

NATHAN HOSHO
versus
LILIAN HASISI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 14 May and 2 June 2015

Trial Cause

P Kashiri, for plaintiff
Defendant in person

TSANGA J: The plaintiff Nathan Hosho, seeks an order for the eviction of the defendant from Stand N0. 4020 Ngoni Township Norton, which property is registered in his name under Deed of Transfer No. 2820/09. The plaintiff bases his claim on purchase and subsequent transfer under an agreement of sale with one Zekiya Mutandwa. The defendant, Lillian Hasisi, opposes the eviction on the basis that she is entitled to the house by virtue of being a surviving spouse as a result of an unregistered customary law union.

The issues referred for trial were:

1. Whether or not the Plaintiff is the rightful and registered owner of Stand No. 4020 Ngoni Township, Norton.
2. Whether or not the Defendant has any lawful right to occupy the above property.
3. Whether or not the Defendant and all those who claim occupation through her should be evicted from the property.

Since he currently lives in Australia, the plaintiff was represented at the trial by one Gloria Musavengana, his sister-in-law, under a power of attorney. Her evidence was that in 2008, the plaintiff asked her to look for a house for purchase. She found a house within his stipulated budget in the newspaper. The house was being sold by an estate agent on behalf of one Zekiya Mutandwa. She stated that she went to see the house that was being sold although she did not go inside. She was familiar with the house as she was aware that the house belonged to the late Robert Jaure whom she had once worked with him at ZIPAM. An

agreement of sale was duly entered into in October 2008 through the estate agent and ownership was subsequently transferred. It was when she went to advise the occupants to vacate that she was told by the defendant that the house was not for sale and that it had been wrongly sold by one Claude Jaure, her step son, to Zekiya Mutandwa. The latter had then sold the house to the plaintiff. Gloria said that she was not aware at the time of purchase that there were any disputes pertaining to the house as it would have made no sense for her to expend money on a property that was the subject matter of any dispute.

The defendant was the sole witness in her case. She said that she had an unregistered customary law union which came into being in 1993 with the late Robert Jaure. She did not have any children with the deceased but had her own two children from a previous marriage. The deceased, however, had one child, Claude Jaure, from a previous union. Her narrative was that the house was acquired in 1997 during her marriage to the late Robert Jaure who died in 2003. The house was in the deceased's name only.

She said that after Robert Jaure, died she had a dispute with his sisters over the estate. She further stated that Claude Jaure had stolen the documents from her that enabled him to sell the house to Zekiya Mutandwa. She said she had also told others who had previously come to view the house that it had not been for sale. Whilst she stated that she had shooed away five purchasers, in reality the evidence confirmed that the house was sold by Claude Jaure to Zekiya Mutandwa in the initial instance, and then by the latter to the plaintiff, Nathan Hosho.

Although the defendant alleged that she had a customary marriage she was unable to support her claim through any witnesses from those who were present at the *roora/lobola* ceremony. She stated that all material witnesses who had been a part of the process were since deceased. Her narrative of the marriage therefore largely relied on their residence together over a period of ten years and also on the fact that two documents, namely the deceased's medical aid card, and secondly, a loan application form filled during his life time had listed her under "spouse" as Lilian, which is her first name. She also highlighted that his death certificate indicated him as married. Her evidence was also that the deceased had lived with at least five different women and that he had mental problems as evidenced by his often reckless disposal of household property for small sums of money. Only she had managed to stay with him for as long as she did. However, there was no evidence to verify that she was the "Lilian" being referred to in both these documents. Even if she is accorded the benefit of

the doubt that the name referred to her, the claim of an existence of a customary law union was not supported in court.

The court also sought clarification from her on whether she had received the deceased's pension benefits in her capacity as a spouse. She told the court that the deceased's sister, and not her, had received his pension benefits because the family did not recognise or consider her as a wife and had told his employers that he did not have one. She was also asked whether the magistrate's court had recognised or confirmed her as her as a surviving spouse in winding up the estate. Her evidence was that the deceased's family had not informed her about the registration of her husband's estate and that she had just stayed at home waiting for them to approach her.

