendant's case.

THE LAW

The assets subject to distribution in divorce proceedings are those that were acquired by the parties during the subsistence of the marriage which they consider to be belonging to the family. The law relating to the sharing of the assets of the spouses is set out in s7 of the Matrimonial Causes Act [*Chapter 5:13*], (the Act). The concept "the assets of the spouses" was

defined in *Gonye v Gonye* 2009 (1) ZLR 39 SC as 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. In subsection 4 of the same section, the Court is enjoined to 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;...”

The Act further directs that in distributing the assets, the court shall endeavor as far as is reasonable and practicable and, having regard to the conduct of the parties, where it is just to do so, place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.

Section 26 of the Constitution provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution and in the event of dissolution, provision must be made for the necessary protection of spouses. Article 16 (1) of the Universal Declaration of Human Rights (1948) provides that men and women of full age are entitled to equal rights as to marriage, during marriage and at its dissolution. This means that there must be a fair and equitable division and distribution of property at the dissolution of marriage.

ANALYSIS

1. WHETHER OR NOT THE PROPERTY STAND NO 21577 DARWENDALE VIEW PHASE 1 NORTON REGISTERED UNDER TAVENGWA CHIKWATURE FAMILY TRUST FORMS PART OF THE MATRIMONIAL PROPERTY? IF SO, WHAT IS A FAIR AND EQUITABLE DISTRIBUTION OF THE PROPERTY?

The property subject to distribution as stated in *Gonye v Gonye* (supra) are the assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution

of the marriage by the court. The question to be answered therefore is whether stand number 21577 Darwendale View Phase 1, Norton belonged to the category his, or hers or theirs. Initially the property was his but at the time the summons was issued out it was no longer his. Defendant, in her closing submissions referred to the case of *Mhora v Mhora* SC 89/20 in which the Supreme Court upheld the award to a wife of a 50% share of an immovable property which was registered in her husband's name. The registration of the property in *casu* distinguishes it from the property in the Mhora case (*supra*). The property is registered in the name of the Tavengwa Chikwature Family Trust. That registration was not challenged. The property therefore does not belong to any of the categories subject to distribution. It does not form part of the matrimonial property in the absence of an order reversing the registration in the name of the trust. Accordingly, it is not available for distribution.

2. WHETHER OR NOT PLAINTIFF SHOULD BE ORDERED TO COMPLETE THE CONSTRUCTION OF STAND 21577 DARWENDALE VIEW, NORTON.

Defendant's payer in the closing submissions includes a request that plaintiff be ordered to complete construction of Stand number 21577 Darwendale View Phase 1, Norton. As submitted for plaintiff, there is no legal basis for that request. The property does not belong to either party. It is for the registered owner to decide what should be done on the property. The Defendant's request cannot be granted.

3. WHETHER OR NOT DEFENDANT WILL CONTINUE RESIDING AT STAND NO 21577 DARWENDALE VIEW PHASE 1 NORTON UNTIL THE MINOR CHILDREN NAMELY JAYDEN, JOSHUA AND SETH CHIKWATURE REACH THE AGE OF MAJORITY OR UNTIL SHE REMARRIES WHICHEVER OCCURS FIRST.

The property in question is under the control of the trustees of the Tavengwa Chikwature Family Trust. The trustees are not part of these proceedings. In my view, it is incompetent to make an order concerning a property that belongs to a party who is not before the court. It therefore follows that whether or not defendant will continue residing at stand no 21577 Darwendale View Phase 1 Norton until the minor children namely Jayden, Joshua and Seth Chikwature reach the age of majority or until she remarries whichever occurs first will be up to the trustees of the Tavengwa Chikwature Family Trust.

4. WHETHER OR NOT THE PARTIES SHOULD CONTRIBUTE TO THE MAINTENANCE OF THE MINOR CHILDREN, IF SO, THE EXTENT THEREOF.

It is trite that in terms of the Maintenance Act [*Chapter 5:09*] the parents of a child are primarily and jointly responsible for the maintenance of that child until the child attains the age of majority or becomes self-supporting. The plaintiff offered to pay US\$50.00 per child at the prevailing inter-bank rate. Defendant, in oral evidence, sought an order that plaintiff be made to pay US\$100.00 per month per child. In her closing submissions she proposed that he be ordered to pay US\$70.00 per child per month. The amount of maintenance to be paid is assessed according to the means of the parties vis-à-vis the needs of the children. Plaintiff tendered his pay slip showing that his last earnings were ZW\$800 000.00. No justification was given for the proposed US\$70.00 demanded by the defendant. I am satisfied that the plaintiff's proposal of US\$50.00 per month per child meets the justice of the case.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. Custody of the minor children, Jayden Chikwature, born on 22 May 2012, Joshua Liam Chikwature, born on 12 January 2017 and Jordan Seth Chikwature, born on 8 November 2019, be and is hereby awarded to the defendant.
3. Plaintiff be and is hereby ordered to pay maintenance in the sum of US\$50.00 per month per child, at the prevailing inter-bank rate, until each child attains the age of majority or becomes self-supporting.
4. Each party bears its own costs.

Tawanda Law Practice, plaintiff's legal practitioners.
Musunga and Associates, defendant's legal practitioners