KEDISON MUTSWAKATIRA
versus
PRIMROSE MUNANGA
and
ADALIA MUNANGA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 13, 14, 15, 16, 17 February & 23 June 2023

Civil Trial – Divorce

Mr *S Mupindu*, for the plaintiff
Mr *T Tandi*, for the first defendant
Mr *T.S Manjengwa*, for the second defendant

MUCHAWA J: On 12 April 2016, the plaintiff issued out summons against the first defendant only and sought the following relief:

a. An order that a partnership existed between him and first defendant in respect of the assets of the union.
b. An order awarding the defendant custody of the minor children namely:
    i. Takunda Mutswakatira born 27 June 2004
    ii. Dionne Mutswakatira born 14 April 2007
c. An order that 6162 Bloomingdale, Ashdown Park, Mabelreign Harare, be awarded to plaintiff with plaintiff meeting the costs of transfer into his name.
d. An order awarding the defendant all the movable assets together with stand number 6605, 132 Street Kuwadzana 5 as her sole property.
e. Costs of suit.

The first defendant filed a plea opposing the claim relating to distribution of immovable property. She averred that the Bloomingdale property was her sole asset as the plaintiff had not contributed to the purchase and development of same and it was in fact registered in her name. The Kuwadzana property was alleged to belong to the first defendant's sister, the second defendant who she said they had bought the house on her behalf as both she and her husband were in the United Kingdom then. She averred that they had entered an unregistered customary

law union in April 2000 which collapsed in September 2013 when the plaintiff moved out of the home, they were living in. The plaintiff had said the union collapsed in February 2010.

On 19 January 2017, the first defendant filed a Notice of Amendment: Plea in which an exception was taken that the summons did not disclose a cause of action, a plea of prescription and non-joinder of the second defendant. The amended plea was admitted at the pre-trial conference held before Honourable Justice Munangati-Manongwa. Thereafter the second defendant was joined to the proceedings after filing an application for joinder. She filed her plea to the main matter and a claim in reconvention in which she sought a declaration that she is the owner of stand 6605, 132 Street, Kuwadzana 5, Harare. There does not appear to be any replication or response to the amended plea. Even the joint pre-trial conference minutes do not reflect any such issue as referred to trial.

The issues referred to trial were as follows:

1. Whether or not house number 6605 Kuwadzana, Harare was bought by the plaintiff and first defendant on behalf of the second defendant, such as to exclude it from their matrimonial property.
2. Whether or not the plaintiff and first defendant had a tacit universal partnership and if so, what percentages are they entitled to in the partnership?
3. What would be the fair and equitable distribution of the stand number 6162 Bloomingdale, Mabelreign, Harare and subject to the court's finding on issue number 1(stand number 6605 Kuwadzana, Harare)?

The issue of custody of the minor children and division of the movable property was resolved at the pre-trial conference. In the closing submissions of the parties, the first defendant raised the issue of prescription which was adequately canvassed in its pleadings and at the trial. The plaintiff's closing submissions did not touch on this. I therefore invited the parties and asked plaintiff's counsel to file supplementary submissions on this issue only.

Whether the plaintiff's claim has prescribed

I have already pointed out that the first defendant raised the special plea of prescription, but the plaintiff simply kept mum on this. The case of *Jennifer Nan Brooker* v *Richard Mudhanda & The Registrar of Deeds & Anor* SC 5/18 sets out what the plaintiff should have done and the effect of a failure to do so. It is stated as follows:

> "Generally, a plea is the answer by a defendant to the claim by the plaintiff as set out in particulars of claim or in a declaration as the case may be. In addition to a plea which raises a defence on the merits of a claim, a defendant may also raise a special plea which has its object either to delay the proceedings or to quash the action altogether.
>
> After being served with the special plea of prescription the respondent should have replicated. The purpose of a replication is to inform the court and the defendant of the plaintiff's rebuttal to the special plea. The failure by the respondent to file a replication to the special plea means that there are no disputes for determination on the special plea. In the absence of such replication there would be no issue for determination by the court *a quo*."

As already observed, the plaintiff did not file any replication and it is not surprising that the issue of prescription was not included in the issues for trial. The issue should have ended there, it meant there was no issue for determination by the court.

In further motivating for the upholding of the special plea of prescription, first defendant's case is that there was an unregistered customary law union between her and the plaintiff which terminated in 2010 and the summons in this matter were issued on 12 April 2016, some six years later. The claim is said to have prescribed in terms of s 15 (d) of the Prescription Act [*Chapter 8:11*]. This section on periods of prescription of debts provides that,

> "The period of prescription of a debt shall be—
> (*d*) except where any enactment provides otherwise, three years, in the case of any other debt."

Further, s 20 (2) of the Act says:

> "(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings:
> Provided that a court may allow prescription to be raised at any stage of the proceedings."

