EMMAH MUDZINGWA
versus
WEBSTER J.N. HAMUSI

HIGH COURT OF ZIMBABWE
MUCHAWA J, KATIYO J, MAMBARA J & DEMBURE J
HARARE, 19 July & 23 September 2024

Civil Appeal

S. Chirorwe, for the appellant
M B Nyathi, for the respondent

DEMBURE J: This is an appeal against part of the judgment of the Magistrates Court ("the court *a quo*") handed down on 5 March 2024. The appellant appealed against part of the judgment of the court *a quo* that awarded her only 25 percent shares in the immovable property called Stand 2094 Kukura Kuroja Housing Co-operative, Hatcliffe, Harare ("the Hatcliffe property"). In terms of that judgment, the court *a quo* dismissed the respondent's claim for the eviction of the appellant from the Hatcliffe property and awarded the appellant a share of 25 percent of the said property against the 50 percent share she claimed. In her counterclaim, the appellant had sought an order against the respondent for a 50 percent share of the Hatcliffe property and 40 percent of a property in Mverechena Township, Domboshava.

FACTUAL BACKGROUND

It is common cause that the appellant and the respondent entered into an unregistered customary law union sometime in 1996 after cohabiting for about a year. Though there were instances when the parties would separate and live apart, they would reconcile again. They have lived together at the Hatcliffe property for a substantial period to the date of the action. Their union was customarily terminated in March 2023. This was after they had three children born out of their union. Of these children, one was a minor at the time of the hearing before the court *a quo* having turned 17 years old. The respondent got into another customary union in 2010 and lives with both the appellant and his other 'wife' in the same house.

The Hatcliffe property was acquired during the subsistence of the parties' customary law union. The parties differed in their testimonies as to their respective contributions to the acquisition and development of that property. The respondent, who was the plaintiff in the court *a quo*, claimed that the appellant contributed nothing financially towards the acquisition and development of that property. On the other hand, the appellant insisted she contributed both financially and indirectly.

After the termination of the union in March 2023, the respondent instituted legal action in the court *a quo* on 17 April 2023 seeking an order for the eviction of the appellant from the Hatcliffe property, their home and costs of suit on a legal practitioner and client scale. The suit was premised on the ground that the appellant was in unlawful occupation of his property. Since the union had been officially terminated, he alleged that she had no right to stay at his property where he stays with his wife and children without his consent. In other words, the claim was one for *rei vindicatio*.

The appellant entered an appearance to defend. This prompted the respondent to file a court application for summary judgment which was dismissed by the lower court on the ground that there were material disputes of fact. The appellant then filed a special plea of *res judicata*. The court *a quo* correctly dismissed the special plea as the lower court in 2017 had only granted absolution from the instance in the respondent's previous claim for eviction against the appellant. The appellant went on to file her defence to the claim on the merits. Her grounds of defence were that the property was their 'matrimonial home'; that she was entitled to occupy the property and was entitled to a half share of the same. At the same time, she counter-claimed for a half share of the Hatcliffe property and a 40 percent share of the property at Mverechena Township, Domboshava. The respondent requested for further particulars to the claim in reconvention, which were duly furnished on 17 October 2023 and he was called upon as the defendant in reconvention to plead. The record shows that there was no plea or any other answer filed to contest that counterclaim.

PROCEEDINGS BEFORE THE COURT *A QUO*

A full trial was conducted on the following issues, which both counsels for the respondent and appellant considered to be the triable issues:

"1.1 Whether or not there was a tacit universal partnership between the parties?
1.2 Whether or not the defendant is entitled to a share of the properties acquired during the existence of the partnership?"

1.3 Whether or not the defendant is in illegal occupation of house number 2094 Kukurakuroja, Hatcliffe
1.4 Whether or not the plaintiff is the rightful owner of the above property.
1.5 Whether or not the plaintiff is entitled to an order of eviction against the defendant and all those claiming occupation through her."

The issues were contained in the Joint Pre-Trial Conference minute signed by the parties' legal practitioners.

