CATHERINE CHIKAVHANGA

versus

EVANS KUYERI

and

KUYERI FAMILY TRUST

HIGH COURT OF ZIMBABWE

MAWADZE J

HARARE, 14, 15, & 28 November, 2 December 2011 & 9 August 2012

FAMILY LAW COURT

**Trial Cause**

*T.G. Makanza*, for the plaintiff

*T. Chiminya*, for the 1st & 2nd defendants

MAWADZE J: The plaintiff and the first defendant were wife and husband respectively under an unregistered customary law union which has now been dissolved. The second defendant, Kuyeri Family Trust (hereinafter The Trust) is cited in these proceedings on account of the purported interest it has in the major dispute between the plaintiff and the first defendant.

The plaintiff issued summons out of this court on 30 September 2010 wherein she claimed a 70% share of the value of a house known as Number 1415 Muchecheni Close, Houghton Park Harare, a Ford Bantum and a 50% share of all household goods.

In her declaration the plaintiff stated that she married the first defendant in terms of customary law rites and thereafter stayed with him for all intents and purposes as “husband” and “wife” from 1999 until 25 August 2010 a period of about 11 years. According to the plaintiff the customary law union between the plaintiff and the first defendant has irretrievably broken down because the first defendant is an infidel who during the subsistence of the union nurtured a relationship with another woman who has since successfully claimed in the Magistrates Court a 30% share of the value of the same house Number 1415 Muchecheni close Houghton Park, Harare which house the plaintiff claims was solely acquired by the plaintiff and the first defendant during the subsistence of their customary law union. In her declaration the plaintiff states that the first defendant has since chased her away from the matrimonial house (Number 1415 Muchecheni Close, Houghton Park, Harare) and that the first defendant is now staying with yet another woman. The plaintiff said in order to remove her from the matrimonial house the first defendant called the plaintiff’s parents and asked them to take the plaintiff and her children with them for two weeks promising to take back the plaintiff and children but has since never bothered to do so. The plaintiff states that the cause of action in this matter arises from the tacit universal partnership which existed between the plaintiff and the first defendant during the subsistence of the customary law union. According to the plaintiff during the subsistence of the union she was gainfully employed and was therefore also a breadwinner of the family whereas the first defendant was busy spending all his money on other women. The plaintiff in the declaration states that she andthe first defendant through joint effort and contribution acquired the following property; House Number 1415 Muchecheni Close, Houghton Park Harare, Stand No. 1176C Makomo Extension Epworth, Ford Bantum, Toyota Corrolla and household goods and effects. The plaintiff claims that all this property is divisible under the tacit universal partnership.

The first defendant in this plea simply stated that the customary union between him and the plaintiff ended or was dissolved in 2003 and not 2010 as the plaintiff claims. The first defendant further stated that the house in issue, no 1415 Muchecheni Close, Houghton Park Harare was acquired after 2003 when the first defendant was now staying with another woman who has since claimed and was awarded a 30% share of the value of the same house in the Magistrate Court.

In terms of the joint pre-trial conference minute filed by the parties the following issues were referred to trial:-

1. Whether or not the universal partnership ended in 2003.
2. Whether or not the Houghton Park House was acquired or purchased after the dissolution of the tacit universal partnership and if not how it should be apportioned.

At the pre-trial conference a directive was issued by the presiding Judge

that KUYERI FAMILY TUST (now the second defendant) be joined to the proceedings as the second defendant. Thereafter the plaintiff and the first defendant filed a joint application for joinder on account of the fact that KUYERI FAMILY TRUST has an interest in the Houghton Park house Harare, Number 1415 Muchecheni Close as it was alleged during the pre-trial conference that the same house is now registered in the name of KUYERI FAMILY TRUST. At the commencement of this trial I granted the application for jonder in terms of order 13 r 87(2) of the High Court Rules 1971. The second defendant adopted in the main the pleadings filed by the first defendant. It is therefore clear that the plaintiff’s claim is now only limited to the house in issue, Number 1415 Muchecheni Close Houghton Park Harare (hereinafter the Houghton Park House). The plaintiff therefore lays no claim to all other property listed in her declaration.

During the trial, the plaintiff gave evidence and called her father Misheck Chikavhanga and her aunt Norah Chikavhanga as witnesses. The first defendant gave evidence and called his aunt Idah Kuyeri and a friend Zvirikwandiri Mugwira as witnesses. The first defendant’s ex-wife who was awarded 30% share of the value of the Houghton Park House Daffnie Olwage gave evidence as a representative of the second defendant KUYERI FAMILY TRUST.

A total of 17 exhibits were produced by all the parties during the trial and I will deal with the probative value to the placed on some of the exhibits during the analysis of the evidence adduced. At this stage I will simply list hereunder the list of the exhibits for clarity purposes;

Exh 1 -A loan approval letter dated 21 February 2000 offering the plaintiff Zimbabwe $140 000-00 by Time Bank.

Exh 2 - An agreement of sale dated 17/10/03 between the first defendant and one Edward Kandawasvika Ticharwa of stand No. 725 Tynwald South Harare through Action Property Sales (Pvt) Ltd. The first defendant is the seller.

Exh 3 - Deed of transfer of stand No. 1415 Ardbennie Township 16 of Subdivision A of Ardbennie. known as No 1415 Muchecheni Close Houghton Park Harare (the Houghton Park House). It shows that the first defendant took transfer of the said property on 17 December 2003 after paying the full purchase price of Zimbabwe $40 million. The seller is one Anderson Nyangazonke Woffie Ncube.

Exh 4 - Proceedings in the Magistrates Court case No. 1488/08 between the Daffnie Olwage and the first defendant being

Exh 4(a) - Summons commencing action

Exh 4(b) - Defendant’s (Evans Kuyeri’s) plea

Exh 4(c) - Defendant’s (Evans Kuyeri) closing submissions

Exh 5 - Document signed by the plaintiff and her relatives on one hand and the first defendant his relatives on the other dated 23 August 2010 which the plaintiff produced as proof of the date the union between the plaintiff and the first defendant was dissolved.

