

LONGINA WASHAYA
versus
NATSAI NHEMACHENA (N.O.)
In her capacity as Executrix Dative
of Estate Late PIUS MIKIYA WASHAYA
and
SESEDZAI MUPFUMA (N.O.)
and
THE MASTER OF THE HIGH COURT OF ZIMBABWE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 27 & 28 February, 10 March & 18 May 2023

Civil Trial

Mr *O Mutero*, for the plaintiff
Ms *N Nhemachena*, in person for first defendant
Ms *F Ketshemani*, for the second defendant
No appearance for third and fourth defendants

MUCHAWA J: The plaintiff filed this action in which she prays for an order against the first and second defendants, for:

- a) A declaration that stand number 187 Marimba Park of Marimba Park held under Deed of Transfer number 1788/76 (hereinafter called the immovable property) belongs to plaintiff and does not form part of the late Pius Mikiya Washaya's estate.
- b) A declaration that the will executed by the late Pius Mikiya Washaya on 8 April 2019, is null and void.
- c) An order directing first defendant to transfer through fourth defendant stand 187 Marimba Park Township of Marimba Park held under Deed of Transfer number 1788/76 to plaintiff at the estate's expense.
- d) Costs of suit.

The plaintiff was married to the late Pius Mikiya Washaya in terms of the then Marriage Act on 17 December 1966. Five children were born to them who are all majors. In or around 1976, the immovable property was purchased and registered in the name of the late Pius Mikiya Washaya who died at Harare on 14 January 2020. He had executed a will on 8 April 2019 in which he bequeathed the immovable property in equal and undivided shares to the plaintiff and two children, Beniya Mikiya Washaya (born on 17 October 2006) and Tinotenda Ndamuka Washaya (born on 17 July 2009).

The first defendant is cited in her capacity as the executrix dative to the estate of the late Pius Mikiya Washaya.

The second defendant is the mother and natural guardian of the two minor children who are co-beneficiaries to the immovable property and is cited in that capacity.

The third defendant is the Master of the High Court and is cited as the administrative authority of deceased estates in Zimbabwe whilst the fourth defendant is cited as the registering authority of, among other things, immovable properties in Zimbabwe.

Only the second defendant opposed the plaintiff's claims. The first defendant only attended the hearing once in the three days and indicated that she would be bound by the court's decision. The plaintiff filed her closing submissions on 20 March 2023 whilst the second defendant filed hers on 30 March 2023.

The Plaintiff's Case:

The plaintiff is the only one who testified on her own behalf. The salient features emerging from her evidence are that when she got married to the late Pius Mikiya Washaya in terms of a civil marriage on 17 December 1966, she was a temporary schoolteacher in Gutu whilst her husband was working here in Harare at BAT as a clerk. Upon her marriage on 17 December 1966, she joined her husband in Harare. She says she got a place to continue as a temporary teacher at St Peters in Mbare, but her husband did not want a working wife. Five children were born to their marriage in the years 1966 (Gladys), 1968 (Shambare), 1969 (Assumpta), 1973 (Mirirai) and 1977 (Nancy). All the children are now majors with one being deceased. Plaintiff is now 79 years old.

It was the plaintiff's evidence that she did not just sit at home and wait for her husband to provide. As she had been used to having her own income, she quickly embarked on some income generation endeavours. In 1970 she asked her husband to buy her a sewing machine which cost 30 pounds and he said he had no money. She had experience in sewing as her father owned a sewing machine. She subsequently joined a Women's Handicraft club through her

neighbours wherein they would make handcrafts for sale in Victoria Falls and share the proceeds every last Thursday of the month depending on the work done. The plaintiff said she saved up the 30 pounds to buy a manual machine and used the rest of her income for the family upkeep. She started making clothes and baby carriers for sale whilst continuing at the Women's Club as she had a maid. At some point the plaintiff said, she bought an electric machine as her sewing business was thriving because the Majobheki area they lived in was the arrival point for people from the rural areas. A lot of people then knew about her business. She continued to save some money and give some to her husband for the running of the household. She believes she was making a lot of money.

On how the immovable property was bought, the plaintiff testified that in or about 1974 to 1975, the City Council advertised stands for black businesspeople in Marimba and the late Pius Mikiya Washaya is the one who came across the advertisement in the newspaper. Because black businesspeople were few the City Council was forced to open the advertisement to non-businesspeople who were able. Then, the deceased was working at Standard Chartered Bank, and he applied for a loan to buy the stand and to develop it. The loan amount was said to have been \$15 000 but the bank wanted a deposit of \$1 900 for one to be eligible for the loan. A letter from Standard Chartered Bank on p 31 of the second defendant's bundle of documents was relied on which shows that the loan was for \$17 000. In explaining the difference in the figures, the plaintiff said that Standard Chartered Bank wrote to City Council in that letter confirming the loan amount of \$17 000 which included the \$15 000 and the deposit of \$1 900 paid. The loan of \$15 000 was to cover the costs of building the main house and cottage whilst the \$1 900 was the purchase price for the stand as shown by the document on p 8 of her bundle of documents being the deed of transfer of the house. The plaintiff said that she paid the deposit of \$1 900 from her savings from the sewing business.

