

EUWITT MANDICHAMIRA NYANHONGO
versus
HATIWARI WINNIE MAMVOSHA
and
JACQUALINE CHINAWA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 7 February & 12 July 2023

Civil Trial

H S Tsara, for the plaintiff
P Mahembe, for the 1st defendant
2nd defendant excused per request

MAXWELL J: On 3 September 2019 Plaintiff sued out summons against the two defendants seeking an order for;

- a) Sharing of matrimonial property acquired by the parties during the subsistence of their unregistered customary law unions following the dissolution of the unions.
- b) An order for eviction of the first defendant and all those claiming the right of occupation through her from stand No. 7226, Zimre Park, Ruwa.
- c) An order that each party shall bear its own costs.

In his declaration, plaintiff stated the following. He married the defendants under unregistered customary law unions on or about the beginning of April 2000. Three children were born out of the union with first defendant whilst two were born out of the union with second defendant. The marriage to the second defendant terminated in 2006 after the parties developed irreconcilable differences. The second defendant moved out of the matrimonial home and went to live with her parents. The marriage to the first defendant was terminated after she obtained a Protection Order against him. The parties lived modern lifestyles throughout the duration of

their unions. The general law principle of Tacit Universal Partnership should be applied in this matter.

On 22 May 1998 plaintiff acquired an immovable property, namely, Stand No. 7226 Ruwa Township of Dispute Estate measuring 538 square metres held under Deed of Transfer No. 2663/03. This property became the parties' home. Both defendants were not employed and only Plaintiff was gainfully employed. Prior to both unions, Plaintiff acquired a 2 plate stove, a double bed, a double-door wardrobe, an upright refrigerator and a motor vehicle. During the subsistence of the unions he acquired movable property for the benefit of the unions. He proposed the distribution of the movable property to the two defendants and that he keeps the immovable property as his sole and exclusive property as well as the movable property acquired prior to the unions. He also seeks that first defendant vacate the immovable property and give him vacant and peaceful possession.

On 23 September 2019, first defendant entered her appearance to defend and on 23 October 2019 she filed her plea. She disputed being married in 2000 and stated that she married Plaintiff in 1999. She claimed school fees for two minor children as well as maintenance amounting to \$2000 per month. She submitted that whilst the immovable property was purchased prior to her union with Plaintiff, the house had not been constructed in full. She submitted that plaintiff instructed her to leave her employment and become a housewife. She claimed an indirect contribution to the immovable property entitling her to a 50% share in the property. On 13 December 2019 Plaintiff gave notice of amendment of summons and declaration. In the amendment, plaintiff indicated that the defendants eloped to him on or about the first week of April 2000 and he accepted both of them and paid lobola for both of them in May and June 2000 respectively. Further that when second defendant moved out she did not take anything with her from the movable property that had been acquired by the parties during the subsistence of their union. Plaintiff also indicated that he gave first defendant a token of divorce to signify the end of their union on 30 April 2019. He also stated that after paying lobola for the Defendants, the three parties were living together, pulling their resources together and acquiring wealth and movable property together for a common purpose. He further stated that all of them were not formally employed but made diverse direct and indirect contributions towards the acquisition of their movable properties. On 16 March 2020 first defendant pleaded to the amended summons

and declaration insisting on her claim for a 50% share in the immovable property. After a pre-trial conference, the issues referred to trial were,

“Whether or not the 1st Defendant contributed to improvements made on Stand No. 7226, Ruwa acquired by the Plaintiff before their unregistered customary union. If so, what will be the value of the compensation due and payable to 1st Defendant?”

TRIAL

Plaintiff's testimony was that first defendant came when the house was complete. She was employed when he married her but she left employment for marriage. The funds used in building came from his work as a sculptor. When first defendant eloped to him, he was lodging elsewhere. Second defendant was the first to stay at the property in question. First defendant did not contribute anything towards improvements on the property and she is not entitled to any share. Under cross-examination he disputed telling first defendant that he did not want a working wife. He stated that the only contribution first defendant made was to cook for him as he went to work. On being asked whether he had given first defendant a divorce token he answered in the positive. When asked when he had done that he indicated that it was between 2013 and 2014 but he could not remember. When he was referred to his summary of evidence where he said he gave first defendant the divorce token on 30 April 2019, he said he could not remember. He disputed that first defendant is entitled to a third of the property. He confirmed that the only reason for denying first defendant a share in the property was that it was acquired before he married her.

