

JENEPHER MURAHWA
versus
NGONI BHAMU

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 12 October 2015, 8 July 2016, 9 July 2016, 3 October 2016 & 14 June 2017

Civil Trial

B Nyamwanza, for the applicant
R Madembo, for the respondent

NDEWERE J: The plaintiff and the defendant lived together as husband and wife in an unregistered customary union and bore two children, Prince Munyaradzi Bhamu on 2 February, 1997 and Privilege Tinotenda Bhamu on 3 January, 2002. The parties later separated. The plaintiff issued summons claiming a share of the movable property and immovable property acquired during the union, on the basis of universal partnership.

During pre-trial, the parties agreed on the distribution of the movable property and agreed that the defendant would retain the Chihota Communal Home as his own. The only issue they referred to trial was whether Stand 6536 Westlea, Harare, was developed during the subsistence of the union and whether the plaintiff is entitled to a 50% share of the stand.

The common cause factors were that the parties met in 1996 and started living together as a couple. They were both not formally employed, but were traders. They lived in Warren Park D while they had a rural home in Chihota. On 12 February, 1997 the couple had their first child, Prince Munyaradzi. Some payment was made to the plaintiff's family. Stand 6536 was acquired in November, 1998 and registered in the defendant's name. The parties continued living together as a couple after the stand was acquired. In 2002, the couple had their second child and according to the child's birth certificate, they both lived at Stand 6536, Westlea when the birth certificate was obtained on 11 April, 2003.

The factors which were in dispute during the trial was whether the bride price was paid as opposed to just damages and the date of such payment; as well as the date of separation of the parties. The other factor in dispute was whether the plaintiff contributed directly to the purchase of the stand and the developments and when the main house was completed and whether the plaintiff ever lived at stand 6536, Westlea.

The plaintiff's evidence was that she met the defendant in March, 1996, and that same year, the defendant's elder brother whom she referred to as "baba vaPeter", went and paid the bride price as well as "Masungiro" after which she went and delivered her first child at her own home according to custom, in February, 1997. She denied that any damages were ever paid for her. She said after delivery of the child, she rejoined her husband and they continued their life together. She said they continued to live together till 2013 when they separated.

She said they acquired stand 6536 Westlea on 10 November, 1998 and she produced the Memorandum of Agreement between the City of Harare and defendant as exhibit 1. She said they were pulling resources together through market gardening at their home in Chihota. The defendant would bring their produce to Mbare Musika for sale. Then in 1997, they built a three roomed structure in Chihota which she said the defendant could keep since it was not possible for her to continue going to the defendant's rural home when she was no longer his customary wife. Her evidence was that in November 1998 they then bought the stand in Westlea, constructed a cottage and in early, 1999, they started living on the stand. While based on the stand, they began to build the main house and by 2003 the main house was habitable although it still required finishing touches and they moved into the main house.

On sources of income, she said in addition to market gardening, they did a poultry project. She also said she was a professional dressmaker and she used to make tie and dye outfits which she took to Tete and Katandika provinces in Mozambique to sell. She said the defendant used to sell buttons to factories in addition to the farming projects. She said they never applied for an extension of time to build stand 6536 because they complied with the agreement, in particular Clause 7 which had stated that a minimum of four rooms and ablution facilities should be completed within 3 months and 18 months respectively, from the date of signing the agreement. She said the defendant had a Shelf Company whose name he used as his trading name.

During cross-examination, she was asked details about the interior of the house and she was able to tell the court the description of the interior of the main house at the time she left the property after the separation. After her evidence, the plaintiff closed her case.

The defendant's testimony was that they met in 1996 and that they started cohabiting. In 1997 they had their first child and in 1998 he went and paid damages only to the plaintiff's family. He denied paying the bride price. He said he acquired stand 6536 in November 1998 on his own, the plaintiff never contributed anything. He said they separated in 2001 before the stand developments were done, therefore the plaintiff was never involved in developments and never contributed. He said she never built the Chihota home, it was his first wife who did so. He said he has been paying maintenance for his children to the defendant since 2001. The defendant said his source of income for the stand was his company; but he had no cash flow documents showing the income and expenditure of the company. He said the company was no longer operational and he was surviving on farming and rental income. As far as he was concerned, the plaintiff was not entitled to any share of stand 6536 Westlea. The defendant produced the main house plan as exhibit 5 as proof of when construction of the house started and ended. He, however, did not call anyone from the Harare City Planning Department to explain the endorsements on the plan and what they meant. Neither did he call any other expert witness on plans.

The defendant then called one Tendai Magombera as his second witness. She said she was the defendant's wife and she had a substantial interest in stand 6536 Westlea because she had developed the stand together with the defendant through their company Bhameck Trading where she was a co-director. When questioned further about the company, she said she was a director for just a year, between 2003 and 2004. She also said when she became a director, the defendant stepped down as a director. This meant that the two were actually never co-directors because from the testimony, they were directors at different stages.

