

THOMAS CHAURAYA
versus
PROGRESS MAKOKORO

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 10 and 11 October 2013

Family Law Court

Trial Cause

S. Simango, for the plaintiff
P.R. Zvinavashe, for the defendant

MAWADZE J: The plaintiff on 24 February 2011 issued summons out of this court seeking an order of sharing of the assets of the parties on the basis of the common law principle of unjust enrichment.

In his declaration the plaintiff stated that he entered into a customary law union with the defendant which union was blessed with four children two of whom are minor children. At the time he contracted the union the plaintiff said he was already married to his first wife and it was also a customary law union.

The plaintiff stated that he acquired the immovable property in issue known as stand no 2573 Kuwadzana 4 Harare when he was married to his first wife and had not married the defendant. He said the immovable property is registered in the joint names of the plaintiff and his first wife. It is the plaintiff's case that the customary union between him and the defendant has been since dissolved as per the customary rites. The plaintiff however contended that he would be unjustly enriched if the defendant does not receive any share in the immovable property No. 2573 Kuwadzana 4 Harare (hereinafter the house or the property). The plaintiff states in his declaration that it is fair and equitable to award the defendant a 20% share of the open market value of the property, a figure he later amended before the commencement of the trial to 5% share.

In her plea the defendant sought the distribution not only of the house but also of some movable property not stated in the plaintiff's declaration which include mainly household goods itemised in para 2 of her plea. While the defendant conceded that the house

was acquired by the plaintiff and his first wife, she said in her plea that at the time she married the plaintiff the house only consisted of a core house of two rooms. The defendant said she contributed to the extensions and improvements made to the house which is now a 7 roomed house. In her plea the defendant alleges direct contribution to the extension of the house by raising money from the sale of clothes which money was used to purchase the building materials. She said she bought clothes in Harare for resale to illegal gold panners in Shamva, Mazowe, Chikuti and Sanyati. She said the money she raised was specifically used to pay the builders, carpenters and purchasing building materials. In her plea she said she also used to sell uniforms sewn by the plaintiff using the family sewing machine in Makonde area and used the profits in the same manner already explained. The defendant further stated in her plea that she indirectly contributed by taking delivery of the building materials bought when the plaintiff was at work, assisting the plaintiff in the purchasing of the building materials and for their safekeeping and preparing food for the builders and carpenters. The defendant said she further contributed in the construction of the plaintiff's rural home firstly in Muzarabani where she cleared virgin land, moulded bricks, constructed a homestead, cattle and goat pens at the time the plaintiff was in full employment in Harare. The defendant said she performed the task when the family moved from Muzabani to Gumbura area, Makonde in Mashonaland West Province where she said they built a rural home which now remains the sole asset of the plaintiff. The defendant stated in her plea that it is just and equitable that the house or property in issue be sold all the proceeds shared equally.

It would seem the purpose for replication was lost to the plaintiff as he did not seek to respond to pertinent issues raised by the defendant in her plea. The need to do so became apparent during the trial.

In terms of the joint pre-trial conference minute adopted by the parties the following issues were deemed not to be in contention.

“1. ADMISSIONS

1.1 That stand No. 2573 Kuwadzana 4 Harare was acquired and jointly owned by the plaintiff and his late wife Maud Chauraya.

1.2 That the household effects be shared as follows:-

PLAINTIFF

DEFENDANT

- 1 Sewing Machine
- Delivery bicycle
- 1 scotch cart
- 4 plate electric stove
- Spraying machine
- Mountain bicycle
- 1 sewing machine
- 2 plate stove

1.3 That the defendant be awarded custody of the minor children.

1.4 Maintenance to be paid in accordance with the order of the maintenance court under case No. M637/09”

The following issues were referred for determination, at the trial;

“2 ISSUES

- 2.1 Whether or not the plaintiff has already given the defendant the household effects that were acquired during the subsistence of the marriage,
- 2.2 Whether or not the plaintiff sold any assets that were acquired during the subsistence of the marriage,
- 2.3 Whether or not the defendant is entitled to any share to the immovable property stand No. 2573 Kuwadzana 4 Harare. If she is entitled to any share what percentage.
- 2.4 Whether or not the refrigerator is part of matrimonial property. If yes, which party should be awarded the refrigerator.
- 2.5 Whether or not the building structure that stood on number 2573 Kuwadzana 4 at the time the parties got married, was a 2 roomed core house only,
- 2.6 Whether or not the 7 roomed house presently stands on stand number 2573 Kuwadzana 4, was the result of extensions effected during the subsistence of the marriage,

2.7 Whether or not the defendant set up the plaintiff's rural home in Makonde which now remains the sole property of the plaintiff."