Plaintiff called his brother, Dennis Nyanhongo as a witness. He confirmed the acquisition of the property prior to the unions and that first defendant eloped in 2000 at a time the property was complete, habitable but with no electricity. Under cross examination he confirmed that first defendant was doing all the house chores and taking care of the children. First defendant's evidence was that she eloped in 1999 to plaintiff. At the time she was working in a shop at Nyanga. At the time of eloping the house was still under construction but was at window level, almost complete. She made indirect contributions cooking for builders and cooking and washing clothes for plaintiff. She stated that she had wanted to rent a shop in town for electrical gadgets but Plaintiff said he did not want a wife who was employed. She did not look for employment for 20 years as plaintiff forbade her. Her sister suggested she starts a project like poultry rearing. Plaintiff said he would do the project himself and bought materials

for the fowl run but did not start the project. She disputed receiving a token of divorce and stated that plaintiff attempted to give her but she advised him to follow proper procedures which he did not do. She disputed making minimal contributions and indicated that she stayed at the house for two years without electricity. Under cross examination she disputed that pregnancy was the reason for her eloping to Plaintiff. She indicated that she was amending her demand from 50% share to 30%.

THE LAW

The parties are agreed that general law is applicable, particularly the issue of tacit universal partnership. The question of choice of law therefore does not arise. A tacit universal partnership exists where the following are present,

- (a) Each of the parties brought something into the partnership;
- (b) The business or acquisition of the property is carried on for the joint benefit of the parties. The object of the partnership must be to make a profit and
- (c) The contract should be legitimate one.

See *Mtuda v Ndudzo* 2000 (1) ZLR 710. Where parties pool their resources for their common enjoyment, even if they are not involved in a commercial venture for profit, they are in a universal partnership for the purposes of their livelihood and the maintenance of their common household. See *Marange v Chiroodza* 2002 (2) ZLR 171. The partnership, being tacit, has no defined expected contribution from each party. In *Marange v Chiroodza (supra)* it was stated that in Roman Dutch Law, there is no presumption of equality of shares in a partnership, but the share of each partner is in proportion to what they have contributed. It is therefore essential to consider the evidence of the respective contributions of each party.

ANALYSIS

A partnership's aim is to carry on business for profit. The partners collaborate, conduct business and share profits, losses, and assets acquired during the subsistence of the partnership. Going by the wording in the Joint Pre-Trial Conference Minute, the parties are agreed that the property in question was acquired before the first defendant's union with the plaintiff. It therefore does not fall into the category of partnership assets. That is the reason why the issue in contention was whether or not first defendant contributed to improvements on the property. The Cambridge dictionary defines "improvement" as the fact of something getting better, or the act

of making something better. In my view, that presupposes a complete and existing thing that is then made better. Had the house on the property been incomplete, as alleged by first defendant, the issue would have been worded differently. Probably the wording would have included whether or not first defendant contributed to the completion of the house.

First defendant did not lead any evidence on any improvements made on the house. She did not mention any areas that were improved or renovated. She did not mention any builder who worked on the improvements despite claiming that she knew the builders. Had there been any improvements made on the house, the value thereof would have been subject to distribution after the dissolution of the union. On being challenged why she had not brought any documents or evidence to support her claim, first defendant's response was that she would not know what evidence to bring. On being asked why she did not secure the support of the builders if her claim was true, her response was that she never thought of that. Those responses are not expected from a litigant who is legally represented. The most probable reason why there was no mention of the names of the alleged builders or what work they did is because the house was complete as alleged by plaintiff. Cooking for builders which she mentioned in her evidence-in-chief must have been an afterthought. Plaintiff's position was that the partnership acquired movable property only. I find that no improvements were made on the immovable property and it is not subject to distribution following the dissolution of the union.