Exh 6 - Birth certificate for the last born child (being the 3rd child) between the plaintiff and the first defendant one Chantelle Kuyeri a female born on 20 May 2007. The plaintiff produced it as proof that her union to the first defendant did not end in 2003 as claimed by the defendant.

Exh 7 - Document dated 7 March 1999 showing the lobola which was demanded when the plaintiff entered into the union with the first defendant.

Exh 8 - Agreement of sale dated 7 June 2001 involving the first defendant and one O.A Muchatuta of the sale of the latter’s Takeaway business (and equipment) at Malborough Civic Centre

Exh 9 - Letter from Ziumbe & Mtambanengwe to the first defendant dated 4 January 2005 indicating transfer of stand No. 7893 Tynwald Harare from Assetfin Pvt Ltd to both the plaintiff the first defendant.

Exh 10 - Loan application approval form in the name of the first defendant from CABS in the sum of Zimbabwe $30 million dated 17 October 2003. This relates to the mortgage finance for the Houghton Park House.

Exh 11 - Various payment vouchers compiled by the first defendant and receipts dated 28/10/05, 1/11/05, 4/11/05, 15/1205, 4/01/06 and 6/01/06 showing payments made to the first defendant for work he did. The first defendant alleges he used these amounts to service the loan awarded to him as per Exh 10.

Exh 12 -Agreements of sale of the Houghton Park House dated 3 and 6 October 2003 between the first defendant (being the buyer) and one Anderson Nyangazonke Woffice Ncube. The purchase price is Zimbabwe $40 million.

Exh 13 Document which shows list of movable property i.e. 1 double bed, 1 x 21 inch sharp TV, 1x 2 plate stove, cutlery, pots, plates, blankets and fridge which the plaintiff took from the matrimonial house dated 10 October 2011 and signed by the plaintiff.

Exh 14 - Court order granted by the Magistrates Court in case No. 1488/08 between Daffnie Owage and the first defendant dated 2 October 2008 and reads as follows:-

“(A) Matrimonial property is hereby shared as follows:

The plaintiff is awarded the following property; DVD player, double bed, micro wave, breakfast set, cutlery, TV, pram, cot, bed, feeding set, ½ bed linen, 2 plate store and small fridge.

(B) The defendant (being the first defendant *in casu*) is awarded the following property; DVD player, 1 double bed, dressing table, Decoder, ½ bed linen, Toyota Corrolla, coffee table, chest of drawers.

(C) The matrimonial house being stand no 1415 Muchecheni Houghton Park to be sold. The parties are to agree on the value of the property within 10 days of the date of the order, failure of which they shall appoint a valuator to do so. If parties cannot agree on a valuator, the Registrar shall appoint a valuator who shall as soon as possible value the property. The cost of the valuator shall be deducted from the proceeds of the sale. The house to be sold within 6 months of the order and the plaintiff be awarded 30% and the defendant 70% of the valued proceeds. The defendant is given an option to buy out the plaintiff of 3 month after the value of the house has been determined. Each part to bear its own costs.

22/09/08” (*sic*). (brackets are mine)

Exh 15 - Notarial Deed of Donation and Trust in which the first defendant, Daffnie Olwage and one Tranos Mabvika are Trustees. The beneficiaries are all the first defendant’s children with various women being Edward born on 9/09/93, Tinashe born on 22/07/95, Charlene born on 07/05/99, Sean born on 09/05/02, Karen born on 18/03/05, Chantelle born on 10/05/07 and Daryl born on 11/11/07. The founder Trustees the first defendant and Daffnie Olwage each donated 70% share and 30% share respectively in the Houghton Park House purportedly in accordance with the court order exh 14. The Notarial Deed of Donation and Trust was registered on 24 January 2011.

Exh 16 - Draft Notarial Deed of Donation and Trust (which is the same on Exh 15.

Exh 17 - Statement of Loan Account from CABS in relation to mortgage finance advanced to the first defendant showing repayments from 09/12/03 to 31/12/05. It was produced by the first defendant to show how he made repayments or serviced the loan from CABS.

There are four issues which fall for determination in this matter. They are

as follows:-

1. Whether the customary law union between the plaintiff and the first defendant ended in 2003 or in 2010.
2. Whether the Houghton Park house was acquired during the subsistence of the union between the plaintiff and the first defendant
3. If the Houghton Park house was acquired during the union how it should be shared between the plaintiff and the first defendant.
4. Whether the second defendant owns the Houghton Park house and whether this is a bar to the plaintiff’s claim.

I now proceed to deal with these issues, not necessarily in the order

stated above.

**Whether the second defendant owns the Houghton Park House**

It is common cause that the Houghton Park house is still registered in the first defendant’s name as per exh 3. The first defendant and Daffnie Olwage in their evidence confirmed that the second defendant has not taken transfer of the Houghton Park house. This puts to rest the claims made by the first defendant and the second defendant in their closing written submissions that the plaintiff has no claim against the first defendant on the basis that he is no longer the owner of the Houghton Park house and that the Houghton Park house is now owned by the second defendant.

A close look at the evidence before the court shows that the defendants especially the first defendant have not been candid with the court in this regard. The plaintiff issued summons out of this court on 30 September 2010. The first defendant in his plea dated 18 October 2010 made no reference at all to the fact that the Houghton Park house in which the plaintiff claimed a 70% share of the value of the house was no longer owned by the first defendant, but by the second defendant. In fact the first defendant makes the no mention at all of the second defendant. This gives credence to the view that the second defendant was only joined in the proceedings as an after thought. In fact that notarial deed of Donation and Trust exh 15 was only registered on 24 January 2011 long after the pleadings in this matter had commenced.

