ELIZABETH MANHENGA

versus

ANDREW WHINYA

HIGH COURT OF ZIMBABWE

NDEWERE J

HARARE, 20 June 2016, 5 July 2916, 3 October 2016,

4 October 2016 & 8 March 2017

**CIVIL TRIAL**

*P Muchemwa*,for the plaintiff

*M Chiheve*, for the defendant

NDEWERE J: The plaintiff and the defendant had a customary law union. The date of the union was in dispute. The plaintiff said defendant paid lobola in November 1999 at her parents’ house at No. 2. Marange Avenue Old Location Sakubva, Mutare. Therefore the date of the customary union was in November, 1999. The defendant said he paid lobola in 2004.

It was common cause that the parties dissolved their customary union in 2012 when the defendant gave the plaintiff a divorce token. In April, 2014, the plaintiff issued summons against the defendant, claiming a 50% share of house number 17 Twiza Road, Msasa Park, Harare, registered in the name of the defendant, which she alleged to have been bought during the period of the customary union using contributions from both of them.

On 21 October, 2014, the defendant filed a lengthy response, denying all the plaintiff’s claims. He then filed a counter-claim in the same papers.

In the counter-claim, the defendant said the union was in 2004. He said further that no immovable property was acquired during the subsistence of the union. In addition, he said during the union, they had lived completely separate lives and their financial, social and religious lives were separate.

The agreed facts were that the parties had a customary law union which terminated in 2012 and that two children were born to the parties from their relationship as follows; Andrew Munashe Whinya who was born on 16 December, 2000 and Will Mutumwa Whinya born on 30 December, 2003.

On 29 October, 2015, the parties filed a Joint Pre-trial Conference Minute where they agreed on the issues to refer to trial. The following were the issues:

1. When did the parties enter into a customary union.
2. Whether the immovable property being house number 17 Twiza Road, Msasa Park, Harare, was acquired before or after the union.
3. What would be a fair and equitable distribution of the property between the parties.

The trial started on 5 July, 2016. The plaintiff was the first to give evidence. Her evidence was that she got into a love relationship with the defendant in 1998 and in 1999, the defendant who was in the process of divorcing his first wife moved in to live with her in her own rented premises in Arcadia. In November, 1999, while they were still living in Acadia, the defendant, accompanied by his elder brother Tichaona Whinya, went to pay lobola for her in Mutare at her parents’ home. She said she was present when the lobola was paid, so were her two sisters, two brothers and her mother. She said one Pachiti acted as the go between.

She said the amount which was paid in November, 1999 was between $1 500.00 and $2 000.00. She said he did not pay everything on that day, but by the time her mother passed away in 2011 he had finished paying all the customary dues.

Her evidence about house number 17 Twiza Road was that it was acquired during the customary union in 2000. She said she was actually pregnant with her first child when they were searching for a property to buy. She said they discussed and agreed to buy a property. Since the mortgage repayment was going to swallow up all of the defendant’s salary, the defendant asked her if she would be able to provide the family with the rest of its needs from her own income and she had said she would manage to look after the family. She said that is how No 17 Twiza got purchased; with defendant paying for the mortgage directly from salary deductions while plaintiff met the rest of the family expenses like food, rates and clothing. She said she earned more than the defendant firstly as a secretary at ZEXCOMM and also from her company, E and J, a microfinance lending unit. She said they abandoned the company during the economic meltdown in 2007. She said her salary at ZEXCOMM was $1 500.00 while the defendant’s salary as a bank teller at CBZ was $600.00. At E and J, she used to get between $1500.00 and $2 500.00 a month. She said after acquiring the house, they agreed not to move in right away but to rent it out to augment their income as a family. They moved to the house in 2004. She said she also improved the house by fitting kitchen cupboards, digging a well and doing carpentry finishes.

She said the defendant paid the mortgage over a ten year period and during this period she carried the burden of looking after the family, which comprised defendant, his two children with her and his child from his first wife. She said had it not been for her direct contribution to the other family expenses, defendant would never have managed to acquire the house. She said although the mortgage got paid off in 2010, she still continued providing for the family because the defendant had other debts to pay as well as his extended family to assist. She said she continued carrying the financial burden till 2012 when they dissolved the customary union. As a result, she was asking for 50 % of the value of the house as her share.