The cause of action in this case between plaintiff and first defendant is alleged to have arisen in 2010 when the union or alleged partnership was terminated. As the plaintiff's claim is based on tacit universal partnership, which is a general law principle, it is argued that the claim is subject to prescription.

The plaintiff's declaration provides that:

> "3. The parties married in August 2000 by way of an unregistered customary law union and the said union collapsed in February 2010."

Under cross examination by first defendant's counsel, the plaintiff confirmed that the union collapsed in February 2010, and he instituted the current summons on 12 April 2016. This was reiterated when he was cross examined by the second defendant's counsel, and he confirmed that it took him 6 years to act as he sought to evict the Kuwadzana tenant in 2016.

This is the same time he issued this summons. The first defendant, in her evidence in chief, when asked when they eventually separated, said that they separated in 2010.

It was argued for the first defendant that on the strength of the case of *Ngaru* v *Kusano* HH 265/21, a claim based on tacit universal partnership is premised on general law and subject to prescription.

As the plaintiff had not canvassed the issue of prescription in both his evidence in chief and in closing submissions, I invited counsel for the parties and requested closing submissions on the issue of prescription only. It was in these closing submissions that evidence was sought to be led from the bar to the effect that the marriage of the parties had been dissolved in 2014. It was said that in 2016 the first defendant in concert with second defendant was claiming the Kuwadzana house as hers and she had attempted to evict his brother without his knowledge in March 2016 spurring him into action. It was argued that the cause of action therefore arose in 2016 at the occurrence of those events and as the marriage had only been dissolved in 2014, prescription had not run.

Another aspect of evidence from the bar is that of the plaintiff having allegedly approached their "munyai" or facilitator in 2014 to advise him of the collapse of their marriage union and then in 2017 to ask that the first defendant should collect her clothes and kitchen utensils from the rural home in Gutu. This was not canvassed anywhere in the evidence before me.

Additionally, it was argued that the unregistered customarily law union of the parties was not dissolved in 2010 as no "gupuro" was paid to mark the customary dissolution. All that happened in 2010 is alleged to be mere separation with dissolution happening in 2014.The cases of *Nyandoro* v *Mukowamombe & Ors* HH 209/2010 and *Pasipanodya* v *Muchoriwa* 1997 (2) ZLR 182 (S) were referred to, to argue that an unregistered customary law union is only dissolved by either giving "gupuro" or before a customary law court and that mere separation was not dissolution of marriage.

The plaintiff's counsel then embarks on semantics. I am invited to consider that the collapse of a customary law union does not equate to dissolution but is mere separation. I say so because there is no evidence backing these assertions. In all the plaintiff's evidence in chief, under cross examination and in re-examination, no mention was ever made of the dissolution of the marriage having happened in 2014. I reproduce the evidence before me.

Under cross examination before Mr *Tandi,* the following exchange took place:

Q. If I take you to page 3 paragraph 3, is it your evidence that the union collapsed in February 2010?

A. Yes

Q. Confirm that summons was issued on 12 April 2016

A. Yes

Q. That was 6 years after collapse of union

A. Yes

Under cross examination by Mr *Manjengwa*, this is what transpired:

Q. During this period you separated from first defendant in 2010?

A. Yes

Q. So you took 6 years to try and evict the tenant?

A. It was not 6 years as the court said nothing was to be done till we finalised this matter.

Q. Take us to court case which said that.

A. I asked lawyers and was advised that since the matter was before lawyers there was nothing I could do.

Q. Proceedings where you attempted to evict Mr Chitate were out of the Magistrates' Court. See p 205 of record.

A. Yes

Q. That was taken in April 2016?

A. It's not clear on the date.

Q. Date is below.

A. 12 April 2016 Messenger of Court

Q. That is date you instructed Messenger of Court to serve

A. Yes

Q. So you took action in April 2016?

A. Yes

Q. Before that you took no action?

A. We had already taken action and hoped to settle.

Q. When

A. First defendant and I came to Zimbabwe and Bloomingdale and our relatives came and tried to have us reconcile.

Under re-examination the plaintiff did not clarify at all what he meant by saying that the union had collapsed. He did not, either in his pleadings or evidence allude to the customary dissolution of the union in 2014.

The purpose of closing submissions which are to be submitted after all evidence has been heard and whose form is to be directed by a judge as per r 56 (26) of the High Court Rules, 2021, is to persuade the court to rule in a party's favour. Such closing submissions generally contain:

1. An analysis of the evidence produced to the court at trial, including arguments on why the court should believe in that party's case or rule in his/her favour on an issue in dispute.
2. A party's arguments on how the law shall apply to the case based on the evidence produced to the court.
3. The order that the court is invited to make.

In *casu*, the court directed that supplementary closing submissions be made on the issue of prescription only. The plaintiff's supplementary submissions are not analysing the evidence produced to the court at trial. They are seeking to introduce new evidence. The law cited is sought to be applied to non-existent evidence relating to the dissolution of the customary law union in 2014.

