

LOVENESS KUDZANGA  
versus  
GODFREY KUDZANGA  
and  
THE REGISTRAR OF DEEDS  
and  
DEPUTY SHERIFF HARARE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 14, 15 & 16 November 2012 and 12 December 2013

### **Civil Trial**

*T.E. Gumbo*, for the plaintiff  
*R. Mapondera*, for the first defendant  
No appearance for the second and third defendants

MAWADZE J: The plaintiff issued summons out of this court on 17 August 2011 seeking an order compelling the first defendant to effect change of ownership of Stand No. 9781 Kuwadzana Phase 3 Harare from his name to the plaintiff's name and that of Dickson Kudzanga within seven days of the date of judgment, that should first defendant fail or refuse to effect change of ownership as requested the Sheriff of Zimbabwe be authorised to sign any papers or documents as provided for the second defendant to effect change of ownership of the said stand from the defendant's name to that of the plaintiff and Dickson Kudzanga's name.

In this alternative the plaintiff's claim is that should the court make a finding against a donation, an order that the plaintiff be awarded a share which represents her contribution to the improvements on Stand No. 9781 Kuwadzana Phase 3 Harare be granted and that the first defendant pays costs of suit.

The background facts of this matter are as follows;

On 18 December 1999 the plaintiff was joined in holy matrimony with the first defendant's son Dickson Kudzanga. The plaintiff is therefore a daughter in law to the first defendant. Currently, the plaintiff resides at No. 9781 Kuwadzana Phase 3 Harare and the first defendant at No. 22 Mukarati Road, Mufakose, Harare.

The second and third defendants are cited as their official capacities.

It is the plaintiff's claim that after solemnisation of her marriage to Dickson Kudzanga in terms of the Marriage Act [*Cap 5:11*] on 18 December 1999 and during the wedding ceremony of plaintiff and her husband, the first defendant donated or gave a residential Stand No 9781 Kuwadzana Phase 3 Harare as a present to the plaintiff and her husband. It is common cause that at the material time Stand No 9781 Kuwadzana Phase 3 Harare was not fully developed and comprised of a single room and toilet. The plaintiff and her husband took occupation of the said property in that state in 2000. The plaintiff in her declaration stated that she jointly with her husband developed the said stand and built a ten (10) roomed house which the plaintiff occupies to date.

It is the plaintiff's case that the marital relationship between plaintiff and her husband developed problems and plaintiff's husband deserted the matrimonial home No 9781 Kuwadzana Phase 3 Harare and is now cohabiting with another woman.

According to the plaintiff, the first defendant, despite the donation of the said stand to the plaintiff and her husband on 18 December 1999 has not yet effected transfer of the stand into the names of the plaintiff and her husband who became joint owners of this stand upon the pronouncements by the first defendant at the wedding ceremony that he gave this said stand as their sole and exclusive property. It is the plaintiff's contention that the first defendant has an obligation to effect change of ownership of the said stand into the plaintiff and her husband's names and that the first defendant should be compelled to do so.

The facts alleged in respect of the alternative claim are that when the plaintiff and her husband took occupation of the same stand which was a core house comprising of a single room and toilet, the plaintiff went to the United Kingdom in January 2002 and her husband joined her later in 2002. The plaintiff alleges that through their joint and complimentary efforts while in the United Kingdom she and her husband developed the said stand to a ten (10) room house. The plaintiff and her husband returned from the United Kingdom in 2007 and occupied the same house to date. The plaintiff in the alternative therefore claims for an order awarding her a share, which she did not specify in the declaration, which share represents her contributions to the improvements done on the said stand.

The first defendant in his plea denied that he offered a donation as a wedding gift a certain piece of land known as Stand No. 9781 Kuwadzana Phase 3, Harare, to the plaintiff and her husband. The defendant also disputes that the plaintiff and her husband built a ten (10) roomed house on the said piece of land. The first defendant contends that he has no legal obligation to transfer the said piece of land into the names of the plaintiff and her

husband. According to the first defendant the plaintiff is now separated from her husband Dickson Kudzanga who is not even part of these proceedings. The defendant further states that the plaintiff cannot purport to sue for a benefit allegedly due to Dickson Kudzanga who is not claiming the same in his own capacity. The first defendant stated that the plaintiff has no cause of action against the first defendant as the first defendant never donated the said stand to the plaintiff or her husband.