The second witness was the plaintiff’s sister, Helen Manhenga. She said she was there when defendant paid lobola in November, 1999. She corroborated plaintiff’s evidence about the lobola and said she was there, her two sisters, two brothers and her mother. She said the defendant was accompanied by his brother and the go-between was Aaron Pachiti. She said the amount paid was between $1 500.00 and $2 000.00 Zimbabwean dollars. She confirmed that when lobola was paid, the couple was already living together although she could not state the duration of the cohabitation before payment of lobola since she lived in Mutare while they lived in Harare. She said the first child was born after the lobola was paid.

As regards no 17 Twiza Road, Helen’s testimony was that all she knew was that number 17 Twiza was their house which they had bought and where they lived together up to the time they separated.

She said all the lobola was paid on the same day.

The third witness for the plaintiff was Aaron Joseph Pachiti, a subsistence farmer based in Chipinge. His evidence was that Andrew approached him and asked him to accompany him to go and marry Elizabeth. He said he accompanied him together with his elder brother, Tichaona, to pay lobola at No 2 Marange Avenue, Mutare. He said this was in November, 1999 and the venue was the residence of Elizabeth’s parents. He said the people who were inside the house were Elizabeth’s mother, an aunt, Elizabeth’s two sisters and two brothers. He said in his own team there was the defendant, his elder brother Tichaona and himself as the go between. He said the person who played the role of Elizabeth’s father was her elder brother, Jacob, since the father had died. He said all the money Andrew had brought with him on that day got finished before he had settled all the lobola dues in full. He said Andrew later went back about 5 to 6years later to settle the balances when his mother in law started to demand all her dues. He said the actual bride price known as “rusambo” in Shona, was paid in full on that November day, 1999. He said Andrew through his brother informed him in 2012 that the two of them had dissolved their union. He said Andrew sent his brother Tichaona all the way to Chipinge to inform him about the dissolution of the customary union.

He said when he got involved as go between in November, 1999, all the arrangements had already been made by the two families. He said the defendant made lobola payments on two occasions. The first occasion was in November, 1999 and the second occasion was in 2004 or 2005 and in both instances, he was the go between. He said the records were with the two families. Jacob, Elizabeth’s elder brother had a list he would read out from and Andrew’s side would record the transaction. After Aaron Pachiti’s evidence, the plaintiff closed her case.

The defendant was the first to testify in the defendant’s case. He admitted getting into a relationship with the plaintiff in 1999. He said she became his girlfriend. He admitted that she lived in Arcadia at the time. He said when she became his girlfriend he was still married to his first wife. He however said he did not intend to be a polygamist. He denied going to the Manhenga family in 1999.

He said he went for introductions to the Manhenga family at the end of year 2000 together with his brother. Below is an extract from defendant’s evidence.

“Q. Why did you go there

1. We wanted them to know who was responsible for the plaintiff’s pregnancy.

Q. So you went for introductions

A. Yes

Q. Did you intend to marry her

A. No. I did not want the child to be illegitimate and in case of complications from the pregnancy.”

He admitted going there with his brother, Tichaona. He agreed being accompanied by

Aaron Pachiti, He said when they left Harare it was just him and his brother and when they got to Mutare, Pachiti joined them. He said Elizabeth’s family had made arrangements with Pachiti. But he denied that Pachiti was go between, saying he was not present when they did other things. He said there was no payment in 1999 although as a family they knew they were supposed to pay something.

He said tenants are the ones who lived in the Msasa Park house after it was purchased.

He admitted paying some bride price, although he said it was not in 1999. He said he was told that the bride price was $1500-00 and that is what he paid.

He said he bought the Msasa Park House in 2001 and he began to live there in 2004.

On improvements to the house, he admitted that the plaintiff put pelmets in the dining room and that she finished digging a well which the defendant had started. The defendant’s evidence was that the plaintiff should get only 10% of the value of the house.

His evidence of what transpired at the introductions was that when they got to the Manhenga residence, the mother was there, her two sons, mother’s sister and one sister. He said the plaintiff was not there, she had remained in Harare.

The defendant’s second witness was his elder brother, Tichaona. He said the plaintiff was married in 2004. He said in 2000, he accompanied his brother for introductions.

