HC 904/02

STEWART KUSEMA
versus
ELIZABETH SHAMWA

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 15 November 2002, 24 January and 26 March 2003

Opposed Application

Mrs Bvekwa, for the applicant;
Mr Chivinge, for the respondent.

MAKARAU J: The applicant and the respondent are step-son and step mother respectively. The applicant is seeking an order for the eviction of the respondent from Stand number 2061 Mabvuku Township, Harare, ("the stand"). The facts forming the backdrop to this application are largely common cause. They may be summarised as follows:

The late Simon Kandema, ("Simon"), who hailed from Ntache, Malawi, married the respondent, from Bindura, Zimbabwe, according to African customary rites and practices in 1960. In 1968, the two had their marriage registered in terms of the African Marriages Act, (*Chapter 105*), as it then was. By virtue of his status as a married man, Simon was, on 6 March 1968, allocated accommodation at the stand, by the then department of African Administration. In due course, Simon became the holder of certain disposable rights, title and interests in the stand. The stand formed his and his wife's permanent home until his death in 1991.

Prior to his marriage to the respondent, Simon had sired the applicant. At the time this happened, he was not married to the applicant's mother either at customary law or in terms of any other law. Upon Simon's marriage to the respondent, the applicant's mother left Simon and went back to her people, taking the infant applicant with her. She then raised the applicant and according to African custom, gave him

her own name. It is not disclosed on the papers whether the applicant at any stage, stayed with the late Simon and the respondent at the stand. This fact is however, largely immaterial for the determination of the dispute before me but would have made for a fuller picture.

After Simon's death in 1991, the applicant inherited the late Simon's rights title and interests in the stand. This was in 1993. Simon left a Will in which he bequeathed his entire estate to the applicant. The estate was duly administered by Syfrets Trust and Executors. In due course, the applicant became the registered tenant in respect of the stand. The respondent continued to reside at the stand, paying the rates and other charges due directly to the local authority. In July 2001, the applicant sold his rights title and interests in the stand to one Abigail Domboka. He then gave the respondent notice to vacate the property by 31 December 2001. The respondent did not respond to the notice, resulting in the applicant filing this application.

After hearing submissions from counsel at the initial hearing, I was of the view that the real issue arising from the facts of the matter had not been canvassed in the heads submitted and in the oral addresses of both counsel. It became apparent to me that both counsel were agreed that general law applied in resolving the dispute before me. In this regard, it further appeared to me that the legal nature of the defence being put up by the respondent, as I understand it, had not been fully appreciated. In my view, the respondent is raising her relationship with customary law as a defence to a claim brought under general law. I then caused the parties to file supplementary heads on two specific issues. These were:

1. On what basis is general law being applied to the respondent who was married under customary law?
2. Is the respondent's occupation of the former matrimonial home not protected under customary law?

Counsel commendably did their best to grapple with what in my view, is a complex legal issue. They filed heads of argument in which attempts were made to answer the above two questions.

It appears to me that the conflict between customary law and general law will be an issue that will confront the courts in this jurisdiction for some time to come. It is an issue, in my view, that has the potential of causing palpable injustice in some cases, especially for women married under customary law, who may find general law being applied against them to erode whatever positions they may be occupying by virtue of customary law. The relationship between customary law and general law is an issue that has dogged this court before, and in the absence of intervention by Parliament expressly harmonising the two legal systems, injustice may only be avoided by innovation and creativity on the part of judges, creating remedies that straddle, but remain compatible with the two legal systems.

It is common cause that in this jurisdiction, general law and customary law are both recognised as competent laws of the land. The primary recognition of the two legal systems is to be found in the Constitution. In s 89, the Constitution provides that:

> " Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any other courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law."

Legal historians will trace the origins of this provision to the Royal Charter granted to Cecil John Rhodes in 1889. The Charter was apparently granted on the understanding that the cultural and traditional laws and practices of the local inhabitants were to be preserved by the incoming settlers, except in relation to matters of criminal law. The equivalent provision has been repeated in all the

constitutions of the country since the Royal Charter.

The position that the courts in this jurisdiction may have to make a choice of law between general and customary law is reinforcement by the provisions of s 3 of the Customary Law and Local Courts Act, [*Chapter 7.05*], that provides for the instances when customary law should apply in civil cases. The section provides as follows:

> **"3. Application of customary law**
> (1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires-
> (a) customary law shall apply in any civil case where-
> (i) the parties have expressly agreed that it should apply; or
> (ii) regard being had to the nature of the case and the surrounding circumstances, it appears the parties have agreed it should apply; or
> (iii) regard being has to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
> (b) the general law of Zimbabwe shall apply in all other cases."

It appears to me that in enacting this section, the legislature was putting it expressly that, in this jurisdiction, there are two legal systems that, in some cases, may apply to the same dispute. Thus, where for instance, an issue presents to the court, seemingly capable of resolution by the application of either of the two laws, but with different results, the court deciding the dispute has to first make a determination at to the choice of law applicable. This in my view, is the situation that confronts me in this dispute.

The applicant's position is quite simple. He argues that he inherited rights, title and interests in the stand from his late father. He now owns that property by virtue of testate succession. By seeking an eviction order against the respondent, he is simply enforcing one of his rights as owner of those rights, title and interests in the property. His rights as stated are in my view, beyond question. Under general law, he is entitled to the remedy he seeks.

