WINNIE PAMACHECHE	**PLAINTIFF**
AND	
ESTHER PAMACHECHE	**1ST DEFENDANT**
AND	
ESTATE LATE KENNETH KUDZAI PAMACHECHE	**2ND DEFENDANT**
AND	
BRUCE LONGHURST N.O	**3RD DEFENDANT**
AND	
MASTER OF THE HIGH COURT N.O	**4TH DEFENDANT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 MAY 2011 AND 19 MAY 2011

Ms N. H. Ncube for the plaintiff
Ms N. Ncube for 3rd defendant
No appearance for the 1st and 2nd defendants

Civil Trial

MATHONSI J: The late Kenneth Kudzai Pamacheche ("the deceased") was a polygamist. He had met the plaintiff in 1966 and a couple of years later he married her customarily. On 30 December 1977 they registered their union in terms of the then African Marriages Act. That marriage certificate is part of the record. When this dispute started the validity of that marriage was questioned although it is not clear why. That issue however has not been placed before me and will not be addressed by this judgment which proceeds on the strength that the plaintiff and the deceased had a customary marriage. The marriage was blessed with 6 children.

It would appear that in the month of December 1977 the deceased was in a marrying mood because on 21 December 1977, and unbeknown to the plaintiff, the deceased had

registered yet another customary marriage in terms of the African Marriages Act, [Chapter 238], this time with the first Defendant, a divorcee he had met much later. The two wives did not live together and it would appear that the deceased never introduced them to one another.

Sometime in 1980 the plaintiff and the deceased purchased House No. 7 Cheryl Road Eloana also known as stand 75 Eleona Township of subdivision IB of Farm 1 of Matsheumhlope Bulawayo. They moved into the property, where the plaintiff has remained to this day. From the papers the first Defendant was generally resident at her own house, No. 24 Aylmer Road Saurcetown, Bulawayo.

On 15 April 1992, the deceased and the first Defendant upgraded their customary marriage to one in terms of the Marriage Act, [Chapter 5:11]. Bearly a year later on 25 September 1993, the deceased tragically met his death in a road traffic accident. Problems then started which have seen the dispute being taken to the customary law court, then to the Supreme Court which referred it to the fourth defendant for adjudication and finally to this court, a journey of almost 20 years.

The matter was set down for trial on 10 May 2011 by all the interested parties and a notice of set down signed by all of them, including the first Defendant's legal practitioners on 8 April 2011, is filed in the record. Notwithstanding that, the first Defendant defaulted at the trial.

At the commencement of trial *Ms N Ncube* for the second and third Defendants submitted that although they had filed opposition, they were not contesting the plaintiff's claim and would abide by whatever decision the court came up with.

The plaintiff then gave evidence to the effect that she was customarily married to the deceased in 1968 and their union was blessed with 6 children. She resides at the house in dispute having moved into it when it was purchased by herself and her deceased husband in 1980. In the process of buying the house they had secured a loan from Beverly Building Society in the name of the deceased and the house was registered in the deceased's name.

She was employed by Zimbabwe Textile Workers Union as a receptionist/typist and she basically took over the mortgage bond repayment, the capital sum of which was $14000-00, local currency. As proof that she is the one who paid the bond she had bank deposit slips

bearing her signature and they totalled well over 50% of what was paid to the bank. The said deposit slips were submitted to the fourth Defendant in an effort to prove her claim to the house but over the years the fourth Defendant indicated that those deposit slips were lost.

At no time did the first Defendant live in the house in question and she had absolutely nothing to do with it, did not contribute anything towards its acquisition and only surfaced after the death of the deceased. It is the plaintiff and her children who have always stayed at the house.

After the death of the deceased, *Mr N Lang*, then a partner at *Ben Baron and Partners* was appointed executor of the deceased's estate. When the dispute over the estate was dragging on the parties tried to negotiate an out of court settlement. Those negotiations resulted in a concrete agreement in terms of which the plaintiff and the first Defendant agreed that the plaintiff was entitled to 50% share of the house by virtue of her direct contribution towards its acquisition, presumably on the strength of the Beverly Building Society deposit slips which have gone missing.