It is also important to note that that both the first defendant and Daffnie Olwage did not even comply with the court order exh 14 in so far as it relates to the Houghton Park house which court order is dated 22 September 2008. The parties did not have the property valuated as per the court order. Daffnie Olwage did not even register her 30% share value of the property. It is therefore difficult to appreciatehow she then transferred her 30% share value of this property into the Trust. Both the first defendant and Daffnie Olwage being the founding Trustees of the Trust and sole donors to this Trust were not able to explain how the beneficiaries of the Trust listed in exh 15 are benefitting or would benefit from the Trust. The first defendant in his evidence admitted that only the first defendant, his current wife and child are benefitting from the Houghton Park house as they are the ones residing at the house. The plaintiff and her three children are not staying at the house. Daffnie Olwage and her child stay in Masvingo. It was therefore not surprising when the first defendant told the court in cross examination that he formed the Trust in order to safe guard the Houghton Park house from his several wives. Indeed the defendant is a serial polygamist as will be shown later in the judgment. Daffnie Olwage was equally unhelpful in explaining the benefits of the Trust even to herself and her child born out of the union with the first defendant. She is currently working in Masvingo where she stays with the child. She admitted that the first defendant who appears to be a willy fox sold to her the idea of the Trust soon after the court order exh 14, and she took it hook line and sinker without any clue as to what the Trust entails. All in all it is my finding that the second defendant is a sham. This court can therefore not be deceived by the existence of the second defendant. After rendering aside the veil in which the Trust is wrapped it remains clear that the Trust was not only meant to avoid the consequences of the court order exh 14 but also to shield away from the plaintiff the Houghton Park house which is the only asset in dispute in these current proceedings. It is my finding that the Houghton Park house does not belong to the second defendant.

**Whether the customary law union between the plaintiff and the first defendant ended in 2003 or 2010**

According to the plaintiff the customary law union between her and the first defendant ended in 2010. The first defendant’s version is that the union ended in 2003. The first defendant’s view is that the Houghton Park house was acquired well after the dissolution of the union hence the plaintiff cannot lay a claim to the property.

The plaintiff gave evidence as regards the history of her marriage to the first defendant. She said the first defendant had had two failed marriages with two women who gave him two children before he “married” the plaintiff in 1999. According to the plaintiff she started to stay together with the first defendant in 1999 when the plaintiff was in her final semester at the University of Zimbabwe where she was doing a Bachelor of Arts degree and they were staying in a two roomed house as tenants in Kuwadzana. The first defendant was an electrician and she started to work in 2000 as a teacher. The customary law union between the plaintiff and the first defendant was confirmed by all witnesses. The plaintiff’s father Misheck Chikavhanga and the plaintiff’s aunt Norah Chikavhanga confirmed the union and as per exh 7 the first defendant was charged and paid most of the lobola on 7 March 1999. The union was blessed with three children, Charlene (born on 7 August 199) Sean (born on 9 August 2002) and Chantelle born on 10 May 2007 whom the first defendant alleges was born after the union has been dissolved.

The plaintiff in her evidence stated that her “marriage” to the first defendant was painful and traumatic from as early as 2000 and she soldiered on purely on the basis of Mr Misheck Chikavhanga’s views that the plaintiff could only leave the first defendant if she left custody of the children with the first defendant. This was confirmed by Mr Misheck Chikavhanga who confirmed that despite reports of abuse by the plaintiff he was not willing to accept the dissolution of the union between the plaintiff and the first defendant. This is understandable as Mr Misheck Chikavhanga impressed the court as a very traditional man.

The plaintiff in her evidence attributed the breakdown of the union to the first defendant who, she said had an insatiable appetite for the fairer sex and consorted with many other women. In fact it is not in issue that after “marrying” the plaintiff in 1999 the first defendant married Daffnie Olwage in 2003 and thereafter married another women Adelaide who stayed in Kuwadzana. In 2009 the first defendant married another woman now the 4th wife since marrying the plaintiff and currently he is married to yet another woman. No wonder why the first defendant was keen to protect the Houghton Park house from the “wives”. It is important to note that the first defendant did not register any of the “marriages”. He was contend to be in polygamous unions which remained unregistered.

The plaintiff in her evidence said she stayed with the first defendant as “husband” and “wife” from 1999 in Kuwadzana and later moved to the Houghton Park House. She said she briefly separated with the first defendant in May 2003 due to problems in the union and went to her parents’ home in Chimanimani but reconciled with the first defendant after a period of about 6 months in October 2003. The plaintiff said when she left the Houghton Park house in May 2003 she gave the first defendant Zimbabwe $1-00 as a divorce token (gupuro). She however said in September or October 2003 the first defendant in company of his aunt Idah Kuyeri followed her in Chimanimani. She said discussions were held with her aunt Norah Chikavhanga and she reconciled with the first defendant and was taken back to the Houghton Park house. She said this was before they had disposed of a stand they jointly owned in Tynwald South to raise finance to purchase the Houghton Park house. Under cross examination the plaintiff said that she did reconcile with the first defendant after this brief separation. She said that the first defendant took her back to the Houghton Park house on 2 October 2003 after which they proceeded with the transaction to sell the Tynwald stand and purchased the Houghton Park house during the same month. She said the first defendant only married Daffnie Olwage after the reconciliation and that they had bought the Houghton Park house.

