

TENDAI MOYO
v
FIDELIS MUSANGO

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 19 July 2021, and 3 September, 2021

Civil Trial

P.R Zvenyika for the Plaintiff
C. Ndlovu for the defendant

WAMAMBO J: Plaintiff and defendant were in an unregistered customary law union which has since been dissolved. Plaintiff has proceeded to issue summons for the sharing of property basing the claim on unjust enrichment. Defendant is opposing the claim.

The parties agreed on the sharing of the farm and plot and some moveable property. Issues referred for trial are as follows.

- “1. *Whether the parties have 25 herd of cattle and how they should be shared*
2. *Whether the following vehicles are subject to sharing by the parties and if subject to sharing how said motor vehicles should be shared.*
 - a) *Range rover Sport registration number AAP 5899*
 - b) *Toyota Serena registration number ACT 2411*
 - c) *Ford Pickup truck registration number ABW 3209*
 - d) *DAF lorry (8 tonne) registration number ABW 3536*

- e) *Whether the plaintiff is entitled to 50% share in Stand 9342 Lundi Star Drive, Rhodene Masvingo”*

I will take into account the principles enunciated in the following cases in deciding the merits of the case.

In *Patience Moyo v Elphas Mavume Maphisa HB 311/16 MAKONESE J* at page 5 restated the requirements under unjust enrichment thus.

“The five prerequisites for an action based on unjust enrichment are summarised in the case of Nyamukusa Maswera as follows:-

- a) *The enrichment of the defendant*
- b) *at the expense of the plaintiff who should have been impoverished by defendant’s enrichment*
- c) *the enrichment must be unjust*
- d) *classical enrichment action should not be applicable*
- e) *there should be no positive rule of law against the plaintiff’s enrichment action”*

In *Shingisai Maryln Myamukusa v Gilbert Karenga Maswera HH 35/16 UCHENA J (as he then was)* said the following at page 4;

“Unjust enrichment is easier to prove as all the plaintiff has to prove is that she contributed something which if not shared equitably, will leave the defendant enriched at her expense. In the case of Industrial Equity v Walker 1996 (1) ZLR 269 (H) at 296 G - H to 298 D and at 302 F - G BARTLET J (as he then was) said “I have already found that general enrichment action providing relief where just, according to the principles expounded by de Vos, in cases of unjustified enrichment not covered by any existing enrichment action exists”

In the same matter at page 8 UCHENA J. (as he then was) continued as follows;

“I have considered the possibility of the plaintiff having been impoverished through indirect contributions which could have unjustly enriched the defendant as was commended by GILLESPIE J (as he then was) in Jengwa v Jengwa 1999 (2) ZLR 121 (H) at 130 B to D where he said;

‘Whenever the general law applies to a relationship and a wife has contributed to the marital wealth either by her financial contribution or by supressing 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.

In *Thomas Chauraya v Progress Makokoro HH362-73* at page 8 MAWADZE J said;

“In the case of Ntini v Masuku 2003 (1) ZLR 638 (H) at 642 C-F the court outlined the factors to be considered in a case where the cause of action is unjust enrichment. These include the direct contribution of the party, the indirect contribution and even the duration of the union among other things. These principles are applicable in this case”.

To bolster plaintiff’s Father Emmanuel Jongwe and Mary Anne Manasidze gave evidence in her case. Defendant meanwhile was the sole witness in his case.

Exhibits were produced in the course of the trial. I will enumerate and comment on the exhibits where necessary.

Exhibit 1 is a letter emanating from Deford Enterprises dated 28 February 2020 certifying that the Plaintiff worked for Sameera Enterprises trading as Brooks Fabrics from 1998 to 2003 as a ‘shop assistant, a till operator and was involved in paying staff wages.

Exhibit 2 is a letter from Montana Meats dated 16 November 2020 which reads in part;

“This is to confirm that Tendai Moyo ID 50-088690 C 50 was dealing with us from 20 November 2017 to December 2018 when they closed their butchery. She was always up to date with her dues”.

Exhibit 3 is a registration certificate issued by the City of Masvingo for Lion restaurant operating as a restaurant at 7924 Welby, Downtown, Masvingo.

Exhibit 4 is a valuation report compiled by Great Zimbabwe Realtors on Stand 9342 Masvingo Township of Fort Victoria Lands. It reflects *inter alia* that the sand property is registered in the Deeds Registry in favour of Fidelis Masango under Deed of Transfer No 006227/2011 dated 30 December. The open market value of the property is given as USD 75000, 00.

Exhibit 5 is a registration book for a DAF truck with the owner’s details reflected as Rudrof Nyandoro of Bishop House Diocese of Masvingo.

Exhibit 6 is a registration book for a ford ranger vehicle reflecting the name of the owner as Munyongana Xaverio Johneri of Bishop House, Masvingo.