The plaintiff testified that the parties had agreed, on the basis of the Supreme Court decision which declared the first Defendant sole beneficiary of the estate, that the deceased estate owned the other 50% of the house. It was then agreed that the plaintiff would purchase that 50% from the estate and take over ownership of the house. In pursuance of that agreement the house was valued by B.T. Bell Estate agents on 20 December 1999 at $650 000-00, local currency, and the plaintiff paid to the executor, through her legal practitioners, *Messrs Lazarus and Sarif* the sum of $325 000-00 to purchase the 50% share belonging to the estate.

The plaintiff was unable to produce proof of that payment alleging that it is among those documents submitted to the fourth Defendant as she was laying a claim to the house, which documents went missing.

It is the plaintiff's view that in light of that background she is entitled to an order awarding to herself the entire house and directing that the third Defendant should transfer the said house to her name. The plaintiff's evidence was corroborated by correspondence between the legal practitioners, which is filed of record.

In a letter dated 18 August 2000 *Mr N Lang* of *Ben Baron and partners* stated as follows:

> "We refer to the above matter and to our recent telephone conversation. We confirm that the writer met with *Ms Ncube* and Mr Nkomo on the 16th August 2000 and the following arrangement was made: The house will be revalued by *Messrs Brian Bell Estate Agents*. Mrs Winnie Pamacheche will be afforded an opportunity to pay out the other heirs their respective shares in terms of the proposal put forward on the 18th July 2000. The parties have yet to reach agreement, on the time frame for Mrs Winnie Pamacheche to make the payment but we believe this is a matter that can be resolved by the correspondence between the parties.
> It should be noted that Esther Pamacheche has indicated that should Winnie Pamacheche be unable to pay within a reasonable time she (Mrs Pamacheche) would like to have the opportunity to purchase the house at the agreed valuation...."

Mr Lang followed that up by another letter to *Lazarus and Sarif* dated 3 October 2000 which reads in part as follows:-

> "We refer to the above matter and to our letter of the 18th August 2000. We would be grateful to receive your advice as to when Winnie Pamacheche proposes to pay for the house. We would be grateful to receive this information within the next fourteen days."

Lazarus and Sarif responded to that letter on 18 October 2000 as follows:

> "We refer to your letter dated the 3rd October 2000. Please be advised that we are holding the money in trust and once we agree on an amount we will pay. We shall await to hear from you."

Clearly therefore, at that stage an agreement to the effect that the plaintiff would pay for the remaining ½ share of the house had been reached. As the plaintiff's legal practitioners were now holding the purchase price, after an evaluation had been undertaken, I have no reason to disbelieve that the money was paid to the executor thereby completing the sale to the plaintiff especially as it has not been disputed that a lot of relevant and important documents proving plaintiff's claim disappeared while in fourth defendant's custody.

I am however mindful of the fact that in August 2000 the parties had agreed on a revaluation of the house. In her evidence the plaintiff alleged that she paid $325 000-00 local currency which was in compliance with a valuation of $650 000-00 made by Brian Bell Estate Agents in December 1999. However in the fourth defendant's record, which has been made available to me, there is indeed another valuation report made by Brian Bell Estate Agents on 9 October 2000 placing the value of the house at $800 000-00.

I have no reason to disbelieve that when *Lazarus and Sarif* stated on 18 October 2000 that they were then holding the money they had not taken into account that the plaintiff was then required to pay $400 000-00 instead of $350 000-00. On a balance of probabilities, I believe that as a result of the passage of time, the plaintiff may have overlooked that detail.

I therefore find that indeed the plaintiff paid the executor for the remaining ½ share of the house and is therefore entitled to the relief that she seeks.

The matter should ideally end there but even if I am wrong in that finding, I am fortified in my conclusion that the plaintiff is entitled to the relief she seeks because, for a start, the parties appeared to labour under the mistaken belief that the Supreme Court had crowned the first Defendant heir to the estate. Nothing can be furthest from the truth and it is difficult to comprehend why that mistake was perpetuated for such a longtime.

I propose to trace the background of the Supreme Court's involvement so as to demonstrate the fallacy if that notion. The matter came before the Supreme Court under case No. SC 676/94 by virtue of an appeal noted by *Ben Baron and Partners* representing the first Defendant. This was after the District Court sitting as an appellate Court, per Mr Mkandla, had burnt its fingers by issuing an order recognising the plaintiff's marriage ahead that of the first Defendant and then seeking to reverse its own decision.

