MARTHA WAZILI
versus
PAULINE MANDINGO N.O.
and
MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS
and
CHENGETO MASHINGAIDZE
and
FIDES JOFIRE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 18, 19, 20 October 2021 & 12 October 2022

CIVIL TRIAL

J Bamu , for the plaintiff
T K Mudzimbasekwa, for the 4th defendant

INTRODUCTION

MANZUNZU J: Disputes arising from affairs of deceased estates are common and this is one of them. Wilfanos Gabriel Mashingaidze died intestate on 25 November 2013. He left behind, among other properties, a farm known as Glasalla (the farm) in Darwin district measuring 1105,9293 hectares. It is this farm which is now the centre of dispute with the plaintiff, Martha Wazili, (Martha) claiming half share of it. On the other hand the 4th defendant, Chengeto Mashingaidze (Chengeto) contests the claim and has asked the court to dismiss the plaintiff's claim with costs. Chengeto has also in an earlier court application in case number HC 2557/15 which is pending before this court sought to be declared the sole beneficiary to the farm.

PLAINTIFF'S CLAIM

According to the summons Martha seeks a declarator that she was in a tacit universal partnership with the late Wilfanos Gabriel Mashingaidze (the deceased) in respect of the purchase, development and running of the farm. If this does not turn out to be, she claims in the alternative that the farm was jointly owed by her and the deceased in equal shares. If this also does not turn out to be she claims in the alternative that she be entitled to 50% share of the farm or its value on the basis that the estate has been unjustly enriched. As an alternative to the

last alternative, Martha proposes the subdivision of the farm into half so that she is allowed to occupy her half share.

Of note Martha's claim raises the following key legal issues for consideration by the court; universal partnership, joint ownership and unjust enrichment. The forth alternative is nothing other than a suggestion of how the affected parties and beneficiaries can harmoniously settle at the farm.

This action is effectively between Martha and Chengeto because the other defendants are just office bearers who will abide with the decision of the court.

Martha has pleaded that she married the deceased customarily in 1986. In 1987 they entered into a universal partnership and bought the farm as a commercial enterprise. The two went into farming with each making a contribution. They became successful commercial farmers. At one point she was in full control of the management of the farm when deceased was hindered by ill health. Their universal partnership was terminated by the death of the deceased.

Martha has then pleaded in the alternatives for joint ownership or unjust enrichment drawn from her contribution.

CHENGETO'S PLEA

Chengeto pleaded that she is the widow to the late Wilfanos Gabriel Mashingaidze having contracted a civil marriage in 1967. She said the alleged customary union between Martha and the deceased was unlawful.

While Martha pleaded that the funds to purchase the farm were sourced from a loan, Chengeto said the loan was insufficient and they raised the balance of the money from the sale of their house in Chinhoyi and other business ventures. Chengeto also claim enormous contribution towards the purchase of the farm from her salary and management of other businesses. She dismisses what Martha says was her contribution and said there were savings over the years before Martha even came into picture.

Chengeto contests Martha's claim and its alternatives. She denies the existence of any universal partnership, joint ownership or unjust enrichment. She attributes the purchase of the farm and associated commercial activities to herself and the deceased.

ISSUES

The parties agreed on the following issues to be determined at trial:

1. Whether or not there was a tacit universal partnership between the plaintiff and the late Wilfanos Gabriel Mashingaidze?
2. Whether Plaintiff and the late Wilfanos Gabriel Mashingaidze jointly owned Glasalla farm?
3. Whether or not the estate of the late Wilfanos Gabriel Mashingaidze was unjustly enriched to the detriment of the plaintiff?
4. What is the percentage share of the plaintiff in the farm, if any?

The onus is on the plaintiff to prove all the issues. The above issues boil down to a position where Martha is saying, "*I have a share in the farm to be specific 50%"* On the other hand Chengeto is saying "*you have no share whatsoever*." The question which must be answered is whether Martha has a share in the farm and if so, what amount of share?

