ROSEMARY MAPONGA
versus
ELSON MAPONGA
and
FORTUNE TAPIWA MAPONGA
and
THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 20 January and 4 February 2004

Opposed Application

Mr *Mhlanga*, for the applicant
1st respondent in default.
2nd respondent in person

MAKARAU J: The applicant and the first respondent were married in terms of the Marriages Act [*Chapter 5:11*] on 11 February 1997. The marriage subsists. Prior to his marriage to the applicant, the first respondent was married to one Naome Maponga, who passed on in 1978. The second respondent was born to the first respondent out of that marriage. He is a stepson to the applicant.

During the subsistence of his marriage to the late Naome Maponga, the first respondent was allocated a residential stand in Mabvuku by the local authority. This appears to have been on a rental basis for in1981, the first respondent was offered an opportunity to purchase the property under a suspensive agreement of sale, an offer that he accepted. Between 1978 when Naome passed on to the 1997 when he married the applicant, the first respondent occupied the Mabvuku property with the second respondent and the other children from his first marriage.

In November 1997, the first respondent and the applicant moved from the Mabvuku property and set up home in a single room that they rented in Ruwa. The applicant alleges that this move was a deliberate one on their part to enable them to qualify for a residential stand in Ruwa. In their absence, it is common cause that the second respondent took occupation of the property in Mabvuku. The applicant further alleges that he did so as a caretaker. Later in 1999, she discovered that the second respondent actually occupied the

property in his own right as cedant of the first respondent's rights in the property. The first respondent had donated his rights title and interests in the property to the second respondent on 14 October 1997 without the applicant's knowledge.

The relationship between the applicant and the first respondent became strained to such an extent that the first respondent left the applicant and moved in with his mother at her rural home. The applicant soon followed the first respondent to his mother's home but their differences resurfaced and she had to leave. At the time of the hearing of the application, the first respondent had abandoned the applicant. She tried to return to the Mabvuku property to take occupation but the second respondent barred her entry.

Allegedly homeless, she filed this application.

In her application, the applicant prays for an order declaring the Mabvuku property the matrimonial home to which she has a right of occupation. She further prays for an order permitting her to reside at the property without interference from the second respondent and for an order setting aside the cession of rights in the property between the first and the second respondents.

First and second respondents opposed the application. In his opposing affidavit, the first respondent denies that the property in Mabvuku ever constituted his matrimonial home with the applicant and that the applicant ever had any claims to the property. The second respondent adopts the position advanced by the first respondent.

The applicant's claim to the property is not one of ownership. It is for an order declaring the Mabvuku property the matrimonial home to which she has the right of occupation and consequent to that declaration, an order directing that she be allowed to occupy the property without let or hindrance from the second respondent.

The mainstay of applicant's case in this matter is her status as the first respondent's wife.

The applicant deposes in her founding affidavit that upon the solemnisation of her marriage to the first respondent, they both proceeded to the third respondent's offices for her status to be recorded against title to the property. She further argues that the recording of her status against the title to the property transformed the property into the matrimonial home.

The issue that arises in this application concerns the rights that a wife has to property belonging to her husband. The question usually relates to immovable property registered in the name of the husband as in most cases, this constitutes the most valuable asset that the spouses will fight over.

The rights of a wife to property belonging to her husband is a problem area and is in my view far from satisfactory. As observed by McNally JA in *Muzanenhamo& Anor v Matanga* 1991 (1) ZLR 182 (SC)'s case, claims of occupation of the husband's property rested on the wife's status have always posed difficulties for the courts. This is what he had to say at page 187:F

> "I turn to consider whether she may have a right of occupation arising from her status as a wife. This is always a difficult problem for the courts to solve. See for example *Jackson v Jackson* [1971] 3 All ER 774 (CA); *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) RLR 261 (A) and *Owen v Owen* 1968 (1) SA 480 (E).
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> It is essentially a matter of equity. The courts will intervene where, for instance, the husband sells the house as part of a policy of harassment arising out of divorce proceedings."

In this jurisdiction, the rights of a wife to the property of her husband are governed by common law. The acts of Parliament that have been enacted to regulate marital relationships since 1923 have left this area of the law untouched. For instance, the piece of legislation, where from its somewhat misleading tittle, one would expect to find provisions governing the relationship of the spouses to each other's or to joint property, the Married Persons' Property Act [*Chapter 5:12*] deals with the abolition of community of property between the spouses to any marriage solemnized after 1929 and nothing more. In my view, it would have been useful to provide in the same Act, the rights that the spouses have to property acquired by the spouses and especially to the matrimonial home during the subsistence of the marriage. The Matrimonial causes Act [*Chapter 5:13*], admittedly the most progressive of the Acts in this field to date, grants the court granting a divorce the power to equitably distribute the property belonging to the spouses, including the making of orders transferring property registered in the name of one spouse to the other. The Act does not however contain provisions as to the respective rights of the spouses to the property during the subsistence of the marriage. The position remains governed by principles of the common law of husband and wife.

