

JUDITH HAISVOSVI (NEE MANATSA)

Versus

COLLEN HAISVOSVI

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 22 NOVEMBER 2002 AND 19 FEBRUARY 2004

S Mabhena for applicant

J Dhlamini for 1st respondent

Judgment

NDOU J: On 9 June 2000 this court issued a provisional order in the following terms:

“Terms of order made

Final order

1. That 1st and 2nd respondents are hereby interdicted from in any way whensoever or howsoever, directly or indirectly selling and transferring title to the immovable property at stand and house number 22355 Pumula South, Bulawayo.
2. That 1st respondent shall pay the costs of this application on a legal practitioner and client scale.

Interim relief granted

3. That this order shall operate as an interim interdict until the order is confirmed, interdicting 1st and 2nd respondents and those deriving authority from them, from selling or transferring title to the immovable property or stand and house number 22355 Pumula South, Bulawayo.”

The salient facts of this case are that the applicant and the respondent were living as wife and husband from 1984. They have three children born of their union.

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The gravamen of their dispute centres around the nature of their union. According to the applicant the parties contracted a civil marriage in terms of the Marriages Act [Chapter 37] on 19 June 1992. It is common cause that between 1984 and 1992 they were parties to an unregistered customary law union. The first respondent's case is that the latter relationship obtained until their separation in 1996. He disputes the validity of the marriage certificate dated 19 June 1992 on the basis that the marriage officer did not sign the marriage register and further that he and one of the alleged witnesses dispute being part of the marriage ceremony. I will return to this issue later in the judgment. I propose to deal with the position of the parties prior 19 June 1992.

1. **Rights of the applicant arising from the existence of an unregistered customary union with the first respondent**

The validity of the marriage certificate of 19 June 1992 dominates the dispute between the parties. Most, if not all, of the evidence adduced by the applicant and the first respondent centre around this dispute. What the parties did not seem to appreciate is the relationship of the unregistered customary union. I have already indicated that this position is common cause. In paragraph 4 of her founding affidavit the applicant stated "First respondent and I had in fact been customarily married since 1984." In paragraph 5 of his opposing affidavit the first respondent stated-

"5. Ad Paragraphs 4-5

No issue arises from these paragraphs."

In *Ntini v Masuku* HB-69-03 CHEDA J (with my concurrence) held that an unregistered customary law union on its own does not entitle a party to successfully claim her right under the principle of tacit universal partnership. A party so claiming must lay a foundation under general law in order for such a claim to succeed. It is

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upon the establishment of a legal foundation that the court can then assess the claim and thereby make its determination. On the basis of the principle of unjust enrichment the court held that the wife had cause of action and awarded 25% of the net value of the house. In *Mtuda v Ndudzo* 200 (1) ZLR 710 (H) GARWE J (as he then was) also awarded a share in the matrimonial house to a wife in an unregistered customary union. In *Chapenyama v Matinde & Ano* 1999 (1) ZLR 534 (H) CHINHENGO J held “that although an unregistered customary law marriage is not valid as far as the general law is concerned, it is nonetheless a valid marriage according to customary law and is recognised by the general law for many purposes. Where a customary law marriage is dissolved even where a tacit universal partnership has not been pleaded a division and distribution of property acquired during the subsistence of the customary union is possible.” (see head note on page 534). In my view, if the applicant is able to show, by evidence, that the said house was acquired during the subsistence of unregistered customary marriage and her contribution thereto she is entitled to a share of the house. Once the applicant is able to do so the provisions of section 7(1) of the Matrimonial Causes Act [Chapter 5:13] apply. In the circumstances, the determination of the validity of the marriage certificate dated 19 June 1992 is rendered academic. She has rights to matrimonial property provided that she satisfies the court that the property in question is indeed matrimonial and she can therefore found her cause of action on account thereof – *Maringaniza v Munyikwa* HB-102-03 and *Matibiri v Kumwe* 2000 (1) ZLR 492 (H). Applicant has established her rights in terms of the said principles.

