

MORLEEN MACHIHA
(NEE GWEKWERERE)
versus
BERNARD MACHIHA

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE; 20 June 2024 & 12 March 2025

Opposed Court Application

B Mtetwa, for the applicant
G Maromo, for the respondent

WAMAMBO J: This matter concerns an application for variation of a court order in the divorce action under HC 3607/19. The parties in the middle of the trial decided to resolve issues by way of a consent paper. They also gave testimony in open court confirming the terms of the consent paper and other necessary issues.

Clauses 2.3 2.3.1, and 2,5 of the consent paper are the clauses under focus in this case. They read as follows:

“2.3 It is agreed between the parties that the property known as Lot 7 of Saligna also known as No 7 Saligna Lane Borrowdale, Harare held under Deed of Transfer no 6044/2006 be donated to the children of the marriage namely

- a) Claude Munashe Machiha born on 20th February 1996 ID 63-2421366C10 and
- b) Bernadette Chiedza Machiha (born on the 24th August 1999 ID No 63 2118945 J 24 in equal shares, share and share *alie*

2.3.1 That the plaintiff herein Morleen Machiha (Nee Gwekwerere) ID No 63 - 73 6849 H 70 be and is hereby granted a life usufruct over the donated property being Lot 7 of Siligna also known as 7 Saligna Lane Borrowdale, Harare under Deed of Transfer No 6044/ 2006”

Clause 2.5 of the consent paper reads as follows:

“2.5 That the transfer of the properties be undertaken by legal practitioners *Messrs Hogwe & Nyengedza* who shall only proceed with such transfer upon agreement having been reached as to the value thereof and upon the plaintiff and defendant having secured all the necessary transfer and other fees which they shall share equally.”

The consent paper referred to above was incorporated as an order of court. For clarity I will regurgitate the order spelt out in the divorce case between the parties under HC 3607/19. The order reads on the pertinent portion as follows:

IT IS ORDERED BY CONSENT THAT

1. A decree of divorce be and is hereby granted.
2. The terms of the divorce be and (is) are hereby regulated in terms of the consent paper signed between the parties on the 24th May 2023.
3. The consent paper be and is hereby incorporated herein and that its terms be made part of the order as if each term was specifically set out herein.
4. Each party pays his or her own legal costs.

Subsequent to the order as stated above being granted disagreements arose between the parties as regards the property more fully described in clauses 2;3 and 2;3 1 of the consent paper. I will hereafter refer to the said property as the Saligna property.

Upon advising the children of the terms of the divorce including the donation to them of the Saligna property the children of the marriage as referred to earlier expressed reservations about applicant returning to this Saligna property for various reasons including earlier break-ins and incapacity to effect renovations to the property.

The applicant and the children advertised the Saligna property for sale. The highest offer was US \$ 305 000. According to the applicant respondent and his legal practitioner contacted the real estate agent and sought to induce her to pay half of the purchase price to respondents' legal practitioners and the other half to applicants' legal practitioners.

Correspondence followed between the parties thereafter. The applicant is of the considered view that respondent wants to resile from the consent paper and is only prepared to allow transfer if he gets half of the purchase price.

Applicant seeks costs on a higher scale or costs *de bonis propis* if the legal practitioner is found to be culpable.

Counsel for the respondent submitted that these proceedings must be stayed pending the determination of HCHF 71/20 which is a matter between the same parties and which raises the same issues arising in this case. I do not agree. I am aware that the consent paper encapsulated as a part of the court order in HC 3607/19 is still extant I am also aware that the order was granted by consent after the parties testified and confirmed the contents of the consent paper.

If there is a similar case as is advanced it is not an absolute bar to the hearing of this matter, I find the point *in limine* unmeritorious and dismiss it.

I quickly move to the merits. Although both parties filed substantial and substantive pleadings and gave long oral submissions, I am of the considered view that the resolution of the matter is fairly simple.

The parties were involved in an acrimonious divorce. Evidence was given during the trial. Mid-stream the parties saw the light and decided to enter into negotiations which culminated in the consent paper.

The parties gave *viva voce* evidence confirming the contents of the consent paper. Problems only arose when applicant and the children sought to sell the Saligna property.

Parties are bound by their word especially if given under oath in a court of law. Both parties agreed that the Saligna property should be donated to the children of the marriage.

To suggest that the property should be sold to the advantage of the parties to the exclusion of the minor children is mischievous to say the least. Parties should reflect long and hard before executing documents. Worse still if they gave testimony confirming the contents of the consent paper such as in this case.

What is clear is that there is a court order which respondent now wants to resile from. There is a long-standing principle of law that court orders must first of all be obeyed whether or not one agrees or doesn't agree with the said orders.

See *Church of the Frame of Africa and Ors v Kunonga & other* HH 217/11. The question to be asked is is it just and equitable that the variation sought by applicant be granted in the circumstances.

In this case effectively respondent consented to the order being made and now deliberately and consistently refuse to follow the order that was ordered by consent. To my mind the respondent is defying his own word encapsulated as an order of court. After considering the full circumstances of the case and the oral submissions take the narrow view that there is an extant court order. It was entered into my consent. I have not been supplied with any cogent reasons for parties to resile therefrom. To give effect to the order as entered by consent the order sought in this application will ensure that parties enjoy the fruits of what they agreed to be encapsulated as an order of court by consent. I note that a lot of issues that are not directly relevant to the resolution of this matter have been advanced particularly from respondent's side.

As for costs I am of the view in the circumstances that costs on a higher scale are called for. For purpose of this case I will not order costs *de bonis propis* against the legal practitioner concerned. I note however that the attitude reflected appears to fall short of that expected of a legal practitioner, if proven right. I say if proven right because I am not armed with the full circumstances of the case including the explanation by, the legal practitioner concerned.

To that end I order as follows:

1. That the consent paper and consent order in case no HC 3607/19 be and is hereby amended and varied as follows:
 - 1.1 That clause 2.5 of the consent paper be supplemented as follows:
 - 2.5 (a) *That Messrs Hogwe & Nyengedza* provide the applicant's legal practitioner and the respondent with the proforma invoice setting out all the necessary transfer and other fees based on a value of US \$ 300 000 three hundred thousand United States dollars) within seven (7) Calendar days of the service of this order on Messrs Hogwe & Nyengedza.
 - 2 (5) (c) In the event of Messrs Hogwe & Nyengedza *failing* to comply with provisions of clause 2 (5) (a) herein that the Sheriff of the High Court be and is hereby ordered to appoint a conveyancer to undertake the transfer of Lot 7 of Saligna also known as No 7 Saligna Lane Borrowdale, Harare held under Deed of Transfer 6044/06 on the same terms and conditions as would have Messrs Hogwe & Nyengedza.
 - 2 (5) (d) In the event of the respondent refusing/ neglecting to pay his share of the fees and to sign all documents required of him to effect the transfer that the Sheriff of the High Court sign all such documents on behalf of the respondent and applicant pay the respondents share of the fees which will be recoverable from the respondent and executable on the basis of this order.
 - 2.5.1 That the respondent pays the applicant's costs on a legal practitioner and client scale.

Mtewa & Nyambirayi, applicant's legal practitioner
Messrs Hogwe & Nyengedza, respondent's legal practitioner