

DISTRIBUTABLE (42)

Judgment No. SC 53/09  
Civil Appeal No. 23/09

MARBLE TIMBE v NGONIDZASHE FAMILY TRUST

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA  
HARARE, SEPTEMBER 7, 2009

*H Mucheche*, for the appellant

*O Matizanadzo*, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which upheld the decision of the magistrate's court ordering the appellant's eviction from the premises at 104 Airport Road, Hatfield, Harare. After hearing the appellant's counsel, we dismissed the appeal with costs, and indicated that the reasons for that decision would be given in due course. I now set them out.

The background facts in this appeal may be tabulated conveniently as follows –

1. On January 21, 1963 Stanlake Gahadzikwa Timbe (“the deceased”) married Grace Marara (“Grace”) in terms of the Marriage Act [*Cap 5:11*].

2. Thereafter, in 1983 the deceased and the appellant contracted an unregistered customary law union, during the subsistence of the deceased's marriage to Grace. About two years later, on November 8, 1985, the customary law union was purportedly registered as a customary marriage in terms of the then African Marriages Act [*Cap 238*], now the Customary Marriages Act [*Cap 5:07*]. It was common cause that this marriage was a nullity.
3. During the period of her cohabitation with the deceased, the appellant gave birth to two children. The deceased considered the children to be his, and his name was entered in the Register of Births as the name of the father of both children.
4. In 2001 the deceased had an altercation with the appellant's sister, as a result of which he shot and killed her. He was subsequently charged with murder, and during his trial he raised the defence of provocation. He alleged that the appellant's sister had humiliated him by taunting him about his manhood in front of the children. As a result of that allegation, on October 30, 2002 the trial Judge ordered that the deceased be examined by a medical doctor in order to ascertain the truthfulness or otherwise of the allegation that he did not have sexual organs. The medical examination, which was conducted on January 9, 2003, revealed certain unusual features about the deceased's sexual organs. However, the doctor did not express any opinion on the deceased's ability to have children. At

the end of the trial, and on the basis of the results of the medical examination, the deceased was found guilty of culpable homicide.

5. On February 18, 2004 the deceased died in a road traffic accident. He left a house at 104 Airport Road, Hatfield, Harare (“the property”), where he had lived with the appellant and the two children before his death. Unfortunately he did not leave any will.
6. In February 2005 Davison Shoniwa was appointed the Executor Dative of the deceased’s estate (“the executor”) and Letters of Administration were issued to him by the Master of the High Court (“the Master”).
7. On March 2, 2005 the appellant filed a court application in the High Court (case no. HC 1049/05) against the executor, the Master and the Registrar of Deeds, seeking an order: (a) that she be granted the property on the basis of a universal partnership that had existed between her and the deceased before he died; and (b) that the executor and the Master be interdicted from evicting her from the property, selling the property or claiming from her the original title deeds of the property. The court application was dismissed with no order as to costs on September 22, 2005.
8. On March 17, 2005 the Registrar-General of Births and Deaths (“the Registrar-General”) cancelled the birth certificates of the appellant’s two children on the ground that the information given to him that the deceased

was the children's father was false. In drawing that conclusion, the Registrar-General relied upon the contents of the medical report compiled by the doctor who examined the deceased during the murder trial, and upon what the deceased's relatives told him.

9. On November 10, 2005 the Master authorised the executor to sell the property otherwise than by public auction.
10. On November 23, 2005 the appellant filed an urgent Chamber application in the High Court (case no. HC 6127/05) against the executor and the Master, seeking an interdict restraining the respondents from liquidating and distributing the assets in the deceased's estate until an application to be filed by her in the High Court regarding the status of her two children and the status of the other woman, Grace, was determined by the High Court. The Chamber application was dismissed with costs on the ground that it was not urgent. An appeal was noted against that decision on December 8, 2005, but the record before us does not indicate what happened to that appeal.
11. On May 29, 2006 the appellant filed a court application in the High Court, in her capacity as the guardian of her two minor children, against the Registrar-General (case no. HC 3055/06), seeking an order nullifying the cancellation of her children's birth certificates.

