

ESTHER NGARU  
versus  
LIVINGSTONE KUSANO

HIGH COURT OF ZIMBABWE  
MUZOFA J  
HARARE, 12 & 28 May 2021

**Opposed Application- Special Plea**

*E.T Muhlekiwa*, for the plaintiff  
*R. Gasa*, for the defendant

MUZOFJA J: The plaintiff sued out summons for the division of immovable property acquired by the parties during the subsistence of their tacit universal partnership. Alternatively, the division of the immovable property acquired during the subsistence of the parties' unregistered customary law union based on unjust enrichment. In opposition to the claim the defendant filed a special plea, that the claim is prescribed.

The plaintiff and the defendant were living together as husband and wife in terms of an unregistered customary law union from December 1982 when lobola was paid. Three children were born of the union. In 2010 the defendant gave the plaintiff "gupuro" a token of rejection thereby terminating the union. There is no dispute that this is when the plaintiff's cause of action arose.

During the subsistence of the union the parties acquired both movable and immovable property. In order to obtain her share of the property, the plaintiff approached the community court in Bulawayo for division of property. She was awarded by consent an immovable property known as No 6 Birkley Street North End "the property". The defendant was awarded No 32 Wigton Road, Avondale in Harare. Both properties were registered in the defendant's name. When the defendant delayed in causing the transfer of the property, the plaintiff approached this court to compel transfer. The matter was heard and the court dismissed the application and set aside the community

court order<sup>1</sup>. The court found that the community court had no jurisdiction to dissolve a customary law union neither could it share the “matrimonial” property because there was no marriage recognized at law between the parties. This was on 15 October 2020, some 7 years after the order of the community court. The plaintiff was undeterred, faced with this new hurdle, she did not throw in the towel. The plaintiff issued out summons as already set out.

In opposing the claim, the defendant filed a plea in bar that the claim is prescribed in terms of s 14 and s 15(d) of the Prescription Act [*Chapter 8:11*] (hereinafter referred to as the Act). The submission is that, the claim is founded in general law. Tacit universal partnership and unjust enrichment are general law concepts. As such prescription is applicable. The declaration is clear that the unregistered customary law union between the parties was terminated in 2010. The court process in the community court did not interrupt the running of prescription since the judgment was subsequently set aside. The summons in the main matter was issued in October 2020 almost 10 years after the cause of action arose.

In response, the plaintiff insisted on the claim. It was argued that the cause of action is based on the unregistered customary law union, pleading tacit universal partnership or unjust enrichment is for purposes of division of property only. In reality the claim is founded on customary law and in terms of s 3(2) of the Act prescription does not apply and referred to case authority for that proposition<sup>2</sup> where the court confirmed the position of the law that prescription does not apply where the rights and obligations of the parties are determined in terms of customary law.

The issue for determination is whether prescription applies in the circumstances of this case. This is a matter of interpretation of statutes. The golden rule of interpretation is that where the language of the statute is clear and unambiguous, the words used ought to be given their ordinary grammatical meaning. However where the language used is ambiguous and lacks clarity or may result in an absurdity, the court will interpret it and give it meaning. In the event of an absurdity the court is required to give a meaning that does not result in an absurdity because it is presumed that the legislature in enacting<sup>3</sup> any statute does not intend an absurdity<sup>3</sup>.

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<sup>1</sup> *Esther Kusano (nee Ngaru) v Livingstone Kusano and Another* HH 647/2

<sup>2</sup> *Pasipanodya v Muchoriwa* 1997 (2) ZLR 182 (SC)

<sup>3</sup> *Endeavour Foundation and Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) AT P356F-G

In *Coopers and Lybrand and Others v Bryant*<sup>4</sup> the court noted,

‘According to the ‘golden rule’ of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument’

I find no ambiguity in the language used in s3 (2) of the Act. The intention of the legislature can easily be ascertained from the ordinary and grammatical meaning of the language used.

Section 3(2) of the Act reads:

"In so far as any right or obligation of any person in relation to any other person is governed by customary law this Act shall not apply."

The section deals with the applicable law in the determination of the parties’ rights and obligations. It is the applicable law therefore that determines whether the provisions of the Act are applicable or not. The applicable law is determined by the nature of the pleadings through the cause of action.