In her evidence the plaintiff said after the first defendant married Daffnie Olwage her marital problems became even more intense. She said the first defendant decided to move her out of the Houghton Park house and found lodgings for her and the children at No. 699 Reeler Crescent in Park Town Waterfalls Harare. This was rented accommodation and the first defendant paid the rent and met all her children’s needs. She said this was the arrangement the first defendant decreed after deciding to stay with Daffnie Olwage in the Houghton Park house. By then the first plaintiff said she had stopped working in 2002 as she had failed to secure study leave for her Graduate Certificate studies hence she was fully dependant on the first defendant. The plaintiff said the arrangement was that the first defendant as a polygamist was now running two homes, the Houghton Park house in which he now stayed with new wife Daffine Olwage and the Park Town rented accommodation where the plaintiff stayed with the children. She said the first defendant would at times sleep over at the Park Town rented accommodation and they continued to enjoy conjugal rights. In fact she said the first defendant would at times demand the conjugal rights bragging that he had paid lobola for the plaintiff and that he was at liberty to marry as many wives as he wanted. After about 6 months the first defendant moved the plaintiff and the children from the Park Town rented accommodation to similar lodgings now in Cranborne Harare were she said she stayed from 2004 to 2008. She said during that period the first defendant had also married a 3rd wife one Adelaide Rukodzi a former employee. The plaintiff said while in Cranborne she continued to enjoy conjugal rights with the first defendant and that the third child Chantelle was conceived in Cransborne in 2006 and was born on 10 May 2007. By then the plaintiff said she had started working. The plaintiff said at all maternal times the first defendant regarded her as his wife, he paid rentals, bought all the groceries and shared conjugal rights with the plaintiff. The plaintiff said due to the economic meltdown in 2007-2008 the first defendant found it difficult to run the three homes supporting 3 wives, that is, the plaintiff, Daffnie Olwage and one Adelaide Rukodzi who was in rented accommodation in Kuwadzana. The plaintiff said the first defendant was now unable to pay the rentals and purchase food for her and the children who were now three. She said she explained her dilemma to the first defendant and she moved back to the Houghton Park house initially briefly in 2007 and permanently in April 2008. She said it was during this period that Daffnie Olwage indicated that she could not share the same house with the plaintiff at the Houghton Park house after which Daffnie Olwage moved out in 2008 and instituted proceedings to share the property in the magistrate court per exh 4.

The plaintiff went further to explain how her union with the first defendant was dissolved.

The plaintiff said after Daffnie Olwage had left the Houghton Park House she stayed with the first defendant at the Houghton Park house until October 2009 when the first defendant married yet another wife, now the 4th wife. She said the first defendant then moved out of the Houghton Park house to stay in rented accommodation in Mainway Meadows Waterfalls with the 4th wife. The plaintiff said before he left the first defendant brought to the Houghton Park house the 3rd wife who was now left to stay with the plaintiff. She said the first defendant abandoned all his responsibilities and neglected the plaintiff and the three children. The plaintiff said she had to look after the three children and also the 3rd wife who was not employed and had a child. After a while she said the first defendant moved from Mainway Meadows to Park town where he was now staying with the 4th wife and the mother-in-law. The plaintiff said the first defendant fell out of favour with his 4th wife whom he accused of infidelity and in 2011 he returned to the Houghton Park house without the 4th wife, although he still would spend some days at the 4th wife’s place. The plaintiff said it was only in August 2010 when the first defendant called her parents to the Houghton Par house and asked the parents to take with them the plaintiff and the 3 children for 2 weeks as he wanted some space to sort out his marital problems with his many wives. The plaintiff said she had by then refused to move out of the Houghton Park house and take up rented accommodation. She explained that the first defendant, his relatives and the plaintiff together with her relatives wrote down all what was agreed as per exh 5 dated 23 August 2010 and they all signed. The document exh 5 reads:-

“2 weeks from 23/08/10 Mr E Kuyeri to go to Marondera to collect his family to stay at home”. It is signed by all parties present.

The plaintiff said it was on that basis that she left with her father and children and

proceeded to stay with her father at his Marondera farm. She said after two weeks the defendant did not come to collect her and children as per exh 5. She telephoned the defendant who seemed uninterested. This is how the plaintiff said she separated from the first defendant. It was at this stage that she realised that the union between her and the first defendant had ended and that the first defendant had duped her and her relatives. The plaintiff proceeded to institute these proceedings in September 2010.

The complexion of the plaintiff’s evidence did not changeduring cross examination. In fact the sequence of events as narrated by the plaintiff was not materially challenged. All that the first defendant could say was that he continued to look after the plaintiff and the children not on account of her being his “wife” but simply the mother of his children. The first defendant did not dispute that he sired the 3rd child with the plaintiff. Again all what the first defendant could say was that this was simply a one night stand which resulted in the plaintiff conceiving the child. The first defendant was at pains to explain why in August 2010 he summoned the plaintiff’s father to his residence if he had “divorced” the plaintiff 7 years before in 2003. All what the first defendant could say is that the plaintiff was forcing herself upon him and that he was forced to sign exh 5 without explaining even the nature of the force used. The first defendant admits that he was and is a polygamist of repute. As a result it is clear that like the historical Bismarck of the Germany Republic he tried to juggle around with the many wives employing various tactics to keep his fairly large empire of the fairer sex within the union. This emerged very clearly from the plaintiff’s uncontroverted evidence. The first defendant was only able to do this for a while but eventually he could not keep all the balls up in the air at the same time and the centre could not hold.

The plaintiff gave a simple, clear and coherent account of her marital history. In a nutshell she described her “marriage” to the first defendant as hell. She explained that she felt humiliated by the first defendant whose sexual behaviour forced her to live the shameful and painful life of polygamy, not by choice but circumstances. As a result of the first defendant’s numerous sexual partners the plaintiff said she has now contracted lethal HIV virus and is on ARVs. The plaintiff said she is in so much pain because the first defendant was the only sexual partner she knew only to discover her HIV status in 2010. The first defendant denied that he infected the plaintiff with the HIV virus but could not volunteer proof of his HIV status to the court.

The complainant’s evidence was well corroborated by her father Mr Misheck Chikavhanga and her aunt Norah Chikavhanga. According to Misheck Chikavhanga the plaintiff “married” the first defendant as per exh 7 on 7 March 1999 and according to him as complainant’s father the union subsisted until 2010 in August when the first defendant called him culminating in the signing of exh 5. Mr Chikavhanga said the first defendant explained that he was under pressure from his many wives and wanted the plaintiff to move out of the Houghton Park house. He said he asked the first defendant if he still loved the plaintiff and he said he still loved her and would only need two weeks to sort out his problems after which he would take the first plaintiff and the children back. As an elder and a traditional man he preferred to have this in writing and the first defendant agreed and signed exh 5 after which he took the plaintiff and the 3 children with him. He said the first defendant never contacted him and he realised the first defendant had not been sincere. To date Mr Misheck Chikavhanga has custody of the first defendant’s three children. He dismissed as untrue that the union between the plaintiff and the first defendant ended in 2003. He even wondered why the first defendant would call him to his Houghton Park house in August 2010 if he had severed all ties in 2003.