The respondent's position is equally simple, in my view. She

argues that she married her late husband in terms of customary law. As a result of that marriage, her husband was allocated the stand that constitute their permanent matrimonial home. She does not claim to have inherited the stand nor to have acquired ownership of the stand by virtue of her marriage. She merely claims the right to continue regarding the stand as her permanent home and to be able to occupy it as a result of that relationship. She bases her right to regard the stand as her permanent home on the basis of her marriage at customary law.

The applicant has sought to argue that general law applies to this dispute as he inherited the property from his late father. I have no doubt that he is correct in arguing that his rights to the property are to be determined by the application of general law. That is not the issue before me. The issue before me is whether general law should be used to evict the respondent from what at customary law (so she claims), she regards as her permanent home. In my view, the focus should not be on the law applicable as to how the applicant acquired his rights to the stand, but, rather, on the law applicable if the respondent is to lose her occupation of the stand.

If it is accepted, (which in my view, it must), that the applicant's claim is fully based on the Roman Dutch law concept of ownership and that the respondent's defence to the claim is that she has the right to occupy the stand by virtue of her marriage at customary law to the late Simon, then in my view, I am confronted by a situation similar to the one that confronted CHINHENGO J in *Gwatidzo v Masukusa 2000 (2) ZLR 410 (H).* In that case, the plaintiff, married to Gwatidzo under the Marriages Act, [*Chapter 5.11*], sued the defendant for adultery damages, alleging that the defendant, married to the same Gwatidzo under customary law, had committed adultery. Whilst dealing specifically with the facts of the matter before him, the learned judge, at page 420B had this to say about the situation of the two women:

> "A woman to a customary union has acquired rights in that marriage. A woman to a civil marriage has also acquired rights in that marriage. Why should the one woman lose her rights merely because the other woman has acquired certain rights which purport to exclude the rights of the one?"

In my view, while the judge in that case was concerned about the particular facts of the matter that were before him, in accepting that both women had acquired rights under the respective legal systems they had pleaded before the court, the learned judge in my view, was enunciating an important principle. It is that no rights acquired by the one party under one legal system are to be regarded as inferior to the rights acquired by the other party under the other legal system. In other words, both sets of rights should find expression and protection at law.

Instead of assigning one law to the parties, the judge proceeded to marry the two laws and show that the rights of one party could be interpreted in light of the rights of the other. This is an approach that commends itself to me. It is an approach that does not find conflict between the two legal systems but looks for a way of accommodating and reconciling the two systems.

I have indicated elsewhere above that the applicant's inheritance at general law cannot be impugned. Further, the fact that as the current holder of certain rights, title and interests in the stand, he is at general law entitled to evict all those occupying the stand beyond his invitation is also beyond doubt.

On the other hand, it has not been shown that the respondent is completely without rights entitling her to remain in occupation of the stand at customary law. She is a widow at customary law. I hold this position notwithstanding that her late her husband disposed of his property using general law. In my view, the fact that her late husband disposed of his property using general law can hardly de-link the

respondent from customary law and make her a widow at general law. In my view what denotes her position within the legal system is her closeness to customary law and her understanding of her position within that legal system. It appears to me that to hold otherwise will amount to accepting that her position in the legal system can be determined by her late husband from his grave.

Generally, the rights of widows at customary law to support and accommodation by the heir of their late husband's estates has been long recognised by these courts. In this regard I refer to the cases of *Masango v Masango SC 66/86 (an unreported judgment),* where at page 3 of the cyclostyled judgment, BECK JA had this to say:

> "In the absence of making it possible for the appellant to find such alternative accommodation for herself and her children as would be reasonable in all the circumstances, I do not consider that the respondent is entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision having been made for their shelter would be tantamount to sanctioning an avoidance by the respondent of his customary law obligation to care for his father's wife and children."

The same approach was adopted by DUMBUTSCHENA CJ (as he then was) in the case of *Chihowa and Mangwende* 1987 (1) ZLR 228 (S).

I am aware that the above obligations may not be applicable to the applicant for two reasons. Firstly, the applicant is not an heir at customary law. Secondly, the late Simon came from Malawi. The customary practices of his tribe in relation to the rights of widows would have to be established by a court wishing to apply customary law to the dispute. The point I make at this stage is that widows at customary law generally, have certain rights and expectations upon the demise of their husbands. The contents of those rights and expectations may vary from tribe to tribe, but, can only be determined by the application of customary law rules and principles. Further and more importantly in my view, those rights and expectations, once ascertained, can only be

discharged or extinguished by the application of customary law.

In the matter before me, no basis has been laid for holding that the general law of Zimbabwe alone is applicable to the dispute between the parties. No basis has been laid for excluding completely the consideration of the respondent's position at customary law. In my view, while the inheritance of the stand by the applicant is governed by the principles of general law, the right of the respondent to remain or to be removed from the house that she regards as her permanent home by virtue of her status at customary law, can only be determined by the customary law of the tribe that the deceased belonged to. To view the resolution of the dispute in this manner is in my view, consistent with the approach adopted by CHINHENGO J in the *Gwatidzo* case, that seeks to harmonise general law with customary law.

Regarding costs, it is my view that although the applicant has not succeeded, his position is correct at general law. His approach to the court for an eviction order is understandable in the circumstances. Further, the respondent was represented in *forma pauperis* and the level at which she was so represented caused me to request the senior partner of the law firm representing her, to give me certain assurances, which, commendably, he did.

In the result, I make the following order:

1. The application is dismissed.

2. There shall be no order as to costs.

Gutu & Chikowero, applicant's legal practitioners.
Manase & Manase, respondent's legal practitioners.