The appeal was noted on the following grounds:

> "BE PLEASED to take notice that the Appellant wishes to note an appeal against the decision of the district Court held at Bulawayo on the 3rd October 1994.
> Appellant will aver that the learned Provincial Magistrate was wrong in fact and in law in holding that customary law applied.
> Appellant will further aver that the learned Provincial Magistrate was wrong in fact and in law in holding that Appellant's civil marriage contracted in 1992 did not take precedence over the customary union contracted by the first respondents in 1968 and registered by the first respondent in 1977."

The matter eventually came before the Supreme Court and the results from that Court are contained in an order issued on 1 April 1997, the essential part of which reads:

> "An appeal from the judgment by the Magistrate at Bulawayo on the 3rd day of October 1994.
>
> Bulawayo: Tuesday the 1st day of April 1997.

Before the Honourable Mr Justice Korsah, Judge of Appeal and the Honourable Mr Justice Muchechetre, Judge of Appeal.

J Dyke, for the appellant
No appearance for the respondents.

WHEREUPON, after reading documents filed of record and hearing counsel,

IT IS ORDERED:
That the appeal be and is hereby allowed.
That the orders by the magistrates are set aside.
That the matter is referred to the Assistant Master for the administration of the Estate of the Late Kenneth Kudzaishe Pamacheche.
That any party lodges whatever claim he or she deems fit in respect of the said Estate of the late Kenneth Kudzaishe Pamacheche, which claim shall be adjudicated upon by the Assistant Master.
That the appellant's costs of this appeal be borne by the Estate.

BY THE COURT

NL.B MACHAKAIRE
ASSISTANT REGISTRAR."

There is no other order that was issued by the Supreme Court. The above cited order must be read in conjunction with the notice of appeal. The court simply agreed that the District Court was wrong in holding that customary law applied and that the first Defendant's civil marriage took precedence over the customary marriage of the plaintiff. It then remitted the matter for adjudication by the fourth Defendant. Nowhere does it say that the first Defendant is the sole beneficiary of the estate.

I must mention that although the parties lodged their claims to the fourth Defendant over the years there has been a signal failure by the latter to adjudicate on any of the claims which then led to this litigation.

I have already determined that the plaintiff is entitled to the house in dispute by virtue of having contributed to its acquisition and also paying for the other half of it to the executor. I am happy that such result accords with the current legal position, which admittedly, did not obtain at the time of the deceased's death.

The house was purchased when the deceased was married to the plaintiff in terms of what is now the Customary Law Marriage Act, [Chapter 5:07]. The plaintiff lived in the house from 1980 and was living in it at the time of the deceased's death in 1992. At the time the house was purchased the plaintiff's marriage was as valid as that of the first Defendant and she and the deceased made their home at the house to the exclusion of the first Defendant.

The current legal position is governed by Section 68 of the Administration of Estates Act, [Chapter 6:01] which was introduced by Act No. 16 of 1998. I did discuss the effect of those provisions *vis-a-vis* a customary marriage sitting together with a civil marriage in *Ndlovu v Ndlovu and others* HB 10/11 (as yet unreported) at pages 4-5 and concluded at page 5 that;

> "Where the deceased is survived by two wives as in the present case, and those wives live in separate houses, each wife is entitled to receive the house that she occupied at the time of the man's death together with household effects in that house. Where the two wives shared the same house they are entitled to joint ownership. This is regardless of the status of the marriage, as long as, in the case of a customary marriage, it was entered into before the civil marriage."

Admittedly the provisions of the Administration of Estates Act referred to do not have retroactive effect, but they have decisive dealt with the mischief that arose in casu.

In the result, I make the following order:

1. The plaintiff be and is hereby declared the owner of stand 75 Eleona Township of Subdivision 1B of Farm 1 of Matsheumhlope, commonly known as No. 7 Cheryl Road, Eleona, Bulawayo.
2. The 3rd Defendant be and is hereby directed to effect transfer of the said property to the plaintiff.
3. The plaintiff's costs shall be borne by the Estate Late Kenneth Kudzaishe Pamacheche.

Lazarus and Sarif plaintiff's legal practitioners
Ben Baron & partners, third defendant's legal practitioners