The house and cottage are alleged to have been built and completed by January 1977 and the plaintiff and her husband and children moved in, in February 1977. On how the loan of \$15 000 was serviced, the plaintiff said that the late Pius Mikiya Washaya paid a little bit but would also collect money from the plaintiff to assist in paying off the loan at the bank.

During the war, the plaintiff said that there were promises of employment for those who were qualified, and this drove her to go to Nhamburiko College, now Speciss, for a secretarial course which was funded by YWCA UK as her husband was still opposed to her formal employment and had vowed not to pay for any further studies she undertook. She was successful and subsequently got employed as a secretary in the Ministry of Information in the

President's Office with effect from January 1981. Her salary is alleged to have been \$239 per month but she got a lumpsum after three months of probation in March 1981 through a bank cheque. The applicant who did not have a bank account, took the cheque to her husband who suggested that they go to Beverley Building Society to open an account so that her salary would be directed towards servicing the mortgage bond. The account was however opened in the late husband's name and the plaintiff said she trusted what her husband was doing as he was working in a bank. Thereafter, her salary was always directed to this account from April 1981 to 1992 when she left employment.

The plaintiff testified that she never withdrew any money from this account as the arrangement was that her money would be channelled towards servicing the mortgage loan. She said that she continued with her sewing project, employed two women, and put them in a room at Robson House Angwa Street. At that point, her husband's salary was said to have been focused on paying school fees, household expenses, water, and electricity whilst she catered for the mortgage bond clearance. An extract of the late Pius Mikiya Washaya's Standard Bank account of 1982 on p 33 which shows credit amounts of \$200 was said to reflect the deceased's salary then. In 1982 there is a credit of \$16 4000 which reduced the loan to zero. This was contrasted with an extract from the mortgage bond at Beverley which confirms the capital amount as \$16 400 showing that Beverley Building Society paid off the Standard Chartered Bank loan and the debt was then held with Beverley Building Society instead of Standard Chartered. This is the account into which the plaintiff said her salary was directed. In 1984 the plaintiff was promoted to the pensions office and her salary was increased to \$488. On the fate of the sewing business whilst she was at work, the plaintiff said that she closed shop as the women she had employed were stealing from her. She then shifted to buying from wholesalers and reselling for a profit during lunchtime or weekends.

In 1992, the plaintiff opted for retrenchment when government was reducing its workforce during ESAP as she wanted to do business full time. She said she received a pension commutation package in the amount of \$51 064.65 as per the letter to her of 27 August 1992 and the money was directed to the Beverley Building Society Selous Avenue where her salary had been directed. (See p 21 of the plaintiff's bundle of documents). This amount is said to have extinguished the mortgage debt. The plaintiff's pension continued to go into this account from 1992 to September 1994 when she opened a POSB account as she was unhappy with the husband's philandering at that point which even resulted in children born out of wedlock. With one Makambodei he had a child named Athanasia Washaya. With a Melania he had a child

Sophia Washaya. Both mother and child are however late now, having died in 1995. Then there is the affair with the second defendant which resulted in the two minor children who are beneficiaries of the will in issue.

In her evidence, in analysing the Deed of Transfer on p 25 of the second defendant's bundle of documents, the plaintiff professed ignorance of all the subsequent mortgages registered against the house such as \$20 000 in 1986, \$67 400 in 1989, \$22 868 in 1990, \$420 000 in 1997 and \$992 507 in 2001. As far as she is concerned, this money was never used at her household and might have been channelled to fund the deceased's extra marital affairs which were too numerous to detail. These subsequent borrowings were not applied towards development of the house which has remained, to date, as it was in January 1977 when the building was completed.

The plaintiff also spoke to an attempt at running a business called Cape Flats which was a general dealer and bottle store which they bought from one Mr Sithole for \$8 000 and she put in half of that on the belief that her husband was putting in the other half only to learn later that it was the deceased's brother, Boniface Washaya who had put in the money. The deceased's siblings are alleged to have chased her from the business.

Post 1992, the plaintiff said that she incorporated a company called LR and Sue Tailoring Dressmaking (Pvt) Ltd in 1994 and she opened a Zimbank account for her savings. See p 26 to 28 of her bundle of documents.