The argument sought to be ingeniously put up now, that it was a mere separation and not dissolution is like the proverbial, putting something on nothing and expecting it to stand. As per LORD DENNING in *MacFoy* v *United Africa Company* [1961] 3 All ER 1169:

> "You cannot put something on nothing and expect it to stay there. It will collapse."

The other case cited for the plaintiff seems to buttress my position. In *Chafanza* v *Shayamano* HH 350/20 it was held as follows:

> "In my view, the summons provided a true and concise statement of the nature, extent and grounds of the cause of action. The summons gave the alleged partnership as the cause of action. Details and the nature of the partnership are provided in the annexed declaration. Therefore, the summons provided the defendant with sufficient information about the cause of action; enabling the defendant to plead to the summons.
> In my view asking for more than what is already in the summons and declaration is tantamount to insisting that the plaintiff pleads the evidence of her claim as well as raise legal arguments in the summons. Evidence and legal arguments are for a later stage. They are not supposed to be contained in the summons."

In *casu,* in his summons and declaration, plaintiff provided a true and concise statement of the nature, extent and grounds of his cause of action. The summons gave the alleged partnership as the cause of action. In the declaration he gave particulars that the unregistered customary law union came into existence in August 2000 and collapsed in February 2010. This was affirmed in the evidence. Nothing contrary to this was said in evidence.

In *Jennifer Nan Brooker supra*, it was further held as follows:

> "It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea."

In *casu*, no contrary evidence was given, nor pleadings filed to show otherwise than that the alleged customary law union collapsed or ended in February 2010. That is the evidence I must work with in resolving the question of prescription.

It being common cause that the union of the plaintiff and first defendant ended in 2010, the matter prescribed in 2013. Accordingly, the plaintiff's claim stands to be dismissed with costs as it has been extinguished by operation of law.

What remains before me is the second defendant's claim in reconvention and the only issue for determination is this:

1. Whether or not house number 6605 Kuwadzana, Harare was bought by the plaintiff and first defendant on behalf of the second defendant, such as to exclude it from their matrimonial property.

The second defendant's case

The second defendant's evidence is that she is a sister to the first defendant and the plaintiff was married to the first defendant. She knows the plaintiff even before his marriage to his sister as they come from the same rural home area and were at some point at the same school. The plaintiff married first defendant in April 2000 customarily and the handover or "kupereka" ceremony happened in August 2000. The second defendant then left Zimbabwe to join her husband in the United Kingdom in March 2001. She left behind her two children, Tafadzwa Mcmillan Ngwenya and Tanaka Sasha Ngwenya who were then aged around a year and five years. She claims to have left her two children in the care of her eldest sister Mrs Chigogora, in Gweru where the older one was going to school and in the care of a maid she had then. Her children are said to have joined her in the United Kingdom in September 2001.

She averred that between March 2001 and September 2001, her children had not stayed with anyone else except with Mrs Chigogora and that they could not have stayed with the plaintiff and first defendant who had inadequate space to house the children and a maid as both were working.

On the acquisition of the immovable property 6605 Kuwadzana 5 Harare, the second defendant stated that before leaving for the United Kingdom, it had been her and her husband's wish to buy a house, but they could not afford one. They were drawn to relocate by the progress made by her husband's sisters who had already gone to the United Kingdom. Whereas her husband relocated in 1999, she followed in 2001 before they could buy the house. Whilst in the United Kingdom they then tasked the plaintiff and first defendant with the assistance of Precious Moyo, a niece and her husband to look for a house to buy, view and recommend purchase. They initially wanted a house in the low-density area but were advised that inflation was high, so it was better to have an asset anywhere than have the money depreciating. They settled to buy more than one house in the high-density areas.

The plaintiff and first defendant are said to have advised that they had found house 6605 Kuwadzana 5, Harare but the papers were not sufficient to put the house in the names of the second defendant and her now late husband. She said that they agreed to have the house put in the plaintiff and first defendant's names but insisted that their children should be put in as beneficiaries. At this point when the Kuwadzana house was bought, their children were already in the United Kingdom. She says that the idea was to transfer title of the house to them later but both plaintiff and first defendant soon followed to the United Kingdom in 2002 and 2003 respectively and they were never back in Zimbabwe at the same time to facilitate the transfer. The plaintiff is said to have been giving various excuses when requested to travel at the same time to attend to this.

The second defendant further testified that she had added the first defendant as a signatory to her CABS bank before she left so she could help manage her affairs here. When the house was bought, the second defendant said her husband and herself agreed to have plaintiff and first defendant move in and stay in the Kuwadzana house instead of the two rooms they had been renting in Mufakose, rent free as a way of gratitude for helping them in buying the house. The relevant paperwork for the house is said to have remained in plaintiff and first defendant's custody and was then handed over to Precious Moyo when first defendant relocated to the United Kingdom. This she said was because she wanted to rent out the property.

