GEORGE NJAGU

versus

RUDO ZHAKATA

HIGH COURT OF ZIMBABWE

CHITAKUNYE & MAWADZE JJ

HARARE, 22 June 2011 and 26 February 2012

**Matrimonial Appeal**

*J Mandevere*, for appellant

 Ms *N P Goneso*, for respondent

CHITAKUNYE J: The appellant and respondent started staying together as husband and wife in 1969. In 1971 their union was solemnized in terms of the African Marriages Act, [*Cap 238*], now Customary Marriages Act [*Cap 5*:*07*]. In the same year the appellant secured residential accommodation from his employer the Ministry of Health. That property is number 3567 Old Highfields, Harare. The property was a three roomed house. They lived in that house as tenants.

Their marriage was blessed with four children. In the year 1980 the respondent left the matrimonial home and never returned as a wife. In 1981 the property was offered to the appellant for sale. The appellant only signed his acceptance of the offer in 1985.

In 1988 the appellant sued for divorce and such was granted 29 March 1988. The order in case number 93/88 reads, *inter alia*, as follows:

“Decree of divorce has been granted on grounds of irretrievable breakdown of the marriage and desertion. The plaintiff retains custody of three minor children …… the defendant to have reasonable access of the children and taking them on every first school term holiday and every first two weeks of second term holidays…”

In 1994 the respondent sued the appellant seeking an order for sharing of the property. Neither party was certain as to what became of that case such that the only conclusion is that the case was never finalized.

In the year 2008 the respondent sued the appellant again for an order that she be awarded half share of the value of the land and the developments of three rooms on the property number 3567, Old Highfields, Harare. In her particulars of claim she stated as a basis for the claim *inter* *alia*, that-

“The plaintiff contributed directly and indirectly to the acquisition of the matrimonial property and it is just and equitable that the property be divided between the parties.

The property should be sold and the plaintiff be awarded half share of the matrimonial property.”

In her evidence in the court *a quo* the respondent acknowledged that the property was now well developed and no longer a three roomed house. It was in that light that she argued that her claim was for the old structure and not the developed structure.

The appellant contended that he had developed the property from a three roomed house to an eight roomed house. He also built a six roomed cottage within the property. All these developments occurred after he had bought the property and the respondent was not present and so she could not have contributed anything.

The trial magistrate in his judgment summarized the evidence before him after which he concluded that:

 “In the final analysis the court will make a finding that during the subsistence of the marriage which is from 1969 to 1988 a house named property number 3567, Old Highfields, Harare was acquired and the plaintiff contributed indirectly by taking care of the children. She was sewing clothes for the children and the defendant however purchased the property using his own money. Despite the fact that they were on separation, the marriage was still in subsistence. Therefore the plaintiff is entitled to share the property as appears on the record cover.”

 Dissatisfied with that decision, the appellant launched this appeal. Two grounds of appeal were stated namely that:

 1. The learned magistrate grossly misdirected herself in holding that the mere subsistence of the marriage entitled the respondent to a half share of the property and failed to take into account or give due consideration to the following factors;

(a) The parties were married in 1971;

(b) The marriage had four children;

(c) The respondent deserted her matrimonial home and the children in 1980;

(d) The respondent deserted the family for eight years and she never returned to the home until a divorce decree was issued in 1988; and

(e) The appellant purchased the immovable property on solely his own during the respondent’s desertion. Further, the appellant effected all the improvements thereon without any assistance from the respondent.

2. The learned magistrate erred on a point of law in that she failed to appreciate that the respondent had earlier on (in 1994) issued summons seeking division of property including the house in issue and the matter had been determined on merits. The matter is and was therefore *res judicata* at the time it came before the court *a quo*.

The second ground of appeal seemed to have been abandoned as the appellant’s heads of argument were silent on this ground. The appellant’s legal practitioner did not seem to press on with this ground in his oral submissions. That stance was understandable from the evidence led in the court *a quo*. The evidence led showed that whilst both parties were agreed that the respondent had issued summons in 1994 and the matter was apparently set for hearing, neither party had neither the judgment nor an order of court in respect of that case. The respondent’s contention that the matter was in fact not determined due to administrative movements within the magistracy seemed the most likely fate of that case. Clearly therefore there was no case of *res judicata.*

The only ground for appeal is thus the first ground. The issue for determination being whether the trial magistrate misdirected herself or erred in awarding the respondent a 50% share of the property in question.

The question of division of properties at divorce or after divorce is provided for in s 7 of the Matrimonial Causes Act; [*Cap 5*:*13*].