I should confess from the onset that I find it very confusing the manner the parties approached the pleadings in this matter. The exhortation made by MAKARAU JP (as she then was) in *Feremba v Matika* 2007(1) ZLR 337 (H) at 341 F-G seems to have escaped both parties during the pleadings, and unfortunately even at pre-trial conference stage. I shall repeat the relevant poignant remark by MAKARAU JP (as she then was):

"When general law is the correct choice, then a recognised cause of action must be pleaded. Such a cause of action maybe unjust enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that the parties were in an unregistered customary law union is not sufficient to found a cause of action at general law".

In *casu* the cause of action is not properly pleaded especially by the plaintiff in the declaration. The parties were in an unregistered customary law union which has since ended. This explains why an amendment was belatedly made to the declaration just before the trial when I had raised that point with the parties. While the exhortation I referred to by MAKARAU JP (as she then was) in *Feremba v Matika supra* was mainly directed to trial magistrates, I believe all legal practitioners must also be wary of this important aspect. In *casu* when one pays regard to the joint pre-trial conference minute the impression created is that the parties were in a registered marriage if one pays regard to not only the improper use of the word "marriage" but even issues relevant to admissions made in relation to custody of the children. The issues referred to trial are also couched in a manner suggestive of the fact that the sharing of the assets by the parties is in terms of s 7 of the Matrimonial Causes Act [*Cap 5:13*]. This confusion arises from the fact that a proper cause of action had not been clearly pleaded and the issues arising therefrom properly articulated.

Be that as it may the plaintiff, with the consent of the defendant amended the declaration in which it was clearly stated that the cause of action is unjust enrichment. This matter therefore proceeded on the clear understanding that the parties have nailed their colours on the mast of the concept of unjust enrichment. This also necessitated the changes the parties made in respect of the issues for determination. The issues which fall for determination as I now perceive them are as follows;

1. Whether or not the defendant contributed directly or indirectly to the improvements done on stand no. 2573 Kuwadzana 4, Harare.
2. The state or stage the construction of house no 2753 Kuwadzana 4 Harare was when the plaintiff and the first defendant entered into the customary law union.
3. The nature of the share to the immovable property in issue each party is entitled to.
4. Which party should be awarded the refrigerator

The issue relating to sharing of household goods was abandoned as it became clear that the defendant was awarded some “maoko” property at the dissolution of the union and that the parties further agreed to share of other assets as for para 1.2 of the joint pre-trial conference minute. The parties also abandoned item 2.2 which relates to whether the plaintiff sold any assets acquired during the subsistence of the union. It is not clear what issue was being raised therein. In fact during the trial the defendant attempted to raise the issue in a different context alleging that it is the defendant who disposed of assets and livestock at the rural home in Makonde. The issue relating to defendant’s role in the setup of the rural home is only relevant in considering her indirect contribution to during the union and the share she is entitled to.

I now turn to the background facts of the matter.

The plaintiff is employed by Harare City Council in the Dry Cleaning Department. He has been so employed since 1974. The defendant who is now 47 years old, has been, throughout the union a full time housewife.

The plaintiff first entered into a customary law union with Maud Chauraya in 1977 and 6 children were born out of this union. The union between the plaintiff and Maud Chauraya ended in 2006 when Maud Chauraya passed on. The plaintiff entered into a customary law union with the defendant in 1989 as per defendant or 1990 as per the plaintiff. Four children were born out of this union two of which are still minors. This means that from either 1989 or 1990 to 2006 the plaintiff was in a polygamous union with two wives, a period of about 17 years. The union between the plaintiff and the defendant was formerly dissolved in 2009, after being in existence for a period of about 19 years. When the defendant entered into the union with the plaintiff she had two children from a previous relationship or relationships.

The acquisition of the immovable property no. 2573 Kuwadzana 4, Harare is not in issue. The plaintiff acquired the undeveloped stand in 1984 with the assistance from his

employers the City of Harare. As per exh 1 the agreement of sale of this property is in the joint names of the plaintiff and his first wife Maud Chauraya. The first wife passed on in 2006 and her estate is still to be dealt with. This includes her interest in the property jointly registered in the plaintiff and her name. This informs the decision by both Mr *Simango* for the plaintiff and Ms *Zvinavashe* for the defendant that all what is available for distribution between the plaintiff and the defendant, is the plaintiff's 50% share in the property. I find nothing amiss in this approach. Whatever the award this court would make in respect of the property, the award relates to 50% of the value of that property not 100% of its value.