Commenting on the Agreement of Assignment on p 191 of record, the second defendant explained that it reflects the plaintiff as the owner of the house as per agreement alluded to above, but her children are put in as beneficiaries in the municipal records. This arrangement is said to have been based on trust. On the plaintiff's allegation that they put the second defendant's children as beneficiaries because they were yet to have children of their own and were in fact staying with the children, the second defendant said this was a blue lie as they never stayed with the children who were already in the United Kingdom when the house was bought in December 2001.

Furthermore, the second defendant testified that she has been in control of the Kuwadzana house since the plaintiff and second defendant relocated, through Precious Moyo who secured a tenant and has been collecting rentals and using them as per her instructions. She said that she uses the rentals to cater for her mother and extended family here. She said that the plaintiff has never had any idea of the quantum of rentals paid for the Kuwadzana property nor where they are paid.

Over and above the instructions given to the first defendant to buy the Kuwadzana property, the second defendant said she authorised the first defendant to pay for the Bloomingdale stand from her account, insisting that she was not going to help her build and had no idea then that Bloomingdale was in the middle density area.

The second defendant said that she has a generous heart and assisted the plaintiff relocate to the United Kingdom by facilitating that he gets an invitation to attend one Kudzai Chigogora's graduation ceremony. Kudzai was a brother-in-law to the first and second defendant and was then unknown to the plaintiff. She also said that she paid for the plaintiff's airfare and accommodated him when he arrived in the United Kingdom up till his wife had joined him and they then moved out later. He is said to have only started to contribute to the payment of rentals after the first defendant had joined them.

Whereas the second defendant said she had made several requests to the plaintiff to attend to changing the names on the Kuwadzana house to hers, she said that the plaintiff had never requested removal of the second defendant's children from the documentation as beneficiaries from 2004 when he had his own children.

In clarifying on the transaction for the purchase of the Kuwadzana house, the second defendant said she did not have personal knowledge of the actual transaction but relied on what she was told by the plaintiff and first defendant, who would have first-hand knowledge of what

happened as they were on the ground executing the mandates. In an averment in her founding affidavit to the application for joinder the second defendant said this:

> "The full purchase price was paid by myself. I attach hereto bank statements from my bankers CABS showing the payment of $ 1 000 000.00 and $ 130 000.00 as agreed by the parties as Annexure "C".

Second defendant commented that she remembered they had paid but she might have mixed up the details of manner of payment as her husband was alive then and would speak directly to the first defendant, She, however remembered that they had sent money. She believes that the court should rely on the first-hand testimony of the first defendant on this aspect as she was not available in Zimbabwe at the time of purchase of the house and it has been a long time now. Under cross examination, she said that the person who was sending money to Zimbabwe was in fact, her husband.

Upon being quizzed on the assertion in the particulars of the claim in reconvention wherein she stated that she paid the full purchase price through her bankers CABS yet the evidence from the first defendant was that part was paid through a bank cheque in the seller's name and only the balance through her bankers, she opted to rely on the testimony of the person who has first hand information, being the first defendant. The second defendant was further questioned on the inconsistency to the agreement of sale exhibit 1 on page 193 which provides that the full purchase price would be paid on signing the agreement and the endorsement in pen that $ 1 000 000.00 would be paid on 5 December 2001 by bank cheque and the balance of $ 130 000. 00 would be paid on 6 December 2001. Her answer remained that the details of the execution of the agreement would be best known by the first defendant who was on the ground.

The second defendant confirmed that at the time of her husband's death in 2002 he was a student and had restricted hours of work. She said before that they had both been working and would send their children to a childcare centre so they made quite a bit of money though she could not remember how much it was. Both had been teachers before going to the UK and had saved a bit of money as they had no accommodation or electricity costs as they were stationed at a rural school. Though plaintiff's counsel tried to prove that the second defendant and her husband were struggling financially in the United Kingdom, a walk through the second defendant's CABS account showed that whilst she had been earning $19 000.00 as a teacher in Zimbabwe, upon relocation, there were significant deposits into that account ranging from $195 000.00 to $2 940 000.00 between October 2001 and January 2002. A question had been put as to how the second defendant and her husband had been able to buy both the Kuwadzana

property in December 2001 and a Budiriro one in February 2002. The income flow was used to explain how this was possible.

The first defendant gave evidence on the Kuwadzana house purchase. She stated that she was customarily married in April 2000, and they started living together in August 2000 in one room in Mufakose. After a month they then moved into two rooms in the same locality to accommodate the plaintiff's brother, Kupakwashe. She insisted that they never lived with anyone else in Mufakose except for Kupakwashe.