PRELIMINARY ISSUES

At the hearing counsel for Chengeto sought for leave to amend Chengeto's plea to raise a special plea that Martha must exhaust domestic remedies for her to lodge a claim with the 1st defendant who is the executor of the estate. He said Martha should proceed to raise an objection in terms of section 52 (8) of the Administration of Estates Act, Chapter 6:01 which provides that; *"(8) Any person interested in the estate may at any time before the expiration of the period allowed for inspection lodge with the Master in writing any objection, with the reasons thereof, to that account."*

Mr Bamu for the plaintiff opposed the application on the basis that it was prejudicial to the plaintiff in two ways; one, it causes further delay in finalizing this matter, and two, that remedy is no longer available to the plaintiff because the 30 day period within which the plaintiff could lodge an objection had since lapsed with no provision for condonation.

It is within the discretion of a court to order exhaustion of domestic remedies after considering the circumstances of each case.

A party must exhaust domestic remedies if they provide effective redress unless there is a good reason why such should not be used; see *Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243; Tutani v Minister of Labour & Ors 1987 (2) ZLR 88 @ 95D; Musandu v Chairperson Cresta Lodge Disciplinary and Grievance Committee HH 115/94; Moyo v Forestry Commission 1996 (1) ZLR 173 (H) @191 D -192B*

In casu I did not find any merit in the preliminary point because not only will it delay a speedy resolution to the conflict between Martha and Chengeto, but the remedy is no longer available. In any event there is no prejudice suffered by either party.

ANALYSIS OF EVIDENCE:

The only evidence adduced at trial was that of Martha and Chengeto who are the contesting parties.

a) Tacit Universal Partnership:

The court is tasked to determine whether there was a tacit universal partnership between Martha and the late Wilfanos Gabriel Mashingaidze. While the plaintiff in the written submissions started with the requirements of section 14 of the High Court Act, [*Chapter 7:06*], that was never identified as an issue by the parties. The issue is the existence or otherwise of a tacit universal partnership.

The 4th defendant argued that tacit universal partnership, being a general law principle, was not applicable to Martha because she did not plead a choice of law process and did not attempt to lay a foundation for the application of this principle. It was argued her claim must fail on that basis. Cases relied upon are *Jeke v Zembe HH 237/18*; *Chapendama v Chapendama 1998 (2) ZLR 18; Mashingaidze v Mashingaidze 1995 (1) ZLR 219*. In these cases, the plaintiff in a terminated unregistered customary union sought to apply the concept of tacit universal partnership without laying foundation for the application of the same. This was in light of the choice of law rules laid down in section 3 of the Customary Law and Local Courts Act Chapter 7:05 which states;

"(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires—
(a) customary law shall apply in any civil case where—
(i) the parties have expressly agreed that it should apply; or
(ii) regard being had to the nature of the case and the surrounding circumstances; it appears that the parties have agreed it should apply; or
(iii) regard being had to the nature of the case and the surrounding circumstances; it appears just and proper that it should apply;
(b) the general law of Zimbabwe shall apply in all other cases."

The catch words in this section are, *"unless the justice of the case otherwise requires"*

In *Matibiri* v *Kumire* 2000 (1) ZLR 492 *(H)* it was stated:

"Although there is no specific mention of the need to apply the general law to those cases where customary law was inapplicable, the section provides that customary law shall apply to the specific areas mentioned 'unless the justice of the case otherwise requires'. In my view, the only logical construction to place on the phrase 'unless the justice of the case otherwise requires' is that if the application of customary law does not conduce to the attainment of justice then common law should apply.

This was precisely the case in Chikosi *v* Chikosi *(1) 1973 (3) SA 142 (R) and* Chikosi *v* Chikosi *(2)1973 (3) SA 145 (R) where it was held in essence that where the justice of the case requires common law principles shall apply……. The phrase 'unless the justice of the case otherwise requires' has remained in all Acts passed by Parliament including the current one namely the Customary Law and Local Courts Act [Chapter 7:05] which, as already seen provides for the circumstances in which customary 'law applies unless the justice of the case otherwise requires'. What emerges is that for the one hundred years during which customary law has co-existed with Roman Dutch law, it has always been provided through legislation that where the customary choice of law rules were found to be inapplicable to the just decision of any matter in controversy, then in that event, resort should be had to common law principle".*

In casu the justice of the matter demands the application of common law principles of tacit universal partnership.