Although the union between the parties ended in 2009 both parties are still sharing the same house with the children. Apparently the plaintiff has moved on as he has entered into yet another customary law union with another woman in July 2013.

Both the plaintiff and the defendant gave evidence and did not call any witnesses.

The plaintiff told the court that he secured the property in issue through a facility provided by his employer Harare City Council in 1984. He paid an initial deposit of then Zimbabwean \$50-00 and was awarded a loan to develop the stand. The loan was disbursed in tranches of Zimbabwe \$500-00 at every stage of the developments. He said this loan was not enough hence when he developed the stand further he had to use his salary. He said it took him 10-15 years to repay this loan.

The plaintiff said he started to develop stand in 1985 with his first late wife. He was unable to give any concrete dates as to how the developments unfolded. Despite probing by his counsel the plaintiff was unhelpful on this rather material issue. He however said he built 4 rooms initially and a slab for further three rooms with his first wife before he entered into this union with the defendant. He was unable to say the dates when he further constructed the 4 rooms and the slab. All he emphasized was that he had built 5 rooms before he entered into union with the defendant in 1990.

The plaintiff said he only constructed further 2 rooms after he had entered into the union with the defendant. The import of his evidence is that the defendant's direct or indirect contribution, if any, is in respect of the 2 rooms only. The plaintiff said the defendant never made any direct contribution as she was a full time housewife who alternated with the first wife in staying either at his rural home or in Harare with the plaintiff. He denied that the defendant contributed in any manner in the construction of either the Muzarabani rural home or Makonde rural home. Instead he said he financed the construction of these rural homes from his sole income. The plaintiff denied that he derives any benefit from Makonde rural

home saying the defendant destroyed all the huts there in 2007 when she abandoned the home and disposed of all stock and household goods at the rural home. The defendant testified that all that the defendant is entitled to is a 5% share of the 50% value of the property in issue which share only relates to her indirect contribution.

It was clear during cross examination that the plaintiff was not willing to acknowledge any contribution, direct or indirect made by the defendant during the union. He grudgingly accepted that defendant did cook, wash, and perform all wifely duties. He was at pains to accept that she looked after the 4 children they have, instead choosing to emphasise that he looked after the defendant's child from another relationship.

The plaintiff was clear that he has no financial means to buy out the defendant whatever the share the defendant may be awarded. He told the court that he may attempt to secure a loan from his employer but he does not believe this would be successful. Instead he would rather have the property sold and the proceeds shared.

The defendant who did only Grade 6 denied that when she entered into this union with the plaintiff the house in issue was a 5 roomed house. She insisted that it was a core house of 2 rooms with a toilet and a bathroom. She said the two rooms were not even complete as they used zinc tiles for window panes. She even said she vividly recalls their first tenant or lodger, a Tshuma who shared one room and they used the other room. The defendant said all the improvements done of additional 5 rooms was done after she had entered into the union with the plaintiff. She insisted as per her plea that she made direct contributions by selling clothes and gave the money to plaintiff to use in the improvements of the property. She was unable to quantify her direct contribution. As regards indirect contribution she said she used to cook, wash and look after the plaintiff and the children and attend to the rural home, tilling the land. She maintained that she directly contributed to the construction of firstly the Muzabani rural home and later Makonde rural home.

The defendant accepted the plaintiff's evidence that she did not directly contribute in the purchase of the refrigerator. This then puts to rest her claim in respect of the refrigerator.

Our courts have now accepted that despite the inapplicability of the Matrimonial Causes Act [*Cap 5:13*] in cases like the instant one, a woman or man married according to an unregistered customary law union can institute a claim for sharing of assets of the parties at the dissolution of the union under the common law principles of unjust enrichment, tacit universal partnership or joint ownership.

See *Zimnat Insurance Company v Chawanda* 1990 (2) ZLR 143(S); *Mashingaidze v Mashingaidze* 1995(2) ZLR 219(H); *Feremba v Matika* 2007 (1) ZLR 337(H).

In this 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.

While the parties are agreed that they can only share 50% of the value of the property or house they are not agreed as to what share should be awarded to each party. This emanates from the failure to either acknowledge or appreciate the direct or indirect contribution of each party.

