

DISTRIBUTABLE (61)

Judgment No S.C. 69/03  
Civil Appeal No 36/02

**Mark Kabaya V Getrude Kabaya**

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA  
HARARE SEPTEMBER 22, 2003 & JUNE 17, 2004

*H. Simpson*, for the appellant

*A. Moyo*, for the respondent

CHIDYAUSIKU CJ: This matter started in the Magistrates Court. In that court a decree of divorce was granted and custody and most of the matrimonial assets were distributed in terms of an order by consent. There was, however, a dispute over how the matrimonial home, house number 3348 – 255<sup>th</sup> Crescent, Kuwadzana 3, should be distributed. The learned trial magistrate heard evidence on the issue. After hearing the evidence the learned trial magistrate came to the following conclusion. The parties were allocated a stand by the City Council after they had been on the waiting list as a married couple. The respondent was not formally employed but stayed with the children at the family's rural home. The appellant was employed at a supermarket. A loan in the amount of \$1 500.00 was obtained from the City Council. The respondent tilled the land in the rural area and this contributed to the subsistence for the family. While it was difficult to quantify this contribution of the respondent it certainly was substantial and relieved the appellant from applying some of his earnings in providing for the family and redirecting them towards the construction of the matrimonial home, now the subject of the dispute. The learned trial magistrate concluded that it would be a travesty of justice to find that the respondent's contribution towards the construction of the marital home was negligible or less than half of the total effort needed to construct the home. In

coming to the above conclusion the trial court also relied on the fact that the respondent at times resided in town and that during those periods she sold food at certain construction sites. The income to the family derived from this source was difficult to quantify but the court was of the view that it might have been more than what the appellant earned. The probabilities support this conclusion.

It is common cause that the parties were married for a long time and had five children. Three of the children were minors at the time of the divorce. The acquisition and construction of the house took place over a period of time. The stand was acquired in 1984. The construction of the house was completed in 1993. The parties separated in 1996. It would appear from the record that the house is not registered in the name of the appellant as such but rather that there is an agreement in terms of which the City of Harare sold the house to the appellant but ownership of the house will be transferred upon satisfaction of certain terms of the agreement of sale. The learned magistrate's finding on the facts was not seriously challenged and is consistent with the evidence led at the trial.

On the basis of these findings the learned magistrate ordered that the house be shared equally between the parties. Put differently, the respondent was awarded 50% of the value of the house. The appellant was given the right to buy out the respondent.

The appellant was dissatisfied with the judgment of the learned magistrate and appealed to the High Court. The High Court upheld the decision of the learned trial magistrate. In dismissing the appeal ADAM J reasoned as follows: -

"We are satisfied on that evidence that the property was acquired as a family property. There is nothing from the evidence that indicates to us that the Magistrate erred in any way in making his findings pertaining to the question of how the property was acquired. We are also satisfied that he took into account the relevant factors in determining how the property should be divided quite clearly as submitted by the respondent in his Heads of Argument that although registration confirms right of ownership, this is not the only criteria considered in the division of matrimonial property in terms of the Matrimonial Causes Act. He then refers to the judgment in *Sikwila v Sikwila* S-55-99 and says that 'when marriage is dissolved, the court has a wide discretion of apportioning the matrimonial assets to the parties, but that discretion must be exercised judicially.'

It was submitted that in the present case, taking into account the factual findings made by the Magistrate together with the direct and indirect contributions made by each party towards the acquisition of the property, the duration of the marriage, the award of 50% to the Respondent by the Magistrate indicated that he properly and correctly exercised his discretion and that the appeal should be dismissed with costs.

It was submitted on behalf of the Appellant that since the divorce, the Appellant has constructed a durawall around that property and it is conceded on behalf of the Respondent that if that is the situation, then the Respondent cannot be and at the expense of the Appellant we are satisfied that in the circumstances, the order granted by the Magistrate indicated that the property had to be valued as at the date when he handed that judgment which I understand was in March of 1999."

The appellant was, once again, dissatisfied with the High Court judgment and he now appeals to this Court upon the following grounds set out in the Notice of Appeal.