There are four essentials for the existence of a tacit universal partnership.

In the case of *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H) the requirements of a tacit universal partnership were crisply spelt out as follows:

1. Each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether money, labour or skill.
2. The business should be for joint benefits of the parties.
3. The object of the business should be to make profit.
4. The agreement should be a legitimate one.

Martha's evidence was that when she fell in love with the deceased in 1986 she knew the deceased was married to Chengeto to whom she was introduced. She said she was in a customary union with the deceased. She treated herself as a second wife though legally that could not be in the face of a monogamous marriage between Chengeto and the deceased. There was no marriage between them. They cohabited as husband and wife. She said it was through her effort and that of the deceased that the deceased ended buying the farm through a loan. Martha's evidence does not say she contributed towards the purchase of the farm apart from the fact that she assisted in various ways in the commercial enterprise at the farm. She did not say the farm was bought for her and the deceased but rather a property for the benefit of the entire family, Chengeto included. She could not confirm that the farm was bought for the joint benefit of the two. In her own evidence Martha said she played the role of a wife who took care of her husband's family and relatives. It is quite clear from her evidence that the idea of a tacit universal partnership was planted in her after the death of Wilfanos Gabriel Mashingaidze in an effort to recoup what she says is her contribution in the farm.

It is not in dispute that Martha and the deceased moved to stay at the farm after resigning from their formal employment. While Martha says the deceased secured loans to buy the farm she could not properly give a breakdown of the same. The farm was bought for $170 000.00 which was confirmed duly paid by 28 April 1987 according to the title deeds. The three loans she referred to for $83 000.00, $89 000.00 and $72 000.00 do not only exceed the purchase price of the farm the last one came after transfer of the farm to the deceased.

On the other hand Chengeto's version was more probable. From a humble beginning as a teacher and demonstrator she said they were involved in a number of projects through which they bought two houses in Chinhoyi and had some savings. When they saw the advert for the sale of the farm which required a deposit of $81 000.00 she said the deceased and her withdrew their savings which included that from their pensions which came up to $69 000.00. They borrowed $12 000.00 from a Mr Makororo to make up for the deposit of $81 000.00. They paid the deposit to AFC before the deceased got the loan of $89 000.00.

Evidence was therefore clear that Martha made no contribution into the alleged partnership (purchase of the farm) neither was it acquired for the joint benefit of Martha and deceased despite the object of acquiring the farm being to make profit.

In *Mühlmann v Mühlmann* **1984 (3) SA 102** (A) at 124C-D the approach as to whether a tacit agreement can be held to have been concluded was said to be, 'whether it was more probable than not that a tacit agreement had been reached'.

Martha failed to prove on a balance of probability that there was a tacit universal partnership neither can it be inferred from the proven facts.

a) Joint Ownership Of the Farm

Martha did not advance any evidence or argument to support the issue of joint ownership. I take it is because of the obvious reasons that such claim has no merit. When Martha was asked a specific question about her claim of co-ownership of the farm with the deceased, she said she considered the farm was owned by the entire family. The court had to ascertain as to who comprises of the entire family and her response was that it was the deceased, herself, Chengeto, and deceased's children, brothers and sisters. The farm is registered in the sole name of Wilfanos Gabriel Mashingaidze. In the absence of any explanation, the alternative claim can only be treated as abandoned.

b) Unjust Enrichment

The law on unjustified enrichment is now settled and in the matter of Industrial *Equity* v *Walker* 1996 (1) ZLR 269 (H) the requisites for liability for this action are:

1. The defendant must be enriched.
2. The plaintiff must have been impoverished by the enrichment of the defendant.
3. The enrichment must be unjustified.
4. The enrichment must not come within the scope of one of the classical enrichment actions.
5. There must be no positive rule of law which refused an action to the impoverished person.

