

LLYOD MUTETWA
versus
LISSY WASARIREVU

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 22 January and 18 February 2025

Opposed Application-Application for eviction

Mr *N T Sithole*, for the applicant
Mr *F Siyawareva*, for the respondent

MUSITHU J: On 22 January 2025, I handed down an *ex-tempore* judgment in which I granted the order below following submissions made by the parties' counsel.

“IT IS ORDERED THAT:

- a) The application for eviction is hereby granted.
- b) The Respondent and all those claiming occupation through her be and are hereby ordered to vacate from Stand No. 29 Chikurubi Township of Manresa Park with Deed No. 2146/2014 House known as Number 29 Cedar Road Manresa Park, Harare within 30 days of the service of this court order on them, failing which the Sheriff for Zimbabwe or his deputy, if need be, with the assistance of the Zimbabwe Republic Police are hereby authorised to evict them.”

On 7 February 2025, the respondent through the registrar requested written reasons for the judgement. The detailed reasons for the judgment are hereby rendered as requested.

Background

The applicant and the respondent were married in terms of an unregistered customary union from December 2013 until June 2022. The union was blessed with two minor children. The union was customarily terminated sometime in June 2022 because of what the applicant called an irretrievable breakdown in the parties' relationship.

It was the applicant's case that following the termination of their customary union, the parties could no longer live peacefully together in the same house, being stand No. 29 Chikurubi Township of Manresa registered under Deed of Transfer Number 2146/2014, also known as House Number 29 Cedar Road Manresa Park, Harare (the property). This prompted the applicant to temporarily vacate the property. The applicant approached this court seeking an order for the eviction of the respondent and all those claiming occupation through her from the property.

The applicant averred that he was the registered and sole owner of the property in question as confirmed by the title deed attached to his founding affidavit. The applicant averred that emotions had since cooled down and it was his desire that the respondent gives him vacant possession of the property as the owner. The applicant averred that he had served the respondent with a notice to vacate the property on or about 2 November 2022 and the respondent had remained defiant and in unlawful occupation of the property.

The applicant also averred that although the parties had an unregistered customary law union, marriages in Zimbabwe are out of community of property and therefore he had the prerogative to enjoy rights of ownership as the registered owner of the property. Further, the Harare Magistrates Civil court had under CCA 209/23, granted the applicant equal and reasonable access to the minor children. It was his obligation to provide for their schooling requirements, while the respondent took care of their accommodation requirements as the custodian parent.

Respondent's Case

In her opposing affidavit, the respondent raised a preliminary point which was to the effect that there was material non-disclosure of material facts in the matter. The respondent averred that she was customarily married to the applicant from 2013 to date and that their union was still extant since she was not given the customary divorce token by the applicant. The respondent also averred that during the subsistence of their marriage, their way of living was more inclined towards the general law. The general law principle of unjustified enrichment was therefore expected to determine the parties' proprietary rights. The respondent averred that if the applicant was allowed to evict her, he would be unjustly enriched at the respondent's expense.

The respondent averred that there were material disputes of fact afflicting the matter. It was not factually correct that the applicant was the sole owner of the property. The property in question was their matrimonial property that was developed through the direct and indirect complementary efforts of the respondent and the applicant. The respondent further averred that both parties were gainfully employed and contributed towards development of the residential stand in question. As a result, there existed exceptional circumstances which entitled the respondent the right to occupy the property until she was paid her half share of the property.

On the merits, the respondent argued that the circumstances of the matter did not meet the requirements of an application for eviction. The respondent reiterated that the parties' marriage was still extant. She argued that she was not given a divorce token, and she believed

that the parties were on separation despite having irreconcilable differences. The respondent also averred that the applicant moved out of the house upon realising that the respondent had more need for the property since she had custody of the minor children. The respondent averred that the law in dealing with rights of spouses considered the best interests of minor children, equality of spouses and that none of the spouses would be left homeless among other factors.

The respondent further averred that the property in question was their matrimonial home and belonged to both parties. The applicant tacitly accepted the respondent's right of retention of the house by moving out of the house. The respondent also averred that she had a lawful right to remain on the property. The respondent denied holding on to the property without consent or just cause as alleged. She averred that she was entitled to reside at the property until there was a property sharing arrangement. Any attempt to do otherwise would result in the applicant being unjustly enriched at the expense of the respondent since she believed that she had a share in the property.