The first defendant said the fact of the matter is that the plaintiff and her husband have been staying at the said property at the benevolence of the first defendant.

The first defendant filed a counter claim or claim in reconvention for an order for the eviction of plaintiff and all those claiming occupation of the said property through her. The first defendant also prays for the dismissal of plaintiff's main and alternative claim with costs. In support of the counter claim the first defendant states that on 30 June 2011 through his legal practitioners, gave the plaintiff and her husband three (3) months notice to vacate this said property. The notice expired on 30 September 2011 and the plaintiff and her husband have remained in occupation of the said property. According to the first defendant the plaintiff and her husband have no right to remain in occupation of the said property. The first defendant is also claiming holding over damages from the date of the expiry of the three months notice from the plaintiff and her husband. However, what is surprising is that the first defendant did not seek to join this plaintiff's husband in this proceedings.

In terms of the joint pre-trial conference minute the following issues were referred for determination;

- (i) whether or not there was a donation of the immovable property Stand No 9781 Kuwadzana Phase 3, Harare to the plaintiff and her husband by the first defendant. If yes, whether the donation is binding at law.
- (ii) whether or not the plaintiff and her husband constructed a ten roomed house on the said premises.
- (iii) whether or not the first defendant has got the locus standi to evict the plaintiff from the owner's property.

The plaintiff, Loveness Kudzanga gave evidence and called her aunt Erica Maphosa and a friend Getrude Mukuto as witnesses.

The first defendant Godfrey Kudzanga testified and called as witnesses his wife Agnes Kudzanga, his friend Misheck Paradzayi Mutambirwa and his son who is also the plaintiff's husband Dickson Kudzanga.

The plaintiff produced exhibits 1 to 4 in her evidence and the first defendant produced exhibits 5 to 11. I should at this stage pose and comment on each exhibit as I shall later on refer to the exhibits in dealing with each evidence of the witnesses.

Exhibit 1(a) – is a receipt dated 27 May 2000 for Zimbabwean \$1 342-00 in the plaintiff's name. It is for the purchase of electrical goods which the plaintiff said were for the connection of electricity at the said property. The items include carth rode, wood screws, 20 amp MCB, 2 switches, 500ml solvent cement and other small items. The first defendant puts into issue this receipt stating that in 2000 when the plaintiff and her husband took occupation of the property electricity had been connected hence there was no need for plaintiff to make such purchases.

Exhibit 1(b) is a receipt in plaintiff's name dated 28 May 2000 for Zimbabwean \$2 974-00 for purchase of PVC pipe, PVC lamp holder, meterbox and some other smaller items. The plaintiff's explanation and that of the first defendant are as per Exhibit 1(a).

Exhibit 1(c) – is a receipt dated 4 July 2000 in plaintiff's name for Zimbabwean \$1 000. The plaintiff explained that she paid the amount for installation of electricity (items Exhibit 1(a) and (b)). The first defendant states that electricity had long been installed or connected by the time plaintiff and her husband took occupation of the property.

Exhibit 2.1 to 2.4 are receipts for cash the plaintiff said she sent to Zimbabwe when she was in the United Kingdom for the purchase of materials to develop the said property to its current state. Briefly the receipts reflects the following;

Exhibit 2.1 – it's a western union receipt in the name of Dickson Kudzanga dated 15 April 2004 for £2 500 sent to Denis Kudzanga.

Exhibit 2.2 – is a customer deposit receipt of Natwest Bank dated 5 April 2007 showing a cash deposit of £490. There are no details of the person making the cash deposits but attached to the receipt are handwritten notes on a separate sheet addressed to one Martha who was supposed to give cash (amount not stated) to Dennis Kudzanga. The handwritten note has a Zimbabwean cellphone number and is signed by the plaintiff.

Exhibit 2.3 is a customer deposit receipt for Natwest Bank dated 13 November 2003 for £300. Attached to it are handwritten notes addressed to Tendai to give Agnes Kudzanga

“this money” which amount is not stated. A CBZ account is given together with a Zimbabwean telephone number and is signed by the plaintiff.

