

BARBARA MAKAHAMADZE
versus
DOUGLAS MUTUVIRA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 15, 21 and 28 October 2014 and 19 February 2015

Civil Trial

R Munhuweyi, for the plaintiff
Mrs M R Zvimba Mukono, for the defendant

MWAYERA J: The plaintiff and the defendant were customarily married for about seven years from 2002 to 2009 when the union became dysfunctional. During the subsistence of the union the parties who were in universal partnership acquired movable and immovable property. The parties agreed on issues for referral to trial namely:-

1. What constituted the property of the parties as at the date of separation.
2. How was this property both movable (livestock), and immovable acquired.
3. Whether or not the Nyanga property has been sold, and if so, whether or not the plaintiff was aware of such sale.
4. Whether the property in issue should be distributed in the manner described in the schedules attached to the plaintiff's declaration or the manner described in para 14 of the defendant's plea.

At commencement of trial, it became abundantly clear that the property which formed the subject of the dispute included a Nyanga residential property, Chitungwiza residential property, and movable property in the form of livestock at the Masvingo residential rural home. The plaintiff in the pleadings and evidence claimed a 100 percent share in the Chitungwiza residence and three cattle, four goats and two sheep pointing out that the defendant would take 100 percent share of the Nyanga home and the remaining live stock.

It was apparent from the plaintiff's evidence that she has five minor children with the defendant whom she married in 2002. They separated in 2009. The plaintiff narrated that she married the defendant when she was employed by Ok Zimbabwe as a closed circuit

television operator (CCTV). It became common knowledge she was employed as such since the defendant did not dispute the evidence and the plaintiff also tendered as Exh 1 a letter of confirmation of the employment. According to the complainant all the money from her salary and also money raised from a market stall operated from home was controlled by her husband. She recalled how the Nyanga stand was first purchased and a house constructed and then the Chitungwiza stand also followed by construction of a house. The plaintiff argued that she contributed directly and indirectly. She also pointed out that her husband contributed through earnings from his clients since he was endowed with a gift of healing as a spiritual healer. According to the plaintiff, at the time they separated, the house in Nyanga was still theirs and it was occupied by a tenant who paid rentals. She vehemently denied knowledge of disposal of the property by sale to one Mr Muringani and pointed out that if there was a sale agreement, it was after she had instituted the current proceedings and that she did not agree to or even benefit from the same. She pointed out that the property which the defendant alleges to have sold five years ago is still registered or at least at the time of trial was registered in the defendant's name.

The plaintiff maintained her evidence that during the marriage to the defendant she contributed directly and indirectly to acquisition of the property and that she was entitled to her claims. The defendant on the other hand, told the court that he was customarily married to the plaintiff from 2002 to 2009 for about eight years. He disputed paternity of the last born child and accepted having had their union with the plaintiff blessed with four children. In pleadings and evidence, he told the court that he acquired the property which forms subject of dispute solely on his own. He stated that in his capacity as preacher and healer he had many well to do patients who gave him tokens of appreciation inclusive of the stands and resources with which he built the immovable properties. He argued he was in a better financial standing than the plaintiff a security guard who earned a meagre salary. He argued that he solely contributed to the acquisition of the properties using proceeds he got from the patients he helped, some of whom were foreigners and senior government officials. It was crystal clear from both the plaintiff and the defendant that the property was bought during the subsistence of the customary union.

The defendant recalled that on 2 January 2009, after they separated, he sold the Nyanga house to one Mr Henry Mugore Muringai with whom he entered into an agreement of sale. I must hasten to point out that such agreement of sale was not satisfactorily supported by both the defendant and Mr Muringani's evidence. The plaintiff disputed there

was ever a sale transaction as she continued to receive rentals from the tenant even after the separation. Also at the time of trial after five years from the purported sale no transfers of ownership had been made. The property remains registered in the defendant's name. Mr Muringani, the alleged buyer's testimony, did not change the complexion of the matter. Mr Muringani's version was riddled with inconsistencies and was difficult to follow. It was not clear why he took so long to pay for the house and the manner they conducted sale was not consistent with the contract. Further Mr Muringani appeared not well versed with the nature, type and extent of property he deemed to be his. He could not explain satisfactorily why if he had bought the property the tenants would pay rentals to the defendant and or his wife. He did not even know the rental amount. Other than his mere say so, there was no proof that he paid for the house in question. In fact the picture painted by the witness of having paid more than 10 instalments contrary to the sale agreement and the unavailability of receipts when payment was made for purchase of an immovable property, painted the defence witness and the defendant's story as incredible. Mr Muringani's evidence about him having bought a house whose specifications he was not well versed with and making payment of up to \$19 500-00 with no record whatsoever was not only unsatisfactory but unbelievable, given his background as a lawyer. He would naturally be expected to appreciate the difference between buying a loaf of bread and a house. The manner in which he testified left a lot to be desired. His testimony did not bolster the defence's claim of a sale. If anything, it painted a picture that the Nyanga house was still the defendant's property, acquired during the customary law union.

It is not in dispute the two houses and livestock constitute the entire property which forms the subject of dispute. The plaintiff agreed that some of the livestock might have died in the five years of separation and that she did not know how much was left as livestock. In the absence of specific quantities on the stock it is difficult for the court to speculate and come up with a formula for distribution.