According to the first defendant, the second defendant and her late husband requested them as a family to find a property to purchase for them. This same request was extended to Precious Moyo and her husband Webster Moyo. This was made easier by the fact that the second defendant had authorised her to manage her CABS account. It is alleged that the plaintiff, first defendant, Precious Moyo and Webster Moyo viewed the Kuwadzana house and settled on it as suitable for purchase. Thereafter Precious Moyo and Webster Moyo were not involved in the following transactions relating to purchase. Plaintiff and first defendant are said to have negotiated on the price and then they went to *Musariri Legal Practitioners* wherein it was agreed that $1 000 000.00 would be paid by bank cheque on the date of signing the agreement and the balance of $130 000.00 would be paid by cash the following day. The bank cheque was said to have been procured through an Indian pharmacist who was a family friend through whom other cash would be received from the second defendant and her husband. On the Kuwadzana cheque she says it was on the advice of the second defendant's husband that it was not safe to move around with a lot of cash hence the bank cheque was written in the names of the seller, L Mwerenga. In the agreement of sale the plaintiff is said to have signed for the purchaser whilst she signed as the first witness. The first defendant says she put her husband ahead and let him sign in line with cultural norms of allowing the husband to take the lead. She says this was her first involvement in purchasing immovable property. Her further role was to pay the purchase price as outlined in the annotation to the agreement. The $ 130 00.00 is alleged to have been withdrawn from the second defendant's CABS account which she was managing. Under cross examination, the first defendant insisted that she had consistently said the purchase money came from the second defendant and her husband. She had never said that all payments had come through the CABS bank account.

Thereafter, the first defendant said that they attended at the Municipality offices wherein a Memorandum of Agreement of Assignment was entered into between the seller, Leonard Mwerenga and his wife Nyarai Kasanga, on the one hand, and plaintiff and first

defendant on the other. Mr Mwerenga and his wife as assignors, who were entitled to possess and occupy stand No. 6605 Kuwadzana assigned all their rights and obligations to the plaintiff and first defendant. This was approved by Municipality on the 5th day of December 2001 and subsequently date stamped on 12 December 2001. Her inclusion as co-assignee was explained as resulting from the plaintiff's knowledge that they were only acting as agents of the second defendant and her husband. She further said that they had included the second defendant's two children as beneficiaries to the Kuwadzana house on the instructions of the second defendant and her late husband. The failure to put the assignment agreement in the names of the second defendant is said to have been occasioned by the advice from the municipal officers who said since this was a Memorandum of Agreement of Assignment and there were no title deeds, they could not put the house in the names of the principals they were representing.

Furthermore, the first defendant dispelled the plaintiff's assertion that it was in fact plaintiff and first defendant who bought the Kuwadzana house, by saying that they could not save their two salaries which were just for sustenance as they could not even afford to rent more spacious accommodation. She added that they had just married in April 2001 and upon moving in to stay together they had incurred more expenses in buying furniture and utensils and had Kupakwashe as a dependant.

After the purchase of the Kuwadzana house, the first defendant said they moved there in December 2001 with the blessings of the second defendant and her husband. They did not pay any rent. She confirmed the second defendant's story that the second defendant and her husband financed the plaintiff's travel to the United Kingdom by buying his ticket and housing him for a season.

When the first defendant went to the United Kingdom in 2003, she says that she handed over the Kuwadzana property documents which were in her custody to Precious Moyo who had been assigned to manage it by the second defendant.

The purchase of a second house in Budiriro in February 2002 was explained as resulting from the advice they gave to the second defendant and her husband about inflation and the need to secure even two or more houses in the high-density areas than wait to get a house in the low-density area. For the Budiriro house, an instruction is alleged to have been given to the first defendant, Precious Moyo and Webster Moyo and payment was made through the CABS bank account. It was the plaintiff and herself who stood in to pay for the purchase price and she proceeded to process the title deeds into the second defendant's names. This was said to have

been different from the Kuwadzana property which had no title deeds and was acquired through a cession which both the legal practitioners and municipal officers said they needed to complete the cession first and could not exercise full capacity. She denied that she could have been given a power of attorney to act in a representative capacity for the Kuwadzana property, in the light of the advice which she was relying on. The CABS statements show the payments for purchase of the Budiriro property.

The second defendant's averment that she had requested transfer of Kuwadzana to her names, several times was affirmed in the first defendant's evidence as well as that the plaintiff gave many excuses.

Under cross examination, the first defendant insisted that though the sale agreement for Kuwadzana had provided in clause 2 that the purchase price would be payable upon signing of the agreement, an endorsement or annotation had been entered in the presence of the parties to the effect that $ 1 000 000.00 was payable upon signing on 5 December 2021 by bank cheque whilst the balance of $ 130 000.00 would be payable on 6 December 2021.

At the point of moving to the Kuwadzana house, the first defendant said that she informed the plaintiff's sister, Mavis Gumbo that they were moving to a house bought by second defendant and her husband.

Upon relocating to the United Kingdom, the first defendant said that she did not assign Precious to manage the Kuwadzana house as it was not her place to do so as the house was not hers.

