ESTHER KUSANO (NEE NGARU)
versus
LIVINGSTONE KUSANO
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 6 & 15 October 2020

Court Application

R. Gasa, for the applicant
E T Muhlekiwa, for the 1st respondent

MANZUNZU J This is a court application in which the applicant seeks relief in the following terms;

"IT IS ORDERED THAT:

1. The 1st respondent be and are hereby ordered to attend ZIMRA offices to do things necessary in respect of his obligation to pay capital gains tax or make an application for an exemption or roll over in order to facilitate the transfer of the property into the Applicant's name within (10) ten days of this order.
2. The 1st respondent be and is hereby ordered and compelled to sign all the relevant papers to effect transfer of a certain piece of land being stand 2361 Bulawayo North of Bulawayo Township Lands situate in the District of Bulawayo measuring 1 636 square metres, held under Deed of Transfer No. 796/89 dated 1 March 1989, also known as No. 6 Birkley Street North End Bulawayo (hereinafter called the property) into the applicant's name within 10 (ten) days of this order.
3. Upon the 1st respondent's failure to sign the necessary transfer papers in terms and or to attend ZIMRA offices in terms of paragraph 1 above, the Sheriff of Zimbabwe be and is hereby ordered to sign all requisite papers for and on behalf of the 1st Respondent and submit them to ZIMRA and to 2nd respondent who is

ordered to accept the documents so signed by the Sheriff and effect transfer of the property into the Applicant's name.

4. The 1st respondent to pay the applicant's costs of suit at a higher scale."

The application is opposed by the 1st respondent.

The background to this matter is that the applicant and the 1st respondent (the respondent) were in a customary law union. When the union failed to work, the respondent initiated the dissolution of the union by paying applicant a divorce token, commonly referred to as 'gupuro' in the Shona language. Thereafter the applicant proceeded to file an action for divorce and ancillaries in the Magistrates Court premised on the Matrimonial Causes Act, [*Chapter 5:13*] as if it were a valid marriage. The dispute between the applicant and 1st respondent (the parties) is on the judgment that ensued. Among the ancillaries sought by the applicant was the division of two immovable properties.

A judgment by consent of the parties was entered at the Magistrates Court. Applicant supported her assertion with a civil record and judgment document and respondent correspondingly did the same with a copy of the court order. The two documents have their variance which should not detain us. They differ on dates, one says order was on 19 November 2012 and other says 20 November 2012. The names of presiding officers also differ. The copy of the court order deals with the issue of divorce in its first paragraph. Despite these differences the parties are in agreement that an order by consent was granted by the court in which the immovable property being stand No. 6 Birkley Street, North End Bulawayo was awarded to the applicant as her sole and exclusive property and stand No. 32 Wigton road, Avondale, Harare was awarded to the respondent as his sole and exclusive property.

It is on the basis of this order by consent that the applicant seeks an order to compel the respondent to transfer stand No. 6 Birkley Street, North End Bulawayo (the property) into her name.

The respondent has resisted the relief sought by the applicant on the basis that the court which granted the order by consent had no monetary jurisdiction to deal with the matter. As such, the argument goes, the order despite it being by consent is a nullity with the effect of nullifying any acts which purport to derive its authority from it. I will come back to this argument later after a full narration of the events.

The property awarded to the applicant is registered in respondent's name. Despite the order awarding the property to the applicant in November 2012, the respondent remained in

occupation. On the basis of this order the applicant instituted eviction proceedings in the Magistrates Court and obtained judgment by default on 15 July 2016. The applicant executed the eviction order and respondent was evicted from the property on 4 October 2016. This was not without an attempt by the respondent to have the judgment rescinded. Respondent's application for rescission was dismissed on 8 November 2016.

In the meantime, the respondent had filed an application for condonation for the late filing of an application for review at High Court Bulawayo under Case No. HC 04/16. The matter was set down for hearing on 18 March 2020 but before then the respondent filed a notice of withdrawal on 12 March 2020.

The issue for determination is whether the proceedings before the Magistrates Court which led to the order by consent were valid.