I was urged to consider the genesis of the right and conclude that the cause of action is based on customary law therefore the provisions of the Act do not apply. There is a difficulty in the submission. The plaintiff’s cause of action is based on tacit universal partnership and unjust enrichment. The plaintiff cannot rely on the customary law union since the cause of action is not based on the customary law union. Section 3 (2) of the Act is very clear and allows of no other interpretation. In other words where customary law is applied in the resolution of a dispute, the provisions of the Act will not apply. The opposite is equally true, where general law is applicable in the determination of the parties’ rights the provisions of the Act will apply. This interpretation resonates with reason since the concept of prescription is unknown under customary law.

The plaintiff and the defendant were married in terms of an unregistered law union and therefore customary law would apply in the division of the property they acquired together. However in light of s3 of the Customary Law and Local Courts Act (Chapter 7:05), a claim on a proper cause of action under general law can be made. Customary law applies in civil cases where, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. It does not apply if the justice of the case otherwise requires. Where

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<sup>4</sup> 1995 (3) SA 761 (A) at p 767

the application of customary law would bring injustice, the general law will apply. Indeed our courts have applied general law in many cases where the plaintiff has properly set out her cause<sup>5</sup>. Thus even if parties are married in terms of an unregistered customary law union, their rights and obligations can be determined applying general law provided the cause of action is properly pleaded.

The plaintiff's cause of action as set out in the summons is

- (a) Sharing of immovable property that was acquired by the parties during the subsistence of their universal partnership alternatively
- (b) The plaintiff claims against the defendant sharing of immovable property acquired during the subsistence of an unregistered customary law union between the parties based on the principle of unjust enrichment.

The pleaded causes of action are tacit universal partnership and unjust enrichment. These two concepts are unknown under customary law. They are common law concepts. The *Pasipanodya* case (supra) does not assist the applicant. In that case, the cause of action was based on the unregistered customary law union. The cause of action was not based on general law as set out in the plaintiff's summons.

In submitting that the provisions of the Act do not apply in this case, the plaintiff is blowing hot and cold. In pleading general law concepts as causes of action, she wants general law to apply in her circumstances. The plaintiff dedicated some paragraphs in her founding affidavit narrating how they lived a life that deserves the application of general law. It would seem that the plaintiff wants a restricted application of general law. If general law applies in the sharing of the parties' property, therefore all the general law principles must apply. It would be an absurdity and an affront to the proper administration of justice to selectively apply the principles of general law by applying only the two concepts of general law as pleaded by the applicant and turn a blind eye to other general law principles. I was not given any authority for such a proposition which I believe maybe problematic.

The court fully appreciates the plaintiff's unfortunate circumstances. The status of a customary law union has not developed in light of modern trends. The legislature has not intervened to

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<sup>5</sup> Jengwa v Jengwa 1999 (2)ZLR 121 (H), Mtuda v Ndudzo 2000 (1) ZLRr 710 (H)

properly guide the parties on how to proceed in the event of termination of the union despite numerous calls from different sections of society<sup>6</sup>. As a result parties grope in the dark in pursuit of a share in their hard earned properties. While they knock different doors time lapses as in this case. The plaintiff held on to a nullity from 2012 until 2020. Surprisingly the defendant who initially consented to the division of property now raised a sword to destroy the plaintiff's claim.

As observed in the *Zembe* case (supra), it is for the litigant through their legal practitioners to approach the court and properly plead their cases. In this case even if the plaintiff properly pleaded her case, the claim had prescribed. This is so because in the determination of the parties' rights and obligations general law shall apply. As such the provisions of s3 (2) of the Prescription Act do not apply.

It is common cause that the summons was issued after the prescriptive period. It was also conceded that the litigation in the community court did not interrupt the running of prescription. On that basis the special plea must succeed.

The defendant seeks costs on a higher scale. I do not find any justification for costs on a higher scale. The plaintiff's claim was justified considering that the matrimonial property was not shared except for the technicality of prescription.

Accordingly the special plea is upheld

The plaintiff's claim dismissed with costs.

*Gasa-Nyamadzawo & Associates*, Plaintiff's Legal Practitioners  
*Muhlekiwa Legal Practice*, Defendant's Legal Practitioners

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<sup>6</sup> Jenke v Zembe