The second defendant's next witness was Precious Moyo. She said that she and her husband Webster Moyo had been invited by the first defendant and plaintiff to go and view the Kuwadzana house on behalf of the second defendant and her husband who are the owners. She said in 2004, when Kupakwashe moved from Kuwadzana, he had handed over the keys to the Kuwadzana house to her as she had been assigned by second defendant to manage the house. She said that such management included finding a tenant, maintaining the house, and collecting rentals every month. From 2004 she found the tenants, Mr and Mrs Chitate and reference was made to the lease agreements appearing from pages 164 to 169 of record as a sample. These were explained to show that the lease agreement was between Adalia Munanga, the second defendant, and Mr Chitate. Rent was to be paid into a Barclays Bank Account number 2128-1279343 which she said was her own account and she would account to the second defendant. She vehemently denied that rentals were ever put in the first defendant's bank account. Afterwards, due to changes in the economy, rent was paid as cash. Under cross examination,

Precious Moyo confirmed that she had not received any instructions to purchase any house but to assist in viewing and help decide on possible purchases. She said she did this for both the Kuwadzana and Budiriro houses.

Mrs Sheilla Chitate gave evidence and simply confirmed that they have been tenants at the Kuwadzana house since 2004 to date and they account for rentals to Precious Moyo.

The plaintiff's case

The plaintiff's evidence is that he started working for the Ministry of Agriculture and Research in 1995. He says that he accumulated quite some savings from his salary and travel and subsistence allowances as he was always going out for field trips as a researcher. He confirmed that he got married in 2000 to the first defendant but claims to have bought the Kuwadzana house on 5 December 2001 as his personal property. To further augment his earnings, the plaintiff said that he would buy oranges and potatoes from the farms they would visit, for resale in Harare and he made quite a handsome amount from that. He claims to have paid the full amount of $ 1 130 000.00 to the seller Leornard Mwerenga on 5 December 2001 which was the day of signing the agreement. The transaction was alleged to have happened at the offices of *Musunga and Associates Legal Practitioners* who were situated at corner Chinhoyi and Leopold Takawira streets. Payment is said to have been made by way of a bank transfer to Leonard Mwerenga from his Beverley account. Under cross examination he relented and said that it was in fact a cash payment. He was further quizzed and said he had withdrawn the cash from Beverley First Street and proceeded to pay at *Musunga and Associates*. A question was put as to whether it was a single withdrawal, to which he said they had made a booking. Asked about how he remembered the booking; he said it has been long. He was also corrected to say that exhibit 1 shows that they went *to Musariri and Partners* and not *Musunga and Associates*

The plaintiff questioned why the second defendant who had her own relatives, would have asked him to buy a property on her behalf. He also queried why it has taken her some fifteen years to claim the house.

On why the second defendant's children were put as beneficiaries to the Kuwadzana house, the plaintiff said that they put those children as they did not have children of their own and were in fact staying with the children as they were on their way to the United Kingdom at the time of purchase of the house. He clarified that they stayed with the children for about two months because the second defendant is alleged to have requested the first defendant to stay

with the children pending their travel to the United Kingdom. He says they had toyed with putting his brother Kupakwashe as a beneficiary but had discarded the idea thinking that he might kill them if he got wind of this. When it was put to the plaintiff that the second defendant's children left Zimbabwe for the United Kingdom in September 2001 and were therefore not around when the Kuwadzana house was bought, he conceded that he may be mistaken on the dates. He was asked as to whether they were obliged to put any beneficiaries and he said they just thought of completing that portion.

The plaintiff rejected the annotations on the agreement of sale and said the agreement had been prepared whilst they were waiting, and they had been shown and confirmed that full payment of the purchase price would be on the date of signing and not in instalments. It was pointed out that there was no corresponding record of payment of $ 1 130 000.00 from the second defendant's CABS account on the date of 5 December 2001. He however confirmed that on 6 December 2001, there had been a withdrawal of $130 000.00 from that account.

It was the plaintiff's further evidence that he had never surrendered the Kuwadzana house to the second defendant to collect rentals but had left first defendant and his brother, Kupakwashe in occupation. He stated that it was the first defendant who then instructed Kupakwashe to move from Kuwadzana to Bloomingdale when she relocated to the United Kingdom as the house in Bloomingdale was then habitable and there had been thefts there. This was after further developments on the house from the window level at which first defendant had left it.

On the question of rental collection from Kuwadzana, the plaintiff said that the tenant was paying rent into first defendant's Barclays account and the money would be used by Kupakwashe for the development of the Bloomingdale property as Kupakwashe had been authorised to operate the first defendant's account.

Upon being quizzed about his failure to produce any bank statement or cheque to show that in 2001, he had the capacity to pay $1 130 000.00 for the Kuwadzana house, the plaintiff said he was using Beverley Bank which had since closed. He also blamed the lack of any documentary evidence on the fact that the first defendant had collected a bag from Kupa which contained most of the evidence when she realised, she was no longer interested in the relationship. He referred to his payslip as proof that he was earning a lot of money then which shows he was earning $31 037.00. It was put to him that inflation then was at 112% but even assuming that it was 0%, he would take 36 months to save $1 130 000.00 without spending it

on anything else. He pointed to travel and subsistence allowances and his vegetable and fruit sales. A follow up question was how white farmers would have been selling to him at the height of the land reform programme and he said it was before that. Further cross examination on the payslip had the plaintiff conceding that his second last payslip of August 2002 reflected a higher salary to what he had been earning in December 2001.