In closing submissions, first defendant made reference to five cases in which the courts have recognized the indirect efforts of the customary law wife including looking after the household. She argued that her case is not different. I do not agree.

In *Mhurushomana v Sigauke* HH 415/17 it was observed that the parties' story was a "rags to riches" story where they moved from occupying a single rented room to ultimately buying a house in a plush suburb in Mutare.

In *Mautsa v Kurebgaseka* HH 106/17 the properties in contention were acquired during the subsistence of the marriage. The parties married in 1996 and acquired two houses in 2000 and 2006 respectively.

In *Machafa v Mukumirwa* 2001 (2) ZLR 540 it is clearly stated that the house in question, even though it was registered in plaintiff's name, was acquired during the parties' marriage.

In *Sithole v Sithole* HB 14/94 the parties married in 1984. The plaintiff is the one who selected the house which eventually became the matrimonial home with the assistance of her uncle. The parties had together saved money for the deposit as they were both working.

In *Muteke v Muteke* SC 88/94 the properties in question were acquired during the subsistence of the marriage of the parties.

It is therefore clear that the recognition of the indirect efforts of the customary law wife including looking after the household entitles the wife to a share in the property acquired during the subsistence of the marriage. First defendant's conceded that the property in question was acquired before the union. On that basis the cited cases are distinguishable.

First defendant also argued that if plaintiff is awarded the relief he seeks, unjust enrichment would result. For unjust enrichment to suffice the first defendant must show that:

- a) the Plaintiff has been enriched;
- b) at the expense of the first defendant;
- c) the enrichment is unjustified;
- d) the case does not come under the scope of one of the classical enrichment actions;
- e) there is no positive rule of law which refuses an action to the impoverished person. See *Industrial Equity v Walker* 1996 (1) ZLR 269 (H) at p 298 D.

In *Jengwa v Jengwa* 1999 (2) 121 (H) at 130 F-G the court indicated that a claim for unjust enrichment would succeed where the claimant has made a contribution that impoverishes her and will leave the husband enriched at her expense. In *Mashongedza v Mutsvanga* HH 214/13 the Court was satisfied on the evidence led that the plaintiff did contribute to the purchase and construction of the property due to the fact that during the subsistence of the union she was gainfully employed and therefore made monetary contribution. The court further observed that she also made indirect contribution as a wife.

For unjust enrichment to succeed, first defendant ought to have contributed to the acquisition or improvement of the property in question. I have already found that she did not. Her claim of unjust enrichment therefore cannot succeed.

In her summary of evidence, first defendant based her claim on having spent 19 years as a housewife providing for all the plaintiff's needs. Her initial claim of a 50% share was not justified as the immovable property was acquired before the union. The reduction of the claim to 30% did not alter the fact that the property was acquired prior to the union. Where first defendant has a legitimate claim in respect of the movable property acquired during the subsistence of the union, which issue was settled between the parties. Accordingly, there is no reason to deny the plaintiff the relief sought.

DISPOSITION

1. First defendant shall take as her sole and exclusive property the following;-
 - a) Queen bed
 - b) Wardrobe
 - c) Headboard
 - d) Dressing Table
 - e) Dining Room Suite
 - f) 4 Plate Stove
 - g) Upright Fridge
 - h) Microwave
 - i) A set of Sofas
 - j) A Television Set
 - k) Decorder
 - l) Half of Blankets
 - m) Half of Kitchen Utensils.
2. First defendant and all those claiming the right of occupation through her be and are hereby ordered to vacate stand No. 7226, Zimre Park, Ruwa within 7 (seven) days of this order failure of which the deputy Sheriff be and is hereby authorized to evict first defendant and all those claiming the right of occupation through her from the said property.

3. Each party bears its own costs.

Tsara & Associates, plaintiff's legal practitioners
Gurira & Associates, first defendant's legal Practitioners.