“Q. Why was it necessary to have introductions

1. The plaintiff was pregnant so we went there to get to know each other in case

of complications with the pregnancy.

Q. Who accompanied you

A. From Harare, it was me and my brother, then we later met Mr Pachiti

Q. What transpired on the day in question

A We were introduced. Pachiti was the one talking. Elizabeth’s mum and a

friend, her two brothers and a sister, Mrs Ngwenya later came.”

His evidence on the acquisition of the house was that it was acquired in 2001.

“Q. Was your brother already living with Elizabeth

1. Yes.”

The defendant closed its case after Tichaona Whinya’s evidence.

What follows is an analysis of the evidence in relation to the issues.

1. When did the parties enter into the Customary Union

It is common cause the plaintiff and defendant started a relationship in

1998/1999. They started living together thereafter. It is common cause the parties had their first child on 16 December, 2000.

But before that child was born, the defendant said he had decided firstly, that, he did not want his child to be born illegitimate and secondly in case of complications he did not want to end up dealing with a complicated pregnancy without the plaintiff’s family’s knowledge and support. So he decided to go and make himself known to the plaintiff’s family before the birth of his first child with the plaintiff. The defence case is that these introductions took place in year 2000, at the plaintiff’s parents’ home in Sakubva, Mutare, in the presence of the plaintiff’s mother, two brothers, a sister and an aunt. The defendant said his own team comprised of him and his brother Tichaona and when they got to Mutare, Aaron Pachiti joined their team and according to Tichaona, Pachiti is the one who spoke during those “introductions”. They do not give us the exact date, but say it was in 2000 but from the gist of their case, the introductions were done before the birth of the first child who was born on 16 December, 2000.

From the defence’s own case, it is clear that all the ingredients of a customary union were present. The plaintiff’s family was present, at their own home in Sakubva. The defendant, his brother and a spokesperson were also there. The defendant’s motive was to ensure the unborn child would be legitimate and in case of a complicated pregnancy. The only essential ingredient they deny is the payment of any money on the day of the introductions. But they admit that they knew that they were supposed to pay something.

On the other hand, there is the plaintiff’s case which categorically states that the defendant paid the bride price in November, 1999 at the plaintiff’s family home in Sakubva, Mutare, in the presence of her mother, brothers and sisters and that the defendant’s team had three people, namely the defendant, his elder brother Tichaona and a go between named Aaron Pachiti. They said about $1500.00 was paid on that day. They said further payments were made 5 to 6 years later and that is when the defendant cleared the balance. All the plaintiff’s three witnesses were consistent about the payment of the bride price in November, 1999, at the plaintiff’s family home in the presence of the plaintiff’s family, the defendant and his brother. All three witnesses were present and were testifying to what happened in their presence.

In my view, the plaintiff’s assertion that the bride price was paid in November, 1999 is more probable. The three plaintiff’s witnesses gave their evidence well and remained unshaken during cross examination on the date this happened and on the fact of the payment of the bride price. Indeed, their evidence is in line with what happens during customary unions. The would be son in law never goes empty handed, he goes with some money and a go between. They do not just go to be seen. It is unheard of that a man who is living with someone else’s daughter will drive all the way from Harare, with his brother plus a go between just to be seen. So the defendant obviously paid some bride price which he is denying now because he wants to argue that the plaintiff became his customary wife after he had already acquired the house in dispute.

Unfortunately for the defendant, there are holes in his case because you cannot say you approached your in laws for introductions because you did not want your child to be born illegitimate yet it is common knowledge that introductions do not confer legitimacy on any child. Neither can one argue that they went for introductions in case of complications in the pregnancy. Its known that the only guarantee to legitimacy and to moral support in case of a complicated pregnancy is the payment of the actual bride price, not mere introductions. And indeed, both the defendant and his brother confirmed in evidence that they knew they were supposed to pay something. The defendant’s brother admitted in evidence that he knew that the child can be said to be legitimate only if born in a proper customary marriage. So if their purpose was to ensure the legitimacy of the children, the defendant must have paid the bride price before the children were born, not in 2004, after both the children had already been born. Consequently, the finding of the court is that the parties entered into the customary union is November, 1999 as asserted by the plaintiff, not in 2004.