It was put to the plaintiff that he should not question why the second defendant would have asked him and first defendant to purchase the Kuwadzana house on her behalf even though she had her own relatives as she had even paid for him and stayed with him in the United Kingdom ahead of her relatives.

On exercise of control over the Kuwadzana house from 2004, after Kupakwashe moved out, the plaintiff said he had no idea who moved in as he trusted his wife, the first defendant. He had no idea to whom the keys were handed and said his brother had not favoured him with this information. If this information is accepted for the period the parties were still together up to 2010, plaintiff was asked to explain about the period 2010 to 2016, when they had separated. He said he had attempted to evict the tenant in April 2016 because the tenant was no longer paying rent into first defendant's Barclays account.

The plaintiff said that he had not paid any rates nor maintained the Kuwadzana house from 2001 when it was acquired to 2016 and said he had been told that the tenant would pay rates. He said that even though he had been back in Zimbabwe for at least two times from September 2002 to 2016, he had never bothered to go and check on the condition of his alleged first house in Kuwadzana. He said he respected the tenant, and first defendant would say everything was in order. He was questioned about relying on the first defendant's opinion even after the fall out in 2010, and he had no clear answer.

Kupakwashe Mutswakatira gave evidence on behalf of the plaintiff. He said he has no idea about how the Kuwadzana house was bought but says he was told they had purchased it as they were staying with him. He saw that the house was in plaintiff and first defendant's names but does not know where the money to purchase the house came from. All he knows is that they were both working and doing things together. He confirmed that they had stayed with the second defendant's children at Mufakose but said that when they moved to the Kuwadzana house in December 2001, these children had already left for the United Kingdom. He also confirmed that when he moved from Kuwadzana to Bloomingdale in 2004, he left Precious Moyo in charge of the Kuwadzana house. He has no idea of the rentals paid and how they were paid. Regarding the Barclays Bank bank account, he was managing, he claimed that the money

in the account would be deposited by his brother. When told about his brother's testimony that some of the money in the account was for rentals, he said he would just see some money and did not know it was partly rentals. From 2004 to date, Kupakwashe said that he had never then spoken to Precious Moyo. He also said the bank statements he received had never reflected that money was being deposited by the tenant Mr Chitate. He has never been back to Kuwadzana since he left in 2004.

When asked about his brother's source of funds before buying the Kuwadzana house, the witness said that he was employed as a laboratory technician earning a salary and was also in receipt of travel and subsistence allowances. He surprisingly made no mention of any orange and potato vending.

Mercy Gumbo, plaintiff's sister was another witness called. All she knows about the Kuwadzana property is what she was allegedly told by the first defendant; that they had bought the Kuwadzana house and were moving to stay there. She said she did not know anything about the source of the funds.

Analysis of the evidence and findings

The plaintiff was inconsistent in his evidence and seems to have been making it up as he was being questioned. He forgot key facts. There was inconsistency between his evidence and that of his witnesses. When he was cornered, he then pleaded passage of time as a factor playing against him.

The first outstanding issue is that whereas the plaintiff claimed to have made lots of money from the vending of oranges and potatoes helping him raise the money to buy the Kuwadzana property, his brother Kupakwashe whom he claims to have been staying with, did not point to this as a source of income. He just alluded to the salary and travel and subsistence allowances as his brother's only sources of income.

An analysis of the plaintiff's salary based on his second last payslip before going to the United Kingdom, shows that in December 2001 he was earning much less than reflected on the payslip. Less inflation, he would have taken more than three years to raise the Kuwadzana house purchase price without considering any other expenses he might have had such as rentals and food. He had also just paid lobola in April 2000 and was setting up house with his new wife in August 2000. These activities would have eaten into whatever savings he might have had. His living arrangements in two rooms with a wife and a brother, having to turn one room

into a living room/ kitchen/ bedroom does not point to the level of means he professes to have had.

On the other hand, the second defendant's account showed healthy deposits into it at the relevant time.

A key snag for the plaintiff relates to why the second defendant's children were put as beneficiaries to the Kuwadzana house. Whereas he said that the children lived with them for two months before travelling to the United Kingdom in Mufakose, he was left tongue tied as to how the two young children who were under two years and five years old were left in the house when plaintiff, first defendant and Kupakwashe were going to work. When told that the children travelled to the United Kingdom in September 2001, he eventually conceded this and blamed passage of time. This does not however explain his reason for including the children as beneficiaries as he said he was prompted by the fact that they were living with them at the time of the purchase. Kupakwashe did not help as he could not remember how long they stayed with the children and under what conditions. He ended up saying he was also a dependant, and that question should be directed to the plaintiff and first defendant. He however confirmed that by December 2001 soon after the purchase of the Kuwadzana house, when they moved in, the children had long left. The plaintiff could not give a satisfactory explanation as to why he felt obliged to include any beneficiaries as they had no children yet. The only plausible reason for the inclusion of second defendant's children as beneficiaries is that advanced by the first and second defendant; that second defendant and her late husband insisted on this as their agents had signed as assignees to their property.