2. **Validity of the Marriage Certificate of 19 June 1992.**

The disputed marriage was purportedly conducted by a Western Commonage magistrate according to marriage register number 236-1992. The marriage register was not signed by the presiding magistrate in her capacity as the marriage officer. The parties “signed” and two witnesses “signed”. The parties’ particulars and physical address were entered. The date of 19 June 1992 was entered. On the face of document the only missing aspect is the signature of the marriage officer. But, two lines were drawn across the face of the entire page. This is the type of crossing usually made to signify that the entry has been cancelled. In her affidavit filed in support of the application, the marriage officer did not make any reference to this crossing at all. She attributed oversight as the reason for her failure to sign not only the marriage register, but the copies of the marriage certificate. She, however, stated that she solemnised the marriage in the presence of the parties and witnesses. She also stated that she was not personally known to either party. Her testimony is vehemently disputed by the first respondent and the alleged witness to the marriage, one Shadreck Kahwena. The latter filed an affidavit in support of the first respondent’s opposition in which he categorically stated he was not party to the civil marriage between the parties. He went further and speculated that the marriage certificate was corruptly procured with the assistance of the marriage officer. It is clear to me that there are serious factual disputes which are not capable of resolution on the papers. A robust approach will still not resolve the factual issues. There are material disputes which can only be determined by oral evidence and findings of fact. Credibility of the witnesses is central to the resolution of the dispute on this issue. In light of what I said in (1) above there is no need to resolve this issue now.

Final order sought

I have already highlighted that the applicant seeks a final interdict barring the first respondent from selling the disputed house, finish and *klaar*. The order is not pending any event occurring. She seeks a total bar from selling the house at any given time. The parties are on separation.

A closer examination of the applicant's rights in this regard is necessary. In *casu*, the applicant does not seek the order pending divorce. She wants to enjoy occupation of the disputed house perpetually, it seems. In *Muzanenhamo & Anor v Katanga & Ors* 1991 (1) ZLR 182 (SC) the Supreme Court held that the right of a wife to remain in occupation based on a claim under section 7 of the Matrimonial Causes Act (*supra*) as against her husband depends upon the exercise of purely discretionary remedies. At page 186D-E McNALLY JA made reference to an English case:

“LORD UPJOHN made this point very firmly in *National Provincial Bank Ltd v Ainsworth* [1965] 2 ALL ER 472; [1965] AC 1175 (HL) at 485G when he said:

“The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition; it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So, as a matter of broad principle, I am of the opinion that the rights of husband and wife must be regarded as purely personal *inter se* and that these rights as a matter of law do not affect third parties.”

The Supreme Court further held that a wife cannot prevent her husband from disposing of assets unless he is thereby attempting to defeat her first rights. A wife's right of occupation due to her status as a wife is essentially a matter of equity. Even if the husband is a defaulting party he may eject the wife from the matrimonial home

provided he offers suitable alternative accommodation. See also *Cattle Breeders*

Farm (Pvt) Ltd v Veldman (2) 1973 RLR 261 (A) at 267E where the court stated:

“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.” See also *Jackson v Jackson* [1971] 3 ALL ER 774 (CA) and *Owen v Owen* 1968 (1) SA 480 (E).

I find that the applicant has shown equitable consideration for this court to intervene on her behalf to stop the *prima facie* lawful wish of the first respondent to dispose of stand 22355 Pumula South, Bulawayo without offering her suitable alternative accommodation. As alluded to above the parties have been customarily married since 1984 and their union is blessed with three children. This is the only home that the applicant and their children know. First respondent should not be allowed to dispose of the property in such a way that the family will be rendered homeless. The property is registered in the name of the first respondent. I therefore, confirm the final order in the following terms:

- “1. It is ordered that, pending the provision with or offering of the applicant suitable alternative accommodation or offer her the means of acquiring such suitable accommodation the first respondent is interdicted from in any way, directly or indirectly, selling and transferring title to the immovable property known as stand number 22355 Pumula South, Bulawayo.
2. The second respondent is interdicted from registering such transfer unless the conditions in (1) supra are met.
3. The first respondent shall bear costs of this suit.

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Bulawayo Legal Projects Centre, applicant's legal practitioners
Lazarus & Sarif, first respondent's legal practitioners