GLADYS CHIGOVA
versus
STANLEY NYADZOMBE
and
HANKY TERBALANCHE

HIGH COURT OF ZIMBABWE
TAGU & MUCHAWA JJ
HARARE, 9 September 2021 & 20 October 2021

CIVIL APPEAL

F Nyakatsapa, for the appellant
S Muyemeki, for the respondent

MUCHAWA J: This is an appeal against the judgment of the Magistrate Court which granted an interdict sought by the first respondent against the appellant and the second respondent.

The first respondent alleged that he had been customarily married to the appellant and the marriage had since been dissolved. During the subsistence of the marriage, the appellant was granted a lease in respect of Subdivision 1 of Kupinda farm in Hurungwe, measuring 395.76 hectares. Following the dissolution of the marriage, the appellant had sought to evict the first respondent under case HC 243/13. That matter is pending. Meanwhile on the strength of the policy espoused by the Ministry of Lands and Rural Resettlement regarding its 99 year leases, that upon dissolution of marriage, the spouses each retain their rights as holder of an equal joint and undivided share in the leasehold unless the lessee compensates the divorced spouse for his assessed share under the lease, each party had been farming on the farm, on a 50/50 basis since 2011. The case of the 50/50 demarcation of the farm was said to be pending before the Minister. It was the first respondent's averment that the appellant had, in 2020, contracted the second respondent to plough the whole farm including his 50% share thus disrupting his farming plans under command agriculture. The first respondent sought an order barring the appellant and second respondent from interfering in any manner with his 50% share of Kupinda Farm, in the interim and to be interdicted

from ploughing, cultivating and planting the whole farm without his consent regarding his 50% share.

The appellant in her opposition alleged that there were material disputes of fact which needed the adducing of oral evidence and she included the following as disputed facts;

i. That she was married to the first respondent
ii. That the land was offered to her when they were staying together
iii. That they had been farming on a 50/50 basis on the farm
iv. That the parties had entered into a deed of settlement
v. That the first respondent had a clear right to the farm
vi. That she had invaded the first respondent's farm

In particular, the appellant claimed that the first respondent was her boyfriend and they had not been married customarily at all. She further alleged that she had entered into the lease agreement in 2007 after an offer of the land in 2003. Additionally, the appellant argued that the Land Policy was not applicable in her case as there was never a marriage between the parties registered in terms of either the Marriage Act or Customary Marriage Act. It was her case that the first respondent did not have a clear right to the farm, there had been no deed of settlement and she had not invaded the first respondent's farm and there was no basis to grant the interdict.

The court *a quo* resolved the dispute relating to the existence of a marriage between the parties, on the basis of papers on record and after a finding that there was indeed a marriage, which formed the basis for first respondent's entitlement to the remedy sought. The court found that the marriage commenced in 2003 whilst the offer letter was dated 15 December 2003. On a balance of probabilities, the court *a quo* found that the land was acquired during the subsistence of the marriage. It was further held that the first respondent had a clear right as a spouse to the leased farm on the basis of equality of marriage. It was reasoned that the first respondent could not have approached the court if there was no imminent harm. The fact that the appellant had lied about her marriage to first respondent worked against her as the court *a quo* discarded her story on whether she had contracted second respondent to carry out farming on the whole farm. The order sought, of an interdict, was granted as the court *a quo* found that there was no alternative remedy available for the first respondent.

The grounds of appeal before this court are given as follows:

a) The court *a quo* erred at law in concluding that the first respondent had lied when she said she was not married to the appellant when in actual fact no legally recognized marriage had ever ensued between the appellant and first respondent.
b) The court *a quo* erred at law in granting a final interdict when no clear right had been established by the first respondent over the property.
c) The court *a quo* erred at law in concluding that the first respondent had suffered harm when no evidence of harm suffered had been placed before the court.
d) The court *a quo* erred at law when it concluded that the key issue for determination was whether there existed a marriage or not between first respondent and appellant when the issue of marriage between first respondent and appellant was only one of the 5 disputes of fact raised by the appellant as a preliminary point which were key to the resolution of the matter.
e) The court *a quo* erred in granting a final interdict against the appellant on the 50% share of the first respondent when the said 50% share is not defined and the matter is pending before the Minister of Lands, Water, Climate and Rural Resettlement as to whether the first respondent is entitled to any share thereof and if so which part.