From the plaintiff and the defendant's evidence, it is clear that the relationship and property regime falls under tacit universal partnership. The defendant, in his evidence, admitted that the plaintiff contributed indirectly by looking after the children and buying grocery items as and when she felt like doing so. He equated this contribution to entitling the plaintiff to 20 % share in the Chitungwiza house which according to the defendant, is the only immovable property that remained for distribution. It is worth noting that the

defendant's version of claiming 100% contribution towards the purchase and development of the Nyanga and Chitungwiza home was rendered porous by the defendant's own evidence.

First the defendant submitted fraudulently obtained receipts for a small fraction of the building material as was exposed by the insertion in the receipts of current cell numbers which were not in operation back then in 2007 and 2008. The receipts were clearly produced to raise dust so as to mislead the court on the defendant's contribution.

Having considered the totality of the evidence before the court it is apparent both the plaintiff and defendant contributed directly and indirectly to the acquisition of the two immovable properties. It is important at this stage to look at the law in respect of unregistered customary law unions. The law is settled that general principles of law including unjust enrichment be resorted to in a bid to achieve just and equitable distributing of customary law estate such as the present case. The cases *Matibiri v Kumire* 2000 (1) ZLR 495 and *Marange v Chiroodza* 2002 (2) ZLR 171 are also instructive. Inroads have been made in recognising customary law unions as marriages for proprietary, maintenance and children's issues as evidenced by not only precedent but legislative measures.

The administration of Estates Act [*Chapter 6:01*] s 68 thereof recognises a surviving spouse as a beneficiary regardless of the marriage registration status. The Matrimonial Causes Act [*Chapter 7:05*] s 7 is handy when it comes to division of property even for unregistered union where the general law principles of unjust enrichment and universal partnership existed or have been shown to exist.

The principle of equitable sharing on jointly acquired property is internationally recognised and our courts in pronouncements in decided cases have endeavoured to uphold such a principle, where universal partnership has been established. It is also worth noting that also to buttress this approach is the constitution of Zimbabwe Amendment (No. 20) Act 2013 which prohibits discrimination s 56 reads:

“All persons are equal before the law and have a right to equal protection and benefit of the law.”

and s 56(3) reads:

“Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as nationality, race, colour, tribe, place of birth, ethnic or social language, class, religious belief, political affiliation opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born out of wedlock.”

In *casu* both the plaintiff and the defendant have contributed to the acquisition of the estate. The houses are situated in different locations namely Nyanga and Chitungwiza clearly entailing they are of different values. It would in my view not be just and equitable to order each to get one of the houses but to apportion an appropriate share in each of the properties with an option for the parties to buy each other out. Given the background of the matter and the contributions of each of the parties it would not be appropriate to award 100 percent share in Chitungwiza and Nyanga property to either of the parties.

In *Mashangedza v Mutsvangwa* HH 214/13 MAWADZE J took the approach that general law should apply in cases where land rights are involved irrespective of whether the union was customary or not as to do otherwise would be discriminatory against those women married customarily. I entirely associate with Honourable MAWADZE J 's sentiment when he quoted with approval remarks in *Ntini v Masuku* 2003 (1) ZLR 638 where the judge stated that time has come for a customary union to be recognised as a marriage institution for all intents and purpose, it serves the same purpose as a registered marriage.

It is that discrimination on nature of marriage which the constitution sought to outlaw by out lawing custom or law that is discriminatory. It would not be progressive in the 21st century to allow a party to be unjustly enriched because he contracted an unregistered marriage in the face of clear evidence of contribution by both spouses in acquisition of property.

It is not in dispute that in our jurisdiction unregistered customary law union should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during the subsistence of the marriage where tacit universal partnership is established. For this pronouncement I am guided by the words of MUCHECHETERE JA in *Chapeyama v Matende* 2000 (2) ZLR 356.

I am satisfied that the plaintiff contributed directly and indirectly through the monthly earnings while the defendant also contributed directly and indirectly through his earning as a spiritual healer. It would in the circumstances be just and fair that the parties share the Nyanga and Chitungwiza properties at the rate of 50 percent share each.

Accordingly it is ordered:

1. That the plaintiff be awarded 50 percent share of House Number 24444 Unit P Extension, Chitungwiza and that the defendant be awarded the other 50 percent share of the said property.
2. That the defendant be awarded 50 percent share of House Number 410 Nyamhuka Government Complex, Nyanga and that the plaintiff be awarded the other 50 percent share of the said property.
3. The property shall be evaluated by an independent evaluator appointed by the Registrar within a period of 30 days from date of judgment.
4. That the cost of evaluation shall be borne by the parties at the rate of 50 percent each.
5. That the parties have on option to buy each other out within a period of 3 months from date of judgment.
6. In the event of the parties failing to buy each other out the property shall be sold at open market to the best advantage by an Estate Agent to be appointed by the Registrar of High Court within a period of 14 days from date of failure by the parties to buy out each other out and the proceeds shall be shared at the ratio of 50 percent each in respect of both properties.

Each party is to bear its costs.

Mahuni & Associates, plaintiff's legal practitioners
Mugiya and Macharaga, defendant's legal practitioners