She did not dispute the facts as contained in the plaintiff's summary of evidence that the estate was registered under case no. DR 741/04 in the magistrate's court and that Claude Jaure was appointed as executor pursuant to an edict meeting held on May 20 2004. Letters of administration are said to have been issued to him and the property had been subsequently transferred to him at the Municipal offices on the strength of these. He had then sold the property to Zekiya Mutandwa who later sold the property to Nathan Hosho in 2008. It was after the property was sold that she said she got to know about the sale and sought to reverse the transfer on the basis that the house documents had been illegally taken from her.

In terms of the relevant law impacting on widows, Section 68 (3) of the Administration of Estates Act [*Chapter 6:01*] recognises a union contracted according to customary rites notwithstanding that it has not been formally solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]. As such, the absence of a marriage certificate is not at all fatal to the recognition of such a union when it comes to inheritance. The law is very clear in its protection of widows not just in the Administration of Estates Act but in the new Constitution¹ as well as well as other significant human rights instruments we have ratified.

Section 68(3) is already in consonance with s 26 (d) of the Constitution which requires the State, in the event of dissolution of marriage through divorce or death, to ensure that provision is made for the children and spouses. Where such an unregistered union or marriage is proven to exist, in the event of a property dispute on intestacy, s 68F (d) makes it clear that where the deceased is survived by one wife or one more children, the surviving

¹ Constitution of Zimbabwe Amendment (No.20) Act 2013

wife gets ownership, or if impracticable, the usufruct of the house in which the spouse lived at the time of the deceased's death. This is together with the household goods in that house. This provision is equally in sync with the spirit and intent of Article 21 of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, a continent inspired Charter which we have ratified and which provides that the widow has the right to continue living in the matrimonial house.

However, where a party relies on an unregistered customary union, central to asserting widowhood and claiming the protection accorded widows under relevant legislation, is proof that such customary union indeed existed. The subject matter of a customary marriage is clearly one to which customary law applies. I say 'marriage' for while it is often referred to as a customary law union to distinguish it from a registered customary marriage, in reality at least customarily, it is for all intents and purposes, a marriage.

For a marriage to qualify as a customary marriage, certain cultural practices which involve the payment of *roora/lobola* are attendant upon its formation. Payment consists of a lump sum payment of money (called *rutsambo* among the shona) as well as cattle though increasingly the money equivalent is paid in today's society. Its payment is part of the culture for the majority of the citizens who adhere to customary ways of marrying. Constitutionally, in terms of s 63, every person has a right to participate in the cultural life of their choice although such freedom cannot be exercised in a manner which violates fundamental human rights and freedoms that are guaranteed in the constitution.

Despite growing qualms about the blatant commercialisation and valid feminist concerns about the inherent contradictions and implications for gender equality arising from the payment of *roora/lobola*, it remains a fact that the customary meaning accorded to a customary marriage revolves on the payment of *roora/lobola*. No doubt these courts will be called upon from time to time to squarely address some of the inherent contradictions in its payment in light of the Bill of rights. The payments made traditionally secure the wife's domestic services as well as the man's rights to any children that are to be born to the marriage. Yet the constitutional and legal reality is that parental rights to children regardless of type of marriage have nothing to do with the payment of *roora/lobola* but have everything to do with the best interests of the child. Furthermore men and women now constitutionally have an equal status in marriage. (See s26 (c)) Even though in practice a *roora / lobola* debt is often not fully discharged, it is unlikely that young men who find themselves as much as \$10 000.00 to \$15 000.00 in debt at the start of a marriage owing to unfulfilled payment

obligations, will continue to laud its customary value even if they generally ‘reap patriarchal dividends’ from its payment. Also since it is paid in anticipation of children being born, it is equally discriminatory on the basis of culture and custom to make someone a cast away just because they do not have children.

Still despite these observations, suffice it to say that where it has not been paid there is strictly speaking, no customary marriage to talk about. There are considerable limits to the extent to which in practice law can effectively run head of people’s thinking in society. The continued payment of *roora/lobola* for women in Zimbabwe regardless of legislative inroads, bears testimony to this. Its continued existence is about a way of life and a distinct sense of “African” identity – it is an unspoken resistance to what is often perceived as cultural imperialism from the rapid westernisation of African societies. What is therefore fundamental where an unregistered customary marriage is averred, is proof of the existence of a recognisable customary union.

The process of paying *roora/lobola* and the ceremony itself involves key representatives from both families, as well as other people who can attest to process having taken place. Furthermore, in today’s reality there is also often documentary evidence in the form of a book of record kept by the receiving and paying families respectively of what has been paid and what remains owing.