The respondent's case (as the plaintiff in the court *a quo*) was that he was the owner of the Hatcliffe property which he acquired and developed without any contribution from the appellant. He further stated that he was entitled to the *rei vindicatio* remedy as the appellant was in occupation of his property without his consent or unlawfully after the termination of their union. He submitted that the law entitled him to recover possession from anyone including the appellant. He called three witnesses to prove his case that he was entitled to an eviction order.

Per contra, the appellant contended that she contributed immensely to the acquisition and development of the Hatcliffe property. She further claimed that her contribution entitled her to a half share of the property and accordingly, she cannot be evicted from her matrimonial home. She counter-claimed against the respondent for a half share in the Hatcliffe property and a 40 % share in the property at Mverechena property. On trial, she also called three witnesses to prove her case.

THE COURT *A QUO*'S FINDINGS

The court *a quo* held that the issues dispositive of the matter can be largely summed up into two from the joint pre-trial conference minute. These the court *a quo* identified as "whether there is a tacit universal partnership between the parties and whether the defendant is entitled to a share of the property." This proved to be the turning point. The court *a quo* took a wrong tangent and missed the real issues in dispute or the triable issues arising from the parties' pleadings. A failure to appreciate the issues and deal with the correct issues for trial is a gross misdirection entitling this court to interfere with the decision of a lower court.

The court *a quo* further held that there was a tacit universal partnership and that it had to consider the evidence of each party's contributions to the partnership. It further found that the respondent did not show any contributions of his own except receipts of the transactions relating to the money he received from Andrew Raft, his employer, to buy building materials. Further, that when the parties were customarily married, they never envisaged the idea that 20 years later they would be called upon to answer what each contributed. The court *a quo* further held that the law

recognizes the indirect contributions made by "customary law house wives", whatever that means. The appellant was held to be "a typical African customary house wife" for a significant part of their union.

The court *a quo* also held that given her contribution and the duration of the partnership, the appellant equitably would be entitled to a percentage of the property. The court *a quo* concluded that 25 percent was the fair share of the appellant in the Hatcliffe property while the respondent should get 75 percent. Consequently, the court *a quo* dismissed the respondent's claim for an eviction order against the appellant and awarded the appellant 25 percent with the respondent retaining 75 percent in the Hatcliffe property. The order also granted the respondent the right to buy out the appellant's share and outlined further the enforcement mechanism of the sharing judgment.

Aggrieved by that part of the decision awarding her only 25 percent of the Hatcliffe property the appellant noted this appeal on the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* injudiciously exercised its discretion and misdirected itself in awarding only 25 percent shares in the matrimonial home to the appellant with the respondent retaining 75 percent shares thereof, particularly in that the court failed to properly consider the following:
   (a) The appellant's indirect contribution to the acquisition and development of the matrimonial home, and
   (b) The appellant's needs post-separation or dissolution of the union, to the extent that the appellant needed accommodation with her minor child, and
   (c) The duration of the union which is long enough to warrant an award of 50/50 share structure between the parties in respect of the matrimonial property.
2. The court *a quo* grossly erred in law in failing to determine the appellant's counterclaim relating to the distribution of another immovable property being a house at Mwerechena Township, Domboshava, resulting in unfairly excluding the appellant from a share in that property, when she deserved at least 40 percent shares thereof.

   The relief sought by the appellant is that:
   (a) The appeal be allowed with each party bearing its own costs.

(b) The judgment of the court *a quo* be set aside and substituted in paragraph two with the following order:

(i) The defendant is awarded 50 percent shares in the immovable property namely; stand 2094 Kukura Kuroja Housing Co-operative, Hatcliffe, Harare

(ii) The defendant is awarded 40 percent shares in Mverechena Township, Domboshava whilst the plaintiff retains 60 percent shares of the same.