Ms *Gasa* who represented the applicant said the proceedings were valid as well as the order by consent by the parties. She sought refuge in s 11 (1) (b) (vii) of the Magistrates Court Act [*Chapter 7:10*] which reads;

> "(1) Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction—
> (*a*) …….
> (*b*) with regard to causes of action—
> (vii) in all actions other than those already specified in this paragraph, where the claim or the value of the matter in dispute does not exceed such amount as may be prescribed in rules:
> Provided that a court shall have jurisdiction to try any action or case referred to in subparagraph (i), (ii), (iii) or (vii) otherwise beyond its jurisdiction in terms of this paragraph <u>if the defendant has consented thereto in writing</u>." (my emphasis)

This means that where the Magistrates Court has no monetary jurisdiction to deal with a matter, jurisdiction may be conferred upon such court if the defendant consents in writing. It was submitted that the defendant consented to the jurisdiction when he signed a consent paper. Although the consent paper was not made part of the record, the respondent did not dispute its existence which led to the consent judgment.

Ms *Gasa* maintained a forceful argument that the Magistrate Court order remains extant and has not been nullified by the due process of the law. The case of *Lifort Toro* v *Vodge Investments (Pvt) Ltd & 2 Others* SC 15/17 was relied upon to demonstrate that this court cannot, sitting as a court of first instance, disregard or overrule the extant order of the lower court.

However, that does not preclude this court from determining whether or not the proceedings upon which the order was obtained, by consent or otherwise, was valid or not. The respondent, as of right, must be heard on his defence. Does he have a valid defence? The court cannot shut doors against respondent because there is an extant order without hearing him.

While the applicant argued that the Magistrates Court did not grant a decree of divorce other than deal with the division of property, the court order reveals otherwise. There is also no explanation from the applicant on how the court dealt with the prayer for divorce which is in the summons.

Mr *Muhlekiwa* who represented the respondent stood firm with his argument that the consent order relied upon by the applicant was a nullity. His attack was more on the monetary jurisdiction of the Magistrates Court which at the time stood at US$10 000. I did not hear Ms *Gasa* say the property in question was less than US$10 000 in value. It is common cause that the property was worth more than US$10 000 at the time. But applicant relies on consent by the defendant.

Of essence, Mr *Muhlekiwa*'s argument was that the Magistrates Court had no jurisdiction to determine a claim for divorce in the circumstances of the parties, let alone deal with the division of property in question. In other words, the respondent is saying the Magistrates Court was not competent to deal with the claim to the extent that whatever is derived from the claim is a nullity.

The case of *Dube* v *Maphepha Syndicate & Ors* 2009 (1) ZLR 29 (H) at 31 D-F was cited as authority where KAMOCHA J had this to say;

> "When a magistrates' court does what is not within its jurisdiction, the result of what it purports to do is void and it is a nullity in law with no force or effect. No benefit can be derived from it. It has been repeatedly stated that it is like trying to build something on nothing and expect it to stand; it will collapse. See for instances *Mcfoy* v *United Africa Co. Ltd* (1961) ER 1165.

See also *Mkhize* v *Swemmor and Others* 1967 (1) SA 186 where it was stated at 197C-D that, "judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are exceptions, one of them being that, <u>where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside</u>." (my emphasis)

It is crucial to look at the proceedings which gave rise to the order by consent. Before I delve into that, let me hasten to say that a customary law union is not a valid marriage

except in certain exceptional situations created by statute. Section 3 of the Customary Marriage Act, [*Chapter 5:07*] provides that;

> "(1) Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless—
> (*a*) such marriage is solemnized in terms of this Act; or
> (*b*) such marriage was registered under the Native Marriages Act [*Chapter 79 of 1939*] before the 1st January, 1951; or
> (*c*) such marriage was contracted before the 1st February, 1918; or
> (*d*) being a marriage contracted outside Zimbabwe, such marriage is recognized as a valid marriage in the country in which it was contracted.
> (2) A marriage contracted according to customary law on or after the 1st February, 1918, and before the 1st January, 1951, which was not registered under the Native Marriages Act [*Chapter 79 of 1939*] shall, subject to subsection (2) of section *seven*, be regarded as a valid marriage.
> (3) If the male party to a marriage referred to in subsection (2) fails to have such marriage solemnized in terms of this Act, he shall be guilty of an offence and liable to a fine not exceeding level one.
> (4) A prosecution for a contravention of subsection (3) shall not be a bar to further prosecution or prosecutions thereunder if the accused does not thereafter have his marriage solemnized in terms of this Act.
> (5) A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage."