Mr Misheck Chikavhanga gave his evidence very well. He is a mature man who seemed to hold very strong traditional values about marriage. He was even candid with the court that he is the one who caused the plaintiff to remain in the “marriage” as way back as 2000 despite the plaintiff’s reports of assaults, infidelity and abuse. He said he only realised in August 2010 when the first defendant called him to Harare that the first defendant was staying in the same house with two wives, a situation he found untenable and that the plaintiff seemed very unhappy. No meaningful questions were put to him and his evidence reads well.

I find no cause why Mr Misheck Chikavhanga would lie that the first defendant is still expected to take the customary procedures if he intends to “divorce” the plaintiff in same manner he did when he paid lobola.

Norah Chikavhanga the plaintiff’s aunt who took part in the discussions in 2003 after the plaintiff had given the first defendant $1-00 as a divorce token and went back to her rural home in Chimanimani also corroborates the plaintiff that the plaintiff that the first defendant and the plaintiff reconciled and returned to Harare together from Chimanimani without even the involvement of the plaintiff’s father Mr Chikavhanga her brother. She said in 2003 the plaintiff who had advised her of her marital problems came to her homestead and gave her $1-00 formerly advising her that she wanted to walk out of the marriage with the first defendant due to these problems. She said as per tradition she simply told the plaintiff to go and stay at her father’s homestead in Chimanimani and wait for the first defendant. Later she said the first defendant and his aunt then came from Harare to Chimanimani and she discussed the problem with the plaintiff and the first defendant and implored the two to stay together as husband and wife. She said the plaintiff and the first defendant took her advice and returned to Harare in 2003and she never heard from them again. She told the court that the problem in 2003 was rectified and denied that the first defendant and the plaintiff dissolved the union in 2003. In fact she said she still awaits for the first defendant to formerly dissolve the union as per customary rites. Again her evidence is beyond reproach. No meaningful in roads were made during cross examination. The first defendant confirms this visit and admits that he returned with the plaintiff to Harare although he insists he had not reconciled with the plaintiff.

As already pointed out the first defendant’s account is highly improbable in the circumstances. The sequence of events as explained by the plaintiff clearly shows that the first defendant and the plaintiff from 1999 to 2010 were for all intents and purposes “husband and “wife”. It matters not in my view that, at some stage the plaintiff walked out of the first defendant in 2003 for a period of 6 months. The first defendant is simply trying to misconstrue this development to suit his selfish ends. The fact that the first defendant would move the plaintiff from the Houghton Park house to other rented accommodation is not proof that he had dissolved the union between the two but is consistent with the first defendant’s polygamous life style as he battled to find peace with the many wives in an urban environment. It is not surprising that the first defendant failed to give reasons for the breakdown of the union.

I have also considered other evidence which show that the first defendant and the plaintiff had not dissolved the union in 2003. Firstly a child was conceived in 2006 and born in 2007 well after the period first defendant alleges the union had ended. Second, the first defendant continued to support in all material respects the plaintiff and the children until 2010. Thirdly as per exh 13 the plaintiff only took movable property from the Houghton Park house on 10/October 2011 as her share of movables. If the union had ended in 2003, why would it take the plaintiff 8 years to collect her share of movable property. Lastly Daffnie Olwage called by the first defendant in her particulars of claim exh 4 (a) dated 22 July 2008, in para 3 thereof gave her reasons for instituting proceedings in case No. 1488/08 as follows:-

“3 Plaintiff and the defendant (referring to the first defendant) were married in terms of an unregistered customary law union in 2003 and they separated since the defendant subjected the plaintiff to severe abuse during the subsistence of the marriage. The defendant reconciled with his first wife and brought her to live with the plaintiff under the same roof thereby making it difficult for continuation of a normal marriage relationship” (brackets mine)

This averment by Daffnie Olwage in her declaration in 2008 clearly

shows that the union between the plaintiff and the first defendant did not end in 2003 as the first defendant claims. It is therefore my finding that the customary union between the plaintiff and the first defendant was only ended in August 2010 in circumstances explained by the plaintiff and not in 2003 as the first defendant had rather clumsly tried to mislead the court. This leads me to the last issues and I shall deal with the last two issues as one.

**Whether the Houghton Park property was acquired during the subsistence of the union and how it should be shared between the plaintiff and the defendant**

From the pleadings it is clear that the parties were in agreement that when the plaintiff and the first defendant entered into the customary law union in 1999 it was a tacit universal partnership. This was not an issue in dispute and it is the basis to found the cause of action See *Feremba* v *Matika* 2007(1) ZLR 337(H); *Mtuda* v *Ndudzo* 2000 (1) ZLR 710(H); *Chapendama* v *Chapendama* 1998 (2) ZLR 18 H. This means that there is a proper cause of action pleaded upon which an award or decision can be made. This probably explains why the plaintiff as per exh 13 was allowed to take her share of movable property. It also explains why under cross examination the first defendant was now willing to offer the plaintiff 10% of the value of the Houghton Park house.

I have already made the finding that the Houghton Park house was acquired during the subsistence of the union. All I have to consider is whether the plaintiff on the basis of a tacit universal partnership is entitled to a share of that property and to what extent. In doing so I shall consider the evidence of the plaintiff and the first defendant. In specific terms the court shall consider both the direct and indirect contributions made by the parties to the acquisition of the Houghton Park house. See *Chapendama* v *Chapendama* *supra*; *Chapenyama v Matende & Anor*1991 (1) ZLR 534(H).