Exhibit 2.4 - is a Natwest customer receipt dated 7 January 2004 for £1 600. Attached to it is a handwritten note to Tino to give “this money” to Denis Kudzanga and there is a Zimbabwean telephone number and this note is signed by the plaintiff. My brief comment at this stage is that exhibit 2.1 to 2.4 which are bank deposit slips for Natwest Bank do not show who made the bank deposits. The nexus between the bank customer receipt and the attached handwritten notes is difficult to appreciate as there is no proof that the bank deposit slip and handwritten notes attached were done contemporaneously. Lastly the people to whom the handwritten notes are addressed did not testify.

Exhibit 3.1 to 3.3 are photographs of the house taken at different stages, which are;

Exhibit 3.1 – shows the core house and the foundation for the 10 rooms and is dated 2002 (endorsed).

Exhibit 3.2 – is a photograph with date endorsed as 2003 and shows developments to window level.

Exhibit 3.3 shows the complete ten (10) roomed house with date endorsed as 2004.

According to the plaintiff she took photographs of the house to capture the different stages of development and the photographs were sent to her while in the United Kingdom as proof of how the money she had sent to develop the house was being used. The first defendant dismissed this as false indicating that he took photographs of the developments of the house for his own record and that plaintiff has just picked few photographs out of many. In my view very little probative value can be placed on the photographs exhibit 3.1 to 3.3 in relation to issues in dispute.

Exhibit 4.1 to 4.3 are receipts for building material the plaintiff said she bought for the house.

Exhibit 4.1 is dated 23 December 2004 and is in plaintiff's name for 12 air vents, 8 flash doors, 4 paddlock keys and other items valued at Zimbabwean \$207.

Exhibit 4.4.2 – is dated 4 July 2005 in plaintiff's name for 256 floor tiles, crout grey white, tiles adhesive all valued at Zimbabwean \$291.

Exhibit 4.3 – is dated 15 July 2007 and is for a kitchen sink valued Zimbabwean \$65-00. There is no name endorsed on this receipt.

Again exhibit 4.1 to 4.3 are of very little probative value. The total value of these materials bought as per those receipts is a paltry Zimbabwean \$563-00. Such a value is

insignificant to the cost of building the 10 roomed house and is irrelevant to even the plaintiff's alternative claim. The first defendant simply denied knowledge of exhibit 4.1 to exhibit 4.3.

Exhibit 5 to 11 were produced by the first defendant. They are as follows;

Exhibit 5 is a letter from Zimbabwe Building Society dated 7 January 1999 addressed to first defendant approving a mortgage bond for Stand No. 9781 Kuwadzana Phase 3.

Exhibit 6 – is a memorandum of agreement dated 23 January 1999 between the first defendant and his wife Agnes Kudyanga vis-à-vis a contractor Budiriro Housing Development Corporation for the construction of the House No. 9781 Kuwadzana Phase 3 Harare.

Exhibit 7 is a letter dated 3 September 2004 by Zimbabwe Building Society to Honey and Blanckenberg copied to first defendant indicating that the mortgage account for the first defendant for Stand No 9781 Kuwadzana Phase 3 has been paid off.

Exhibit 8 – is an interim statement of Loan Account from Zimbabwe Building Society dated 10 November 2001 to the first defendant.

Exhibit 9 – are receipts in the first defendant's name for plan drawing of No 9781 Kuwadzana Phase 3 dated 9 June 1999 for Zimbabwe \$600-00 and 7 July 1999 for Zimbabwe \$900-00.

Exhibit 10 – are 3 pass books for Beverley Building Society in the first defendant's name showing that the first defendant was a Savings Account holder with Beverley Building Society from 2001 to 2006.

Exhibit 11.1 to 11.7 are receipts produced by the first defendant for the building materials he said he bought for the construction of No 9781 Kuwadzana Phase 3, Harare and are in first defendant's name.

Exhibit 11.1 – dated 26 March 2003 is for asbestos sheets, ridges and nails for Zimbabwe \$528 042.28.

Exhibit 11.2 – dated 2 April 2013 for end asbestos and nails but there is no amount.

Exhibit 11.3 – dated 29 April 2003 for ridges and no amount is stated.

Exhibit 11.4 - dated 7 April for endurite asbestos and there is no amount.

Exhibit 11.5 – dated 10 June 2003 for end nails and there is no amount.

Exhibit 11.6 – dated 11 July 2003 for window section and round bar for Zimbabwe \$129 576-00.

