

REGINALD MUSARA
versus
CHIDO MAWOYO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 22 March & 24 May 2023

Civil Trial

MM Ushe, for the plaintiff
SZ Luthuli, for the defendant

TSANGA J: The plaintiff issued summons on 15 October 2021 for the sharing of movable property only, under general law on the basis that though he had an unregistered customary law union with the defendant, their lifestyle was more in accordance with general law. The movables he wanted allocated to the defendant included two chairs, a kitchen table, a 5 kg gas canister; a two plate gas stove, a DSTV decoder, curtains, blankets, a sewing machine and a three quarter mattress. To himself he wanted to be allocated 2 chairs, a 32 inch television, a solar panel, a solar battery, a 20 amp charge controller, a drip tank irrigation pipe, a bunk bed and a three quarter mattress. The unregistered customary law union was entered into in 2006, ending in December 2021 when he formally gave her the traditional divorce token called *gupuro*. At the time of the hearing, it was therefore no longer in dispute that the marriage had been dissolved. Three children, all minors, were born during their union.

In response to the summons, the defendant indicated that the plaintiff had omitted to mention an immovable property acquired during the union as well as some projects that they were engaged in during their time together. He was said to have omitted 19 chickens, 7 koi fish and 4 Boerboel dogs from the list of what was to be distributed between them from the specialist rearing projects they were engaged in. She also stated that a motor vehicle, a BMW registration number AAN 5564 had not been mentioned.

The immovable property in question was described as Stand 21241 Darwendale, measuring 2000 square metres. It has a three bedroomed cottage which she says they put up during their time together. It also has three wells.

The Plaintiff's Evidence

The plaintiff acknowledged that indeed there is such a property but stated that the stand is not yet his as he is still paying for it. His evidence was that they were in the process of acquiring the stand, having been given a chance to pay for it for a period of eight years. Though the eight years had lapsed, he had not yet cleared the payments for the stand. He said he had been given a year to clear the balance of US\$3 500 for the stand which was valued at US\$20 000. He suggested there is no guarantee that he will finish paying as he has been struggling.

He told the court that he entered into the agreement for the stand in his personal capacity and produced the agreement of sale in his name. He also produced a statement of payments of his account. Whilst he has yet to take transfer of the property in question, he said he had indeed put up a temporary cottage on the property in which he currently resides with the defendant and his family. According to him, the defendant did not contribute to this structure. He described her role as taking of the children and attending to household duties. Regarding the projects she said he had omitted, he said these had collapsed. He indicated his willingness to give her movables as outlined in his summons.

As for the car, he called a witness, one Nomvuyo Madziro, whose evidence was that the plaintiff bought the car from her in 2018 but was still paying for it. The agreed price was for US\$1 800. Her evidence was that the plaintiff still owes \$1 164 to date. Although he has possession of the vehicle, ownership had not yet been passed to him. Since he is a mechanic she said the ongoing arrangement between them is that when her car needs attention, she takes it to him and he deducts from the balance he owes for the purchase of the vehicle. Their parents were friends so she regards him like a brother.

The plaintiff's main legal argument was therefore that the stand is "his" property to which the defendant did not contribute. He further argued that indirect contribution cannot be taken into account because the property does not yet belong to him and that in any case she would not be entitled to 50%.

The Defendant's Evidence

The defendant, in her evidence, confirmed that theirs was customary union which lasted for 16 years ending in December 2021. During their 16 years together they acquired a stand and a car and were doing projects which focused on koi fish, brahma chickens and raising Boerboel dogs. She had not been involved in the acquisition of the fish or the dogs. Whilst she had not contributed financially, her emphasis was that she had done so indirectly by doing house work and looking after the children whilst her husband went to work. She would also clean the chicken runs. She had also helped clear the site when the stand was bought. They have now been staying there for five years. She explained that the current living arrangement with nowhere else to go is that he occupies the main bedroom whilst she stays in the spare bedroom with her daughters. Her claim to the stand is 50% given the years she says her life was invested in being a mother and a wife. She told the court that as she is now working at a school, she is willing to contribute toward payment of the balance of the purchase price so that they can share the property which she lays claim to. She stated outright that on her part she cannot afford to buy him out of his share. She therefore put forward a suggestion that as the stand is 2000 square metres it could perhaps be subdivided. However, whether this is possible had not been explored prior to the trial.

She acknowledged that none of the projects were on going though she claimed that the chickens had been given to a person she knows by the plaintiff. She wanted a share of their value since she had looked after them particularly in cleaning after the chicken runs. As for the car, she admitted knowing it was under sale but that she did not know the balance owing. Whilst she had tried to run her own projects such as selling fish and running a shop, capital had been the challenge. Her argument in essence, amounted to unjust enrichment in the context of a marital setting maintaining that her role was comparatively just as worthy as that of the plaintiff in contributing to what she regarded as their marital estate. See *Jengwa v Jengwa* 1999(2) ZLR 121(H) where the elements of unjust enrichment were said to be apposite to the case of the wife at customary law, to whose property rights the general law applies.

Analysis

The evidence on the projects was very scant and this court had to try and extract values from the defendant as to their value which seemed very minimal. It would be very difficult for this court to order their sharing in the absence of any real evidence as to their

monetary worth. Materially, at the hearing the defendant did not challenge the plaintiff's suggestion regarding the distribution of other movables as indicated in his summons. These, as indicated are mainly household items and in the absence of any dispute this court agrees that they be shared as outlined by the plaintiff in his declaration. As for the car, since the defendant admitted that she knew of the sale but was just unaware of how much was still owing, there is no reason to disbelieve the plaintiff's witness that the car still has a sizeable amount owing and that it remains registered in her name. It cannot therefore be for distribution.

