

JANE MUSINDO

And
AUGUSTINE TONGAI KEREKE
versus
LEOCADIA KEREKE (NEE MUROIWA)

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 26 January & 8 June 2022

Civil Appeal

Mr Muvhami & Ms G Makina, for the appellants
Mr J. Mambara, for the respondent

ZISENGWE J: The term “mistress” is universally used to refer to a woman (other than the man’s wife) who has a sexual relationship with a married man. In Zimbabwe such a woman has earned the rather unusual moniker of “small house” implying that she is the “less significant” woman in that man’s life. This present matter is an appeal against the decision of the Magistrates Court sitting at Bikita granting an application brought by the man’s wife (the respondent) for the eviction of such a “mistress” (the 1st appellant) from a rural homestead situate in that district. That homestead is referred to as the Kereke homestead and is regarded by the parties as the matrimonial home of the 2nd appellant and the respondent.

The 2nd appellant and the respondent are married in terms of the Marriage Act [*Chapter 5:11*] which marriage has subsisted for the better part of half a century having been solemnised in 1966. The said marriage notwithstanding, the two appellants are in a romantic relationship. Put bluntly, the 1st appellant is in an open adulterous relationship with the 2nd appellant. So firmly established is that relationship that not only does the 2nd appellant regard the 1st appellant as his

second wife but more pertinently for current purposes, the 1st appellant has since moved in with 2nd appellant and currently resides within the Kereke homestead. Although this rather unusual arrangement initially subsisted, apparently without much ado, from 2015 when the 1st appellant moved into the Kereke homestead, it has of late been beset with severe acrimony.

It is this acrimony that prompted the respondent approach the court *a quo* alleging incessant harassment at the hands of the 1st appellant. So severe has this abuse been, according to the respondent, that she has been forced to practically desert her matrimonial home and seek refuge at various relatives' homes around the country.

In her summons she initially sought three things, firstly the eviction of the 1st appellant from the Kereke homestead, secondly an order interdicting the 1st appellant from interfering with farming business at an identified farm in Chiredzi and thirdly an interdict restraining 1st appellant from continuing with her adulterous relationship with the 2nd appellant.

Following an exception raised by the 1st appellant in relation to the second claim, the respondent sought and obtained an order amending her summons to delete the claim for the interdict barring 1st appellant from interfering with farming activities at farm 24 Hippo Valley estate Chiredzi.

In her plea, the 1st appellant raised a preliminary point objecting to respondent's *locus standi* to institute eviction proceedings given that she is not the owner of the Kereke homestead.

The question of respondents' *locus standi* was in the proceedings *a quo*, (as in this appeal) the main bone of contention. The parties submitted written submissions in support of their respective position with the respondent steadfastly maintain that she had sufficient *locus standi* by virtue of her marriage to the 2nd appellant.

In this regard reliance was placed by 1st appellant on two related legal principles namely that only the owner of property in this case the 2nd appellant on the basis of the *actio rei vindicatio* to institute eviction proceedings against Whomsoever he/she finds in possession of the property. Cases cited in support of this argument included *Baxter v Changwa* HMT 734/20; *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999(1) ZLR 263 (H).

Related to the above was the contention that in terms of the Zimbabwe marriage laws, a wife enjoys very limited rights in respect of matrimonial property which rights are of personal

nature against the husband. This is the argument that has been carried forward to the present appeal. Several authorities were in support of this position to which I will advert later.

The contrary position presented by the respondent was that she had every right to institute eviction proceedings against a third party in the position of the 1st appellant who sought to interfere with and tear apart her marriage. Biblical scriptures were quoted and judicial precedent cited in support of the fact that the court should not be seen to countenance the sacrilege of the hallowed marriage institution.

The court *a quo* summarily dismissed the point in *limine* and ruled that the court could not appear to support the desecration of the marriage institution and undertook to provide detailed reasons for its ruling at the conclusion of the trial.

In the ensuing trial, the respondent was the sole witness for the plaintiffs' case and the two appellants were the only witnesses for the defendants' case. It serves no useful purpose to repeat the individual accounts of the witnesses as the resolution of this appeal rests not so much on the disputed facts (which are in any event largely common cause) as with the legal implications thereof.

