

TENDAI CHRISTINE MAZARIRE  
(NEE MHUNDURU)  
versus  
GABRIEL MAZARIRE

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
HARARE: 20,27 June & 30 July 2024

### **Divorce Action**

*C Shonhiwa*, for the plaintiff  
*C Kwiriwiri*, for the defendant

WAMAMBO J: The parties herein got married under the Marriage Act [Chapter 5:11] at Harare on 25 November 2006. Three children were born of the marriage namely Ryan Mufaro (born 10 October 2007) Bryan Tinotenda (born 23 March 2009) and Tessa Bryana Nyasha (born 13 September 2023). The marriage suffered a serious setback leading to plaintiff filing summons for divorce. Before filing for divorce the parties tried counselling to no avail. Since July 2020 they have been living separately. According to the plaintiff the relationship took a turn in the negative direction when defendant asked for money from her on her pay day and she was unable to be of assistance leading defendant to fly into a rage shouting obscenities at her and later her boss leading to her losing her employment. She testified to the various disagreements during the marriage that led her to leave the matrimonial home. On the other hand, defendant testified that from the onset he and plaintiff disagreed on financial matters. He testified that defendant did virtually nothing and only gave a false impression that the two were a couple and the facade that there was a father figure to the children.

At the end of the day the parties were themselves agreed that in the circumstances a decree of divorce should be granted. That much is clear as the issue of whether or not a decree of divorce should be granted is not an issue for trial as per the parties' joint pre trial conference minute. I am satisfied in the circumstances of this case that the parties marriage has suffered an irretrievable breakdown to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

I thus find that a decree of divorce should be granted. The parties joint pre- trial conference minute identifies the issues for trial as follows:

- “1. Whether the defendant holds any legal title lease or otherwise over the following properties.
  - 1.1 Stand 1528 Gletwin Park Harare
  - 1.2 Stand 150 Gadzema Township Chegutu.
  - 1.3 Stand 2977 Randolph Estate Gweru.
  - 1.4 Stand 17407 Epworth, Harare.
- 2 Whether or not it is just and equitable to award to the plaintiff the matrimonial home, being Stand 18669 Salisbury Township of Stand 12626 Salisbury Township lands held under Deed Number 5366/2007.
- 3 Whether or not it is just and equitable to award to the defendant, Stand 1528 Gletwin Park, Harare Agro Residential Stand no 150. Gadzema Township measuring 2,8953 Hectares, Stand No 2977 Randolph Estate Gweru measuring 2200 square metres and Commercial Stand Solani Shops Epworth”

The formulation of the issues for trial is evidence that is evidence that the parties were clearly worlds apart.

Both parties testified. I will not regurgitate the whole of their testimonies but will refer to relevant portions thereof.

During the trial of number of exhibits were produced with no objection from the other party. The exhibits are as follows:

Exhibit A- The parties marriage certificate.

Exhibit B - A Deed of transfer in favour of the defendant for Stand 18669 Salisbury Township of Stand 12626 Salisbury Township Lands measuring 1433 square metres. The execution date is given as 14 September 2007.

Exhibit C – A document with a City of Gweru logo dated 6 April 2023 with the following hand written note:

Remaining balance on stand number 2977 Randolph Phase 2.

1. Roads – US 200.00
2. Land sale Us \$ 4400.00
3. Vat at 15% US 660,00

Total US 5260,00

Exhibit E – A Chegutu Rural Council document statement for the defendant reflecting a balance of US \$ 433.

Exhibit F - An agreement of lease between Chegutu Rural District Council and the defendant for No 150 Gadzema Township Chegutu.

Exhibit G – An agreement of lease entered into between the Minister of Local Government, Public Works and National Housing and the defendant for Stand no 1528 Gletwyn, Harare.

Exhibit H – A letter signed on behalf of the Secretary for Local Government and Public Works directed to the defendant titled Delivery Lease Number A/101/20 Stand 1528 Gletwin Township dated 20 March 2020.