SUBMISSIONS BEFORE THIS COURT

At the hearing, Mr *Chirorwe*, for the appellant, submitted that the court *a quo* exercised its discretion injudiciously and erred when it awarded the appellant only 25 percent of the Hatcliffe property. He argued that this court can interfere with the exercise of discretion by the lower court once that discretion was injudiciously exercised. He further urged that the court ought to use the provisions of s 7 of the Matrimonial Causes Act [Chapter 5:13] as a guideline when sharing property in an unregistered customary law union. See *Melo v Kandibero* HH 323/23. The 'wife's indirect contribution' must be given due weight. He also submitted that the long duration of the parties' union from 1996 to 2023 must have been taken into account and together with the appellant's needs after the dissolution of the union ought properly to have led the court *a quo* to award the appellant half share in the Hatcliffe property. He argued that the court *a quo*'s award of 25 percent to the appellant was unfair.

The appellant's counsel further submitted that the failure by the court *a quo* to make a determination on the counterclaim by the appellant for 40 percent of the property at Mverechena Township, Domboshava was a misdirection. There was no plea filed to contest the counterclaim. It was also argued that the respondent never disputed that the property existed and that it was acquired during the subsistence of the 'marriage'. He argued that the second issue recognised by the court *a quo* related to the two properties in dispute but the court *a quo* awarded shares to the appellant in respect of the Hatcliffe property only and ended there. It ought to have determined whether or not the appellant was entitled to a share in the Mverechena property. He further urged this court, in view of the evidence on record, to award 40 percent shares in that property to the appellant.

Per contra, Mr *Nyathi*, for the respondent, submitted that there was no misdirection warranting interference by this court. In particular, he argued that the respondent is married to his

wife who also regards that property as her matrimonial home and accordingly the appellant cannot be awarded anything more. There will be an injustice to his present wife if more shares are taken away from the respondent. It is important to note, however, that the said second wife, was not a party to the proceedings *a quo*. She never sought for a joinder. Surely if she had an interest in the property, she should have sprung into action to seek the protection of her interest if any in the property. That she did not do so should put her supposed claim, to bed. It is an issue which should not detain this court at all.

He further maintained that the appellant did not make any financial contributions to the acquisition and development of the house. He argued that no evidence to that effect was tendered in the court *a quo* by the appellant. He further submitted that the one who made an indirect contribution should only be the respondent's second wife. The appellant, he further argued, moved to the rural areas in 2001 when the property had only two rooms and the respondent extended it alone. He argued that there was no tacit universal partnership to talk about as the two separated 'years back'. Unjust enrichment, he further submitted, was not proved. Since the union was not a marriage the guidelines under s 7 of the Matrimonial Causes Act were, therefore, not applicable.

In relation to the counterclaim, he submitted that it was abandoned since the appellant did not motivate it in the court *a quo*. The court *a quo*, he argued, could not have decided on "a point which was not moved by the appellant".

THE ISSUE

Upon due consideration of the grounds of appeal, only one issue arises for determination. That is, namely:

1. Whether the court *a quo* erred and misdirected itself in not awarding the appellant half share of the Hatcliffe property and 40% share in the property at Mverechena Township, Domboshava.

THE LAW AND ANALYSIS

It is trite that failure by a court to appreciate the issues requiring a determination or failing to decide on an issue placed before the court is a serious misdirection. That gross misdirection amounts to an error of law and warrants the appellate court to interfere in the proceedings of the lower court. In *Lungu* v *The Reserve Bank of Zimbabwe* SC 26/21 MAKONI JA held that the court *a quo*'s failure to determine an issue placed before it amounted to a misdirection on the part of the court. Thus, the court cannot ignore the pleadings and should decide the issues in dispute based on

the pleadings. This principle was also stated in *Nzara and Ors* v *Kashumba N.O. & Ors* SC 18/18 at p 13 where the Court held that:

> "The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court. This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour…
>
> These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties' issues."