Exhibit 11.7 – dated 23 July 2003 is for putty for Zimbabwe \$432 543-00. My comment on these exhibits produced by the first defendant is that they prove facts largely not in dispute. It is not an issue that Stand No 9781 Kuwadzana Phase 3 (hereinafter the property or house) was purchased by the first defendant using mortgage finance and that it is in the joint names of the first defendant and his wife. Just like the exhibits produced by the plaintiff in relation to the building materials, the receipts produced by the first defendant are not proof that he purchased the building material for the construction of a 10 roomed house. The building materials quoted in the receipts is of little quantity and for those where amounts are stated amount to a paltry Zimbabwean \$1 091 661-00 hardly sufficient to construct such a house.

#### The Evidence

The plaintiff Loveness Kudzanga gave evidence firstly on the alleged donation and secondly on the improvements she did on the property or house.

The plaintiff told this court that after lobola had been paid for her by her husband Dickson Kudzanga the marriage was solemnised on 18 December 1999 at the Anglican Church and the wedding ceremony later that day at Rutendo Hall in Harare. She said during the time for guests to give the donations the first defendant stood up hand in hand with his wife and pronounced to the present guests they were donating to plaintiff and her husband the newly weds, the property or house in Kuwadzana Phase 3 which was just a core house composing 1 room and toilet/bathroom. The plaintiff said it is the first defendant who made the pronouncement and that his wife by conduct endorsed the gesture as she congratulated the plaintiff and her husband referring to the donation. The plaintiff said it was in January 2000 that she and her husband moved in the house and later left for United Kingdom in 2002 with her husband following later that year. They were in United Kingdom for five years and returned in Zimbabwe in 2007. It was while in United Kingdom (UK) that she said they developed the house into a 10 roomed house. I shall deal with her evidence in that regard later.

The plaintiff did not fare very well as a witness under cross examination in respect to the donation and her conduct thereafter. She was unable to explain why she had instituted these proceedings against the first defendant only excluding first defendant's wife when the two made this donation jointly and also jointly own the property. Her reasoning was that the first defendant's wife was willing to pass transfer but the first defendant is the one who refused.

The plaintiff was at pains to explain why it took her 11 years institute proceedings to compel or force transfer of the house. She said initially she would ask her husband to advise his parents but nothing happened. The plaintiff said she trusted that her in laws, that is, first defendant and his wife would act in good faith as first defendant's wife assured her between 2003 and 2004. The plaintiff said what jolted her into action in 2011 was when some people came to view this house saying it was for sale. This prompted her to approach the first defendant who confirmed selling the house saying it was his property and flatly refused to effect transfer. The plaintiff then responded by issuing summons out by this court.

The plaintiff in her evidence insisted that the donation was verbal and never reduced to writing. She said the book in which all the donations and gifts made were recorded cannot be found. She also said that the video recorded during the proceedings at the wedding ceremony which could confirm the donation cannot be found. She said that other donating the property the first defendant and his wife also gave a gift of Zimbabwe \$1 000-00.

The evidence of Erica Maposa, plaintiff's aunt and Getrude Mukuto plaintiff's friend was to the effect that during the award of gifts at this wedding ceremony at which both were present the first defendant and his wife donated the property. Erica Maphosa said that it is the first defendant who made the donation with his wife standing by his side. She said the first defendant and his wife had also paid as a gift Zimbabwean \$10 000-00 not \$1 000-00. Erica Maposa said she only learnt later that first defendant was now unwilling to transfer the house to the plaintiff and her husband's names.. She said she confronted the first defendant who told her in uncertain terms that this property was his.

Getrude Mukuto told the court that the donation by the first defendant was verbal. She had no further evidence to give in this regard.

The first defendant Godfrey Kudzanga told the court that he never donated the house jointly owned by him and his wife to the plaintiff and her husband. He resides at No. 22 Mukarati Road in Mufakose in Harare in a house he inherited from his late mother.

The first defendant told the court that he had been on the housing list for a long time and is employed. He said he was then offered the house in issue by Zimbabwe Building Society as per exhibit 5 and that he jointly owned Stand No. 9781 Kuwadzana Phase 3 Harare with his wife. He produced exhibit 6 an agreement which include his wife as a joint owner of the property. The first defendant said he secured mortgage finance which he repaid in monthly instalments deductions from his salary. He was employed by Dairiboard Zimbabwe

as a mechanic. Exhibit 7 is proof of such payments. He disputes that plaintiff paid for the property's initial purchase price or any such price.