In this instance, evidentiary facts on the customary law marriage were less than satisfactory. In fact there was no evidence of a cultural marriage besides the mere allusion to *roora/lobola* having been paid. The plaintiff’s narrative of wifhood tended to emphasise the reality of having lived together as husband and wife over a period of years with the deceased during his life time. That may very well be the case and constitute a pointer to a valid union in certain jurisdictions that recognise common law marriages but our law only recognises only three types of marriages: the registered civil or Christian marriage; the registered customary law marriage; and for certain purposes such as inheritance among others, the unregistered customary union/marriage. Payment of *roora /lobola* remains the most cogent and valued proof and indicator of a customary union/marriage particularly when it has not been formally registered. It is this that the defendant has failed to prove given the basis of her claim to being a surviving spouse by virtue of such.

Facts such as this bring to light yet again the very reason why despite the increased recognition of the unregistered customary union within aspects of our own law, a registered marriage is ultimately more secure for women. The Customary law Marriages Act generally

requires as such. The international standard in relevant instruments is also in favour of registration. For instance Article 6 (d) of the Protocol to the African Charter referred to earlier is categorical that States are to take measures to ensure that “every marriage is recorded in writing and registered in accordance with national laws, in order to be legally recognised”. The problem is certainly not in the content of our law in this regard but more generally lack of ready access to administrative facilities for registration as well as lack of knowledge about the law further hampered by attitudes among the populace, patriarchal or otherwise. Addressing these challenges requires for proactive measures by relevant state bodies so as to protect vulnerable groups from the results of failure to register.

The defendant also refuses to vacate the house on the basis that there is still a case pending between herself and Claude Jaure under HC 3671/09. The plaintiff herein is the fourth defendant in that matter. On 13 January 2010, the defendant further obtained a court order to serve the application under HC 3671/09 upon Claude Jaure by publication once in the Herald newspaper. According to the order, the application was to be published in the following form:

“Notice is hereby given that an application will be made to the High Court, Harare, for an order setting aside the sale of Stand No. 4020 Ngoni Township, Norton and transfer of the of the stand to Applicant. Notice of opposition shall be filed with the Registrar, High Court, Harare and the same shall be served on the undersigned Legal Practitioner within 10 days of publication of this notice.”

To date some five years later, the application has yet to be published in the Herald. This means that Claude Jaure the main defendant upon whom her claim rests is not even aware of the pending matter before the court as he has not yet been served with process. The defendant’s argument that she has not pursued the matter because Claude Jaure was nowhere to be found makes little sense. The fact that he was nowhere to be found was the very reason why the court granted her an order to publish the application by way of substituted service. Her additional argument that she has failed to raise money for publication although she is willing to pursue the matter, is merely designed to buy time given the length of time that has passed without any action being taken to notify the defendant of the pending case by way of substituted service. Adverse inferences must indeed be drawn from her failure to pursue the matter over the last five years. She has been represented by legal practitioners in the past. If defendant genuinely believed that the property had been fraudulently sold she would have sought speedy resolution of the matter.

The plaintiff herein acquired the property as a bona fide purchaser from Zekiya Mutandwa who in turn had acquired it as a bona fide purchaser from Claude Jaure. The latter had title which has not been effectively challenged. There remains no finding by any court that the property was improperly sold. Without notification to Claude Jaure there is no pending court process to effectively talk about.

The plaintiff argued that the requirements for eviction should be the focus in this matter. These are that one should be a lawful owner and that the occupant must be in occupation unlawfully. The plaintiff acquired title following the agreement of sale and is therefore the rightful owner of the property. In the absence of any concrete evidence to support defendant's assertion that she is a wife by reason of customary law marriage, this court finds that there is no basis at law for the defendant's occupation of the above property.

Accordingly plaintiff's claim is granted as follows

1. The defendant and all those claiming unlawful occupation through her are evicted from Stand No. 4020, Ngoni Township, and Norton within 14 days of this order. In the event of it being necessary the Sheriff is ordered to assist in ensuring compliance with the order of this court.
2. In the event of it being necessary, the Sheriff is further directed to enlist the services of the Zimbabwe Republic Police in implementing and giving effect to this order.
3. Defendant shall pay costs of suit.

Thondhlanga & Associates, plaintiff's legal practitioners