12. On November 16, 2006, after the property had been advertised for sale and the executor had received a number of bids, including one from the appellant, the executor sold the property to the highest bidder, i.e. the respondent in this appeal (“the Family Trust”), for Z\$60 000 000.00. Thereafter, the property was transferred to and registered in the name of the Family Trust on January 31, 2007.
13. On February 2, 2007, after the appellant had refused to vacate the property, the Family Trust instituted a civil action in the magistrate's court against the appellant, seeking the eviction of the appellant, and all those claiming the right to occupy the property through her (case no. HC 1215/2007). The action was opposed by the appellant.
14. On May 30, 2007 the High Court dismissed the appellant’s court application in case no. HC 3055/2006 (i.e. the application for an order nullifying the cancellation of the birth certificates of the appellant’s children). However, an appeal to this Court against that decision was successful, and the cancellation of the birth certificates was declared null and void. See judgment no. SC-25-08.
15. Eventually, the civil action instituted by the Family Trust against the appellant in the magistrate's court came up for trial. After the trial, on July 18, 2008, the presiding magistrate granted the eviction order sought by the Family Trust. Aggrieved by that decision the appellant appealed to the High Court.

16. On February 11, 2009 the High Court dismissed the appellant's appeal. See judgment no. HH-10-2009. Dissatisfied with that result, the appellant appealed to this Court.

In her notice of appeal the appellant relied upon the following grounds of appeal:

- “1. The court *a quo* erred in holding that the appellant had no valid claim under the universal partnership and that the matter was *res judicata* when in fact the Supreme Court had held that the marriage between the appellant and the deceased was a putative one.
2. The court *a quo* erred in law in not realising that as the marriage had been held to be a putative one, the appellant would have a valid claim under the universal partnership.
3. The court *a quo* erred in holding that the rights of the minor children had not been irreparably prejudiced by the sale and transfer of the immovable property in the estate when in fact their rights had been prejudiced.”

Although three grounds of appeal are set out in the notice of appeal, there are in fact two grounds only, because the first and second grounds of appeal are based on the allegation that the appellant had a valid claim in terms of a universal partnership which had existed between the appellant and the deceased before the deceased died. I will, therefore, deal with the first two grounds of appeal together.

#### THE FIRST AND SECOND GROUNDS OF APPEAL

The main point I wish to make with regard to these grounds of appeal is that the allegation that the appellant had a valid claim, in terms of a universal partnership which allegedly existed between her and the deceased before the deceased died, was not

pleaded by the appellant in the civil action instituted by the Family Trust in the magistrate's court, i.e. case no. 1215/07.

Although in case no. HC 1049/05 the appellant sought the order that she be granted the property, on the basis of a universal partnership which she alleged had existed between her and the deceased before the deceased died, her pleadings in that case were not part of her pleadings in the magistrate's court case, i.e. case no. 1215/07.

Consequently, as the allegation was not pleaded by the appellant in the magistrate's court, it could not be relied upon in this appeal.

The same applies to the allegation that the marriage between the appellant and the deceased was a putative marriage. If the appellant had intended relying upon that allegation, she should have pleaded it when she prepared the plea which she subsequently filed in the magistrate's court. As she did not do so, she could not rely upon the allegation in this appeal.

The purpose of pleadings is to define the issues in the litigation, and to enable the other party to know what case he has to meet. That purpose would not be achieved if a party were permitted on appeal to introduce new facts or allegations without seeking and being granted leave to make an appropriate amendment to his pleadings. As it was put by MILNE J in *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A:

“The purpose of pleading is to clarify the issues between the parties, and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.”

See also *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) at 1082.

### THE THIRD GROUND OF APPEAL

The allegation in this ground of appeal is that the court *a quo* erred in holding that the rights of the minor children had not been irreparably prejudiced by the sale and transfer of the property when in fact their rights had been prejudiced.

In our view, this ground of appeal does not have any merit whatsoever. In the first place, the sale and transfer of the property were carried out lawfully by the executor with the Master’s consent.

Secondly, in an attempt to prevent the sale and transfer of the property, the appellant filed a number of applications in the High Court, all of which were dismissed.

And thirdly, the appellant’s children were not parties in the eviction action filed by the Family Trust in the magistrate’s court. They were not parties in the appeal heard by the learned Judge and another Judge in the court *a quo*, and they were not parties in the appeal before us.

If it had been the appellant's intention to have her children's interests considered in the eviction action, she should have made an application in the magistrate's court for her children's joinder as co-defendants, represented by her as their guardian. This she did not do. Accordingly, the interests of her children were not an issue in the magistrate's court, in the High Court and in this Court.

Consequently, whatever views were expressed by the learned Judge in the court *a quo* about the interests of the appellant's children were irrelevant in the determination of the appeal before him, and in the determination of the appeal before us.

In the circumstances, all the grounds of appeal relied upon by the appellant did not have any merit, and the appeal was, therefore, dismissed with costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

*Mutezo & Company*, appellant's legal practitioners

*O Matizanadzo & Associates*, respondent's legal practitioners