Further, according to the respondent estoppel equally applied in this matter. She averred that the applicant caused summons to be issued under HC 7236/23 wherein he offered the respondent some of the assets. The applicant was fully aware that the property in question was subject to property sharing despite it being solely registered in his name. The applicant should therefore be estopped from alleging that the respondent was in unlawful possession of the property. The respondent also averred that parties in a customary law union, although out of community of property were supposed to share property acquired during the subsistence of the union since it formed part of their matrimonial property. The application for eviction was therefore unmeritorious.

The respondent further averred that allowing the applicant to evict her would amount to unjustified enrichment since she substantially contributed directly and indirectly towards the building of the matrimonial home. The respondent also averred that she made financial contributions and that she would also supervise builders, provide them with food and water, as well as cooking, washing, nursing and taking care of the applicant which was an indirect contribution of substance.

The respondent argued that the attached order for access granted by the Magistrates Court did not have any bearing on the matter at hand. It did not impose obligations of maintenance or otherwise. If anything, the interpretation that ought to be given was that the custodian parent needed shelter and should continue to reside at the matrimonial property. The

respondent prayed for the dismissal of the application with an order of costs on the legal practitioner to client scale.

Applicant's Answering affidavit

In response to the opposing affidavit, the applicant insisted that the respondent was given a divorce token. He averred that the respondent was involved in an extra-marital affair which led to her getting pregnant and giving birth to a child whom the applicant believed to be his until a series of Deoxyribonucleic acid (DNA) tests established that the child was not his. The outcome was evidenced by the DNA tests report attached to the applicant's answering affidavit.

The applicant insisted that their customary marriage was dissolved as his go between (Munyai) observed all the customary rites of handing over the divorce token to the respondent's late father. The applicant further averred that he had referred the matter of the termination of their customary marriage to the customary court of Chief Neuso which was in the respondent's rural home where the customary marriage rites had been performed. The outcome of the customary court proceedings, which the respondent and her family allegedly absconded wilfully, was the dissolution of the customary marriage for reasons of infidelity. The record of proceedings of the customary court was attached to the answering affidavit as an annexure.

The applicant averred that the respondent did not contribute anything towards the acquisition, improvements or upkeep of the property. The applicant further averred that he was the owner of the property as evidenced by the proof of acquisition of the property in the form of a letter confirming the provision of a mortgage facility he personally applied for as part of his pension benefits. There were also letters confirming the bond registration and its cancellation after the mortgage was fully serviced.

The applicant averred that he moved out of the property out of anger as he was afraid that he would end up committing a crime after securing irrefutable evidence of the respondent's infidelity. He also averred that the mere fact that he moved out of his own property peacefully despite what he considered to be an extreme act of provocation was not a repudiation or an abandonment of his rights over the property.

The Submissions

At the commencement of oral submissions, Mr *Siyawareva* for the respondent raised a point *in limine* to the effect that the answering affidavit filed by the applicant was defective as it sought to introduce new evidence through annexures. He urged the court to expunge the answering affidavit from the record. Mr *Siyawareva* pointed to the DNA paternity report and

the letter that confirmed the mortgage arrangement in terms of which the applicant acquired the property. Counsel also submitted that an application falls or stands on its founding affidavit and that the applicant ought to have pleaded all the relevant issues in his founding affidavit.

Mr *Siyawareva* further submitted that there were material disputes of fact which could not be resolved on the papers. He pointed to the status of the parties' union, and whether it had been terminated. He also referred to the respondent's right of retention and her improvement lien. Counsel submitted that there seemed to be varying positions as regards the highlighted issues and that there was need for a full trial. Mr *Siyawareva* advised that the respondent was abandoning the preliminary point concerning the alleged material non-disclosures. He urged the court to dismiss the application with costs.