She admitted that stand 6536 Westlea had already been acquired when she became the defendant's customary wife. She admitted that there was already a four roomed cottage on the property, and it is still there now. She said she did not know the plaintiff, she was seeing her for the first time in court, but she knew her children since they used to come to their house during the school holidays.

She said their company sold sewing materials, threads, zips, buttons, lace, elastic and other sewing accessories. She also had no documentation to prove that the company made any money. She could not give the cost of building, she said she never put the cost in mind. She said the company stopped operations in 2006. She said construction of the main house started in 2003 and was completed in 2007.

The defendant called his younger brother, Washington Bhamu. He simply repeated the defendant's evidence. He also did not live with the couple during the relevant period.

From all the evidence narrated above, the court is of the view that the plaintiff managed, on a balance of probabilities, to prove that there was a customary union as opposed to mere cohabitation between her and the defendant from 1996. The plaintiff gave her evidence well on this point and said no damages were ever charged for her.

The defendant's admission to have made some customary payment to the plaintiff's parents corroborates her evidence that she was in a valid customary union. The defendant's admission that they lived as a couple since 1996 and she cooked and looked after him and his children from that date is further confirmation of the existence of a customary union.

The plaintiff also proved that a tacit universal partnership existed during this period in that in addition to doing the housewife's chores, she also jointly with her customary husband, did some market gardening and her husband would sell the produce at Mbare and they would then agree on how to utilize the funds. Her testimony rang very well and had a ring of truth in it. So their first project from this partnership of farming and selling was the 3 roomed house in Chihota which she has said her husband could keep as his own. Her evidence was that they built the Chihota structure in 1997. Corroboration of her evidence is the fact that on 10 November, 1998, the defendant swore to an affidavit that he had been "separated" from his first wife Shupikai who had already married someone else for a year and three months. This would mean that the defendant's first wife was no longer in the picture in 1997 when the plaintiff says that is when they constructed the three roomed structure at Chihota. So that three roomed house could not have been built by the first wife who had already married someone else. Therefore the defendant's own affidavit of 10 November, 1998 when he was applying for a stand corroborates the plaintiff's evidence that in 1997 they, jointly with the defendant, constructed a rural house in Chihota.

After that, the couple pooled resources together from their ventures of market gardening, and trading and bought the disputed stand on 10 November, 1998. They worked hard and complied with the City's deadlines and they never applied for an extension. They put a cottage and moved on to the stand.

The defendant's own evidence confirmed that construction was done within the time periods given and they never applied for an extension. All the defendant's witnesses confirmed that there is a four roomed cottage at the stand which is still in use. This corroborates the plaintiff's evidence that they jointly constructed a four roomed cottage and moved from their rented accommodation to stand 6536 Westlea in 1999.

While on the stand now, construction of the main house started. The parties continued to pool their resources together with the plaintiff now involved in cross border trading in Tete and Katandika Provinces in Mozambique as well as the sewing and selling of uniforms in Mutare. In 2002, their second child was born, which is confirmation that their customary union was alive and well. In April, 2003, they obtained their child's birth certificate and the address given on the birth certificate shows that the child's parents were living together at the disputed stand. In fact, the plaintiff's evidence was that they actually went to the Registrar's office together to obtain the birth certificate, coming from their home at stand 6536, Westlea.

The defendant's testimony that they separated in 2001 is therefore rejected in its entirety. How could they have had a child in 2002 if they had already dissolved their union? How could they have jointly registered that child in April 2003 in Harare and given the mother's address as 6536 Westlea if the union had already been dissolved?

Exhibit 4 was produced as an exhibit. It shows deposits of \$100-00 in 2010, \$100-00 in 2011, \$80-00 in 2012 and \$100-00 in 2012 by the defendant in favour of the plaintiff. Exhibit 6 showing deposits of \$100-00 in July 2012 , \$90-00 in October 2012 and \$200-00 in January 2013 was also produced. The plaintiff's evidence was that because of the nature of her trading business, she was away from home on many occasions and her debtors would get to the house to pay her for her wares and the arrangement was that the defendant would then deposit the money into her bank account to enable her to buy raw materials from Mutare rather than wait to give her the money when she got home. So her testimony was that those deposits were her money received by the defendant on her behalf while she was away on business. Her explanation is

highly probable and the court accepts it. That is further proof of her business prowess in the partnership. The fact that the defendant was collecting the money on her behalf and depositing it into her account is further proof of the partnership. It is also proof that their union was alive and well during the period of those deposits. Why would the defendant have done those deposits up to 2013 if the union had been terminated in 2001?