The immovable property was said to have been registered in the late Pius Mikiya's names because then, all women were perpetual minors and could not hold any immovable properties in their names. When questioned as to why, if she bought the property on her own, she did not push for change of ownership, the plaintiff said that she was living with her husband and children and did not see any need for that.

Two other immovable properties were allegedly purchased by the plaintiff being the Muda plot, which was registered in her son's name, Shambare Washaya in 1988. The money for this was from her income generation activities as explained above. She also said that she bought a property in Mufakose which was registered in the names of a daughter, Mirirai Washaya.

Another important factor raised by the plaintiff was that after she caused the eviction of the second defendant from the immovable property under case number HC 9367/15 in an order of 24 June 2016, she was served with divorce summons under case number HC 8804/16. The deceased is said to have moved out with the second defendant and her family and they

were staying at stand 220 Marara Avenue, Mufakose. She said she initially opposed the divorce because they were old and had grandchildren and she wanted to keep the matrimonial home open for these to visit. Her hope was that they would be separated by death. When asked why, in the divorce she was claiming 70% of the house, she explained that she was ashamed that this was the father of her children and they had come a long way. She did not want him to walk away with nothing and was prepared to buy him out. She further said the tenants in the cottage had been paying rentals to the deceased only and she had not received even a cent.

The rest of the plaintiff's evidence related to how the second defendant who arrived on the scene as a maid and was hired by her late husband, in her absence whilst nursing a sick child in the UK, ended up with the two children who have been made co-beneficiaries to the immovable property. Such evidence only served to give a context to the issues at hand but is not relevant to the resolution of the issues before me.

The Second Defendant's Case

Two witnesses gave evidence in the second defendant's case. These are the second defendant herself and Mr George Washaya.

The second defendant stated that she was the late Pius Mikiya Washaya's maid from September 2004 at 187 Bembezi Marimba when he was staying alone, and he said that he had separated from his wife around 2000. She says she was not aware of the existence of the legal marriage between the two. She claimed to have first met the plaintiff in 2016 and denied the plaintiff's assertion that they met in 2006 when she returned from the UK and saw that she was pregnant. She denied too that in the ensuing altercation, she had pushed the plaintiff, and she sustained a painful shoulder.

It was the second defendant's further evidence that she and the late Pius Mikiya Washaya would collect rentals from two of the four rooms in the cottage and she had been told that the plaintiff would collect from the remaining rooms. It was averred that the second defendant was later evicted from the immovable property by the plaintiff and then, the deceased who remained at the immovable property, would visit to see the children, and provide for their maintenance.

According to the second defendant, when she was hired as a maid, the late Pius Mikiya Washaya was of ill health requiring care which she provided whilst the plaintiff and her children never showed up. The health of the late Pius Mikiya Washaya is said to have deteriorated in 2019 whilst he was still at 187 Bembeza Road and she said she contacted Dr George Washaya, the young brother to attend to him as she was not allowed by the eviction

order to enter the premises. She said it was her children who informed her of his worsening condition, and he was taken to hospital and was admitted and then died. She prayed that the court upholds the last will and testament of the deceased which had made her two children with him, co-beneficiaries in the estate.

Under cross examination, the second defendant stated that she is 37 years old and was only 19 years old when she first met the deceased who was around 60 years old then. She claimed that the deceased had paid lobola for her in 2006 in the company of Mr George Washaya when she was pregnant. She said that after this, she started considering herself as wife to the late Pius Mikiya Washaya. When her attention was drawn to her plea in the eviction matter instituted by the plaintiff against her, she first denied that she had entered any plea. The plea on p 63-64 of the plaintiff's bundle of documents was pointed to, to show that there was an inconsistency as she had pleaded that she was at the house as a maid and by virtue of her contract of employment. It was also shown to her that she had even denied the adulterous relationship with Pius Mikiya Washaya. In trying to wriggle out of the mess, she disowned her pleadings in the eviction matter. The second defendant alleged that when she was evicted, Pius Mikiya Washaya remained in the immovable property and stayed there till November 2019. When she was shown a letter written by her lawyers on p 45 of the plaintiff's bundle of documents, which says that both parties had not been staying at their matrimonial home for a long time and is dated 13 September 2019, she said her own lawyers had stated an incorrect position.

The second defendant confirmed in her evidence that her children are the late Pius Mikiya Washaya's children.

When it was put to the second defendant that she does not have actual knowledge about how the house in issue was acquired or built as this occurred before she was born, she confirmed that she has no knowledge of those facts.