These common law principles, largely borrowed from English common law, were developed in a bygone era and are heavily tipped in favour of the husband. The principles were developed in an era where the medieval authorities looked to the husband for dues rather than to the wife.[1] Thus all property, even that belonging to his wife, had to fall under his control for the due payment of feudal dues. It is for this reason that the principles place the wife's rights in a position subservient to that of the husband's in contrast to the thrust in modern law towards equality between spouses. If the historical basis upon which a legal principle was based were enough to do away to determine its validity, it could be strongly argued that the principles governing the rights of a wife to the property belonging to her husband no longer have a place in modern society where both husbands and wives are subjected to taxes by the new feudal lords. This is however, not the position. It is hoped that a future court may venture to suggest and hold that the bedrock upon which the principles that govern the rights of wives to the matrimonial home is outdated and that the principles have long outlived their mediaeval purposes.

It now remains for me to set out as I understand them, the principles that govern the rights of wives to property belonging to their husbands and their rights in particular, to the matrimonial home or any other immovable property belonging to their husbands.

The rights of the wife to the immovable property owned by her husband have been described as personal against the husband and as arising from her right to consortium and the right to be maintained by her husband. (See *National Provincial Bank Limited v Ainsworth* (1965) 2 All ER 472; *Cattle Breeders Farm (Pvt) Ltd v Veldman (2)* (2) RLR 261(A); *Muzanhenhamo and Another v Katanga* 1991 (1) ZLR 182 (SC) ; *Nyatawa v Nene* SC119/91 and *Muganga v Sakupwanya* 1996 (1) ZLR 217 (S)).

That the wife's right to occupy the immovable property registered in her husband's name is a personal right is clearly revealed in the remarks of Lord Hodson in the National Provincial Bank case when he stated at page 249 that:

> "When there is a genuine transfer, there is no reason why the wife's personal rights against her husband, which are derived from her status, should enter the field of real property law so as to clog the title of an owner".

[1] See Bromely's Family Law 8th Ed p 555.

This statement has been cited with approval in a number of cases that followed and in this jurisdiction. It is apparent from the statement that the rights of the wife to the family accommodation are held to be inferior to the rights of an owner of the property, the husband, who may pass good title to a genuine transferee.

It appears to me that two challenges may be raised against the validity of this statement to current disputes in this jurisdiction. Firstly, it was acknowledged in the National Provincial Bank case that the status of a wife and her relationship to property belonging to her husband is a situation *sui generis.* (See the remarks of Lord Upjon at page 472). She is not there as his invitee or as his licensee. She is there in her own right and because of her position as a wife. Having accepted that the status of a wife is *sui generis*, creating a unique situation to which the common law principles of property law such as licence, tresspass and invitation, were inapplicable, in my view, the court should not have proceeded in the same breath to apply some other principles of property law to the situation. The court ought to have evolved different principles consonant with the unique status of a wife, principles that would have given real meaning and effect to her status.

Secondly, in light of legislative interventions in the field of family law and the raising of the status of wives in this jurisdiction, the position that the wife only has personal rights against her husband who remains sole owner of the property with power to alienate the property at will and without reference to the wife is out of step with the policy thrust in this filed of the law. The Matrimonial Causes Act recognizes that the matrimonial estate is built up by the efforts of both spouses who contribute in different ways. The Administration of Estates Act [*Chapter 6:01*] recognizes that a wife has a stake in terms of ownership of the assets acquired by any or both of the spouses during the subsistence of the marriage and gives effect to this stake upon the death of either of the spouses. It therefore stands out as an anachronism that during the subsistence of the marriage, the rights of the wife, which will be recognised at the death of her husband or upon divorce, are not given legal effect because we apply principles that were defined in a by gone era and may no longer be relevant. As Mr *Mhlanga* for the applicant aptly put it in his oral argument, if these courts recognise that the wife's rights to a share in the matrimonial estate upon divorce or the death of her husband, accrue during the subsistence of the marriage, why are the courts

reluctant to give effect to these rights during the period of accrual, that is during the subsistence of the marriage?

The rights of the wife to occupy immovable property belonging to her husband was further defined in this jurisdiction in the case of *Cattle Breeders Farm v Veldman*(2) (*supra*). It would appear that the rights of a wife as against her husband to remain in the matrimonial home are not absolute. After reinforcing the position that the rights of a wife are personal against her husband, the then Chief Justice Beadle had this to say at page 297 about the extent of those rights even as against a defaulting husband:

> "A long line of cases seem to have laid down the proposition that even if the husband may be the defaulting party, he may eject the wife from the matrimonial home, provided he offers her suitable alternative accommodation or offers her the means of acquiring such suitable accommodation."

