

MUFUDZI DENNIS CHIMUSARU
versus
FORTUNATE NDAGURWA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE; 1 October 2024 & 18 December 2024

Civil Trial

H Chitima, for the Plaintiff
T Pfigu, for the Defendant

MAXWELL J: The Plaintiff and Defendant were in an Unregistered Customary Law Union since the year 2005. Plaintiff paid the bride price to the Defendant's family. They lived together as husband and wife until sometime in May 2022. The union was blessed with two children of whom one is deceased. During the subsistence of their union, the parties acquired movable and immovable assets. The immovable asset being a certain piece of land called stand number 589 Lochinvar Township of stand 133 Lochinvar township measuring 1300 square meters was registered in the name of the Defendant.

The parties union was dissolved by mutual consent. On 7 February 2023 the Plaintiff issued out summons claiming an order for the sharing of property following the dissolution of the union. On the movable property, he proposed that he be awarded a motor vehicle and the Defendant be awarded the rest of the movable assets. He also proposed that the immovable property be shared equally between the parties.

Defendant entered notice of appearance to defend. In her plea she disputed that the immovable property was acquired through joint efforts. She stated that Plaintiff did not contribute towards the acquisition of the immovable property as it was acquired through a bank loan which she took in her personal capacity. She prayed for the dismissal of the Plaintiff's claim. In his replication Plaintiff insisted that the decision to acquire the immovable property was jointly made and that his efforts ensured the construction of the house. He acknowledges that the immovable property was acquired through a bank loan but it was his financial effort which ensured the development of the residential stand.

The parties exchanged pleadings and a Pre-trial Conference was well held at which two issues were referred to trial. The issues are

- 1) Whether or not the Plaintiff is entitled to claim benefits under a customary law union when he knowingly entered into a subsequent monogamous civil marriage.
- 2) Whether or not Plaintiff is entitled to a share of the immovable property, if so whether it would be fair to award the Plaintiff a 50% share of a certain piece of land called stand number 589 Lochinvar township of stand 133 Lochinvar township measuring 1300 square meters held under deed number 2892/2016.

Trial

Plaintiff was the first to testify. He stated that the parties customarily married in 2005. They started living together at his parents' house in Glen View. They subsequently moved to rented accommodation in 2007. They were both employed and pooled their resources together for their daily needs. They sired two children but one is deceased. They occupied rented accommodation until sometime in 2015 when at Stanbic Bank employees who had served for a long period were given an opportunity to get mortgage loans. Defendant qualified and as a family they agreed that she should apply for a residential stand rather than a developed property. They started construction and he obtained loans to help fund the construction. He got loans from Nedbank and from his sister. In 2017 they moved in with his sister. He also sold his vehicles to raise money for construction. On a monthly basis he would transfer money to a joint account from which the children's fees were paid. Plaintiff testified that he ran a business with his uncle called Walnut Incorporation and when it was closed, some of the money from it was used for the development of the immovable property. He indicated that he also catered for the Defendant's parents medical aid. In 2019 they moved to the property in question as it was habitable. The parties separated in 2022 after Defendant gave him a token of divorce. He moved out of the matrimonial home. He would rather have his 50 % share and is not interested in buying Defendant out.

Under cross examination Plaintiff stated that it was easier for the Defendant to get cash so he would transfer money to her and she would get cash needed for builders and other materials. He confirmed having sired children with another woman. He insisted that Defendant was aware of the presence of the other woman in his life to the extent that at one time the three of them stayed together. He stated that when he paid lobola for the Defendant the other woman was at his parents' house heavily pregnant.

She gave birth in March 2006. Defendant gave birth in 2007. Both children are boys who grew up together as they would alternate between Defendant and the other woman. That was the Plaintiff's evidence.

Esther Tariro Chimusaru was the next to testify. She is Plaintiff's sister. Her evidence was that she accommodated the parties between 2017 and 2019. She had been approached by the Plaintiff for assistance with accommodation so that the money towards rentals would be used for construction. The parties were staying for free but sharing with her payment of utility bills. They also used her car. She purchased tiles for them at an equivalent of USD 3000.00 after being promised that it would be reimbursed. It was paid back when her daughter was going for form 1.

Under cross examination she indicated that Defendant had not communicated her disgruntlement to her. She confirmed that their relatives were staying at the Lochinvar property from 2016 to 2020 taking care of it whilst construction was going on.

Tsanangurai Motsi testified next. He is a cousin to the Plaintiff and was engaged during the construction of the Lochivar house. He was engaged to do all metal work including welding, burglar bars, and car port. He was consulted on who he would recommend to build the house and he suggested a builder and plumber. Under cross-examination he indicated that he did not discuss with the Defendant anything to do with the construction of the house. That was the Plaintiff's case.

Only one witness testified in the Defendant's case, the Defendant herself. She testified that she met the Plaintiff in 2003 as they were working for the same company. Plaintiff paid lobola on 31 December 2005. At the time of marriage, she was staying in Mutare. In 2006 she moved to Harare to stay with the Plaintiff. She fell pregnant in October 2006 before the customary process was completed. She was aware of another woman with whom Plaintiff had a child who was born in March 2006. The woman was staying with Plaintiff's family. She is the one who ferried this woman to hospital when she went into labour. Plaintiff had indicated that the other woman was a mistake. She only learnt of Plaintiff's marriage to the other woman in August 2016. She confronted the Plaintiff who reprimanded her for listening to gossip. She investigated the issue and in 2017 someone sent her a picture of the marriage certificate between Plaintiff and the other woman. She confronted the Plaintiff again and he left home for some days. Their son had an accident and later died. She took time grieving. In 2017 she

requested a cousin sister to talk to the Plaintiff. He admitted that he was married but promised to divorce.