Exhibit 1 to 6 were produced by the plaintiff with no objections from the defendant.

Exhibit 7 to 11 were produced by defendant with no objection from the plaintiff.

Exhibit 7 is defendant's passport. It reflects *inter alia* that the Home office of the United Kingdom granted defendant visas on 11 June 2002, 11 December 2002, 29 October 2003 and 22 May 2008.

Among other conditions attached to the visas are that the holder:-

“does not enter or change employment paid or unpaid without the consent of the Secretary of State for employment and does not engage in any business or profession without the consent of the Secretary of State for the Home Department.....”

Exhibit 8 contains defendant's student ID card, national insurance card and two bank cards.

Exhibit 9 is a registration book in the name of defendant for a red sedan BMW motor vehicle with registration number 797-900 G registered in Zimbabwe on 22 August 2002.

Exhibit 10 is a valuation report for stand 9342 Masvingo Township of Fort Victoria Township Lands compiled by Sanya Properties. On the valuation date which is 27 May 2021 the property's open market value is given as USD 60 000, 00.

Exhibit 11 is a deed of transfer in the name of the defendant for Stand 9342 Masvingo Township dated 30 December 2011.

Plaintiff's evidence in chief was quite lengthy. She was cross examined at length as well. Although she tended to over-elaborate at times I found her to be a credible witness, I will concentrate on areas in her oral testimony and declaration that touch on the issues referred for trial.

She was engaged in an unregistered customary law union with defendant since 12 November 2020 when she was given a token of termination of the union. They have 3 children together. The Plaintiff contributed directly and indirectly towards the acquisition of among other items the, four vehicle up for determination, 25 cattle and Stand 9342 Lundi Star Drive, Rhodene, Masvingo.

According to her she accompanied defendant to City Council of Masvingo in 2002 to view stands for sale of which they chose Stand 9342 Lundi Star Drive. She gave defendant 1000 Zimbabwean dollars while he sold his motor vehicle in order to pay for the stand. It would appear that she was mistaken about the value of the stand. She testified about defendant sending money to buy bricks for the stand from the United Kingdom while she contracted people to construct the foundation. She contributed her terminal benefits and flea market earnings towards general upkeep and construction of the house. She was involved in running the butchery in Majange, Muccheke

and was supplying beasts to Carswell and Montana. She also testified about the operations of Lion Restaurant at Hillside, Masvingo. Then came the issue of a round table. She testified that the round table lasted for about one and a half years and participants thereof would contribute R20000, 00 Rands per month to the beneficiary. She gave detailed evidence of how the 4 vehicles in issue were bought. To a large extent. Father Emmanuel Jongwe supports her evidence.

I found father Tongwe's evidence credible. It was also supported by documentary evidence. See exhibits 5 and 6 which also reflect that some of the vehicles belonged to the Roman Catholic Diocese of Masvingo.

Plaintiff testified about her participation in buying and exchanging a tractor for cattle. She testified that on 12 November 2020 she counted 25 cattle at the farm. The farm is fenced and does not accommodate cattle other than their own.

Defendant on the other hand has offered plaintiff 10 percent of stand no 2342 Lundi Star Drive, Rhodene while she maintains she is entitled to 50% of the value of the said house.

Plaintiff testified about her former work place. Exhibit 1 speaks to her having been employed at Brooks Fabrics. She testified about her employers allowing her to access materials for business which value would be subtracted from her salary.

I get the impression of a hard working woman at her place of employment, at the butchery, the restaurant the acquisition of cattle, cars and her direct and indirect contribution to the ownership of the stand. Defendant could not quite dislodge her evidence. She virtually remained consistent.

Mary Ann Manisidze testified about her involvement in the round table with plaintiff and others namely Mrs One God, Mrs Gunga and Mrs Willis.

She testified about how the round table was successful and how she learnt from plaintiff of her success at building her house. Mary Anne also supplied plaintiff with chicken wings at her restaurant, Downtown

Her evidence remained intact. I found Mary Anne to be straight forward. Her evidence reflects Plaintiff as a busy and alert businesswoman who was so straightforward that when the time came she opted out of the round table club citing the reason that her rentals at the shop kept on increasing.

Against the evidence of the plaintiff and her two witnesses was the defendant's evidence.

His evidence was that he married Plaintiff on 22 November 2002 and had bought stand 9342 Lundi Star Drive in September 2002. He went to England in 1999 to further his studies but would also work in the evenings, weekends and public holidays. From his earnings he would buy cars and bring them to Zimbabwe and sell them. He testified that plaintiff did not assist him in buying the stand. In spite of the fact that the defendant testified that he used to send plaintiff money every Tuesday for purposes of paying the workers at the stand he didn't provide any proof of that. I find that while he may have send some money to Zimbabwe it was not as regular or as substantial as gave out. Against exhibit 1 which reflects plaintiff was at one stage employed defendant was adamant plaintiff was unemployed. The tenor of his evidence appears to have been to exaggerate his role and underplay that of plaintiff. For instance at one stage he grudgingly admitted that plaintiff took care of his child from another relationship. In spite of the fact that defendant spent some years in the United Kingdom while his house was under construction and his businesses were flourishing he failed to attach to plaintiff any meaningful contribution.