Mr George Washaya's evidence on how the house was acquired was really hearsay evidence of what he claimed to have been told by the late Pius Mikiya Washaya. He said he was shown the mortgage document on p 31 of second defendant's bundle of documents and it meant that a loan to buy the stand had been secured by the late Pius Mikiya Washaya. The document on p 32 was said to be proof that he got a second loan to build the house. Thereafter, his testimony was that he was shown the title deeds on p 25 which show the late Pius Mikiya Washaya as the registered owner. He disputed that the plaintiff had paid the deposit of \$1 900.00. Commenting on the last will and testament of the late Pius Mikiya Washaya, Mr

George Washaya said that this was shown to him by Pius Mikiya Washaya and he said he had educated all his adult children who had jobs but the two minor children had nothing. It was his wish that the beneficiaries to the immovable property get and share rentals from the house so that the minor children would not become street kids. He insisted that the house belonged to the late Pius Mikiya Washaya.

Contrary to the second defendant's testimony, this witness denied ever going to pay lobola for the second defendant and said he does not even know her home. He said that he regarded the plaintiff as the deceased's widow whilst the second defendant was just the mother of late Pius Mikiya Washaya's children. He claimed to have no personal knowledge of the living arrangements of the late Pius Mikiya Washaya just before his death. When asked about the plaintiff and her children's exclusion from knowledge of the late Pius Mikiya Washaya's sickness, death, funeral, and burial arrangements, he vehemently said that they had been kept informed but chose to stay away.

Mr George Washaya was asked about his relationship with the plaintiff, and he said it was not ideal though they were on talking terms. Furthermore, the witness stated that he was no longer a co-executor in the estate of the late Pius Mikiya Washaya after his co-executor objected to his getting a bond of indemnity issued by Old Mutual without his signature alleging that was fraudulent conduct. The bond was later revoked.

Mr George Washaya could not remember what occupation or income generation activities the plaintiff was engaged in, during her marriage. He had however been told she was involved in some income generation of some sought by the deceased. He recalled however, that at the point of marriage she was a primary school teacher and that at some point she had entered the formal employment market in a government department. He had no further personal knowledge of the discussions and arrangements between plaintiff and her husband regarding the purchase of the immovable property. The witness could not explain the mortgage bond endorsements on p 32 of second defendant's bundle of documents nor how the mortgage bond was settled.

Analysis of Evidence

The second defendant's evidence is not helpful in resolving the issues before me. She was not yet born when this property was acquired and developed. In her plea, she does not deny that the plaintiff's salary and pension commutation were deposited in the deceased's account. She had no way of knowing the veracity of this fact. She lied in several respects about how she came to stay at the movable property, whether lobola was paid for her, whether the plaintiff

was staying at the matrimonial property during her adulterous affair, and where the deceased was staying after her eviction and prior to his hospitalisation. There was an inconsistency in her testimony to what is contained in her pleadings for the eviction matter. Here is a mother doing all she can to sanitise her adulterous conduct with the hope that this would secure her minor children's rights. She was not a credible witness but the aspects she lied on, are not relevant to the issue at hand. Her children seem to be accepted as those of the deceased.

Equally Mr George Washaya has no personal knowledge of how the property was acquired. His evidence largely exposed the sour relationship between him and the plaintiff and her children which was played out during the late Pius Mikiya Washaya's illness, death, funeral, burial, and registration of death.

All I must work with is the plaintiff's evidence, therefore. Unfortunately, the late Pius Mikiya Washaya is not there to speak for himself. I will also have recourse to the divorce pleadings under case number HC 8804/16. This will give me a peep into the late Pius Mikiya Washaya's position on the property.

Despite her advanced age, the plaintiff gave her evidence well and was unshaken through cross examination. She broke down at some point as she related the death of her child and how the deceased refused to have the funeral wake at the matrimonial property at the time second defendant was pregnant by him. In every respect she gave detailed information about how they bought and developed the stand. Her evidence shows that she was an enterprising woman, who despite being barred from being in formal employment, engaged in various income generation enterprises including even after finally entering formal employment. This was also confirmed by George Washaya who said he heard so from the deceased though he did not have details of what exactly she was engaged in. He was also aware of the time she entered formal employment.

The plaintiff's evidence on having provided the deposit of \$1 900 is plausible and highly probable. She gave a clear narration of how she was generating and saving income. She attributed to the deceased; the advantage of his employment as having qualified them for the loan. She did not exaggerate and claim that she solely did everything. For the period the loan was held with Standard Chartered Bank, she agreed that the deceased paid some of the money, but she would largely give him money from the proceeds of her income generation to pay off the loan.