In relation to the wedding ceremony the first defendant said both plaintiff and his son Dickson were not employed hence he sponsored fully the costs of the wedding including buying some food, meat and paying lobola for Dickson. At the ceremony he said he and his wife donated as a wedding gift Zimbabwean \$10 000-00 cash which by then was a significant amount of money. He categorically denied donating this property or house. He said he acquired the property being a core house in 1998 and his two sons Dickson and Dennis were staying there as water and electricity had been connected. The first defendant said it was only a week after the wedding ceremony that he offered his son Dickson and his new wife the plaintiff the house to stay not that the property was now their own.

It is surprising that the first defendant was not cross examined on the issue of the donation by the counsel for the plaintiff. His evidence in that regard remained largely unchallenged. He was not cross examined on alleged refusal to pass transfer to the plaintiff and her husband. The first defendant's counter claim for eviction and holding over damages was not put in issue. Most significantly his evidence that he jointly owns the property with his wife was not challenged.

Misheck Paradzai Mufambirwe a 72 year old friend of the first defendant since the early 1970s, a neighbour in Mufakose and a fellow Anglican CPCA church member corroborated the first defendant that no donation of the property was made during the wedding ceremony. He said he attended the wedding and was responsible for playing music. No useful questions were put to him.

Agnes Kudzanga is the first defendant's wife and they have 5 children who are Dickson, Mary, Amos, Macylen and Memory in that order. All are now married. Mary is in the United Kingdom. Memory and Macylen in Darwendale. Dickson the plaintiff's husband and Dennis are in Harare. Her evidence was that at the wedding ceremony she and her husband donated Zimbabwean \$10 000-00 and not the house. She told the court that she jointly owns the property with her husband the first defendant. She denied over agreeing to transfer the property into the names of the plaintiff and her husband. She said she had no reason to do so as no such donation was made and the plaintiff and her husband while in the United Kingdom had bought their own stand in Harare. Again no useful question in this regard was put to her.

Dickson Kudzanga is the plaintiff's estranged husband who said he left the matrimonial home in 2011 after plaintiff obtained a protection order against him barring him from visiting the matrimonial home which is the property in issue. He told this court that at the wedding ceremony his father the first defendant and his mother donated Zimbabwean \$10 000-00 only and not the house. He denied ever asking his parents to transfer the property into his name or that of the plaintiff. He also denied authorising the plaintiff to institute the proceedings on his behalf saying summons were issued out when he was in fact in South Africa. Dickson Kudzanga said plaintiff was untruthful about the donation of the property and challenged her to produce the DVD recorded at the wedding which he said is in the plaintiff's possession. He said all what his parents did after the wedding were to offer him and his wife the plaintiff a place to stay in January 2000 at this house hoping that with time they would find their own accommodation. That is why he said while in United Kingdom he and the plaintiff purchased a stand in Harare which is in their joint names although they failed to develop it.

The question this court has to answer is whether on the evidence outlined it has been proved on a balance of probabilities that a donation of the said property was made by the first defendant to the plaintiff and her husband.

Let me turn to the law as regards donations. The renowned author R.H. Christie 1983 Ed at p 48 in his book *Law of Contract in South Africa* describes a donation at law as a contract where the essential elements of a contract of offer and acceptance are to be present if there is to be a valid contract.

Almer's *Precedents of Pleadings* by L.T.C Harms with the assistance of J.H. Hugo 3<sup>rd</sup> Ed at p 118 defines a donation as follows;

"A true donation is an agreement whereby the donor, motivated by pure liberality undertakes to give a donee a gift without receiving or having received or expecting to receive any advantage in return for it."

See also *Kay v Kay* 1964 4 SA 257 A.

In the case of *Malaba v Malaba* HB – 14 – 05 NDOU J defines "a donation or schenking as a contract whereby one person; who is not under obligation to do so, but out of sheer liberality or generosity, promises to give another person something without receiving anything in return. The motive should be disinterested benevolence and for moral purposes."

It is trite that a donation cannot be presumed. See *Jolly v Shannon & Anor* 1998 (1) ZLR 78 at 89E (H). The onus is on the party alleging a donation to prove that a donation was made. See also *Dube NO & Anor v Logan & Ors* HH117/2002.

