

DOROTHY MATARA (NEE MUTASA)
versus
KNOX MATARA

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 20 March 2025 & 31 March 2025

MATRIMONIAL ACTION

Mr *C. Mukwena*, for the plaintiff
Ms *J. Magama*, for the defendant

SIZIBA J:

1. This case is another illustration of the inevitable emotional, social and economic setbacks that attend the breaking of marital vows through divorce. The parties herein were tied up in marital union on 4 March 2011 in terms of the Marriage Act [*Chapter 5:11*] which marriage now falls under the Marriages Act [*Chapter 5:17*]. Two minor children were born out of this marital union namely: Alvin Matara (born on 21 December 2010) and Alison Matara (born on 26 August 2015).
2. On 13 November 2023, the plaintiff filed this action seeking a decree of divorce and other ancillary relief which included custody of the minor children, maintenance as well as division of matrimonial assets.
3. When the trial commenced, many issues had already been resolved save the issue relating to the division of the immovable property being stand number 9041 Mountainrise, Chikanga in Mutare. In particular, the parties agreed firstly to break their marital vows and have this court grant a decree of divorce as a ceremony of their separation from the marital bond. Secondly, the parties also agreed that the plaintiff should have custody of the two minor children upon granting of the divorce. It was also agreed that the defendant should pay maintenance of US\$60 or local currency equivalent per month per child until the children attain 18 years of age or until the

order is varied by a competent court of law. It was also agreed that the plaintiff should be awarded all the movable assets as her sole and exclusive property. Accordingly, the only issues referred to trial were as follows:

- (a) Whether or not the immovable property should be sold or awarded to the children.
 - (b) If the property is to be sold, whether or not defendant is entitled to 50% share of the immovable property stand number 9041 Mountainrise, Chikanga, Mutare.
4. During the trial, both parties testified on their own without calling any further witnesses. Each of the parties did their best in trying to prove that they contributed more than the other party towards acquisition of the stand as well as the construction work thereon. Their zeal and exaggeration of facts on this aspect negatively affected the reliability of their testimony although there still remained some flashes of truth in their testimonies here and there.
5. What the plaintiff had initially pleaded in her declaration concerning the immovable property at para 9 was as follows:

“9. The Plaintiff also acquired an undeveloped stand namely stand number 9041 Mountainrise, Chikanga, Mutare which she registered in Defendant’s name.

(a) The Plaintiff then single handedly developed stand number 9041 Mountainrise, Chikanga, Mutare whilst Defendant was staying with a girlfriend.”

6. The above stance by the plaintiff simply tells one that her case is that she acquired and constructed the stand on her own without the defendant’s input. In her replication, she then tendered a 20% share of the value of the property to the defendant for his alleged indirect contribution. However, when the trial commenced, her case both during her evidence in chief and throughout the trial was that she contributed more than the defendant both in the acquisition of the stand and also in its development. What became common cause during the trial was that both parties contributed to the purchase

price of the stand as well as the construction of both the cottage as well as the main house. The question of who then did what and paid up what while the other was indirectly contributing by doing this and that became a hair-splitting exercise during the trial. Although the plaintiff demonstrated that she had kept some bit of account as to who bought what for how much and when between them, she still fell short of giving an infallible account which was beyond impeachment and this was obviously because practically, such a task could only be perfectly done by a spouse who not only lived throughout his or her marriage life in anticipation of a divorce but also one who carried along a calculator and a notebook or diary and a pen in all his or her shopping or spending errands. Such a task would be a mammoth one and it is virtually impossible under normal circumstances of a married relationship which is characterised by mutual love, sacrifice and trust. I was not persuaded to decide the important issues before me solely on the basis of such fiction.

7. To demonstrate the above point, during her evidence in chief, the plaintiff told the court that towards acquisition of the stand, the defendant only contributed a sum of US\$1 300 out of the total sum of US\$5000 which she alleged to be the purchase price. She alleged to have contributed the balance thereof. However, during cross examination, she conceded that the defendant and herself had put together money towards another instalment of US\$1 300. The plaintiff was also clear that both parties had contributed towards the purchase of the roofing material for the cottage which was initially meant for construction of a house at the rural homestead. It was also common cause that the defendant would buy groceries for the family even though the plaintiff complained that such groceries consisted of very few items on a sporadic basis. It was also common cause that the defendant would pay school fees for the minor children although this did not come up to the plaintiff's satisfaction. It was also common cause that during the construction of the main structure, the defendant had at one point purchased nine thousand bricks and thirty - five bags of cement. Infact according to the defendant, he had purchased sixty-six bags of cement at the alleged time. The plaintiff also made a concession that although she had furnished some receipts for her spending, those were not exhaustive of the expenditure in respect of the property.

8. On the other hand, the defendant's attempt as well to try and tell this court that he contributed more than the plaintiff towards the value of the property was not convincing to this court. The plaintiff was very passionate about her contribution to the project. Her testimony of how she suffered up to the point of earning a net salary of US\$81 and Zig 2000 out of her salary of US\$250 and Zig 6000 due to repayment of loans which she took at various stages to finance the construction of the property as well as the acquisition of the stand cannot be ignored. She proved that she had taken loans repeatedly from banks and finance institutions which included POSB, Getbucks, Germs loans, Quickloan, Nedbank, FMC and others. Although she would also spend some bit of the money towards children's school fees, clothing and food, a greater portion of the money was channelled toward the construction project for the house. I was not persuaded by the defendant's testimony that the plaintiff contributed nothing toward putting up the foundational box of the main structure. To the contrary, the plaintiff convinced me that the whole project was at her heart at every stage. She did the final furnishings on her own when the defendant was no longer staying at the matrimonial property and the defendant did confirm that at some stage the plaintiff was rejecting his contributions toward the construction of the property.