Central to the claim for unjust enrichment is for the plaintiff to prove that she contributed something which if not shared equitably, will leave the defendant enriched at her expense. See *Nyamukusa v Maswera HH 35/16.*

While Chengeto underplayed the role played by Martha at the farm, evidence shows to the contrary. Martha says she moved with the deceased to stay at the farm in 1986 although she said she wasn't too sure of the dates due to lapse of memory because of the injuries she sustained in a car accident. Throughout her evidence she displayed poor memory of dates as she narrates what she said was her contribution. She said she assisted the deceased in the running of the activities at the farm ranging from crop farming, animal husbandry, management of shops and the milling company, typing, sales, supervision, etc. Martha admits that during the early days at the farm the deceased was managing everything until he got engaged in other activities outside the farm and he subsequently was of ill health. During such period her contribution increased. She admits Chengeto came to live with them at the farm but does not remember the exact time. This was before Chengeto then temporarily left for teaching but came back later.

In her evidence in chief and during cross examination, Martha kept on changing goal posts as to the level of her contribution. She claims 50% share in the farm. In her evidence she says her contribution was 75% and that of the deceased was 25%. When asked as to why she was claiming 50% when her contribution was 75%, she said it was because she was very angry and as a result was prepared to get anything because many beneficiaries were looking forward to benefitting from this farm. Martha however admitted that a lot of people including Chengeto assisted at the farm. She was then asked their level of contribution. She started by saying her level of contribution was 6/10 before she changed it to 2/10, the deceased 2/10, children 1/10, deceased's third wife 1/10, deceased's brother 1/10 and Chengeto 3/10. She was further asked if Chengeto contributed more than she did, she then said Chengeto must get 1/10 and she must get 4/10. In a letter of 21 July 2014 to the 1st defendant Martha had asked if she could be given 170 hectares of the farm. This was before the 1st defendant drew out an interim account on 13 January 2015 which excluded Martha.

Mr Mudzimbasekwa for the 4th defendant has argued that the plaintiff has not met the first three requirements of unjust enrichment because she has sued the 1st defendant and not the estate. Counsel is obviously mistaken on a point of law. The correct position of the law is that a deceased estate should not be cited as a party. It is the executor who must be cited in his capacity as the executor of the estate; see Nyandoro & Ors v NyandoroHH 89/08; Clark v Barnacle NO & 2 Ors 1958 R and N 358 (SR).

The fact that the estate was enriched by the contribution by Martha is beyond doubt. It becomes unjustified enrichment if she were asked to walk out without any benefit from her contribution. This is what the interim account had intended to do. Martha said she claims 50% because she was angry. Her anger could only have arisen from a meeting where she said was told by the 1st defendant that she has no share in the estate because her purported marriage to the deceased was not recognized at law.

In arriving at the appropriate compensation due to the plaintiff the court has taken into account that Martha has since 1986 participated in the farming activities at the farm, she enhanced her business skills through training, her efforts attributed to the repayment of several loans, she played the role of a mother within the extended family and she felt content with a claim of 170 hectares of the farm which represents 15%. Martha was not the only key player in the commercial enterprise at the farm. She also admits that position as she recognizes the crucial role played by the deceased and Chengeto, the children and deceased's brother and deceased's third wife. In all the circumstances Martha is entitled to 15% compensation of the farm.

DISPOSITION:

1. The plaintiff's claim for a declaratur that a tacit universal partnership existed between the Plaintiff and Wilfanos Gabriel Mashingaidze in respect of the purchase, development and running of Glasalla farm be and is hereby dismissed.
2. The plaintiff's alternative claim for a declaratur that the Plaintiff and Wilfanos Gabriel Mashingaidze jointly owned Glasalla farm in equal shares be and is hereby dismissed.
3. The plaintiff's alternative claim for a declaratur that the estate of the deceased has been unjustly enriched hereby succeeds.
    a) The plaintiff is entitled to 15% of the farm or its value.
4. Costs of suit shall be borne by the estate of the late Wilfanos Gabriel Mashingaidze.

Mbidzo Muchadehama and Makoni, plaintiff's legal practitioners
Sawyer and Mkushi, 4th defendant's legal practitioners