Both the plaintiff and the first defendant were professionals at the time they entered the customary law union in 1999. The plaintiff holds a Bachelor’s Arts Degree and a graduation certificate in Education. She had been a teacher from 2000 to date. The first defendant is an artisan (electrician) and had been so qualified since 1996. This therefore means that both parties were bread winners during the subsistence of the union and contributed financially through their respective incomes to the welfare of the family, although plaintiff, concede that the first defendant carried the heavier burden on his shoulders.

The customary union between the parties existed for reasonably long time from 1999 to 2010, a period of almost 11 years. While the court considers that there were periods the parties separated (6 months in 2003) and that at times they did not live under the same roof they remained “husband” and “wife” and carried out most of their respective duties. The first defendant provided financially for the family in terms of rentals and food. The plaintiff looked after the three children and she carried this burden virtually on her own as is common in most polygamous families. She therefore made an immense contribution in that regard.

From the evidence led I am satisfied that the Houghton Park house was acquired through the joint effort of both the parties. In this regard I am more inclined to accept the plaintiff’s evidence which is clear and comprehensive. The first defendant as usual has been inconsistent and untruthful.

The plaintiff testified that in 2000 she obtained a loan from Time Bank exh 1 for Zimbabwean $140 000.00. I do not accept the first defendant’s evidence that the exh 1 is in plaintiff’s name simply because he asked the plaintiff to use her payslip to apply for the loan as she was formally employed and the first defendant was informally employed. The plaintiff said she used the loan to purchase stand No 725 Tynwald South Harare exh 2. At that time plaintiff said her “marriage” to first defendant was blissful and the first defendant assisted in drawing the agreement of sale and she was happy to have the property registered in both the plaintiff and the first defendant’s names. See also exh 9. This shows how the parties jointly acquired this property. The plaintiff testified that she used her salary to pay off the loan and when she was teaching outside Harare during early years of the union she would give the first defendant her bank book to allow him to withdraw cash and pay the monthly loan repayments. No major developments were made on the stand until its disposal in 2003.

The plaintiff said soon after this the first defendant sold a motor vehicle he had a Pulsar and opened a hardware shop in Kotwa which business venture did not last long. She said first defendant bought a Ford Laser for Zimbabwean $65 000.00 and that she made a direct contribution of Zimbabwe $30 000.00 which she paid from her savings. The plaintiff said she when moved to Harare in 2001 they decided to run a fast food out let. She said she contributed from her savings half of the purchase price of the fast food business and equipment although the agreement was in first defendant’s name only. They purchased a stove, chips frier, washing surfaces and other equipment. See exh 8 dated 7 June 2001. It is important to note that although exh 8 is in the name of the first defendant and one O.A. Muchatuta it refers to the Zimbabwean $15 000.00 paid by the plaintiff. All this happened before they moved to the Houghton Park house in 2002. The plaintiff said the Takeaway business which was operational from 2001-2008 was a cash cow for the family and that if it was now not operational it was run down by the first defendant who was busy financing his multiple relationships. The first defendant did not challenge most of the evidence in relation to the take away business except to allege that he solely contributed to the purchase of the Takeaway equipment. This is not supported by exh 8 produced even by the first defendant himself.

The plaintiff explained how the Houghton Park house was acquired. She testified that she moved to the Houghton Park with the first defendant in 2002 as tenants and stayed together until May 2003 when she briefly separated from the first defendant after which they reconciled in September 2003 and they went back to stay in the Houghton Park house still as tenants. The plaintiff said in 2003 the landlord offered them the Houghton Park house for sale but they both had no capital. They agreed to dispose of the Tynwald stand to raise the initial capital and the Tynwald south stand was sold on 23 October 2003 to Edward Kandawasvika Ticharwa. See exh 2 for Zimbabwean $18 million. The plaintiff said the buyer of the Tynwald stand transferred all the Zimbabwean $18 million to Action Property Sales (Pvt) Ltd as they were the agents who facilitated the sale and were also agents for the owner of the Houghton Park House.

The plaintiff said all the proceeds from the sale of the Tynwald stand were used to purchase the Houghton Park house that is the Zimbabwean $18 million. She said the purchase price for the Houghton Park house was Zimbabwean $40 million of which $18 million was paid using the proceeds of the sale of the Tynwald stand. The plaintiff said the balance to purchase the house was financed by mortgage finance taken by the first defendant from Cabs. Exhibit 10 (although first defendant took a loan for $30 million) dated 17 October 2003. The plaintiff said the first defendant repaid the loan from the income from electrical company he operated and from the sales generated from the takeaway business. The Cabs mortgage repayment statements are in first defendant’s name see exh 11. The plaintiff said when they paid for the Houghton Park House in October 2003 they were already tenants in the house. The transfer of the Houghton Park house was effected on 17 December 2003 and the plaintiff said she later realised from services charge receipts that the first defendant had registered the Houghton Park house in his sole name.

The plaintiff said further surprises awaited her. She said she only realised that the first defendant had collected her from Chimanimani in September 2003 and facilitated the reconciliation as a way to convince the plaintiff to agree to the disposal of the Tynwald stand on the pretext of jointly acquiring the Houghton Park Stand house. Little did she know that the first defendant’s plans to marry Daffenie Olwage were at an advanced stage. The plaintiff said soon after the purchase of the Houghton Park House in October 2003 she only stayed in the house for three months after which the first defendant forced her out of the house and caused her to stay in rented accommodation whilst he simultaneously brought in Daffnie Olwage into Houghton Park house. She only returned to the Houghton Park house in 2008 until her permanent departure in August 2010.

I have no doubt in my mind that the plaintiff demonstrated clearly how she directly and indirectly contributed to the purchase of the Houghton Park house. Her evidence in that regard remained unscathed even under cross examination. Although the plaintiff was visibly emotional during her testimony I find her to be a sound witness who gave a clear account and provided relevant detail on how and when the Houghton Park house was acquired.

The plaintiff did not only rely on her evidently sharp memory but her testimony was buttressed by various documentary exibits. All in all her demeanour was good and I assess her credibility to be high.

The first defendant was a very poor witness in this regard and he seemed not keen to take the court in his confidence.