The real dispute relates to the immovable property which the defendant claims a share of and to which general law applies. See *Marange v Chirodza* 2002 (2) ZLR (H) 171 regarding the application of general law to immovable property where parties have a customary union. It is also permissible overall to use as guidelines when applying general law to such cases, the factors to be considered in dealing with divorce assets as captured in s 7 (4) of the Matrimonial Causes Act [*Chapter 6:13*] where the application of general has been justified to apply to assets acquired in a customary law union. See *Chapeyama v Matende* 2000 (2) ZLR 356 (SC).

It is not in dispute that the property has largely been paid for and that there is an existing agreement of sale. A cottage has even been constructed on the premises showing the plaintiff regards the investment as permanent and not tentative even if he still owes some money. Therefore as for the argument that the property does not yet belong to the plaintiff, whilst that is the case, it is also a fact that the property is in fact almost paid for and it is almost certain that the intention is to pay for rather than lose such a valuable asset. The defendant in any event has indicated her willingness to contribute towards settling the balance owed. She has also indicated her inability buy him out even if the property is ultimately made his.

The crisp issue therefore is whether the defendant should be given a value of its worth since the plaintiff sees the house as his individually, and as emanating from the fruits of his sole labour, ignoring totally his former wife's reproductive labour or nurturing roles for the family.

It is worrying that in the constellation of things, particularly in society and at the family level, women's work within the family continues to be regarded so poorly and as inferior. It is simply taken for granted given the arguments that courts are confronted with

time and again when it comes to what constitutes women's just desserts upon dissolution of a marriage. What is evident is that an alarming number of men in society remain locked in outdated perceptions which devalue women's work when looking at the division of labour in the home, manifesting in unfairness when it comes to divorce. If the protection accorded to the family as a fundamental unit of society and commitment to equality during marriage or at its dissolution is to meaningfully gain traction, these perceptions ought to be addressed from their roots. If families are to help form just individuals and citizens, they must be just families. To quote Susan Moller Okin:

“The family is the primary institution of formative moral development..... And the structure and the practices in the family must parallel those of the larger society if the sense of justice is to be fostered and maintained.... It is essential that children who are to develop into adults with a strong sense of justice and commitment to just institutions spend their earliest and most formative years in an environment in which they are loved and nurtured and in which principles of justice are abided by and respected.”¹

Pertinent questions are asked:

“What is a child to learn about the value of nurturing and domestic work in a home with a traditional division of labour in which the father either subtly or not so subtly uses the fact that he is the wage earner to “pull rank” on or abuse his wife? What is a child to learn about responsibility for others in a family in which, after many years of arranging her life around the needs of her husband and children, a woman is faced with having to provide for herself and her children but is totally ill equipped for the task by the life she agreed to lead, has led and expected to go on leading”.²

Articles 5 and 16 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Zimbabwe acceded, are particularly pertinent in that State parties are enjoined in Article 5 to take appropriate measures:

- “(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.”

And in article 16 to:-

“take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular [to] ensure, on a basis of equality of men and women”

¹ Susan Moller Okin Justice, Gender, and the Family (United States of America: Basic Books) 1989 at page 22

² Susan Moller Okin Justice, 1989 (Supra)

A woman's contribution, where she has spent her life as a house wife therefore needs to be looked at from the perspective of comparable worth. It is for the courts to give her indirect contributions their weight in order to do justice but also to shift societal attitudes that devalue this work as insignificant when it comes to sharing assets on divorce or separation. I am inclined to agree strongly that concepts of justice ought to be learnt from engaging with these lived realities within families. The court's role is an important one in setting the pace for just gender sensitive outcomes. The relationship between parents should conform to standards of justice which children can emulate. Just families will hopefully make for a just society.

Bearing in mind that the defendant is willing to contribute to settling the remaining debt, what makes sense in this instance given the length of their marriage is that the balance owing should be settled with each party contributing towards the payment of the remaining purchase price. The property should be valued, and the defendant should be paid a half share of the value of the property.

It is accordingly ordered as follows:

1. The plaintiff is awarded the following movables:
 - a. 2 chairs,
 - b. 32 inch television,
 - c. Solar panel
 - d. Solar battery,
 - e. 20 amp charge controller,
 - f. Drip tank irrigation pipe
 - g. Bunk bed
 - h. Three quarter mattress.
2. The defendant is awarded the following movables:
 - a. Two chairs and kitchen table
 - b. 5 kg gas canister
 - c. Two plate gas stove
 - d. DSTV decoder
 - e. Curtains
 - f. Blankets,

- g. Sewing machine
 - h. Three quarter mattress.
3. The parties shall each contribute 50% towards the settlement of the remaining purchase price for Stand 21241 Darwendale, measuring 2000 square metres.
 4. Thereafter the immovable property shall be valued by a valuator agreed to by both parties or in the absence of agreement by one appointed by the Registrar of the High court from his list of valutors.
 5. Both parties shall contribute towards the valuation of the property.
 6. The Defendant shall be entitled to be paid 50% of the net value of the property which shall be paid within a period of six months from date of valuation or any extended period as the parties may agree to in writing.
 7. Upon payment of her half share, the defendant shall vacate her occupancy of the named property.
 8. In the event of failure to pay the defendant her half share half share within the stipulated time or as agreed to in writing by the parties, the property shall be sold and the proceeds shared equally between the plaintiff and the defendnat.
 9. Each party shall pay their own costs.

Sachikonye-Ushe Legal Practitioners, plaintiff's legal practitioners
Chinawa Law Chambers, defendant's legal practitioners