Mr *Sithole* for the applicant submitted that there was nothing offensive about the answering affidavit warranting its expunging from the record. In motivating his point, counsel cited the case of *Serengedo v Cable* N.O HH 32/08 where it was held that an answering affidavit was aimed at traversing all the averments made in the opposing affidavit. Counsel averred that indeed there was evidence attached to the answering affidavit, but the foundational basis had been laid in the founding affidavit. Counsel averred that the applicant had not wished to air the parties' dirty linen in public, and that explained why he had not alluded to the DNA results in his founding affidavit. However, it became necessary to do so when the respondent refuted the termination of the customary union and the reasons thereof.

Counsel further averred that the applicant had alluded to the termination of the customary union in the founding affidavit. The attached evidence served to confirm that position. The same applied to correspondence confirming the mortgage facility. It confirmed that the applicant had single handedly acquired the property. Mr *Sithole* disputed the existence of the alleged disputes of fact that would require the adducing of *viva voce* evidence. No proof of their existence had been placed before the court.

In his brief reply, Mr *Siyawareva* insisted that the applicant ought to have applied for leave to adduce the additional evidence that was introduced through the answering affidavit. He however abandoned the preliminary point on the alleged material disputes of fact.

On the merits, Mr *Sithole* averred that the applicant was the owner of the property as shown by the letter from the former employer which confirmed the mortgage bond facility used to acquire the property. Counsel further averred that there was no evidence of the respondent's direct or indirect contribution as alleged.

The analysis

The court determined that the attachment of evidence pertaining to the DNA results was irregular as that issue had not been pleaded in the founding affidavit. The question of the paternity of the children had never been an issue for determination by the court. The issue ought to have been raised through a supplementary affidavit for which leave of court was required if at all it was relevant to the resolution of the matter. The court therefore determined that the portion of evidence related to the DNA results was irrelevant and must not be considered at all.

The evidence of the termination of the customary union had to be considered in a different context. In paragraph 2 of the founding affidavit, the applicant made it clear that the customary marriage had been terminated because it had irretrievably broken down. The attached record of proceedings from Chief Neuso's Court merely confirmed that position and the reasons for the termination of the customary union. The Chief's ruling noted that the respondent had absconded court despite being served with summons to appear before the court on two occasions. In the court's view, this evidence was relevant to refute the respondent's contention that the customary union was not terminated.

The fact of the termination of the customary union had already been pleaded in the applicant's founding affidavit. For that reason, the court determined that the record of proceedings from the customary court was properly before the court as it simply confirmed what the applicant had pleaded in his founding papers. The need for that record of proceedings would not have arisen at all had the respondent not challenged the termination of the customary union. It was the court's view that the respondent ought to have sought leave of the court to file a supplementary affidavit to deal with the record from the customary court in terms of r 59(12) of the High Court rules, instead of seeking the expunging of the entire answering affidavit from the record.

On the merits, the court determined that the applicant's claim was incontestable since he was the registered owner of the property as confirmed by the title deed attached to the founding affidavit. The respondent's defence to the claim for eviction was that she was entitled to a share of the property based on some undisclosed financial contribution she made to the maintenance of the property. It was the court's view that the respondent's alleged claim based on her direct and indirect contribution did not assist her at this stage, unless she made a concomitant claim of her own through a counter application or a separate claim altogether.

The respondent did not have to wait for the applicant to mount his claim for eviction and then use her own potential claim against the applicant as a defence. In *Dimbi v Ronwen Investments (Pvt) Ltd SC 8/13* it was held that a notice of opposition is a shield of defence and not a sword of attack.¹ A respondent who wishes to attack must mount a counter application of their own to assert their rights. They need not wait for the applicant's claim to reach the hearing stage and then attempt to use their own potential claim as a defence to the application. The respondent's own claim would have been dealt with simultaneously with the applicant's claim herein. Assuming it had been filed late but was pending, the court would not have hesitated to stay the hearing of the present claim so that the two matters are dealt with simultaneously.

It was for the above reasons that the court determined that the applicant's claim was incontestable. The requirements for a claim of that nature were satisfied. The applicant proved that he was the owner of the property, and that the respondent was in possession of that property without his consent. The respondent should have filed a claim of her own before the present matter was heard instead of just being content with alleging a potential claim of her own in opposition.

It was for the above reasons that the court granted the above order.

Sithole Legal Counsel, applicant's legal practitioners
James Majatame Attorneys At Law, respondent's legal practitioners

¹ See also *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H)