To start with all witnesses the first defendant called to testify were irrelevant witnesses. Idah Kuyeri the first defendant’s aunt told the court that she had no personal knowledge of the dissolution of the union between the plaintiff and the first defendant in 2003. She said she was advised telephonically by the first defendant of the “divorce” in 2003 and Zimbabwean $1.00 *gupuro* which she said the plaintiff’s aunt refused to accept. She was not even aware that first defendant summoned the plaintiff’s father to Houghton Park house in 2010. She was not even aware that the first defendant materially supported the plaintiff and the children from 2003 to 2010. She even was surprised to learn of birth of the third child in 2007 well after the “divorce” in 2003. It is clear that Idah Kuyeri had no knowledge of what was happening in first defendant’s love life and she was merely called to give hearsay evidence on material issues in dispute.

The testimony of first defendant’s friend Zvirikwandiri Mugwira in my view deserve no comment. All he could say was that he was told by the first defendant of the Zimbabwe $1.00 divorce token (“gupuro”).

Daffnie Olwage who has since been awarded a 30% share of the Houghton Park house in the magistrate’s court told the court that she married the first defendant in October 2003 and that the first defendant had left. She married the first defendant at 19 years soon after writing her ‘A’ level examinations and had no professional qualifications. She clearly did not contribute directly to the acquisition of the Houghton Park house as it was bought the very month she was married despite her assertions to the contrary. Her contribution to the union with the first defendant at most in relation to the Houghton Park house was indirectly and probably very minimal. While the order by the magistrate court to grant her 30% value of the Houghton Park house remains valid and is not an issue before me, I hold the view that the trial magistrate may have erred in that regard more-so as the learned magistrate clearly had no jurisdiction to deal with the Houghton Park house.

Daffnie Olwage’s evidence was to the effect that the plaintiff had not made any contribution to the acquisition of the Houghton Park house. This is so despite her concession that the first defendant had reconciled with the plaintiff in 2008 and the first defendant’s offer to have 10% of the value of the Houghton Park house awarded to the plaintiff. This is the same witness who did not bother to claim her 30% share of the value of the house awarded to her by the magistrate’s court but instead proceeded to register a Trust for which she virtually knew nothing about and was totally ignorant of not only know how it operated but how her child was to benefit from the Trust. I assess her to be a gullible witness who despite problems with the first defendant is still mesmerised by his misplaced charm. My assessment of her is that her evidence was half hearted and was clearly biased with the sole intention of discrediting the plaintiff. Daffnie Olwage’s stance is explicable as she has a child with the first defendant as his “ex-wife” and was lured into a meaningless Trust to which she erroneously thought owed a duty to defend. I am unable to place any weight on her evidence.

The first defendant’s version is that he acquired a loan jointly with the plaintiff from Time Bank to purchase the Tynwald South Stand. This is clearly untrue as exh 1 does not support this assertion.

While the defendant admitted that he called the plaintiff to Harare in order to dispose of the Tynwald South stand he was not sure about the dates. In fact throughout his evidence the first defendant was not keen to provide material details especially dates. All that the first defendant could say is that he used the proceeds from the sale of the stand to pay for the transfer fees of the same stand into their names as was required. He also said the stand was in arrears. Needless to say all this was not put to the plaintiff and does not form part of the first defendant’s plea. The first defendant said he sold the stand for Zimbabwe $18 million and used the $10 million to clear the outstanding arrears and gave the plaintiff the balance of Zimbabwe $8 million.

As regards the acquisition of the Houghton Park house the first defendant told the court that he acquired it using the mortgage finance exh 10 he obtained from Cabs on 30 October 2003 for Zimbabwe $30 million. The first defendant was not clear on how he paid the balance of Zimbabwe $10 million since the Houghton Park house was bought for Zimbabwe $40 million. He said he repaid the loan from Cabs using the funds he generated from his business as per the various jobs he performed. See exh 11. The first defendant said he only managed to clear the debt with Cabs in 2006. He denied that the Takeaway business was profitable. In fact he said he closed down the business in 2004 although this again was not put to the plaintiff. The first defendant indicated that the Houghton Park house is registered in his name as per exh 12.

The first defendant gave a number of reasons as to why the plaintiff’s claim should be dismissed. Firstly he said the plaintiff when she left in 2003 after the dissolution of their union got a fair share of all what she contributed in the family and signed for the property. He produced exh 13 but unfortunately for him exh 13 is only dated 10 January 2011 and not 2003.

Secondly, the first defendant said the agreement of sale of the Houghton Park house exh 12 is in his name only and not the plaintiff. Thirdly the first defendant said the magistrate court has already shared the same house between him and Daffnie Olwage as per exh 14 in which he was awarded 70% and Daffnie Olwage 30% of the value of the same house. The first defendant said he did not comply with the court order exh 14 but has since donated all the shares to the second defendant the Trust for which all his children are beneficiaries. All in all the first defendant’s evidence is that the plaintiff made no direct or indirect contribution to the acquisition of the Houghton Park house hence her claim should be dismissed.

The first defendant’s disregard for the truth becomes very clear when one pays regard to what he told the magistrate’s court on the same issue in the case relating to the same house involving him and Daffnie Olwage as per exh 4 (a) to (c) specifically in his plea exh 4 (b) and closing addresses exh 4 (c).

In exh 4 (b) dated 30 July 2008 para 6 this is what the first defendant said in answering to Daffnie Olwage’s claim for a share of the value of the Houghton Park house.

“5 Ad Paragraph 6

The immovable property being stand number 1415 Muchecheni close Houghton Park, Harare was not acquired during the subsistence of the union. I had a stand in Tynwald South, Harare being stand number 7893 which I bought with my first wife Catherine Chikavhanga and it was our matrimonial asset. We then sold this stand and using the proceeds from the sale of Tynwald stand and a loan I got from Cabs, I and my first wife we bought stand number 1415 Muchecheni close, Houghton Park, Harare. This was before I married the plaintiff. There are the documents to that effect which I will produce during the course of the trial. I aver then that house number 1415 Muchecheni close Houghton Park Harare is not her matrimonial property.”