There are also other statutes which recognize a customary law union as a marriage for specific purposes. The bottom line remains, it is not a valid marriage. This means at law the issue of divorce cannot arise in any court. In other words, a party cannot file summons for divorce arising from a customary union.

In *casu* the respondent in opposition filed annexure C1 which is a summons commencing action by the applicant in the Magistrate's court in which she has drawn the pleadings in line with the provisions of the Matrimonial Causes Act where she prays for divorce, custody of minor children, access and division of property.

These divorce proceedings in the Magistrates Court are, in my considered view, fatally defective and are a nullity. The defect of nullity is routed in the cause of action itself. There is no cause of action recognized at law, as MAWADZE J correctly alluded to in *Charwadza Madzwawawa* v *Rosemary Vambe* HH 65-12,

> "I have already alluded to the nature of the relationship between the parties and the property involved. The appellant and the respondent are not legally married hence they may not be afforded the same protection as is provided in respect of parties who are legally married. A customary law union is not regarded as a valid marriage in terms of our law and is only recognised for limited purposes provided for through statutory provisions. To put it bluntly, the respondent cannot regard herself as the appellant's wife at law. She cannot competently

> sue for divorce and division of the matrimonial estate in terms of s 5 and 7 of the Matrimonial Causes Act [*Chapter 5*:*13*]."

In a more recent case of *Jeke* v *Zembe* HH 237-18, CHIRAWU-MUGOMBA J cited with approval the words of MAKARAU JP, (as she then was), in *Mandava* v *Chasweka*, that, "It is still part of our law that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [*Chapter 5:13*]. Consequently, parties to such unions cannot be divorced by the courts and their joint estate cannot be distributed in terms of the divorce laws of this country. Trial magistrates who deal with the estates of the parties to an unregistered customary union tend to fall into three errors. Firstly, they tend to proceed to deal with unregistered unions as if they are registered. Secondly, they fail to avert to the choice of law provisions of our law and finally they tend to forget their monetary jurisdictional limit when distributing joint estates at general law." Commenting about the legal principles flowing from the *Mandava* case CHIRAWU-MUGOMBA J had this to say; "It is pertinent to note that the legal principles from that decision are that:

> "1. A customary law union is not a marriage
> 2. Parties to such a union cannot be divorced by the courts
> 3. The Matrimonial Causes Act cannot be used to distribute their estate, and
> 4. A choice of law process has to be pleaded to establish a cause of action."

When one applies the principles enunciated above, *in casu*, it leads to the conclusion that the proceedings were a nullity, hence nothing valid can be derived from them. The Magistrate's court is a creature of statute. It has no jurisdiction to deal with a purported divorce arising from a customary union. The order by consent cannot confer jurisdiction upon the court either. See Manning v Manning 1986 (2) ZLR 1 (S) at 3D-F; *Mutasa* v *The Registrar of the Supreme Court*, SC 27/ 18 where Guvava JA said; "Clearly the Supreme Court cannot grant a declaratur in the first instance, even where the parties may be in agreement and approach the court by consent seeking an order beyond the courts' jurisdiction, such consent does not and cannot compel a judge to issue an order beyond his or her jurisdictional authority." (my emphasis)

It is futile for the applicant to rely on consent as a yardstick for the validity of the order. It must be shown that such consent sits on something which is valid. This, the applicant has failed to show. On the other hand, respondent has shown that there was nothing valid upon which consent could be expressed. This takes us to the wise words of Lord Denning in *Macfoy* v *United Africa Co Ltd* (1961) 3 ALL ER 1169 (PC) at 11721 that, "If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for

an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Mr *Muhlekiwa* also sought to rely on s 18 (4) (5) of the Customary Law and Local Courts Act [*Chapter 7:05*] that the judgment had superannuated. It was not necessary because there is no judgment to talk about.

For these reasons this application cannot succeed. However, respondent prayed for costs on a higher scale in the event the application is dismissed. Such punitive costs are not justified in the circumstances of this case where the lower court allowed the parties to proceed without raising the issue of jurisdiction *mero motu*.

Disposition

IT IS ORDERED THAT:

The application be and is hereby dismissed with costs.

Gasa, *Nyamadzawo & Associates*, applicant's legal practitioners
Muhlekiwa Legal Practice, 1st respondent's legal practitioners