The respondent and the 2nd appellant as earlier mentioned got married in terms of the Marriage Act in 1966 out of which several children (all of whom are now majors) were born. The 2nd respondent has however routinely brought other women in the past to live within the homestead despite his monogamous marriage to respondent. The 1st respondent in the latest of such women.

The 1st appellant, at 42 years is almost the 2nd appellant's age. She insisted in her evidence that she is married to the 2nd appellant and that through her industry she managed to construct a structure within the Kereke homestead, separate from the house occupied by the respondent. She therefore maintained that she saw no reason for her to be evicted from that homestead as she was there at the behest of the 2nd respondent. She denied ever having conducted herself violently towards the respondent.

The 2nd appellant testified objecting to the granting of the eviction order against the 1st appellant and indicated that he regards the 1st appellant as his wife. It was his evidence that he regards himself as a traditionalist who believes in the polygamous way of life. He further

testified that the 1st appellant care more about him than the respondent. It was therefore self-evident where his loyalties lie.

At the conclusion of the trial, the court in granting the claim for eviction found in the main that it could not be seen to condone or encourage the adulterous relationship between the two appellants which in its view was not only inimical to the notion of a monogamous Chapter 5:11 marriage, but was also anathema to religious scriptures.

Aggrieved by that outcome the two appellants noted the current appeal the grounds of which are couched as follows;

Grounds of Appeal

- 1. The court a quo erred in granting an order for eviction of the 1st appellant from the Kereke homestead when the respondent had dismally failed to establish locus standi eviction proceedings over an immovable property that is not registered in her name.*
- 2. The learned magistrate misdirected himself by delving into issues of adultery and sanctity of marriages solemnised in terms of [Chapter 5:11] which issues had not been placed before the court for determination. The court went on a frolic of its own and failed to make a determination on the issues which had been placed before it.*
- 3. The court a quo erred by failing to appreciate that the 1st appellant and not be evicted from the homestead of the 2nd appellant as she was residing thereat through his consent*

I must confess that when my brother MAWADZE J and I retired to reflect on the submissions by counsel, we could not find a ready resolution to the legal conundrum confronting us. The submissions on both sides were as captivating as they were persuasive, consisting as they did of various jurisprudential arguments. However, after much robust debate and reflection on our part we managed to reach consensus. We are grateful to counsel for their well-researched submissions. The following is a summary of our ultimate findings.

The question of adultery and sanctity of marriage.

It is with this second ground of appeal that I will begin. Here, the main contention by the appellants was that the court below erred in importing into the dispute questions of sanctity of marriage and the abhorrence of adultery and thereafter and basing its decision on the same.

According to them these were extraneous to the issues to the dispute at hand, which issues in any event were not raised by the parties.

However, this particular ground of appeal is without foundation in light of the averments made by the respondent in the declaration attached her summons. In it the respondent specifically referred to the moral depravity and illegal nature of the relationship between the two appellants and her perception of the bearing of the same to her claim for eviction. Paragraphs 9,14 and 16 of her declaration find particular relevance. She averred as follows;

9. *In or around 2015 the 2nd defendant entered into **an adulterous affair** and started co-habiting with the 1st Defendant. The 1st defendant was well aware that the 2nd defendant was married in to the plaintiff.*
14. *The 1st defendant has **defiled the plaintiff's marriage** and is conducting chaotic and disgraceful life all meant to humiliate and harass the plaintiff. The 2nd defendant has lost control of the family and is also living at the mercy of not 1st defendant.*
16. *the plaintiff's wish is to protect her marriage, her family, her assets and above all **her dignity**. She cannot continue living a marriage that is **contemptuous of the law**. (emphasis mine)*

The contention by the 1st appellant. therefore, that the court *a quo* embarked on a frolic of its own into delving into matters of adultery and the need to protect the sanctity of marriage cannot be sustained. These were issues that were specifically pleaded. Apparently the 1st appellant elected not to specially address these issues in her plea claiming that they were irrelevant to the cause of action. She opted instead to solely address the question of the ownership of the Kereke homestead. The fact that 1st respondent chose not to address the issues of adultery and sanctity of marriage, did not necessarily render them of no moment. Without necessarily suggesting that the court *a quo* was correct in predicating outcome of the matter on them, it (i.e. the court aquo) be faulted for adverting to those issues in its judgment.