An endorsement on the deed of transfer shows a cancelled mortgage bond in the amount of \$15 000 entered in 1976. This must be the Standard Chartered one which was cancelled on

30 November 1982. The deed of transfer on p 8 of the plaintiff's exhibits confirms that \$1 900 was the purchase price for the stand and had been fully paid. The \$15 000 must have been applied to the construction of the house and cottage. This tallies with the plaintiff's evidence.

The housing loan debt, as of November 1982, stood at \$16 395.69. A deposit of \$16 400 was made in December 1982 and cleared the debt. At the same time, a mortgage of \$18 900 was registered. This tallies with the plaintiff's testimony that a Beverley Building Society mortgage loan had then been secured. It made more economic sense to have the mortgage from a Building Society than from a Commercial Bank, the deceased's employer.

Though there is no documentary evidence that the account into which the plaintiff salary was directed is the one which was held by the deceased, there is proof in the letter on p 21 of the plaintiff's exhibits, that her lump sum pension was paid to Beverley Building Society Selous Avenue, account number 4333287. This is the same place she said the deceased had taken her to presumably open a joint account which they agreed would service the mortgage loan repayment.

The plaintiff explained that she had been brought up to be submissive to her husband. Though they were married in terms of general law, she was coming from rural Gutu where customary law norms held the day. Ncube W in *Family Law in Zimbabwe*, 1989, p 170 to 171 describes this position as follows:

“Customary law rules governing the ownership, control and re-allocation of matrimonial property were formed and shaped by the feudal relations of production under which men, because of their control of productive resources, assumed a dominant role over women. As a result, customary rules governing matrimonial property rights of spouses inevitably reflect the dominant position of men within the feudal production process.

Under customary law women were perpetual minors with neither contractual nor proprietary capacity. Thus, married women lived under the total guardianship of their husbands insofar as any property they acquired automatically vested in the husband unless it fell within specific recognized categories, they can be said to have worked for their husbands. As Justice Gubbay put it in *Jenah v Nyemba* SC 49/86, “property acquired during a marriage becomes the husband's property whether acquired by him or his wife”.

Ncube continues with his observation,

“Under customary law all meaningful property is owned and controlled by the husband. Women are often, if not always, reduced to the status of property-less dependants who have to submit to the will of their husbands in order to survive. The customary laws on matrimonial property perceive a married woman as an unpaid servant of her husband. She works for him, looks after his family, acquires and preserves property for him. At the end of the marriage, she leaves the matrimonial home property-less and destitute like a sacked employee.”

The deceased's stance of barring his wife from formal employment at the inception of the marriage shows how they were steeped in such a customary law belief system. Had it not been for the plaintiff's determination to go back to college and improve herself, she would have continued outside the formal market. Then, it was not uncommon for an account to be held in the husband's name. In such a context, the plaintiff's testimony is highly probable regarding her salary having been directed into an account held by the deceased and having that designated as the account to service the mortgage loan repayments, albeit having the house registered in the deceased's name only.

GILLESPIE J, in the case of *Jengwa v Jengwa* 199 (2) ZLR 121 (H), describes this situation as follows:

“The black woman, despite her civil monogamous marriage, remained shackled to customary property rights unless she could surmount a further obstacle. The then African Marriages Act¹ provided in its s 13 that:

‘The solemnisation of a marriage between Africans in terms of the Marriages Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom.’

This provision appeared to impose a complete bar against any proprietary interest being enjoyed by the wife other than her customary entitlement”.

The above was the context in which the matrimonial home was bought and registered in the deceased's names only and the plaintiff's account was controlled by the deceased.

It is therefore not a coincidence that the loan from Standard Chartered Bank was transferred to Beverley Building Society after the plaintiff had entered formal employment and her salary was being directed to Beverley Building Society. Had the deceased wanted to transfer the loan purely for economic expediency as someone who worked in a bank and knew it was cheaper to get a mortgage loan from a Building Society, he would not have waited to do so in December 1982 from 1976 when the Standard Chartered loan was acquired. This lends credence to the plaintiff's evidence that her salary serviced the repayment of the mortgage and then her pension commutation cleared the outstanding amount in 1992.

In the divorce matter in which the deceased was the plaintiff, in his summary of evidence filed on 16 December 2016, he had this to say about the immovable property:

“The parties also acquired immovable property being house number 187 Bembezi Road Marimba Park, Harare. It is the Plaintiff's suggestion that the property be subdivided on a plan to be approved by the city council. This is so as the Plaintiff has since retired and has no source

¹ Chapter 238 of the 1974 revised edition; later the Customary Marriages Act [Chapter 5:07]

of income and selling the property does not make economic sense and the subdivision provides a shelter for both parties which is a better option than selling”.