Defendant maintained he never bought any motor vehicle from the diocese of Masvingo in spite of the damning clear consistent evidence of Father Emmanuel Jongwe. He was clearly not a credible witness in many respects. The fact that the defendant insisted the Ford pick-up and Daff lorry were never bought by him in the face of clear evidence that he bought them but that only the change of ownership has not been effected gives me the impression that he may also not be candid about ownership of the Toyota Serena and Range Rover sports motor vehicles to meet fees for the children. I find that defendant was shrewd and in the circumstances if he indeed sold the vehicles it was to circumvent plaintiff's claims.

To that end I find that the four motor vehicles are indeed subject to sharing between the parties.

On the 25 herd of cattle defendant indicated in the discovery schedule that he would discover among other documents a stock register. This never came to be. There should have been a stock register to talk about in the first place before it was registered as a document to be discovered. The fact that the stock register was never produced suggests that it contains the correct number of cattle owned by defendant. This against plaintiff's evidence that she counted 25 cattle belonging to defendant at the farm

I find that plaintiff has proven that the parties have 25 cattle. Considering that she was industrious and further that she made direct and indirect contributions. I find that she deserves 10 of the 25 cattle while defendant gets 15 cattle.

On the motor vehicles I shall share them as follows. Defendant gets the range rover sport, Toyota Serena and the 5 ton lorry while plaintiff gets the ford pickup. This is because I find that the defendant bore the heavier brunt in buying the motor vehicles than the plaintiff. Plaintiff however deserves one motor vehicle.

Considering the parties joint contributions directly and indirectly I find that defendant contributed more to the house financially while plaintiff also contributed directly and indirectly and in fact was the one present most of the time on the ground during the construction of the house. To that end plaintiff gets 30% while defendant gets 70% of the value of the house.

The 2 valuation reports are at variance. One reflects US75 000 while the other reflects USD 60000. It then becomes necessary that an impartial valuation be done through the office of the Registrar of this court. The final order will also include the property encapsulated in the joint pre-trial conference made and agreed to between the parties.

I need to make the order practical and enforceable in the circumstances.

In *Anna Maware v Emmanuel Chiware* HMA 01/19 MAFUSIRE J. when dealing with a civil trial involving unjust enrichment said the following at page 7 in paragraph 15;

“My judgement has to be efficacious. The defendant must deliver or pay within defined time limits but he must know what to deliver or how much to pay. Unless the parties are able to reach agreement by themselves it is necessary for the court to fix these but there is no information to guide me. I have no evidence of the defendant’s capacity. But that should not be a deterrence to a judgement that is effectual.”

I agree with the above statement.

In the quest to make this judgement efficacious I order as follows;

Judgement is entered for the plaintiff as reflected below;

The following assets are awarded to the plaintiff:-

1. (i) A farm known as Sell Camp, which was acquired through the Government of Zimbabwe with the Offer Letter in defendant’s name.

- (ii) 8 seater sofas
 - JVC curved television set
 - Sony home theatre
 - Glass TV Stand
 - Radio and speakers
 - Sharp television set
 - 5 double beds
 - Bedroom suite comprising of a headboard and dressing table
 - Four plate stove
 - Four deep freezers
 - Upright refrigerator
 - Two chicken cages
 - Fifteen hoes
 - Seven shovels
 - Two wheel barrows
 - 50m hosepipe

- (2) (i) Ford pick-up truck registration number ABW 3209
 - (i) 10 head of cattle or the value thereof at US\$ 300 per beast which shall be delivered within 30 days of this judgement
 - (ii) 30 % of the value of the immovable property situated at 9342 Lundi Star Drive Rhodene, Masvingo

- 3. The registrar shall appoint a valuer to evaluate the aforesaid immovable property under clause 2 (ii) above within 14 days of this order. The plaintiff and defendant to pay the valuation costs on a 50-50 basis.

- 4. The defendant shall pay the plaintiff her 30% share within 60 days of receipt of such valuation.

- 5. Upon failure by the defendant to comply with clause 4 above the Registrar shall appoint an Estate Agent who shall dispose of the property on the open market at best value for each party to obtain their share.

- 6. Each party shall bear its own costs

Muchirewesi & Zvenyika, plaintiff's legal practitioners
Ndlovu & Hwacha, defendant's legal practitioners