Again, it appears to me that the basis of this statement seems to have been eroded by developments in the law. The principle was based on the husband's duty to maintain his wife. That duty no longer lies for the benefit of the wife alone. Each spouse now has the duty to support the other and many wives could be self -supporting even within the marriage and may not require means from the husband to acquire alternative suitable accommodation. The implied and I would like to believe unintended meaning of this statement would be that husbands of self-supporting wives, who have been relieved of the duty to maintain their wives by law, are at liberty to eject their wives from properties registered in their names without providing alternative accommodation since the basis upon which such wives could occupy their husband's properties has been redefined.

As against third, parties, the position of the wife is equally precarious. A long line of cases seem to indicate that where there has been a genuine transaction between the third part and the husband, the wife's personal rights against her husband do not enter the field of property law to defeat the third party's claim. See *National Provincial Bank Limited v Ainsworth* (*supra*), *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) (*supra*). It was clearly stated in the Cattle Breeders case that the extent to which the rights of the wife which are of a personal character, are binding against third parties must depend on the particular circumstances of each case, and in particular, on the relationship of the third party to the spouses.

From the decisions in *Ferris v Weaven* (1952) (2) All ER 233 and *in Muganga v Sakupwanya* 1996 (1) ZLR 217 (S) and *Nyatawa v Nene* (supra), among others, emerge the principle that where the third party associates with the husband to defraud the wife of her right on the matrimonial home, the wife's right, derived from her status, is upheld.

It is not every home belonging to the husband that constitutes the matrimonial property. The matrimonial home is her home with the husband. Thus, in *Nanda v Nanda* [1967] 3 All ER 401, the court issued an injunction against a wife who visited her husband's new home with another woman on the strength of a decree of restitution of conjugal rights. He had deserted her in India and had set up a new home in England with a Miss Atiknson with whom he had two children. " She seemed to think that she had a right to arrive at the husband's home, where he was living with Miss Atkinson and demand accommodation; perhaps even to exclude Miss Atkinson and take her place in the home, " part of the judgement reads. The court held that the wife in this case was a trespasser and had no right to trespass in a new home established by her husband with another woman.

In my view, whether a particular abode constitutes the matrimonial home is a fact to be determined by where the parties set up home, and ordinarily reside. It does not have any direct bearing to the property owned by either or both of the parties. It usually coincides with the property owned by either of the parties but this is not necessarily the qualifying factor. This appears to me to have been the manner in which MACNALLY JA, determined the matter in *Muzanenhamo and Another v Katanga,* (*supra*), when he held that the parties matrimonial home moved to Mutare when Mr Katanga purchased a property there after being transferred to that city by his employers. Since Mr Katanga was going to work in Mutare, he was going to be ordinarily resident in that city and it is in that city that the matrimonial home was to be found.

It would then appear to me in summary that the status of a wife does not grant her much in terms of rights to the immovable property that belongs to her husband. Firstly, she has no right to any property that the husband has that is not the matrimonial home. She only has limited rights to the matrimonial home that she and the husband set up. These rights are personal against the husband and can be defeated by the husband providing her with alternative suitable accommodation or the means to acquire one. The husband can literally sell the roof from above her head if he does so to a third party who has no notice of the

wife's claims, thus completely alienating the matrimonial home without making any reference to the wife. Even the wife's right to consortium with her husband is not absolute as evidenced by the decision in *Nanda v Nanda* (*supra*). Finally, the matrimonial home is determined by where the parties intend to jointly set up home.

Applying the above principles to the application before me, it would appear to me that the applicant's status as wife will not do her much good. She does not have a matrimonial home to claim the right of occupation in respect of. The property that once belonged to her husband has since been alienated in circumstances where she cannot show that the second respondent acted in collusion with the first respondent to defeat her just claims. She and the first respondent voluntarily left the property not only to set up a new home but to acquire a property of their own in Ruwa. That they failed to do so does not make the Mabvuku property the matrimonial home in the stead of the failed acquisition. It is common cause that the applicant and the first respondent stayed in the Mabvuku property up to November 1997 when they relocated to Ruwa. At Ruwa, they set up home in rented accommodation. That became the matrimonial abode. From Ruwa they never returned to set up home at the Mabvuku property. The first respondent returned to his mother's home and there the applicant followed him. It thus appears to me that the parties never established a matrimonial home at the Mabvuku property.

In the result, the application is dismissed. There shall be no order as to costs.

Chihambakwe Mutizwa & Partners, applicant's legal practitioners.