The plaintiff was curiously unsure of how he paid for the purchase of the Kuwadzana house and made up his evidence as he went along. This was allegedly his first purchase of a house, yet he did not remember the law firm where this happened, yet he was present, and it is endorsed on the agreement of sale. He should have been interested in his proof of purchase of the house. He started by saying that he paid by bank transfer and then revised this to a cash payment and when pressed on how they had made a once off withdrawal of $1 130 000.00 he then said they had booked for the withdrawal.

The plaintiff's denial of the endorsements on the sale agreement without producing a clean copy, as he who alleges must prove, is rather lame. See the case of *Astra Industries Limited* v *Peter Chamburuka* SC 27/ 12 wherein it was held that the position is now settled in our law that in civil proceedings, a party who makes a positive allegation bears the burden to prove such allegation.

Both Kupakwashe and Mercy Gumbo's evidence on the Kuwadzana property's actual purchase was unhelpful to the plaintiff as it was hearsay.

The second defendant's testimony on how the actual purchase occurred was largely hearsay as she was not in Zimbabwe at the time of the purchase and her husband whom she says took the lead is unfortunately late. This explains the seeming inconsistencies in her evidence which the plaintiff's counsel was harping on when contrasted with earlier pleadings in the application for joinder. I must rely on the first defendant's testimony.

The first defendant submitted that she was instructed by her sister and brother-in-law to look for a house and view and purchase. This evidence was confirmed by both the second defendant and Precious Moyo. This instruction is not surprising given that the second defendant had authorised the first defendant to manage her bank account. The first defendant was consistent on how and where the purchase of the house was executed. In her plea she had said that the Kuwadzana house was bought by the plaintiff and herself on behalf of the second defendant who paid the full purchase price of the property and they had placed second defendant's children as beneficiaries to the property as they anticipated that they would later transfer the property into second defendant's name. In her evidence she then explained that the payment was done as per the endorsement on the agreement of sale. She was not shaken under cross examination, and I accept her version of how events unfolded.

What is more incredible is the plaintiff's lack of control over the Kuwadzana house after he and first defendant left for the United Kingdom. He had no idea about where the rentals were paid and how much it was. Though he claimed they were paid into the first defendant's Barclays account, the lease agreement shows that the account into which these were paid was account number 2128- 1279343 (see record p 164), yet the first defendant's account number was as appears on record pp 134 is 2132-3451699. This supports the evidence of the second defendant's witnesses. Kupakwashe who was said to have been utilising rentals deposited into first defendant's account had never seen a deposit from Mr Chitate. I conclude that the plaintiff was clueless about the affairs of the Kuwadzana house. Even if I was to accept his explanation that he trusted his wife to handle this, there is no explanation for his continued lack of interest after their alleged separation in 2010 up until 2016 when he attempted to evict the tenant. He never visited nor maintained the house. So did his brother Kupakwashe, to check on its condition.

The lease agreement makes it clear that the lessor was the second defendant and was represented by Precious Moyo. The evidence shows that the parties were never in Zimbabwe

at the same time to facilitate the transfer of the Kuwadzana house into the second defendant's names.

The above analysis leaves me with one conclusion only which is that the plaintiff and first defendant purchased house 6605, 132 Street, Kuwadzana 5 Harare, on behalf of the second defendant. The second defendant and her husband supplied the money for the purchase, and it was anticipated that transfer into second defendant's names would be done at a later stage. This never happened.

Costs generally follow the cause.

Disposition

A. On the plaintiff's claim, my order is as follows:

1. The claim having prescribed, it be and is hereby dismissed.

B. On the second defendant's claim I make the following order:

1. House Number 6605, 132 Street Kuwadzana 5, Harare is hereby declared the sole property of Adalia Munanga, the second defendant.
2. The plaintiff shall do all things necessary to facilitate the transfer of the property described as house number 6605, 132 Street, Kuwadzana 5, Harare, to Adalia Munanga, the second defendant.
3. In the event of the plaintiff failing to comply with the provisions of paragraph (2) above, the Sheriff be and is hereby authorised to do all things necessary to effect transfer of house number 6605, 132 Street, Kuwadzana 5, Harare, to Adalia Munanga, the second defendant.
4. The plaintiff shall pay costs of suit.

Mupindu Legal Practitioners, plaintiff's legal practitioners
Kantor & Immerman, first defendant's legal practitioners
Wintertons, second defendant's legal practitioners