It is prayed that the appeal succeeds with costs and the court *a quo*'s judgment be set aside and be substituted with an order dismissing the application for a final interdict. We heard the parties and dismissed the appeal for lack of merit. The appellant has requested a written judgment. This is it.

Ground 1 of appeal: Whether there existed a legally recognizable marriage between appellant and 1st respondent

Mr *Nyakatsapa* submitted that in Zimbabwe there are only two legally recognized marriages, namely the civil marriage contracted under the Marriage Act [*Chapter 5:11*] and the Customary Marriages Act [*Chapter 5:07*] and that no other marriage is valid unless it is solemnized. The court was pointed to the cases of *Mandava* v *Chasweka* HH 42/08 and *Jeke* v *Zembe* HH 237/18 in support of the argument that an unregistered customary law union is not a marriage.

Mr *Muyemeki* submitted that contrary to the appellant's submissions before the court *a quo*, that the parties were only boyfriend and girlfriend, they were married in terms of an unregistered customary law union and were therefore spouses for purposes of the Land Policy which gave the first respondent a clear right as a lease holder.

It is interesting to note that the appellant has changed her story here on appeal. Her story before the court *a quo* was this;

> "I was never married to the applicant. Applicant was my boyfriend and we were never married. He never paid anything to my family or performed any tradition required for one to be married customarily."

The magistrate was shown evidence of proceedings instituted by the appellant before Chief Mujinga on 27 November 2011 wherein she produced a divorce token against first respondent. There was further evidence in case DV 251/11 in which appellant applied for a protection order in terms of the Domestic Violence Act against the first respondent whom she described as her husband. Most telling is the declaration by appellant in case HC 12462/11 in which is sought, division of matrimonial property. She states that the parties were customarily married from 2003 and the marriage has irretrievably broken down to the extent that the appellant gave the first respondent a divorce token and that one minor child was born of the marriage. In an application to interdict the first respondent from moving equipment from the farm, the appellant made the same allegations.

Before this court, the appellant's story has changed from a bare denial of the existence of a marriage to one in which there is now an admission of their having been an unregistered customary law union but arguing that it is not legally recognizable. The *court a quo* was never called upon to determine that issue at all. It is improper to impugn the court for an argument which was not raised before it. In *Chikanda* v *UTC* SC 7/99 it was held;

> "If the argument was not raised before the tribunal, the tribunal cannot be faulted for not dealing with it. It cannot be a ground of appeal from the tribunal that it did not deal with a matter it was not asked to deal with."

In any case the two cases referred to by Mr *Nyakatsapa* relate to different scenarios. In the *Mandava* v *Chasweka* case supra MAKARAU J, as she then was makes the finding that an unregistered law union is not a marriage for purposes of the Matrimonial Causes Act [Chapter 5:13] and consequently such unions cannot be divorced by the courts and their joint estate cannot

be distributed in terms of the divorce laws of the country. The same position was reached in *Jeke* v *Zembe supra*. *In casu* the question of the customary law union of the appellant and first respondent was not raised in relation to divorce or distribution of matrimonial property. Those cases are distinguishable and inapplicable to the case in question.

The issue that exercised the *court a quo*'s mind was whether the appellant and first respondent were married at the material time in a way which entitled the first respondent to benefit from the Land Policy thus establishing a clear right. In other words, was the marriage recognizable for the definition of spouses in the Land Policy? This question was answered in the affirmative by the court *a quo*.

We found for the first respondent too, that the real issue was about what rights accrued to the first respondent from the Land Policy. The Policy is explained in a letter on record page 20 from the relevant Ministry, then, the Ministry of Lands and Rural Resettlement. It is stated;

> "Our policy on 99 year leases if that if the lessee in whose name the lease is issued was married to one or more spouses at the time the lease was issued, his or her spouse(s) shall be deemed to hold an equal joint and undivided share in the leasehold.
>
> If the marriage is dissolved, the divorced spouse shall retain his or her rights as the holder of an equal joint and undivided share in the leasehold unless the lessee compensates the divorced spouse for his or her assessed share under the lease.
>
> The assessed share be determined by the lessor after giving the lessee and the divorced spouse a reasonable opportunity to make oral or written representation in the matter, and interest on the amount so assessed shall accrue at the prescribed rate of interest for each month that the assessed share remains unpaid, excluding the month in which the share was assessed……."