The common law position as regards donation has to some extent been altered by the General Law Amendment Act [*Cap 8:07*]. See *Taylor v Taylor* S -70-07. In general a donation *inter vivos* can be made verbally. Section 10 of this General Law Amendment Act [*Cap 8:07*] provides as follows;

“10 Amendment of Law in respect of formalities relating to donations.  
No contract of donation shall be invalid solely by reason of the fact that it was not registered or notarially executed.”

I am not satisfied on the evidence led that the plaintiff has discharged the onus bestowed upon her. It is only her word against not only that of the first defendant but also against one of the presumed beneficiaries of the donation her husband. It, therefore becomes difficult to appreciate the nature of such a donation. Even assuming as the plaintiff alleges that the donation for the immovable property was orally made, there is no sufficient evidence to support this position. The objective facts of this matter militates against a finding in plaintiff's favour. Let me address these facts.

The evidence in this case is that the rights and interests in this property are not only vested in the first defendant but also his wife. The property is jointly owned. The plaintiff has instituted proceedings against the first defendant only. It cannot be an issue that it is not competent for the first defendant to have donated a property he jointly owns with his wife without the wife's consent. The fact that the plaintiff and her witnesses belatedly in their evidence sought to allege that the first defendant's wife consented to this donation on account by her presence at the time the first defendant made the donation is unattainable. The first defendant's wife Agnes Kudzanga's interest in the said property or house is a real right. If indeed she did not make a donation there is no basis to interfere with her right in this property. If she had made such a donation the plaintiff would have joined her in these proceedings. The relief the plaintiff seeks is therefore incompetent as the first defendant could not have competently donated what is not his neither can he be obliged to transfer his wife's interest and rights in this property without the wife's consent.

The plaintiff conceded that she only instituted these proceedings after she learnt that the first defendant wanted to sell the property. In her evidence the plaintiff was unconvincing as to why from 2000 upto 2011 a period of 11 years she had not sought to enforce her rights

moreso after investing heavily in the property as she alleges. While this defence of prescription as provided in Prescription Act [*Cap 8:11*] may be available to the first defendant I am unwilling to make a finding in this regard. The plaintiff explained that she consistently between 2003 to 2011 asked the first defendant to transfer the property in her name and that of her husband. If this is true it means that the running of the prescription was interrupted at various stages until in 2011 when the plaintiff said the first defendant for the first time denied liability. What is unconvincing about the plaintiff's evidence is that she did not take action for such a long period of time until she had been threatened with eviction and learnt that the house was for sale.

The other legal hurdle the plaintiff is unable to overcome is that she purports to have instituted these proceedings on behalf of her husband Dickson Kudzanga and prays for an order in his favour. Needless to say Dickson Kudzanga's disassociates himself from these proceedings and denies that the property was donated to him. The order sought by the plaintiff in respect of Dickson Kudzanga is clearly incompetent.

It is therefore my finding that the plaintiff has not discharged the onus upon her to show that a donation was made as alleged. I am inclined to accept the version by the first defendant, his wife, Dickson Kudzanga and one Mutambirwa that no such donation was made. The plaintiff's evidence and that of her two witnesses was uninspiring in this regard.

The plaintiff probably realising that her main claim was premised on shaky ground belatedly made the alternative claim that she should be paid for her contribution towards the construction of the house. Again the alternative claim faces insurmountable legal problems. To start with the plaintiff was unable to give the court any figure as to how much in total she allegedly contributed to the construction of the house.

In a bid to prove her contribution the plaintiff relied firstly on exhibit 1(a) to (c) dated 2000. I am not satisfied that plaintiff would incur expenses to connect electricity in 2000 when the first defendant makes it clear that electricity to the house was connected well before plaintiff and her husband took occupation of the house.

