

CONSTANTINE MABAUDI
and
VIOLA MHORA

HIGH COURT OF ZIMBABWE
KARWI AND CHITAKUNYE JJ
HARARE, 3 March 2011

E.T. Matinenga, for appellant
Mr *Mutasa*, for respondent

KARWI J: This is an appeal against the order of the Magistrate in the court *a quo*. The grounds of appeal are that the learned Magistrate in the court *a quo* had erred and misdirected herself in not raising *meru motu* the issue of jurisdiction as the claim was in excess of the jurisdiction of the Magistrates court. It was further contended in the notice of appeal that the learned Magistrate had misdirected herself by failing to appreciate that as Stand 633 Fletcher Road, Norton had been acquired from a previous marriage and had since been sold. Appellant did not own Mitengo farm in Marondera but that the said farm was owned by Mitengo Estate (Private) Limited Company in which appellant has shares and as such should not have been part of any award. It was also part of the appellant's grounds of appeal that the learned Magistrate had misdirected herself by failing to take cognizance of the fact that respondent did not make contributions towards the purchase of the property in Zimre Park, Ruwa and as such should not have been subject of any award. The last ground of appeal was that the learned Magistrate had erred by awarding respondent the Honda Civic as it was solely acquired by Appellant and respondent had been paid \$500 000.

The background of this matter is that parties had been living together without a marriage of any sort. Parties were simply cohabiting between September 1996 to March 2004. It is common cause that respondent had misled appellant into believing that she was not married when in fact she was married to one Govati Mhora. She had got married to Mr Mhora in 1993 in terms of the Marriages Act [*Cap 5:11*] which marriage was only dissolved on 5 November 2004. There was thus no customary union of any kind, registered or unregistered. There had not been any observance of customary procedures like the payment of lobola in a lump sum or instalments to the family of respondent by Appellant. It would appear that the two led independent lives from the other and only met at the time of their physical needs. This

is confirmed by the fact that respondent actually got married to Mr Mhora in 1993 at a time during which she was cohabiting with appellant.

Facts of this matter would further show that after the two parties cohabitation ended in 2004, and after respondent had refused to move out of the house they had been staying in Ruwa, Harare, appellant issued summons out of the Magistrates Court seeking an order for the distribution of their property between themselves. The two had been blessed with one minor child who had been born in April 2001. The matter was tried at the Magistrates Court after which an order was granted which order awarded parties different pieces of property. Appellant was aggrieved by the award of the Honda motor vehicle, a computer and a 35% share in Stand 5579, Zimre Park, Ruwa to respondent. He then lodged this appeal.

It seems to me that this whole appeal was not properly thought out before, during and after it was filed. Clearly, the Court *a quo* also failed to determine issues, particularly the issue of jurisdiction which had been pleaded and raised in court. The appellant's lawyers ended up confused with regard to the issue of jurisdiction, for they were the ones who had approached the court seeking a sharing of property, but they later argued against the issue of jurisdiction when it was raised by respondent. As a result appellant ended up contradicting himself. To make matters worse all that escaped the learned Magistrate. The Magistrate simply ordered at the commencement of the trial that the matter continues without giving any reasons.

It is my considered view that the Magistrate should have declined to deal with this matter for want of a cause of action which would have enabled the court to exercise its jurisdiction. The law of jurisdiction in the Magistrates Court was stated in *Hatfield Town Management Board v Mynfred Poultry Farm [Pvt] Ltd* 1962 RLR at 802 A-B.

“ It has repeatedly been stated that the magistrates court is a creature of statute and has no jurisdiction beyond that granted by statute. It has no inherent jurisdiction such as is possessed by the superior courts and may claim no authority which cannot be found within the four corners of its statute”

In terms of s 11 [1] [b] of the Magistrates Court Act [*Cap 7; 10*],

- “ 1. Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law , the following jurisdiction-
B]with regard to causes of action-
- (iv) in cases in which is claimed a decree of divorce, judicial separation or nullity of a marriage solemnized in terms of Customary Marriages Act, [*Cap 3;07*] , including actions relating to the division , apportionment or distribution of the asserts, whether movable or immovable, of spouses or former spouses of such

marriages and the payment of maintenance in terms of the Matrimonial Causes Act [*Cap 5: 13*]

I agree with the view expressed by appellant's Counsel, Advocate *Mtinenga* in that there is nothing in the particulars of claim which sets out a cause of action recognized in terms of s 11 [1] [b] of Magistrates Court Act. In *Mashingaidze v Mugemba* HH 3/ 99 GWAUNZA J (as she then was) expressed the following view,

“ However, while I would support the view that a proven unregistered customary law union should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during its subsistence, such a view is currently not supported by the law”.

In casu, there is no allegation of a customary union between the parties. Customary law cannot be applied, since the parties did not have a customary union. General Law cannot be applied either as there is no cause of action pleaded and none seems to be applicable to the particulars of claim set out. In *Manning v Manning* 1986 [2] ZLR [S] the Court set aside a village court determination which had been exercised outside the jurisdictional limits of the Customary Law and Primary Courts Act. It is without doubt that nothing was placed before the court *a quo* to enable it to exercise its jurisdiction. It is for that reason that I hold that the magistrate should have declined to deal with the matter.

Consequently, the appeal succeeds and the proceedings in the court *a quo* in this matter are set aside in their entirety.

Musunga & Associates, appellant's legal practitioners
Costa & Madzonga, respondent's legal practitioners