On 30 January the plaintiff yet seems to have revised his summary of evidence. Instead of relying on an approved subdivision by City Council he then said:

“The parties acquired immovable property during the subsistence of the marriage being house number 187 Bembezi Road, Marimba Park, Harare. It is just and equitable that the property be subdivided with the plaintiff getting 70% of the stand and Defendant getting 30%.”

This revised position was the exact converse of what the then defendant had pleaded, that she be awarded 70% whilst the deceased would get 30%. In his replication, he said that he had contributed more.

What emerges from a perusal of this record, is that the now deceased was aware that the immovable property had been jointly acquired. Though he had started off in the declaration claiming the immovable property in question for himself whilst offering a Mufakose house to the defendant, after the plea which made clear that the Mufakose house was not part of the matrimonial property as it was registered in their child’s name, his summary of evidence changed and only focused on the property in issue herein.

It is noteworthy too that whilst the divorce matter was pending and in a joint pre-trial conference minute of 27 September 2017, all other issues had been settled and the only issue referred to trial was what constitutes a fair, just, and equitable apportionment of the matrimonial home being house number 187 Bembezi Road, Marimba Park, Harare. In the face of that, the deceased went ahead to execute a last will and testament on 8 April 2019, in which he acted as the sole owner of the matrimonial property. He seems to have done so on the pretext that the house was registered in his name, so it was his to dispose of as he pleased.

What the Law Says and Application to the Facts

Ms Ketshemani pointed to the Deeds Registries Act [*Chapter 20:05*] s 2 on who an owner of immovable property is. An owner of immovable property means a person registered as the owner or holder thereof in a deeds registry and acquires a real right upon registration.

Mr *Mutero* provided very helpful closing submissions which lay out the legal position regarding exceptions to the above legal position. In *Cumming v Cumming* 1984 (4) SA 574 it was held as follows: -

“It must be taken as trite that registration in the deeds office creates no more than prima facie evidence of ownership and its corollary, namely the right to possession which forms the basis of this application. There are many conceivable circumstances which detract from the inference of full ownership, or which serve to rebut the presumption-----”

This is the case put forward by the plaintiff, that though the house is registered in the deceased's name, it was not his sole property to dispose of.

Ms *Ketshemani* on the other hand provided case law to the effect that title deeds are irrefutable evidence that the registered owner has real rights over the property. See *Betty Kanyuchi v Drawing Services (Pvt) Ltd*. SC 52/10. The case of *Madzara v Stanbic Bank Zimbabwe Limited & Anor* HC 9622/14 was also referred to, to argue that the applicant therein who failed to get a declaratory order sought on the basis that she had no concrete evidence that she had paid the deposit for the house and serviced the loan was in the same position as the plaintiff herein.

The case of *Kanyuchi (supra)* sought to be relied on by the second defendant is distinguishable. Therein the appellant sought to rely on a court order to claim ownership of a property in which the respondent had real rights as evidenced by the title deeds. The court opined that: -

“On the effect of the High court order relied upon by the appellant as bestowing or confirming that the appellant had acquired the rights, title and interest in the property, the court *a quo* found that the order was made in default and was against Champion Constructors (Pvt) Ltd and Elizabeth Chidavaenzi. The court's view was that the order was not binding on Drawing Services (Pvt) Ltd, or enforceable against it, because despite being the registered owner of the property, it had also not been cited as a party to the proceedings.”

The issues in that case are miles apart from this one. The *Madzara (supra)* case is equally distinguishable. That case was dealing with the tensions between matrimonial property, real rights, and personal rights. In that case the applicant had personal rights against her husband, but she sought to enforce them against the bank. This was found to be impermissible as the immovable property was mortgaged to the bank which already had a judgment in its favour which had not been rescinded.

On the other hand, the simple issue *in casu* is whether the registration of the immovable property in the deceased's name bars the plaintiff from claiming ownership. It is a different issue. *Cumming (supra)* says registration gives a rebuttable presumption of ownership. Closer home, the case of *Kassim v Kassim* 1989 ZLR (3) 234 further clarifies this by stating: -

“Registration of the property in the name of one party raises a presumption in her favour, that the person has sole right and ownership of the property unless the defendant proves to the contrary. The duty herein lies upon the defendant to prove on a balance of probabilities, his claim that he was a part owner of the property.”

Has the plaintiff discharged the onus to prove, on a balance of probabilities her claim as sole owner of the immovable property? All that the evidence before me seems to have

established is that the deceased was not sole owner of the property. It shows that both parties contributed to its acquisition albeit at different levels. The property was therefore not available to the deceased to bequeath as he did, particularly looking at his pleadings in the divorce matter. He seems to have conceded that the parties acquired the property jointly. Well knowing that the issue of the distribution of the property was pending before this court in the divorce matter, he cunningly went ahead and executed a will putting himself out as sole owner of the property.