His claim that he was depositing those amounts as maintenance is highly improbable and the court rejects it for the following reasons; (a) there was no maintenance order obtained and up to now there is no maintenance order operating against him. b) If it was maintenance since 2001, the deposits would have started in 2001, not in 2010. c) If it was maintenance, deposits would have continued after 2013, up to the present day.

So the court's view is that these deposits confirm the plaintiff's source of income during their union and her capacity to contribute to the construction of the house. They also confirm that up to 2013, the couple's union was alive and well and not dissolved as alleged by the defendant.

The plaintiff's evidence was that by 2003 the main house was habitable although it still required finishing touches and they moved in. The court accepts her evidence on this point because indeed, from the evidence of cases which come before the courts involving construction of properties, many low income people do finishing touches to their houses when they are already living in them.

The defendant sought to contradict the date of completion of the house by producing the plan of the main house as exhibit 5. He however omitted to call House plan experts from the City of Harare to testify to the endorsements on the plan and their meaning in relation to the construction and completion of the house. The plan produced does not therefore assist his case further because of the absence of tested viva voce evidence about it.

The defendant's evidence on his source of income to buy and develop stand 6536 Westlea on his own as he alleged was that he got the funds from his company. He however did not produce any proof that the company made any funds. It is trite that courts operate on evidence and if a party asserts that he got income from a company, that party must provide proof. A bare assertion is not enough. Yet that is all we have from the defendant in this instance.

His second witness did not assist his case any further. She confirmed that when she began her relationship with the defendant Stand 6536 was already there, with a perimeter wall and a

four roomed cottage. So obviously she could not give the source of income for the purchase of the Stand, erecting of perimeter wall and construction of the four roomed cottage, given that it is common cause that the defendant was not formally employed. This leaves us with just the plaintiff's evidence that the source of funds was her joint income with the defendant from farming and trading.

The defendant's second witness, despite being a director, did not have any documents, to prove any income from the company which could have constructed the main house. She further clarified that she was a director for just a year, and when she became a director the defendant had already stepped down. Yet we know that the main house was not constructed within a year. So obviously, the company was not the source of funding even for the main house. This gives credence to the plaintiff's evidence that the company was just a shelf company used by the defendant who operated as a sole proprietor, while she traded her own wares as well. So this leaves the joint farming and trading efforts of the plaintiff and defendant as the source of funding even for the main house construction.

The defendant's evidence that the plaintiff never set her feet at Stand 6536 Westlea and never contributed is highly improbable when regard is had to her evidence even about the interior of the house and the materials which had already been purchased when she left. How could she know all that if she had never set her feet there? His explanation that someone must have told her or she observed from outside the yard is dismissed with the contempt it deserves.

The plaintiff, however, attempted to smuggle in a claim for maintenance for the minor child in her closing submissions. That is not permissible. The plaintiff is bound by her claim in the summons. The plaintiff is free to approach the maintenance court for maintenance.

As regards the law in such cases, the court accepts the principles enunciated in the submissions by the plaintiff. The requirements of a tacit partnership are as outlined in *Ntini v Defienet Masuku* HB 69/03. In my view, the facts of the current case are in line with the principles set out in that case that each of the parties must bring something into the partnership, and the business carried out must be for the joint benefit of the parties and that the objective must be to make profit and the partnership should be lawful.

In *Murehwa v Murehwa* HC 286/08 a partner who contributed through supervising and cooking for the builders was awarded 60%. In the current case, the plaintiff was a housewife,

looking after the husband and children. In addition, she brought in some income for the acquisition and development of the stand and she also cooked for the builders. Her claim of a 50% share of the stand is therefore a modest claim.

In *Mavate v James Chibande* HH 43/12, a 50% share was awarded to the partner.

This shows that the plaintiff's claim is in line with previously decided cases.

Accordingly, it is ordered as follows:

1. That a tacit universal partnership be and is hereby declared to have existed between the plaintiff and the defendant during the subsistence of their customary union.
2. That the union terminated when the parties parted ways in 2013.
3. That the plaintiff be and is hereby awarded a 50% share in stand 6536 Westlea, Harare and all its improvements.
4. That the parties should immediately agree on a professional evaluator to enable the plaintiff to realise her 50% share. Failing such agreement within seven days of the date of this order, the High Court Registrar shall appoint an evaluator from the list of professional evaluators utilised by the High Court to do such valuations.
5. Each party shall bare 50% of the cost of valuation.
6. Either party has the option to buy out the other party. The parties to come up with written agreement of such buy out within a week after valuation of the property.
7. Failing agreement to buy out the other, stand 6536 Westlea shall be put on the market for sale within three weeks from the date of this order.
8. After the sale, defendant shall sign all necessary documents to enable the disposal, cession or transfer of stand 6536 Westlea to the purchaser within a reasonable time.
9. If the defendant fails to sign the documents within a reasonable period, the Sheriff of the High Court or his authorised representative shall sign the cession or transfer documents.
10. The defendant shall bear the costs of suit.