The question of Respondent's locus standi to institute eviction proceedings

In this regard the 1st appellant reiterated the position she articulated in the court below that respondent's marriage to the 2nd appellant does not confer her any right to evict her (i.e. 1st

appellant) from a homestead owned by the latter particularly in view of the fact that she resides in that homestead upon the 2nd Appellant's invitation. It was submitted that a claim for eviction being based in the *actio rei vindicatio* only allows the owner of property to claim his property from whomsoever he finds in possession of the same.

In resisting the appeal, the respondent insisted that not only was she clothed with *locus standi* to institute the eviction proceedings by virtue of her marriage to the 2nd appellant but also that issues of adultery and the sanctity of the marriage institutions are inseparable from the issues at hand.

When stripped to its bare essentials, the crisp question for determination in this regard is whether or not a woman married in terms of the Marriage Act [*Chapter 5:11*] has *locus standi* to institute eviction proceedings against a paramour who interlopes into that marriage by proceeding to reside within the matrimonial home at the invitation of that woman's husband.

The Current position

The starting point in resolving this issue is an appreciation of the default position that marriages in Zimbabwe are out of community of property, that is of course, unless the parties thereto enter into an ante-nuptial contract altering that position to regulate their proprietary affairs. The corollary therefore is that subject to limited restrictions, either party to a marriage can deal with his or her property as they wish.

Related to the above is the trite legal position that a marriage only bestows limited rights as between husband and wife, which rights are only of a personal nature. In *Muzanenhamo & Anor v Katanga & Ors* 1991 (1) ZLR 182 (SC), McNally JA quoted with approval the words of Lord UPJOHN in *National Provincial Bank Ltd v Ainsworth* [1965] ALLER 472; [1965]AC 1175 (HL) at 485G where the following was said:

“The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition; it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So, as a matter of broad principle, I am of the opinion that the rights of husband and wife must be regarded as purely personal inter se and these rights as a matter of law do not affect third parties.”

Similarly, in *Maponga v Maponga & others* 2004 (1) ZLR 63 (H) at 68D-E MAKARAU J (as she then was) after reviewing a number of cases involving the status of a married woman in relation to the matrimonial home concluded thus;

“It would appear to me in summary that the status of a wife does not grant her much in terms of rights to the immovable property that belongs to her husband. She only has limited rights to the matrimonial home that she and her husband set up. Those rights are personal against the husband and can be defeated by the husband providing her with alternative suitable accommodation or the means to acquire one. The husband can literally sell the roof from above her head if he does so to a third party who has no notice of the wife’s claim.”

Stemming from the above, therefore is the vexed question of whether or not a married woman can evict from the matrimonial home third parties who are resident thereat at the invitation of her husband. This in turn calls for an interrogation of the broad requirements needed for one to succeed in an action for eviction. The action for eviction has its basis in the *actio rei vindicatio* which states that an owner is entitled to reclaim possession of his property from whosoever is in possession thereof. In this regard the following was stated in *Chetty v Naidoo* 1974 (3) SA 13 at p 20:

“It may be difficult to define dominium comprehensively (cf. Johannesburg Municipal Council v Rand Townships Registrar & Ors 1910 TS 1314 at 1319), but there can be little doubt ... that one of its incidents is the right to exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some enforceable right against the owner (e.g. a right of retention or a contractual right).”

In applying the above principle MALABA J (as he then was) in *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H) had the following to say:

*“The principle on which the actio rei vindicatio is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. **The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action.** Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention: *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C:*

Makumborensa v Marini S 130/95 p 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings.”
(emphasis added)

In the context of this case, it is common cause that the Kereke homestead belongs to the 2nd appellant who has found it fit to invite the 1st respondent thereto. Not being the owner of the said homestead, therefore, the respondent was unable to establish one of the prerequisites for an order for eviction. Her claim in that regard could not and should not have succeeded.