It was argued for the plaintiff that the bequeathment of the property by the late Pius Mikiya Washaya was illegal in that he knew the property did not belong to him but to the plaintiff and it should therefore be declared her sole and exclusive property. Upholding the will would be promoting unjust enrichment, it was argued.

In the alternative, it is contended that the plaintiff and Pius Mikiya Washaya formed a universal partnership in which the plaintiff contributed the full funds to the partnership which were used to purchase the immovable property. Such partnership is alleged to have been dissolved by the death of Pius Mikiya Washaya. On this basis, it is contended that the plaintiff should be awarded and declared the sole owner of Stand 187 Marimba Park Township of Marimba Park and the will be declared null and void.

Unjust Enrichment

Du Plessis in his seminal work titled *The South African Law of Unjustified Enrichment* Juta 2012 at p 24 sheds light on the principle of unjust enrichment as follows:

“To succeed with a claim based on unjustified enrichment, the plaintiff must meet four general requirements, or, as it is sometimes said, four general elements of enrichment liability have to be present. First, the defendant must be enriched; secondly, the plaintiff must be impoverished; thirdly, the defendant’s enrichment must be at the plaintiff’s expense and finally, the defendant’s enrichment must be unjustified, which means that it must be without legal ground (*sine causa*).”

GILLESPIE J (as he then was), applying the concept of unjust enrichment to a marriage situation in *Jengwa v Jengwa* 1999 (2) ZLR 121 (H) at 130 B to D had this to say:

“Whenever the general law applies to a relationship and a wife has contributed to the marital wealth either by her financial contribution or by suppressing her income earning capacity in favour of home making and relieving her husband to accumulate capital it should be recognised that she did so in order to promote the family wealth and with a view to sharing in it. By her selflessness she incurs personal impoverishment in favour of communal enrichment. She risks future impoverishment in the event of future divorce. That she does so without any contractual protection or exigency merely highlights, rather than excuses the injustice of denying her a share in that wealth when the family is sundered by divorce. To permit such an injustice to remain is offensive.”

From the evidence, the plaintiff has managed to show that she contributed the bulk of the money for the purchase of the property by using her funds to pay the deposit and later

servicing the loan clearance through her salary. She even assisted before her formal employment, by giving money to the deceased to pay off the loan though she admitted that the deceased did contribute some money too. She also did say that in their allocation of responsibilities, whilst she channelled her salary towards the servicing and clearing of the bond, the deceased paid school fees, and household expenses. To then say that she solely purchased the property would be a travesty of justice as it is equally unfair for the deceased to claim total ownership of the immovable property. I take a leaf from Ncube, *Family Law in Zimbabwe* at p 187 wherein in discussing division of property at divorce, he says the following:

“The proper approach would be to presume that in the majority of marriages the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family.”

Though this is not a divorce matter, the position applies equally herein as I am grappling with establishing how the property acquired during the subsistence of the marriage was held at the point of the deceased executing his last will and testament. In this case I find that plaintiff and the deceased assumed equivalent but different duties which were all beneficial for the welfare of the family. One cannot, however, ignore the stark reality that whilst the plaintiff's salary was directed at clearing the mortgage bond, the deceased borrowed money from the bank for a record six times over the same property at the same time he was embroiled in extra-marital affairs. Nothing tangible towards their household was pointed to as having come out of such loans. On the other hand, the plaintiff bought two immovable properties which she put in their children's names.

What this means is that the deceased only had a fraction of the house to bequeath and not the whole of it. His last will and testament cannot stand, therefore. It is not my place to determine what the actual fraction he held was. It may very well be that the deceased even held much less if regard is taken of his actual contributions and conduct in encumbering the house whilst the plaintiff was clearing the loan. This issue is not before me, however.

In this case, the plaintiff has successfully shown that if the will is upheld, then the deceased's estate would be enriched, and she would be impoverished, and this would be at her expense without any legal ground to justify such a position. Her matter therefore succeeds based on unjust enrichment.

Does the alternative Ground of Tacit Universal Partnership Assist the Plaintiff

In *Mtuda v Ndudzo* (*supra*) at p716 E-G, GARWE J summarised the requirements of a tacit universal partnership in these terms:

“What amounts to a tacit universal partnership has been considered in several decisions of the courts of this country and South Africa. The four requisites for a partnership may be summarised as follows:

- (a) each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill.
- (b) the business to be carried out should be for the joint benefit of the parties.
- (c) the object of the business should be to make a profit; and
- (d) the agreement should be a legitimate one.”