The plaintiff also relied on exhibit 2.1 to 2.4 as proof that she sent money while in the United Kingdom for the development of the house or property. In her evidence the plaintiff did concede that she did not send any money directly to the first defendant, the very person whom she said was responsible for buying building materials and construction of the house. Infact exhibit 2.1 shows that it is plaintiff's husband who sent the money to his young brother Dennis Kudzanga. Exhibits 2.2 to 2.4 takes the plaintiff's cause no further. The actual bank

invoices from Nat Bank did not show who the beneficiaries were and to whom that account belonged. The deposit slips on their own are of no evidential value. The plaintiff seeks to rely on the handwritten instructions in her own hand which she attached to the actual bank invoices. The nexus between the actual bank invoices and the attached handwritten instructions is difficult to fathom. It can well be true that such handwritten instructions could have been written with an ulterior motive. Again no probative value can be placed on them. The photographs exhibit 3.1 to 3.3 are irrelevant to prove plaintiff's contribution. As already said exhibit 4.1 to 4.3 cannot by any stretch of imagination be deemed to be proof of materials which were used to construct the 10 roomed house. There is therefore no evidence placed before this court to support plaintiff's claim that she she sent money to the first defendant while she was in United Kingdom and that even if she did that such money was only for purposes of constructing the house. The plaintiff admitted that she and her husband did send money for the upkeep of their child left in the first defendant's custody for five years. She also said she sent money to purchase a residential stand in Whitecliff. In fact the plaintiff's husband Dickson said they had insufficient funds to develop their own stand in Whitecliff as they bought trucks. The plaintiff herself who worked as a Care Giver and her husband Dickson Kudzanga as a park attendant explained that while in United Kingdom between 2002 to 2007 they bought 2 heavy motor vehicles, a trailer, a motor vehicle for the in-laws, a motor vehicle for each one of them and a stand in Whitecliff.

In her evidence the plaintiff conceded that she is unable to place before the court evidence justifying her claim for a 60% share of the value of this property. No such evidence was placed before this court. It would seem that the 60% share claimed is a figure just plucked from the air. The plaintiff did not even seek to have the valuation of the 10 roomed house done before giving evidence. She did not produce any bills of quantity and the receipts she produced are meaningless. The plaintiff has again dismally failed to prove the alternative claim.

I now turn to the first defendant's counter claim seeking the eviction of the plaintiff and all those claiming underneath her from the property and holding over damages from the date of filing or counter claim.

As already stated the property in issue is jointly owned by the first defendant and his wife. See exhibit 6. In the absence of a donation it means that the plaintiff and her husband Dickson Kudzanga have been staying at this property at the benevolence of the first defendant and his wife. It has not been disputed that the relationship between the plaintiff

and the first defendant became strained as way back as 2011. In fact the plaintiff and those claiming occupation of the property were given the eviction notice to vacate the property which then expired on 30 September 2011. The plaintiff has not in any way challenged the first defendant counter claim. While the property in issue is jointly owned it is trite law that the first defendant being a joint owner has vindicatory rights against all third parties. The first defendant therefore can competently seek the eviction of the plaintiff.

I am however, not satisfied that the first defendant has proved the holding over damages claimed. The onus to prove this amount rest with the first defendant. In his pleadings the first defendant simply stated that as from September 2011 he is claiming holding over damages of US\$700-00 per month calculated at \$70-00 per room which the first defendant alleges is the fair monthly rentals for similar properties in that area. Other than that bold assertion no such evidence was placed before this court. While it is agreed that the property consist of a ten roomed house, it has not been proved that the said rooms are of the same size and would attract similar rentals. The first defendant had not placed any evidence before this court to show the rentals charged for similar property. This was crucial for the first defendant's case moreso as the plaintiff is not a tenant paying monthly rentals. In my view the first defendant has just plucked a figure from the air and claiming it to be a fair and just amount. The first defendant's counter claim in respect of holding over damages cannot succeed.

In view of the findings I have made in regard to each party's claim it is only fair and just that each party meets its own costs in this matter. While I am cognisant of the plaintiff's failure to vacate the property within the period she was asked to do so I believe I should at least grant her a period of 30 days to enable her and the children to find alternative accommodation.

In the result I make the following order

1. The plaintiff's main claim be and is hereby dismissed.
2. The plaintiff's alternative claim be and is hereby dismissed.
3. The first defendant's counter claim in respect of holding over damages be and is hereby dismissed.
4. The plaintiff and all those claiming occupation of Stand No 9781 Kuwadzana Phase 3, Harare through her be and are hereby directed to vacate the said property within thirty (30) days of the grant of this order failing which the Sheriff should eject them.

5. Each party shall bear its own costs.

*V. Nyemba & Associates*, plaintiff's legal practitioners  
*Mapondera & Company*, 1<sup>st</sup> defendant's legal practitioners