The need for reform

In *Maponga v Maponga & others (supra)* the court bemoaned the present state of the law which effectively relegates women to an inferior status particularly in matters relating to the ownership, control and disposal of the matrimonial home and called for reform. I respectfully share that sentiment. One would have hoped that given the strides that have been made in the upliftment and emancipation of women and in the noble quest to achieve equality between the sexes, a married woman in the position of the respondent would by virtue of her monogamous marriage to the 2nd appellant have as much a right as her husband to institute eviction proceedings against persons in 1st appellant's shoes. She should have a right to protect the dignity of her marriage in the same way she has a right to sue for adultery damages against a paramour who engages in illicit sexual relations with her husband.

I find it inherently contradictory to retain the current position which holds that a married woman while vested with the right to sue for adultery damages and to interdict such an interloper from continuing with the illicit relationship with her husband, would remain powerless to evict the such a woman from the matrimonial home in instances where such a paramour has taken the bold step of settling with matrimonial home. That the mistress has taken residence within the matrimonial home at the invitation of the aggrieved woman's husband (as invariably she would have) should not be a bar to the married woman's right to institute eviction proceedings against the mistress. What the "invitation argument" conveniently glosses over is that the 1st appellant is no ordinary guest, she occupies a turpid position in the eyes of the law. Her relationship with the host is frowned upon by society and the law.

There is a bounden duty on the courts to uphold the ethos and mores espoused in the Constitution, which in the context of this dispute, in section 25 obligates the State and all its institutions including the judiciary, to protect and foster the institution of the family and to adopt measures for the prevention of domestic violence among other objectives. Bringing a mistress into the matrimonial home, in my view amounts to emotional abuse and negates this very noble national objective.

Similarly, Section 26 of the Constitution obligates the State to ensure that there is **equality of rights and obligations of spouses during marriage** and at its dissolution. Refusing a claim for the eviction from the matrimonial home of a paramour by an aggrieved spouse (as I am constrained to do) in the name of ownership of that matrimonial home is tantamount to aiding and abetting not only abuse of the aggrieved spouse who happens at the receiving end of such abuse, but also propagates gender imbalances.

Section 56 of the Constitution enshrines the principle of equality between the genders and underscores the fact that both sexes enjoy the right to equal treatment in all spheres of life.

At the risk of repetition, I find the proposition that a husband is at liberty to bring live in girlfriends into the matrimonial home with impunity is inimical to the principle of equality between the sexes and appears to providing a right *carte-blanche* to men to bring into the matrimonial home live-in mistresses. Not only does that offend the express provisions of the Constitution as aforesaid, but also runs contrary to the ideals spoused in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which Zimbabwe has ratified. A married woman should not be placed in the invidious and inequitable position where she is compelled to choose between continuing with the marriage and endure this kind of severe emotional abuse or simply get a divorce. Alongside a claim for adultery damages against a paramour and an action for divorce against the husband, a married woman should also have recourse by way of eviction against a woman who literally hops into the matrimonial bed with her husband.

Regrettably respondent's claim for an order interdicting the 1st appellant from continuing with her adulterous relationship with the 2nd appellant somehow fell by the wayside and ultimately was not an issue for determination in this appeal.

In the final analysis, however, the respondent not being the owner of the property from which she sought the eviction of the 1st appellant failed in the court a *quo* to establish the requisite locus *standi* to institute such a claim and should not have succeeded. The appeal, therefore stands to be upheld.

Costs

The general rule is that the successful party is entitled to his or her costs and there is no justification in depriving 1st appellants' of her costs.

Accordingly, the following order is hereby made:

- a) The appeal is hereby allowed with respondent meeting 1st appellant's costs
- b) The judgment of the Court a quo is hereby set aside and substituted with the following:
 - i) The claim for the eviction of the 1st appellant from the Kereke homestead, Bikita is hereby dismissed with costs.

ZISENGWE J

MAWADZE J agrees.....

Mugiya & Muvhami Law Chambers, appellants' legal practitioners
J. Mambara Partners, respondent legal practitioners