Like most witnesses in divorce cases there was a level of emotion and sometimes outright anger and disappointment displayed by both witnesses. Plaintiff appeared unhappy that defendant had according to her been assisted financially and otherwise by her family and when he attained goals such as acquiring a university qualification and good jobs he became arrogant. On the other hand defendant was of the view that plaintiff was a docile wife whose duties were mostly carried out by the maid while she did not lift a finger to assist but went to marrel at the building of the matrimonial home.

The parties were for the most part at loggerheads. I will proceed to deal with the issues as defined in the joint pre trial conference memorandum.

Stand 1528 Gletwin Park, Harare

Two documents were produced that speak directly to this properly namely Exhibits G and H. Exhibit G is a lease agreement between the Ministry of Local Government Public Works and National Housing and the defendant for stand 1528 Gletwin Park Harare.

The lease agreement was signed by the signatories on 10 January 2020 and 20 March 2020 respectively. The rentals payable by defendant are given as \$ 539 per month from 1 January 2020. A number of conditions are specified including that buildings to the value of not less \$ 200 000 should be erected by defendant during the currency of the lease. Clause 5 provides that the lessee should commence the erection of buildings within 9 months of the commencement of the lease.

Annexure H is a covering letter accompanying Annexure G above. It highlights what are referred to as important clauses of the lease.

Against the above background were the witnesses testimonies. Plaintiff pressed on that the Gletwin property payments were still on course and flowing therefrom that the property formed part of the assets of the spouses. Defendant's evidence was to the contrary. His testimony was to the effort that the parties never acquired the Gletwin property. He gave evidence of how the offer to the Gletwin property was extended to him be by the Police because his father was at some stage a senior police office. He cited financial incapacitation to fulfil the terms of the lease. Much as there is a lease agreement no evidence was adduced by plaintiff to prove the fulfilment of the lease conditions by the parties. There is no evidence of the

fulfilment of some of the lease conditions like the approval of plans and the commencement of building a structure before 30 June 2020 as specified in Exhibit H.

I am cognisant that plaintiff is the one who made the allegations that defendant holds title to this property and she should profer proof thereof.

I find that she has failed to do so. I find in the circumstances that defendant does not hold any title the Gletwin property. The property is turns not distributable.

Stand 150 Gadzema Township, Chegutu

The only documentary exhibits that speak to this property are Exhibits E and F Exhibit E reflects the balance of USD 433 on the stand.

Exhibit F is an agreement of lease between defendant and Chegutu Rural District Council Clause 1 of the lease agreement provides that the lease shall commence on 20 March 2012 and continue for 36 months.

Paragraph 1.2 thereof reads as follows:

“1.2 Subject to the lessee having complied with the terms of this lease the lessee shall have an option to have real rights over the property”

The question of real rights was crisply highlighted in the lease agreement as provided for above. The question is did defendant comply with the terms of the lease to attain real rights over the property?

Plaintiff is evidence on this property was to the effect that only USD 433 stood between the couple and acquisition of the stand as reflected in Exhibit E.

Defendant’s stance is that he secured a lease agreement for the Gadzema stand. He paid a deposit but did not manage to continue paying instalments leading to the lease expiring in 2018.

When defendant’s attention was drawn to Exhibit E he questioned the document the alleging that same does not describe the properly in question. The is no stand number or any other description of an address.

Exhibit E reflects defendant’s name and his Belvedere address. It does not directly speak to 150 Gadzema Township.

The document reflects a balance. The question is the balance is for what? Does the reflection of the balance mean that defendant acquired real rights in the property?

Clause 4:3(b) of the lease agreement provides as follows:

“(b) The lessee shall pay the sum of \$ 468,00 monthly towards both lease and purchase price for thirty six months ending 20 March 2015.”

Although defendant testified of the lease expiring in 2018 the lease agreement reflects the end date as 20 March 2015. With Annexure "E" not being helpful either way as it is unclear to which property it relates to nor whether the defendant has acquired real rights over it. I find that plaintiff has failed to prove that defendant has any real rights over the property.