It was our finding that the issue was about what rights accrued to the first respondent from the policy. The clear intention of the State was to protect spouses irrespective of the form of marriage they had. This is why, the Ministry was proceeding in terms of the policy to entertain the appellant and first respondent who had a meeting scheduled for 7 October 2020 in which their submissions regarding their respective interests to the leasehold would be held. See record page 22. This was being done even where it was clear that the parties had an unregistered customary law union.

We consequently found no merit in ground of appeal 1.

Ground of Appeal 2 Whether a clear right had been established by the first respondent justifying the granting of a final interdict.

Mr *Nyakatsapa* submitted that since the appellant is the registered owner of Kupinda Farm in terms of a lease agreement entered into between her and the government of Zimbabwe she therefore is entitled to do whatever she pleases on that farm. It was argued on the strength of the case of *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* CCZ 7/ 2014 that an interdict cannot be granted against lawful conduct.

Furthermore, it was submitted that since there was an unregistered customary law union, the first respondent should have approached the court to claim a share under unjust enrichment or tacit universal partnership since there was no distribution of property done. It was contended that before distribution of the property, the first respondent had no right to Kupinda farm as it is registered in appellant's name. It was alleged that the first respondent did not place any evidence before the court a quo in order to prove a clear right to the 50% share of the farm.

Mr *Muyemeki* submitted that Kupinda Farm is state land and not personal property of the warring parties thus none of them is the owner as alleged by the appellant and it does not fall to be distributed as matrimonial property. The case of *Chombo* v *Chombo* SC 41/18 was referred to in support of this. It was submitted that the parties' rights to Kupinda Farm flow from a 99 year lease of 2007 and not an offer letter of 15 December 2003. The court's attention was drawn to the cover page of the lease agreement on record page 34 which states that, "in relation to any person who holds land under the lease, lessee shall mean that person and his or her spouse or spouses jointly." It was argued that the offer or lease agreement do not spell out any marriage regime applicable but simply use the word spouse, implying that it is any husband or wife to any marriage relationship in terms of law or recognized custom. Reference was also made to the land policy document which we quoted above to argue that at any stage and at all material times spouses hold equal and undivided shares to a leasehold. This right, it was argued, is only lost by a spouse after the other has paid in full the divorced party if, upon dissolution the lessor chooses to assess the monetary value of the leasehold.

We are in agreement with the submissions and conclusions by Mr Muyemeki. The appellant was misguided in believing that she owns Kupinda Farm. In *Chombo* v *Chombo supra*, it was held:

"On page 1 of the lease agreement the word "lessee" is defined as follows:

> "In relation to any person who holds land under this lease, lessee shall mean that person and his spouse or spouses jointly."

There is therefore no doubt that the appellant has rights and interests in the farm as a joint lessee by virtue of her being the respondent's erstwhile wife. It is clear that the lease was granted for the respondent's and appellant's benefit. The use of the word "jointly" means they were both intended to benefit from the farm."

This therefore means that the appellant is a joint leaseholder with her spouse and his right to occupation will only be extinguished once the lessor resolves the issue of assessment of shares and payment by the appellant, if that is the route taken.

In an application for an interdict, the applicant must prove that he has a certain, definite and established right, in other words, a clear right and this must be established on a balance of probabilities. *In casu*, the first respondent discharged this onus by relying on the lease agreement, the land policy and the existence of the customary law union at the relevant time. The court a quo did not err therefore in holding that the first respondent had established a clear right and proceeding to grant a final interdict

Ground of appeal 3 whether there was proof of irreparable harm suffered or reasonably apprehended

It was submitted for the appellant that the *court a quo* erred in granting a final interdict without satisfying itself that the first respondent had suffered harm or was likely to suffer harm if the relief sought was not granted. It was contended that the first respondent's averments that he was contracted under command farming under contract number 14-02-02-608 and had already approved E vouchers for receiving inputs. It was argued that the first respondent should have stated the inputs he was receiving, whether they were for use at appellant's farm and whether he had permission from appellant to farm. It was also stated that inputs are given to a farm or plot holder and *in casu* the first respondent is none of those.