I have no doubt that the defendant has indirectly contributed to the union between the parties in an immeasurable way. The value of domestic labour is usually downplayed. See *Matibiri v Kumure* 2001 (1) ZLR 492 (H). It is also difficult to quantify. As already said this union lasted for 19 years. The defendant gave birth to 4 children two of whom are now majors. As she is correctly pointed out she is too old to contemplate to start any meaningful new life or to remarry. All her useful and productive life was put in this union. The fact that the plaintiff had two wives should not diminish the defendant's indirect contribution as a wife. She remained with the plaintiff even after the demise of his first wife until the dissolution of the union.

I am not satisfied that the defendant made any meaningful direct contribution. While it may be true that she raised money by selling clothes I do not believe that this meaningfully contributed to the construction of the house. I accept her role and contribution in the establishment of the two rural homes in Muzarabani and Makonde. She should however accept that there was also the first wife who should have played a role.

I accept the plaintiff's evidence that he was the sole bread winner in the family and therefore directly contributed to the acquisition of the house. The plaintiff was however not an impressive witness in explaining how the house was constructed and the time frame. I do not believe that the plaintiff suffered from some amnesia but he simply was not willing to give dates which will show that the defendant was his wife" when extension and developments to the house were done.

I accept the defendant's evidence that when she entered into the union with the plaintiff only a 2 roomed core house was in existence. I am inclined to accept that version as the plaintiff was not able to give dates on when he carried out the various developments. No

documentary evidence was produced. In fact the plaintiff was unwilling to commit himself on this aspect in the pleadings or even at pre-trial conference stage. The defendant's stance was clear throughout the pleadings that only two rooms had been constructed. The plaintiff only came out with his version of 4 or 5 rooms during the trial. This is an afterthought designed to downplay the defendant's role or contribution.

The same can be said about the plaintiff's inconsistency on what he perceives to be a fair award to the defendant. Initially he believed a 20% award was fair. Just before the trial he believed that an award of 5% is just and equitable. This vacillation is unexplained. The only conclusion I can make is that the plaintiff has always been unwilling to acknowledge the defendant's contribution to the house and consequently a fair and just award to her. The award I will make in respect of the defendant is informed mainly by her indirect contribution. The circumstances of this case and the parties are such that I find no useful purpose to be served by giving either party the option to buy the other one out. Neither party has the means and capacity to raise any meaningful income in the foreseeable future. The only option would be to order the sale of the house as soon as possible and allow parties to benefit immediately from such proceeds. I shall order the valuation of the property and the award made to each party relates to 50% of the value of the property as the other 50% belongs to the estate of the late Maud Chauraya, the plaintiff's first wife.

Having considered all the circumstances of the case I believe an award out of the 50% share available of 30% to the plaintiff and 20% to the defendant is just and equitable in the circumstances.

No order for costs is made as the defendant is represented *in forma pauperis*

Accordingly it ordered as follows:

1. The plaintiff is awarded a 30% share and the defendant a 20% share in the 50% share of the value in the immovable property known as stand no. 2573 Kuwadzana 4, Harare.
 - 1.1 The parties shall agree and appoint a registered Estate agent within 30 days from the date of this order to value the property or failing which the Registrar of the High Court shall within 15 days appoint a valuer from the Master's list of valuers.
 - 1.2 The valuer shall evaluate the property within 15 days of the appointment.
 - 1.3 The plaintiff shall pay the costs of valuation.
 - 1.4 The appointed Estate Agent shall sell the property by private treaty to the best advantage of the parties and pay the net proceeds therefrom to the parties at the

ratio of 30% share of the plaintiff and 20% share for the defendant as assessed from the 50% value of the property as provided for in clause (1) above.

- 1.5 The Sheriff of the High Court of Zimbabwe shall be empowered to sign all necessary transfer papers and to do all necessary to pass transfer to the purchaser of the immovable property in terms of clause 1.4 above.
2. The plaintiff is awarded the following movable property as his sole and exclusive property
 - Sewing machine
 - Delivery bicycle
 - 1 scot cart
 - 4 plate electric stove
 - Spraying machine
3. The defendant is awarded the following movable property as her sole and exclusive property
 - Mountain bicycle
 - 1 sewing machine
 - 2 plate electric stove
4. The plaintiff shall continue to pay maintenance in respect of the minor children in accordance with the order of the Maintenance Court Order Case No M637/09.
5. There is no order as to costs

Nyikadzino, Simango & Associates, plaintiff's legal practitioners
G.N. Mlotshwa and Co, defendant's legal practitioners