Whether the immovable property, being no. 17 Twiza Road was acquired before or after the Union.

The finding above is that the customary law union was in November, 1999. The house was bought in 2001. Therefore the immovable property was acquired after the union. In addition, the plaintiff’s evidence was that she was actually pregnant when they were looking for the house, with her first child. We know the child was born in December, 2000 and the house was bought in 2001. This confirms that the immovable property was acquired after the union.

What would be a fair and equitable distribution of the property.

Both parties gave a correct summary of the law on customary unions, tacit universal partnership and unjust enrichment. My task is simply to apply the law to the facts.

The plaintiff claimed a 50% share of no. 17 Twiza road on the basis of a universal partnership and unjust enrichment. Indeed, her evidence pointed to universal partnership. She said before the disputed house was bought, the defendant, who realised that after having the mortgage repayment deducted from his salary, he would not be able to provide other necessities to the family, asked her if she would be able to feed, clothe and pay bills for their family and she said she would manage. The defendant never disputed that piece of evidence. She testified that at that time, she worked as a Secretary for ZEXCOMM and earned $1 500.00 while the defendant earned $600-00. The defendant again did not dispute that she was employed as a Secretary by ZEXCOMM, neither did he dispute her earnings as a Secretary. She said she later formed a micro-finance company which lent money to civil servants and they made between $1 500.00 to $2500. This company was operational till they abandoned it in 2007 following a liquidity crisis in the economy. The defendant did not dispute this evidence either. What he sought to challenge were plaintiff’s earnings as a clothes vendor where he said if she is making just $400 now she could not have made more earlier on. Yet the plaintiff’s evidence was that at the time the house was bought, vending was just an additional source of income because she was employed and earning good money.

In addition to her contribution of meeting the other financial obligations of food, clothes and bills, the plaintiff said she made some improvements to the house. She said she installed kitchen cupboards and dug a well. The defendant admitted the improvements by the plaintiff on the property itself. He admitted that she put pelmets in the dining room and completed a well whose digging he had initiated. This was not the work of an uninvolved customary wife, but a wife who considered herself as a partner.

On the other hand, defendant came up with a far-fetched explanation to explain how he acquired the house. He decided to rope in his estranged first wife, from whom he has been on separation for more than ten years as being the one who was involved through the sale proceeds from a Kuwadzana house. However, the defendant was very economic with documentary evidence about this sale and its proceeds. He never availed the documentation from his employer, the bank or the institution that gave him the mortgage finance about how he acquired the house. The source of funds, his earnings or his repayments were not backed up by documentary evidence, yet this was information he could have obtained easily as someone who worked in the banking industry. He knew how to go about to obtain such documentary information. If some funds came from the sale of the Kuwadzana house, the financial records would have shown that. The bank records would also have shown his capacity to service the loan and the balance in his account after servicing the loan. The defendant did not give the court this documentary information. He simply made a bald assertion that the plaintiff did not help him.

In his counter-claim, the defendant revealed that he owed about US$5 000.00 for domestic bills at the house. That is further confirmation that on his own he still struggles to be up to date even with just the domestic bills since the mortgage bond was paid up. Even his testimony of moving to Mbare to his mother’s house for a while, or that of moving in with the plaintiff in Arcadia as well as renting out the disputed house soon after purchase are symptoms of a man who needed to be assisted financially.

Consequently, the court is of the view that the plaintiff’s evidence of her contribution in the acquisition of house no. 17 Twiza road, Msasa Park is highly probable.

The defendant’s own acceptance that the plaintiff is entitled to a share is a tacit admission that she contributed. All that the court needs to do is to assess the level of that contribution.

I am satisfied that the contribution is as given by the plaintiff, that while the defendant serviced the house loan, she took care of the other family expenses. This confirms the partnership. Accordingly, the plaintiff should get 50% of No. 17 Twiza Road, Msasa Park. To do otherwise would result in the unjust enrichment of the defendant.

It is therefore ordered as follows:

1. That the plaintiff be and is hereby awarded 50% of House Number 17 Twiza Road, Msasa Park Harare.
2. The defendant shall bear costs of suit on the ordinary scale.

*Legal Resources Foundation-Harare* ,plaintiff’s legal practitioners

*Legal Aid Directorate*, defendant’s legal practitioners