9. It is also significant that at all relevant stages of the acquisition and construction of this property, there is no stage where it can be concluded that the defendant had totally abdicated his role towards the welfare of the family in terms of paying school fees for the children and provision of groceries. It is common cause that both parties were gainfully employed at all relevant stages of this case. The defendant was employed as a police officer while the plaintiff was employed as a nurse aid. It is also common cause that sometimes either spouse especially the plaintiff would go and make certain purchasing transactions in the absence of the other spouse when both would have contributed towards the same task or goal. For these reasons, it would be misleading for any one of the parties to try and persuade this court that they contributed more than the other towards both the acquisition of the stand and construction of the matrimonial property. I must hasten to say that this consideration as to the financial contributions

towards this property is not all that a court that is faced with distribution of assets of the spouses has to consider.

10. Before concluding the issue of the extent of entitlement of each spouse to the matrimonial property, I wish to deal with the issue of whether the matrimonial property should be awarded to the children to save it from being sold as suggested by the plaintiff. The law which applies in relation to the distribution of assets of spouses at divorce does not make provision for such. It is only spouses who are divorcing whose property is distributed by a court of law. Nothing would however preclude the parties from agreeing that the property be awarded to the children if they so wish and the court in such circumstances would have to bend to their wishes in line with the doctrine of sanctity of contract unless it is shown that there is a principle of law or statute warranting the court to exercise its discretion otherwise. Section 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] provides clearly as follows:

“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;
(b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.” (Emphasis added)

11. The above statutory provision is very clear that the issue of division of assets concerns the divorcing parties. This does not however mean that a court which is exercising its discretion in dividing the assets of spouses should ignore the welfare of the children. The contrary is true as demonstrated by the provisions of s 7(4) which articulates all the factors that a court which is distributing assets of the spouses at divorce must consider and it provides thus:

“(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 relation-ship continued between the spouses.”

12. All the above statutory considerations are relevant in order to achieve the statutory target of placing the parties and the minor children in the position that they would have been had the marriage relationship continued to subsist. The marriage between the parties has subsisted from 2011 up to date. There are two minor children who are still attending school and who the plaintiff must take custody of. Although the defendant will also contribute her part towards the children's financial needs apart from the maintenance amount which the defendant will provide, it would still be the plaintiff's responsibility to provide shelter to these minor children. The defendant is also entitled to shelter on his own part but his situation is not as dire as that of the plaintiff who will be looking after the two minor children on a day to day basis as the custodial parent.
13. Furthermore, although both parties are employed, the defendant somehow due to the several loans that she took towards the development of the matrimonial home is currently in a dire situation whereby she has to repay all the loans so that she may earn a full salary thereafter. These financial needs are relevant to this court. In view of all these factors, I find it just and equitable to award the plaintiff sixty-five percent of the value of the matrimonial house whilst the defendant shall have thirty five percent share of the value of the property.
14. I find merit in plaintiff's plea that she should be allowed to buy out the defendant from the matrimonial property, however, her prayer that she should be allowed to pay such money in instalments beginning after a year from now would disadvantage the defendant who must also have resources to move on with his plans after the divorce. A

period of about six months to me would be reasonable failing which the property should be sold and the proceeds shared according to the stated percentages.

15. Having thus settled the only issue that was disputed by the parties, I therefore make the following order:

1. A decree of divorce be and is hereby granted.
2. The plaintiff be and is hereby awarded custody of the two minor children namely: Alvin Matara (born on the 21st of December 2010) and Alison Matara (born on the 26th of August 2015).
3. The defendant be and is hereby granted access rights to the two minor children during school holidays and weekends.
4. The defendant shall pay maintenance to the plaintiff in the sum of US\$60.00 or local currency equivalent per month in respect of each minor child until such child reaches the age of eighteen years or until the order is varied by a court of law.
5. The plaintiff be and is hereby awarded sixty – five percent of the total value of the immovable property being stand 9041 Mountainrise, Chikanga, Mutare whilst the defendant is awarded thirty-five percent thereof.
6. The parties shall agree on the evaluator within a period of thirty days failure which the Registrar of this court shall chose an evaluator to evaluate the property and the cost of such evaluation shall be borne by both parties equally.
7. The plaintiff shall be allowed to buy out the defendant by paying him his thirty – five percent share within a period of six months from the date of evaluation of the property failing which the property shall be sold and the proceeds thereof shared as stipulated above.
8. The plaintiff be and is hereby awarded the following movable property as her sole and exclusive property:
 - (a) Kitchen utensils.
 - (b) Deep fridge.
 - (c) CIC upright fridge.
 - (d) 4 plate stove.

(e) Fen.

(f) 10 blankets.

(g) Iron.

(h) Double bed.

(i) Queen bed.

9. Each party shall bear his or her own costs.

Chibaya & Partners, plaintiff's legal practitioners
Legal Aid Directorate, defendant's legal practitioners