The Supreme Court also laid down the same legal position in *PG Industries Zimbabwe (Pvt) Ltd* v *Bkwekerwa & 34 Ors* SC 53/16 as follows:

> "Two issues arise immediately. The first is that the court failed to deal with and determine an issue that had been raised before it. The point *in limine* was to the effect that due to the irregularity in the citation of the respondent to the appeal, there was in fact no respondent before the court. The preliminary point raised was such that the court could not dispose of any issue in relation to the matter without making a finding on the point. The court could not simply wish it away as a non-issue. It had to make a determination. In my view, the failure to deal with an issue raised is an irregularity that can serve to vitiate the proceedings.
>
> The position is settled that where there is a dispute on a question, be it on a question of fact or point of law, there must be a judicial decision on the issue in dispute. The failure to resolve the dispute vitiates the order given at the end of the proceedings. Although the learned judge may have considered the question as to whether or not there was an irregularity in the citation of the employer, there was no determination on that issue."

The inescapable conclusion that can be made from the record of proceedings of the court *a quo* is that the court *a quo* misdirected itself in its failure to appreciate the issues and also not make a determination on one of the claims placed before it. Such misdirection is so serious that it leaves this court with no option but to interfere with the determination of the lower court. Both counsels for the appellant and respondent contributed to this wrong turn when they filed a joint pre-trial conference minute. That Joint Pre-Trial conference minute which adopted the issues for trial muddled up the issues in dispute and the court *a quo* ended up engaged in a full trial including over the claims that were uncontested. It also failed to even make a determination on the part of the appellant's counterclaim for a 40 percent share in the property at Mverechena Township. The issues for trial are recorded as follows:

"1.1 Whether or not there was a tacit universal partnership between the parties?
1.2 Whether or not the defendant is entitled to a share of the properties acquired during the existence of the partnership?

1.3 Whether or not the defendant is in illegal occupation of house number 2094 Kukurakuroja, Hatcliffe
1.4 Whether or not the plaintiff is the rightful owner of the above property.
1.5 Whether or not the plaintiff is entitled to an order of eviction against the defendant and all those claiming occupation through her."

The court *a quo* in its judgment summed up these four issues into two namely: "whether there is a tacit universal partnership between the parties and whether the defendant is entitled to a share of the property." While the purported issues for trial in the joint pre-trial conference minute, particularly numbered 1.1 and 1.2 were uncontested and, therefore, non-issues, the court *a quo*, further misdirected itself by identifying non-triable issues as the only two issues before the court. The only contested issues for trial related to the respondent's main claim for eviction as the appellant's counterclaim was uncontested. An uncontested claim cannot create issues for trial but is one the court should simply enter a default judgment unless on record it is not satisfied that the plaintiff in reconvention is entitled to such a judgment.

From the record, it is shown that the respondent (the plaintiff in the main action *a quo*) sued the appellant (the defendant in the main action *a quo*) for an eviction order from No. 2094 Kukura Kuroja Housing Co-operative, Hatcliffe, Harare on the ground that she was in unlawful occupation of the respondent's property. The appellant filed a plea on the merits denying the claim alleging that the property is the parties' 'matrimonial home' which they acquired and developed together. Together with that plea on the merits filed on 5 October 2023 (*see p 103-106 of the record*), the appellant filed a claim in reconvention or counterclaim. In her prayer, she sought an order for:

"(a) A 50% share in Stand No. 2094 Kukura Kuroja, Hatcliffe, Harare;
(b) A 40% share in the property in Mwerechena, Domboshava acquired by the defendant using some of the rentals from stand 2094, Kukurakuroja or alternatively payment of US$5 800 being the plaintiff's exact share of rentals from stand 2094 Kukurakuroja which she was entitled to.
(c) Costs of suit."

In response to the plea and claim in reconvention, the respondent filed a replication to the plea and a request for further particulars to the counterclaim. The appellant as the plaintiff in reconvention filed the requested further particulars on 17 October 2023 and called upon the respondent, the defendant in reconvention to file his plea. Order 16 Rule 1(b) of the Magistrates Court (Civil) Rules, 2019 enters the fray. The provisions state as follows:

"1(1) The defendant, shall within seven days after:
(a) …
(b) delivery of documents or particulars in terms of rule 1 or 2 of Order 12 ("Further Particulars"); or

(c) …
(d) …
(e) …
(f) …
deliver a statement in writing to be called a plea."