Mr *Muyemeki* submitted that the first respondent's averments were sufficient to prove irreparable harm.

We already made a finding that the first respondent, in terms of the lease was the holder of equal and undivided shares. He did not need the appellant's permission to farm and the averment

that despite being contracted under command farming, in terms of a specified contract, and having already approved inputs, such farming would be disrupted if the appellant was not interdicted. As a joint beneficiary to Kupinda Farm, first respondent did establish that he was contracted under command agriculture, it was farming season. He provided his contract reference number and voucher numbers for already approved inputs he was receiving. Harm was reasonably apprehended if his farming plans were to be disrupted.

We found therefore that there was no error on the part of the trial court in concluding that there would be no reasonable basis upon which the first respondent would approach the court for an interdict if there was no harm suffered or apprehended. The appellant did not help her own matters by selling a sham of a story that she was a mere girlfriend to first respondent, which was quickly unravelled as her own actions and submissions in other court matters laid bare her lie. The court a quo correctly relied on the principle in *Lead Zimbabwe (Pvt) Ltd* v *Smith* HH 131/03 which states:

> "It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given any evidence at all."

There is no merit in ground of appeal 3.

Ground of appeal 4 whether the key issue for determination was the existence of a marriage between the appellant and first respondent?

The appellant argued that the court *a quo* erred in stating that the key issue for determination was whether there existed a marriage between the parties yet this this was only one of five issues raised as a preliminary point.

The appellant in her notice of opposition raised the point in *limine* that there were material disputes of fact incapable of resolution on the papers. First and foremost was the issue of whether a marriage existed. This was resolved on the papers as was the issue of the date of offer of the land relative to the date of marriage. The deed of settlement was on record for the court's perusal. The issue of whether the first respondent had a clear right was resolved by the finding of the existence of the customary law union and that it preceded the offer of land. It was also on the basis of the existence of the marriage that it was found that in terms of the lease agreement and its policy, the first respondent was an equal beneficiary of Kupinda Farm. Since a lot of the other issues were

dependent on the finding on the marital status of the parties, there was nothing amiss in observing that the key issue for determination was the existence of a marriage between appellant and 1st respondent.

Ground of appeal 5 whether the granting of the interdict should have awaited the decision of the Minister of Lands, Water, Climate and Rural Resettlement

In this ground, the appellant postulates that the court a quo should not have granted the final interdict as the 50% shares were still to be determined by the Minister.

We found no merit in this ground. Since the Minister is yet to make his decision the land policy as reflected on record was applicable as it derives from the lessor who is the owner of the land. For the avoidance of doubt, I reproduce the relevant part below;

> "Our policy on 99 year leases if that if the lessee in whose name the lease is issued was married to one or more spouses at the time the lease was issued, his or her spouse(s) shall be deemed to hold an equal joint and undivided share in the leasehold.
>
> If the marriage is dissolved, the divorced spouse shall retain his or her rights as the holder of an equal joint and undivided share in the leasehold unless the lessee compensates the divorced spouse for his or her assessed share under the lease."

The terms of the final order granted were that appellant and second respondent were barred from ploughing, cultivating and planting the whole farm including first respondent's 50% share without his consent, whilst appellant was allowed to continue her own farming activities on her own portion of the farm. The above order does not detract from the Minister's right to decide on the way forward. Importantly, it served to protect the first respondent's clear right to farm on Kupinda Farm when irreparable harm was being committed or was reasonably apprehended and he had no other available remedy, as the Minister was yet to make a decision on the matter.

Consequently the appeal was dismissed with costs for lack of merit.

TAGU J agrees…….

T Pfigu Attorneys, appellant's legal practitioners
Mapaya & Partners, first respondent's legal practitioners