She found out that a third child was born to Plaintiff by the other woman in July 2020. She gave up on the marriage and implored her family to accept her decision. In August 2021 she gave Plaintiff's sister \$ 10 as a divorce token and asked that Plaintiff should leave. He refused and she ended up taking her son to stay with her sister for about two months.

During the subsistence of the marriage she obtained a mortgage and purchased a property in Lochinvar. There was a small cottage and they decided to extend it before moving in. The Plaintiff did not contribute much towards construction as he was busy with other projects. She felt it unjust for him to be awarded a 50% share in the property.

Under cross – examination she stated that staying at Plaintiff's sister's place was not beneficial as the bills they had to pay were high. She admitted that Plaintiff's sister paid for tiles but disputed that the amount was equivalent to USD 3000.00. In her view, at most it could be \$1000,00 She indicated that she was a supportive wife to Plaintiff's business ventures and was a signatory to a bank account opened by the Plaintiff at Stanbic Bank. She admitted that the parties earning capacities would fluctuate. She stated that she had accepted that the Plaintiff had children with another woman but did not accept that he had a second wife. That was the Defendant's case.

Section 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] regulates the division apportionment and distribution of the assets of the spouses when they go their separate ways. In *Chapeyama v Matende & Anor* 1999 (1) ZLR 534 the application of the Matrimonial Causes Act [*Chapter 5:13*] in the determining of proprietary rights of spouses in an Unregistered Customary Law Union was supported. This was in recognition of the value of the contributions, both tangible and intangible, a spouse in an Unregistered Customary Law Union would have made during the subsistence of the marriage. Most case law focuses on circumstances where the wife only makes indirect contributions. In *casu* the wife made substantial contributions to the extent that the property in issue is registered in her name.

In *Marriage v Chiroodza* 2002 (2) ZLR 171 MAKARAU J (as she then was) alluded to the case for a Tacit Universal Partnership in the following words:

“The argument in support of the view that an Unregistered Customary Law Union establishes a Tacit Universal Partnership are similar to the arguments advanced by jurists who favour holding that there is a universal community of property between married persons.

Marriage itself is a union for life in common household. The common estate may be built by the industry of the husband and the thrift of the wife, but it belongs to them jointly as the one could not have succeeded without the other. As Van der HEEVER J put it in *Edelstein v Edelstein* NO. & ORS, the husband could not have successfully conducted his trade if his wife had not cooked the dinner and minded the children. It is on this basis that I hold that there existed a Tacit universal partnership between the Plaintiff and the Defendant in the above matter.”

As stated before, the circumstances of this case are such that it is not only the husband’s industry and the wife’s thrift at play. The wife was quite industrious as she was employed and performed wifely responsibilities as well. I am satisfied that a Tacit universal partnership existed between the parties.

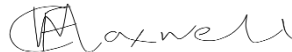
However, the finding that a Tacit Universal Partnership existed does not translate to a half share of the asset, as claimed by the Plaintiff. The share of each partner is in proportion to what they have contributed.

Defendant approached the matter from a point of disappointment and bitterness. In closing submissions, she claimed that Plaintiff’s claim is based on an illegality as it is based on an Unregistered Customary Law Union when he admitted to being in a subsisting civil marriage. In her view, Plaintiff seeks to benefit from his own wrong and his claim should be dismissed. This was a clear departure from her summary of evidence where she had acknowledged the contribution of the Plaintiff in the acquisition of the stand and construction of the house thereon. The fact that another woman was in Plaintiff’s life does not cancel out the contribution that Defendant acknowledged in her summary of evidence. I am however persuaded that as part of his efforts were directed at the other woman, Plaintiff’s contribution was less than that of the Defendant. An award of 30% of the value of the property to the Plaintiff meets the justice of the case.

Accordingly, I make the following order.

1. Plaintiff be and is hereby awarded a 30% share of the value of the immovable property being a certain piece of land called stand number 589 Lochinvar Township of stand 133 Lochinvar Township measuring 1300 square meters.
2. Defendant be and is hereby awarded a 70 % share of the value of the immovable property being a certain piece of land called stand number 589 Lochinvar Township of stand 133 Lochinvar Township measuring 1300 square meters .

3. The property shall be valued by a valuer agreed to by the parties within seven days of this order. If the parties fail to agree on a valuer, one shall be appointed by the Registrar of the High court from the list of registered valuers.
4. The Defendant shall have the first option to buy out the Plaintiff's share within six months of receipt of the valuation report.
5. If the Defendant fails to buy the Plaintiff out, Plaintiff shall have the option to buy out the Defendant's share within two months of such failure.
6. If the parties fail to buy each other out, the property shall be sold by an estate agent appointed by the Registrar and the net proceeds shared in accordance with each party's share
7. The cost of evaluation shall be borne by the parties equally.
8. Each party shall bear its own costs of suit.



Mutandiro, Chistanga & Chitima, Plaintiff's legal practitioners
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