The case for a tacit universal partnership was also set out by MAKARAU J (as she then was) in *Marange v Chiroodza* 2002(2)ZLR 171 at 181D-F, when she stated that:-

“The argument in support of the view that an unregistered customary law union establishes a *tacit universal* partnership are similar to the arguments advanced by jurists who favour holding that there is universal community of property between married persons. Marriage itself is a union for life in common household. The common estate may be built by the industry of the husband and the thrift of the wife, but it belongs to them jointly as the one could not have succeeded without the other. As van der HEEVER J put it in *Edelstein v Edelstein NO & Ors*, the husband could not have successfully conducted his trade if his wife had not cooked the dinner and minded the children. It is on this basis that I hold that there existed a tacit universal partnership between the plaintiff and the defendant in the above matter.”

In both these cases, amongst others, the concept of tacit universal partnership was applied in relation to the dissolution of unregistered customary law unions to achieve an equitable distribution of property because the Matrimonial Causes Act, [*Chapter 5:13*] was not applicable. The common denominator in both cases is the application of the general law principle of tacit universal partnership to a husband-and-wife relationship that is not recognised as a valid marriage.

Whereas the plaintiff sought to rely on tacit universal partnership, in the alternative, Ms *Ketshemani* argued that this basis cannot sustain her claim as she was in a civil marriage. This cause of action is said to be constituted where a couple is cohabiting or in a civil partnership and not legally married. As the plaintiff and the deceased were legally married at the time of his death, it was contended that she is the surviving spouse of the late Pius Mikiya Washaya. On the contrary, Mr *Mutero* argued that the tacit universal partnership principle is applicable even between married persons by referring to the case of *Jengwa v Jengwa* 1999 (2) ZLR 121 (H).

That case had peculiar circumstances. The appellant and respondent were married in an informal customary law union and had several children. The respondent had also married other women in customary law unions and had other children with these women. Only one of these unions had been solemnised. After many years of marriage and just before they separated, the

appellant and respondent solemnised their marriage under the customary Marriages Act. The question the court grappled with was whether the concept of tacit universal partnership could be used in such circumstances to achieve an equitable division of property on divorce, especially where there is more than one wife as various questions arise as with which wife or wives such a tacit universal partnership was formed. It was found that the concept of unjust enrichment can be used as the basis of awarding the wife an equitable share in the immovable property where she has contributed to the marital wealth.

In *casu*, I have before me, a *sui generis* case. I am not having to distribute property upon divorce of the parties wherein the Matrimonial Causes Act would apply. The concept of tacit universal partnership is therefore a useful tool to use to understand how the matrimonial property was held at the time of the execution of the will by the deceased. The plaintiff thus had the onus to establish all the requirements of a tacit universal partnership or unjust enrichment.

The plaintiff is simply arguing that there was universal community of property between her and the deceased. She is saying the marriage itself was a union for life in a common household. The common estate is said to have been built largely by her input with the deceased contributing too though in the form of school fees and other household expenses. They each brought something to the partnership which was dissolved upon the death of Pius Mikiya Washaya. There was therefore a tacit universal partnership between the plaintiff and the deceased.

The finding that a tacit universal partnership existed does not resolve the question posed by the plaintiff that she is entitled to the house as her sole and exclusive property. Such a finding would defeat the conclusion that there was a tacit universal partnership. As aptly noted in *Marange v Chiroodza (supra)* at 181G, 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. This means that I still go back to my earlier finding on unjust enrichment. As both the plaintiff and the deceased contributed, at varying levels to the common estate, the deceased was wrong to proceed on the basis that he was the sole owner of the house.

Disposition

Having found that the will is null and void on account of the deceased having bequeathed a property he did not actually own as his sole and exclusive property, it is fitting to grant part of the order prayed for. My findings do not support the prayer for a declaration that

stand 187 Marimba Park Township of Marimba Park is the plaintiff's sole property and that it be transferred to her.

Costs usually follow the cause. However, s 18 of the Legal Aid Act [*Chapter 7:16*], exempts legally aided from being awarded costs against them. The second defendant was aided by the Legal Aid Directorate in seeking to protect her minor children's interests. The other parties did not oppose the matter.

I therefore make the following order:

1. This matter partly succeeds.
2. The last will and testament of the late Pius Mikiya Washaya who died on 14 January 2020, executed on 8 April 2019, be and is hereby declared null and void.
3. Each party bears its own costs.

Sawyer & Mkushi, plaintiff's legal practitioners
Legal Aid Directorate, second defendant's legal practitioners