Following therefrom I find that the property is not distributable.

Stand 2977 Randolph Estate Gweru

The documentary evidence that speaks to this property are Exhibits C and D. The former is an offer for lease while the latter is a note reflecting the balance left for stand 2977.

Plaintiff's evidence was as follows:

Because of its proximity to Midlands State University the stand was strategic for income derived from students accommodation. A deposit of US \$120 was paid for this stand. Her evidence was that she made enquiries from Gweru City Council and was informed that there were no follow up payments on the stand and that there was a balance of US \$ 5000.00. Exhibit D speaks to this balance. At the end of the day defendant who is the lessee did not or at the time of trial had not paid this outstanding amount. There are no real rights that flowed to the parties from this stand. I find in the circumstances that the said property is not distributable.

Stand 17407 Epworth, Harare

There was no documentary evidence tendered in respect of this property. I take it is the same stand referred to as commercial stand, Solani Shops, Epworth. Defendant was quick to concede that after this stand was offered to him on minimal conditions as an employee. He was suspended and disposed of the property to fund his legal bills and as he was the one who remained with the children, he also used the proceeds to fund school fees for the son at Watershed. He further testified that by the time the council informed him they would transfer the property to his name plaintiff had deserted him. He is currently unemployed.

This was the only property in relation to which plaintiff did not produce any document. Defendant was however candid and forthcoming enough to concede that he indeed received cession of the property but had to sell same to cater for various needs. Plaintiff also failed on detail. There was no value placed on this property and no documentary proof tendered in support thereof. Defendant without this basic bedrock of evidence made a concession with regards to this property.

I find that he was honest and that in the circumstances his version is truthful. I find that the property is matrimonial property. I however also find that the proceeds from the sale of the property went to the legal fees and school fees as averred by defendant. To that end I find that the property was sold and used for the family needs in the absence of the plaintiff, who had desisted the family home.

In *Gladys Chikuni v Busani Mavhivo* HH 21/20 at p 7 CHITAKUNYE J (as he then was) said

“A genuine sale in such circumstances would lead to a finding that the property was no longer available for distribution at the dissolution of the marriage. If on the other hand the sale was not genuine as alleged by the defendant the property would be available for distribution. It is trite that an owner of a property has the right to dispose of their property in a manner they desire. In cases of husband-and-wife relationship a spouse can dispose of his or her property without consent of the other as long as such disposal is not *mala fide*. In this regard the spouse seeking the courts interference on the disposal must show the lack of *bona fides* in the disposal and that the sale was a sham or simply intended to defeat his/her just cause.”

In this case no evidence was presented to reflect that the sale of the Epworth property was *mala fide*. I find in the circumstances that the property referred to interchangeably as Stand 17407 Epworth Township or Commercial Stand Solani Township Epworth is not distributable.

I move to consider the matrimonial property in Belvedere, Harare namely Stand 18669 Salisbury Township of Stand 12626 Salisbury Township Lands held under Deed Number 5360/2007. The parties were worlds apart with regards to the direct contribution to this property.

The plaintiff’s version is as follows:

Defendant was working for City of Harare. He got a chance to acquire a stand. It was decided by the parties to channel all the proceeds from the wedding to building a cottage. While the parties resided in Braeside they built a cottage. She was employed as a Provincial Ecologist and she contributed to household bills. She was later employed as an Environmental consultant and earned more than double her husband’s salary.

She registered a consultancy and also received gifts from a kitchen party which she sold. She cooked food for the builders and would walk on foot from Braeside through Mupedzanhamo to go and cater for the builders in Belvedere. Her own mother also made a contribution of 2000 bricks and also drilled a borehole at the matrimonial home. She got a job as a research officer in the Ministry of Agriculture while defendant worked his was towards attaining a C.I.S qualification.

The parties also embarked on a poultry project wherein she cleaned the fowl run and with the help of subordinates slaughtered and dressed the chickens while defendant did the marketing and selling of the fowls.