The respondent failed to comply with the provisions of Order 16 Rule 1(b) of the said Rules by failing to file a plea or defence to the appellant's counterclaim. We do not agree that the counterclaim was abandoned or deemed abandoned as argued by Mr *Nyathi*. There is no law to the effect that once a counterclaim is placed before the court it can be deemed abandoned without having been withdrawn. Once it is still before the court, the court cannot ignore it. It must decide its fate as with the main claim. The lack of motivation argued by Mr *Nyathi* does not arise since the court *a quo*, though incorrectly, still formulated issues for trial from the same counterclaim. If it was still not live, the court *a quo* certainly would not have taken the erroneous view of the issues as it did.

The purpose of a plea is well settled: it is a party's defence and as such can be likened to a shield. See *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & 2 Ors* SC 40/15 at p 7. There being no plea to the counterclaim for the sharing of the Hatcliffe property and the property at Mverechena filed by the respondent who was the defendant in reconvention, the appellant's claim in reconvention was uncontested. This means that while the court *a quo* had to hold a full trial concerning issues arising from the main claim for eviction which was the only contested claim, there was no legal basis for the court *a quo* to consider as issues for trial the matters arising from the counterclaim. Since the counterclaim was uncontested, it ought to have been treated as an undefended claim.

The court finds that the appellant's claims for the sharing of the two properties in the respective shares she claimed were uncontested. It was a serious misdirection for the court *a quo* to accept the formulation of issues for trial in respect of the uncontested counterclaim and also not to consider the second claim under the counterclaim for a 40 percent share in the Mverechena property. Under Order 9 Rule 5 of the Magistrates Court (Civil) Rules, 2019 the court *a quo* must give judgment on both the main action and the counterclaim *pari passu* if both of them proceed to trial. The only claim which was defended at the trial was the main action for eviction. The counterclaim, being uncontested ought to have been treated and determined as such.

The court *a quo*'s failure to appreciate that the only claim with triable issues was the main action and that the appellant's counterclaim was uncontested, was a misdirection which amounted to an error of law. The misdirection was so serious that it created a legal foundation for this court to interfere with the part of the lower court's decision of not awarding the appellant half share in the Hatcliffe property and a 40 percent share in the property at Mverechena, as these claims were not in contestation in the court *a quo*.

DISPOSITION

In view of the court's analysis above, the court finds that the part of the decision of the court *a quo* appealed against cannot stand as the court should have considered the counterclaim as an uncontested claim. The appellant was and is entitled to an order as sought in the counterclaim. The court, in the due exercise of its powers on appeals in civil cases, as set out in s 31(1) of the High Court Act [*Chapter 7:06*], finds it appropriate to allow the appeal and set aside para 2 of the operative order of the court *a quo*'s judgment and grant the relief as prayed for in the claim in reconvention. That is in the interests of justice. The appellant sought an order that each party bears its own costs. Given the circumstances and how our decision turned out, an order that there is no order as to costs is appropriate.

Accordingly, it is hereby ordered that:

1. The appeal be and is hereby allowed with no order as to costs.
2. The judgment of the court *a quo* is hereby set aside and substituted with the following:

   "2. The defendant's claim in reconvention be and is hereby granted on the following terms:
   (i) The defendant be and is hereby awarded 50 percent shares in the immovable property namely; stand 2094 Kukura Kuroja Housing Co-operative, Hatcliffe, Harare
   (ii) The defendant be and is hereby awarded 40 percent shares in the property at Mwerechena Township, Domboshava whilst the plaintiff retains 60 percent shares."
3. Paragraph 4 of the operative part of the court *a quo*'s judgment is hereby amended by the deletion of "the sharing ratio of 75:25" and substitution with "the sharing ratios as provided in (2) above."

DEMBURE J:……...

MUCHAWA J:……..I agree

KATIYO J: ……I agree

MAMBARA J:…… I agree

Chirorwe & Partners, appellant's legal practitioners
Gambe Law Group, respondent's legal practitioners