The Notice of Appeal reads, in part, as follows: -

"GROUNDS OF APPEAL

- (a) The court *a quo* erred in holding that the property in question is not registered in the Appellant's name.
- (b) The court *a quo* erred in holding that the trial Magistrate properly exercised his discretion when he made the award in question."

Thus the appeal is based on two grounds.

Dealing with the first ground of appeal. In holding that the property is not registered in the name of the appellant the court *a quo* was

merely recognising that ownership of the property was still vested in the City of Harare although there is an agreement of sale in terms of which ownership will eventually be transferred to the appellant. This in fact is the correct legal position. The appellant concedes this point in paragraph 4 of his Heads of Argument wherein the following submission is made:-

- "4. Whilst it is conceded that ownership of the property in question vests with the City of Harare which is yet to transfer same to the Appellant in terms of clause 15 of the Sale Agreement between the Appellant and the City of Harare, it is submitted that it is the Appellant and not the Respondent who holds the rights, title and interest in the property."

Given the above concession I am satisfied that there was no misdirection as alleged in the first ground of appeal or, at all. I am satisfied that neither the court *a quo* nor the trial court took into account any factor they should not have considered nor did they fail to take into account any factor they were required to. The first ground of appeal therefore falls away.

The second ground of appeal is that judicial discretion was not exercised properly. It is now well settled that an appeal court will not lightly interfere with the decision of a lower court in the exercise of its discretion. If there is no misdirection this Court will not substitute its own discretion for that of the court *a quo*. An appeal court only intervenes in the exercise of a discretion by a lower court if the impugned decision of the lower court is grossly unreasonable. If one applies this approach to the facts of this case there certainly is no basis for interfering with the decisions of both the High Court and the Magistrates Court for a number of reasons.

Firstly, the appellant, in paragraph (b) of the prayer to the Notice of Appeal, concedes that the respondent should be awarded 30% of the net value of the house. It reads as follows:-

"WHEREFORE the Appellant prays that the Order of the court *a quo* be set aside and in its place the following order be made:

...

- (b) The Respondent is awarded 30% of the net value of the property in question excluding the value of the durawall which was erected by the Appellant after March 1999."

It is apparent from the above that the respondent's entitlement to a share of the house is not in issue.

It would appear therefore that the crux of the appellant's submission is that it was grossly unreasonable for the trial court to award the respondent 50% instead of 30% of the value of the house. The trial court would have acted reasonably had it awarded the respondent 30% of the value. The 20% difference is what constitutes the gross unreasonableness. In paragraphs 7 and 8 of the Heads of Argument the appellant sets out in some detail why the appellant thinks 30% as opposed to 50% should have been the appropriate award. The following submissions are made therein:

- "7. There is in this case no basis for an equal division of the property. This is because:
  - (a) The Sale Agreement in terms of which the rights, title and interest in the property were purchased is between the Appellant and the City of Harare.
  - (b) The Respondent does not jointly hold the rights, title and interest in the property in question with the Appellant.
  - (c) The Appellant was throughout the duration of the marriage, gainfully employed whilst the Respondent was not.
  - (d) The Appellant made direct financial contributions towards the purchase and development of the property in question whilst the Respondent did not.
  - (e) The Respondent only came to stay at the property in question in 1991 by which time the Appellant had constructed four rooms.

- (f) It is the Appellant who applied for the property in question and paid for it.
- (g) It is the Appellant who secured a loan to develop the Stand.
- 8. It is submitted that whilst the Respondent is entitled to an award in respect of the property, such award should not be equal to the Appellant's award as the Respondent's contributions were of an indirect nature and not in any way equal to the Appellant's contributions."

The above submissions are far from convincing. The decision of the trial court to award the respondent 50% of the value of the house cannot by any stretch of the imagination be categorised as grossly unreasonable. If anything, it is eminently fair and appropriate. This ground of appeal too has no merit.

In the result the appeal cannot succeed and is, accordingly, dismissed with costs.

CHEDA JA: I agree

MALABA JA: I agree

*Kanokanga & Partners*, appellant's legal practitioners

*Coghlan Welsh & Guest*, respondent's legal practitioners