The parties obtained a mortgage which was repaid by a part of defendant's salary. Plaintiff also testified that she is renting in a one room. She stated that she was hiring and paying the maids during the course of the marriage.

Defendant's evidence was as follows:

He acquired the stand for the Belvedere matrimonial property before marriage. After the wedding plaintiff took her half share of the money paid at the wedding and bought her clothes at Sam Levy Village while he used his share to complete the cottage.

He obtained a mortgage loan through his work as a finance director at Epworth Local Board which he used to build the matrimonial house while plaintiff flatly refused to contribute.

He also used the funds he obtained from Cabs to build the house. When all is said and done defendant clearly contributed more in terms of direct financial injection to the building of the matrimonial home. Defendant's direct contributions appear minimal. Direct financial contribution is but one of the many factors to be considered in distributing matrimonial property.

Plaintiff gave birth to children and was married to defendant from 25 November 2006 up to 2020 when she left the matrimonial home. That amounts to about 14 years of marriage. I do not believe defendant when he said that plaintiff did not even assist to feed the builders and was what can be described as a spectator in the marriage and in the erection of the building of the matrimonial home. I believe plaintiff's testimony that her mother also made some contributions generally to uplift the couple and more specifically towards the building materials of the house in the form of two thousand bricks. This evidence was hardly resisted by defendant in any case.

I pay regard to s 7 of the Matrimonial Causes Act [ *Chapter 5:13*]. In considering s7 above MAKONESE J in *Henry Chigozie Ikekpeazu versus Primrose Ikekpeazu HB247/21* said the following at p 6-7:

“This provision gives wide discretion to this court with regards to the sharing and distribution of matrimonial property upon divorce. In terms of s 7(4) of the Act the court is enjoined to take into account certain factors in making an order for the division apportionment or distribution of the assets of the spouses or the payment of maintenance. It is provided as follows:

“In making an order in terms of subrule (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 values 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 spouse.

I will duly pay consideration to the factors as elucidated above in distributing the matrimonial house. Plaintiff is still employed in a professional capacity, and she has high qualifications. The defendant though not employed at the time of trial is also highly qualified. Both are of such ages that they can work for a living. Their marriage has lasted about 14 years. In the course of their marriage both have held various jobs and assisted each other along the way. I have already found that defendant made a higher direct financial contribution to the acquisition and building of the matrimonial home. Plaintiff has been a mother and home carer for the husband and children. Such contribution cannot be taken for granted and is duly considered in the distribution of the matrimonial home.

I note that defendant is residing with the children of the marriage I also note that defendant is staying in squalid conditions considering her status during the marriage.

After due considerations of the relevant considerations and the peculiar circumstances of this case, I find it just and equitable that the matrimonial home should be shared on a ratio of 70% and 30 % to the defendant and plaintiff respectively.

To that end I order as follows:

1. A decree of divorce be and is hereby granted.
  2. Stand 1528 Gletwin Park, Harare Stand, 150 Gadzema Township Chegutu, Stand 2977 Randolph Estate Gweru and Stand no 17407 Epworth Harare are not part of the matrimonial estate.
  3. The plaintiff is awarded 30% share and defendant a 70% share of the immoveable property being Stand 18669 Salisbury Township of Stand 12626 Salisbury Township Lands , Harare which is registered in the defendant’s name.
- 3 (1) The defendant is awarded the right to buy out the plaintiff’s share of the property.



3 (ii) The property shall be valued by an estate agent appointed by the Registrar from his list of estate agents within 30days of this order.

(ii) The defendant shall pay the plaintiff her share of the property within three (3) months of the date of the valuation of the property

(iv) in the event that defendant fails to buy out the plaintiff in terms of this order the property shall be sold at best advantages through a registered estate agent and the parties shall be paid out their shares from the net proceeds.

(v) The plaintiff shall pay 30% of the cost of the evaluation and the defendant shall pay 70%

4. Each party shall bear its own costs.

*I.E.G Musimbe legal practitioners, plaintiff's legal practitioners*  
*Kwiriwiri legal practitioners, defendant's legal practitioners*