These averments made by the first defendant in the magistrate court confirm the plaintiff’s evidence in this court. The same version was repeated by the first defendant in para 7 of the closing written submission exh 4 (c). These averments are to the effect that:

1. the Houghton Park house was acquired before the first defendant entered into a union with Daffnie Olwage;
2. all the proceeds from the sale of the Tynwald South stand 7893 were channelled towards the purchase of the Houghton Park property;
3. the Houghton Park house was bought by the first defendant and the plaintiff jointly;
4. additional finance was obtained from Cabs by the first defendant to purchase the Houghton Park house;
5. that there is documentary evidence to prove all these assertions; and
6. that the plaintiff and the first defendant purchased the Houghton Park house together thus confirming the tacit universal partnership.

It is therefore surprising that the first defendant is trying to pull wool over the eyes of this court by proffering a different version in these proceedings. Under cross examination the first defendant admitted that the two contrasting versions cannot possibly be true and was not able to explain the contradictory versions except to say he would do and say anything to protect his property. While the first defendant may find it proper to lie and mislead various women in his polygamous lifestyle, it is entirely wrong and inappropriate for him to use the same tactics before each and every court he appears by proffering various versions of the same event.

I find the first defendant to be a hopeless witness who seems not to appreciate the value of the truth. I am unable to accept his version he proffered before this court.

The last issue I should consider is the share to be awarded to the plaintiff of the Houghton Park house. This determination is made on the basis that the first defendant and the plaintiff were in tacit universal partnership and that the Houghton Park house was acquired through the joint effort of both parties. In specific terms the award is based on the respective contributions, directly or indirectly made by the parties in the acquisition of the Houghton Park house. I have indicated that I accept the plaintiff’s version of evidence in this regard.

I am satisfied that the plaintiff and the first defendant made significant contributions in the acquisition of the Houghton Park house. In specific terms the plaintiff made a direct contribution of Zimbabwe $18 million and the first defendant a direct contribution of the balance of the purchase price of Zimbabwe $22 million. In terms of indirect contributions I have considered all relevant factors to the union between the plaintiff and the first defendant which include the following:

1. that the plaintiff was a professional woman who was gainfully employed from 2000 to 2010 save for the period 2002 to 2004;
2. that the plaintiff contributed half of the purchase price of the Takeaway business which became the cash low for the family;.
3. That the plaintiff was virtually the sole parent as regards looking after the welfare of the three children; and
4. That the union lasted for a very long period 1999 to 2010 a period of 11 years.

While the court maybe able to quantify the direct contribution of each of the parties to the acquisition of the Houghton Park property I am unable to do so with precision in relation to indirect contributions. I would adopt the approach in *Chapendama* v *Chapendama* 1998 (2) ZLR 18 (H) and estimate their indirect contribution to be equal. The parties’ direct contribution of Zimbabwe $18 million and $22 milling is almost in equal terms. I am satisfied that the plaintiff and the first defendant contributed in equal terms. I am satisfied that the plaintiff and the first defendant contributed in equal measure to the acquisition of the Houghton Park house acquired during the subsistence of the unregistered customary law union. I also make the finding that a tacit universal partnership existed between the plaintiff and the first defendant to what was an unregistered customary law union.

I am aware of the fact that the 30% of the value of the Houghton Park house was awarded to Daffnie Olwage by the magistrate’s court. My expressed misgivings about that order remain largely irrelevant as that order is still extant. I am therefore inclined in this proceedings to deal with the 70% value of the Houghton Park house. I will proceed to award the plaintiff half share (1/2) of the 70% value of the Houghton Park house and the first defendant half share (1/2) of the value of the same house. Since Daffnie Olwage has not claimed her share in any binding legal way and the Houghton Park house has not been disposed of I shall direct that the house be valuated within a specified period and that of the total value 30% share would be given to Daffnie Olwage in terms of the magistrate court order unless the first defendant buys her out. Of the remainder of 70% of the value of the house the plaintiff and the first defendant are awarded half (1/2) share each of the 70%.

In view of the polygamous nature of the first defendant’s relationships I find it inappropriate to make an additional order giving any of the parties the option the party to buy the other out. There are practical problems in implementing such an order and in any case no party has made that offer to buy the other out.

I now deal with the issue of costs. I am inclined to follow the general practice that the issue of costs follows the result more-so as the first defendant who is entangled in a web of polygamy was extremely misleading and untruthful in relation to issues in dispute. This prolonged the trial and in my view did put the plaintiff out of pocket. Since the second defendant is merely a sham I shall order costs against the first defendant only.

In the result, I make the following order:

1. The plaintiff and the first defendant are declared to be owners of an undivided half share of 70% in stand number 1415 Ardbennie Township of 16 of subdivision A of Ardbennie also known as number 1415 Muchecheni Close, Houghton Park, Harare.
2. The said property shall be valued by an estate agent nominated by the plaintiff and the first defendant within thirty days of this order.
3. In the event the parties fail to agree on the estate agent as set out in para (2) of this order the Registrar shall appoint an estate agent from his list of valuers to conduct an evaluation of the said property upon request by either party and the estate agent shall submit a report to the parties within fourteen days of his appointment.
4. The costs of the valuation shall be deducted from the net proceeds of the sale of the property.
5. After the estate agent has submitted the report in terms of para (3) of this order the said property shall be sold at the best advantage and the proceeds shall be shared as follows:
   1. The first defendant shall in accordance with the magistrate’s court order in case number 1488/08 pay Daffnie Olwage a 30% share value of the said property within ten days of being paid the purchase price of the property.
   2. The balance of 70% of the value of the property shall be shared equally between the plaintiff and the first defendant upon sale of the property.
6. The first defendant shall bear the costs.

*Matimba & Muchengeti*, plaintiff’s legal practitioners

*Mabuye Zvarevashe*, 1st and 2nd defendants’ legal practitioners