Section 7(1) of the Act states that:-

“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-

1. the division, apportionment or distribution of assets of the spouses, including an order that any asset be transferred from one spouse to the other;”

Section 7(4) then provides that-

“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—

1. the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
2. the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
3. 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;
4. the age and physical and mental condition of each spouse and child;
5. 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;
6. 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;
7. 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 the children in the position they would have been in had a normal marriage relationship continued between the spouses.”

By virtue of the above court is given very wide discretion in the division, apportionment and distribution of assets of the spouses (*Gonye* v *Gonye* 2009 (1) ZLR 232). This discretion must however be exercised judicially. Court must come to its decision based on the facts found proved before it. It is in this regard that a trial court must provide its reasons for judgment. To arrive at a decision without a judicious reasoning process may not show that court has considered all the circumstances of the case.

In *casu* the trial magistrate merely gave a brief summary of the evidence adduced and proceeded to conclude that:-

“In the final analysis this court will make a finding that during the subsistence of the marriage which is from 1969 to 1988 a house named property number 3567, Old Highfields, Harare, was acquired and the plaintiff contributed indirectly by taking care of the children. She was sewing clothes for the children and the defendant however purchased the property using his own money. Despite the fact that they were on separation, the marriage was still in subsistence. Therefore the plaintiff is entitled to share of the property as appears on the record cover.”

Unfortunately the record cover before us had no order being referred to hence we had to rely on the submissions by counsel as to what the trial court’s order stated.

The manner in which court purported to arrive at its decision did not reflect that court had in fact taken account of all the circumstances of the case and given each circumstance due weight.

It is common cause for instance that the respondents claim was for 50% share in the land and improvements as at the time she left the family in 1980. It is further common cause that the improvements that were on the land in 1980, were no longer there. As at the time she left the matrimonial home the family had been renting the house. Nothing on the property could have been available for sharing then. Equally one may say whatever contributions was made during that period were towards the sustenance of the family and not towards the purchase of the property. The property was only offered to the appellant in 1981 and he accepted the offer in 1985. The offer was to the appellant as the sitting tenant and not because he was married.

The question is therefore whether in those circumstances the respondent was entitled to a share of the property. If so what would be a just and equitable share for the respondent who had not participated in the purchase but had left home and never returned. It was in apparent answer to this that the trial magistrate alluded to the fact that the respondent contributed by taking care of the children and sewing clothes for the children. It is our view that in as far as it is accepted that during the respondent’s tenancy at this property, the property was not under any sale arrangement it cannot be said that she indirectly contributed to its acquisition or purchase. The marriage certificate she referred to may at the most have been used to assess the appellant’s suitability to occupy a house ‘tied’ to the Ministry of Health, his employer, as a tenant. At that time the property was not on sale. When the property was offered for sale it was offered for sale to sitting tenants. Nowhere in that offer is it stated that one needed to be married to be legible for the offer. The initial letter confirming that a decision had been made to sell the houses to sitting tenants reads in paragraph 1 that:

“I have to advise that the following houses which are at presently “TIED” to this Ministry may be released and the sitting Tenants may be offered the option to purchase the houses in question.”

This was then followed by the Deed of Sale which the appellant said he signed in 1985. The deed of sale shows clearly that the sale was intended for sitting tenants. Nowhere in that document is the issue of marital status made a condition of the sale.

It is our view that the circumstances of the case are such that the respondent did not deserve a share in the immovable property. The subsistence of the marriage on paper, as she deserted the appellant before acquisition of the house, would in our view not be sufficient to entitle her to anything of substance over immovable property purchased by the appellant well after she had deserted the family. The trial magistrate in our view misunderstood the weight to attach to the aspects he alluded to in his finding and ended up concluding that the respondent was entitled to a 50% share.

Another aspect noteworthy is that the trial magistrate did not provide the manner in which the 50% was to be assessed. The original improvements that were being rented having been substantially altered, to suggest that the property be sold and the respondent be paid her 50% from the proceeds would be to unjustly enrich her. In any case her claim was for 50% of the old structure which structure was no more. It was therefore incumbent upon the trial magistrate to indicate how the respondent’s percentage was to be extracted from the new structure. In as far as we have found that the respondent was not entitled to a share in the immovable property, such an exercise in not necessary at this stage.

Accordingly it is hereby ordered that the appeal be and is hereby allowed with costs. The judgment by the court *a quo* is hereby set aside and is substituted by the following:-

The plaintiff’s claim be and is hereby dismissed with costs.

MAWADZE J: I agree.

*Sawyer & Mkushi*, appellant’s legal practitioners

*J Mambara & Partners*, respondent’s legal practitioners