

SIBONGILE DIYA (NEE CHITIYO)
versus
TRUST DIYA
and
TAWANDA DIYA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 20 & 22 February, 6 March, 11, 18 May 2023 & 4 January 2024

Civil Trial

N Madya, for plaintiff
P Mathuthu & P Dube, for 1st & 2nd defendants

MAXWELL J

BACKGROUND

Plaintiff and first defendant married on 8 April 2000 and divorced by order of the United Kingdom Family Court at Dudley on 17 September 2017. Second defendant is a brother to the first defendant. On 26 August 2021, Plaintiff issued out summons claiming the following;

“1. An order for the termination of the joint ownership by the Plaintiff and First Defendant of two immovable properties in Harare namely Subdivision B of Lot 208 Block C Hatfield Estate situate in the District of Salisbury measuring 4 776 m² also known as No.37 Winston Road, Hatfield, Harare and Stand No. 4443 New Tafara, Harare on the grounds that there is no basis for the continued existence of the joint ownership following dissolution of the parties’ marriage.

2. Consequent upon the order in 1 above, an order that:

2.1. The First Defendant be and is hereby ordered to transfer his one-half undivided share in Subdivision B of Lot 208 Block C Hatfield Estate situate in the District of Salisbury measuring 4 776 m² also known as No.37 Winston Road, Hatfield, HARARE to the Plaintiff against payment by the Plaintiff of the sum determined in accordance with paragraph 16 (sic) of the Declaration; and

2.2 The Second Defendant be and is hereby ordered and directed to transfer to the Plaintiff all his rights, title and interest in a property called Stand No. 4443 New Tafara, Harare against payment of the sum of US\$8500.00 to the 1st Defendant.

3. Costs of suit.”

In her declaration, plaintiff stated that during the subsistence of their marriage, first defendant and herself (the parties) acquired and became joint owners of the two immovable properties, namely, Subdivision B of Lot 208 Block C Hatfield Estate situate in the District of Salisbury measuring 4 776 m² also known as No.37 Winston Road, Hatfield (The Hatfield property) and Stand No. 4443 New Tafara, Harare, (the Tafara property). The Tafara property was acquired by herself with the intention that it be co-owned by the parties but was registered in the name of the second defendant as nominee of the parties. It was an implied understanding of the parties that the joint ownership of the properties would terminate on the dissolution of the marriage between them. They agreed on the termination of the joint ownership but were unable to agree on a fair and equitable distribution of the properties.

Plaintiff stated that she acquired the Hatfield property with little or no contribution from the first defendant and that the said property was registered in the joint names of the parties solely by virtue of marriage. Following the dissolution of the marriage, she made further improvements on the property with first defendant's knowledge. She continued to pay for the repairs, wages for the employee looking after the property, rates and other municipal charges in respect of the property in order to preserve its value to the exclusion of the first defendant. In her view, it is not physically possible to subdivide the property between the parties and since she has been in effective control of the property, it is just and equitable that she pays to the first defendant 50% of the median assessed market value of the Hatfield property. The property was valued between US\$ 115 000 and US\$ 120 000 in March and April 2021, giving a median value of US\$ 117 500. From first defendant's 50%, plaintiff wants the following deducted;

- 50% of the amount she expended on the property to enhance and preserve value,
- 50% of the amount she would expend to preserve value between the date of summons and the date of the court order,
- 50% of the costs of any appraisal of the property at the time of judgment by a valuer appointed by the Registrar of the High Court in the event that the court orders that another valuation of the property be done; and
- 100% of any taxes that may be required to be paid on the transfer of first defendant's half-share to the Plaintiff, including Capital Gains Tax.

Concerning the Tafara property, she stated that she acquired it from her relative and it therefore has a sentimental value to her. Further that the property was registered in the name of second defendant at first defendant's instigation. She also stated that second defendant is the

parties' nominee and has no beneficial interest in the property. She pointed out that as of April 2021 the property was valued at between US\$ 15 000 and US\$ 19 000. She further stated that the property is incapable of being subdivided and tendered to the first defendant the sum of US\$8500 being 50% of the median market value of the Tafara property against the transfer of all rights, title and interest in the property by the second defendant.

Defendants filed a Special Plea of *lis alibi pendens* and heads of argument arguing that plaintiff instituted an action against first defendant under case number HC 1404/19 for a decree of divorce and ancillary relief in the form of distribution of the assets acquired in the marriage including the two properties. They stated that the claim under HC 1404/19 is still pending and the present matter cannot be determined until the action under HC 1404/19 is disposed of. They prayed for the stay of the present summons action pending the resolution of the action under case number HC1404/19. Plaintiff filed her replication and heads of argument in response to the special plea. She disputed that the matter was *lis alibi penndens* on the basis that the matter in HC1404/19 was removed from the roll on 11 June 2021 on account of lack of jurisdiction on the part of the court. The plaintiff did not set the matter down within three months and in terms of Practice Direction 3/2013 the matter was deemed abandoned. She also pointed out that as of 12 September 2020 the matter lapsed prior to the filing of the Special Plea by the defendant. Accordingly, she argued, HC 1404/19 remains abandoned and can only be resuscitated through an order of this court made on application by the plaintiff which application has not been made. In addition. Plaintiff stated that the jurisdictional issue raised by the court constituted an insuperable handicap to the suit under case number HC 1404/19 to proceed and in any event, plaintiff's lawyers in the suit withdrew it. Plaintiff also disputed that the action in HC 1404/19 is based on the same cause of action as the action in HC 4226/21. She stated that the present suit is premised on the common law action *communi dividundo* whilst the proceedings in case number HC 1404/19 were filed as a matrimonial cause based on the invocation of s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Plaintiff submitted that the court cannot exercise its discretion by staying the present proceedings in favour of proceedings which it held has no jurisdiction to deal with. She prayed for the dismissal of the special plea with costs on a higher scale.

Defendants pleaded to the merits of the matter. They confirmed that a decree of divorce was issued on 17 September 2017 and that second defendant was first defendant's nominee in the Tafara property. They stated that in addition to the property listed by plaintiff, first defendant and plaintiff acquired House number 6644 Mkwisi, Westlea, Harare, (the Westlea

property), which is registered in both their names and Flat 18 Block 3 Mufakose, Harare, (the Mufakose property), which is registered in plaintiff's name. On the Hatfield property, they stated that it was purchased in 2005 after plaintiff had received a lump sum payment following the reinstatement of her employment contract. Further that during the suspension of her employment contract and the litigation process to have it reinstated, first defendant catered for the financial needs of the household and part of his income was utilized to pay the purchase price. They also stated that the Hatfield property was purchased from contributions of both parties and it was registered in their names as co-owners. They disputed that there were improvements made on the Hatfield property and stated that plaintiff made renovations, leased out the property and hired labourers without first defendant's knowledge and consent. As such, the cost of the renovations, the electricity consumed by plaintiff and those occupying the property through her are not shared expenses. They stated that plaintiff is masquerading herself as the sole owner of the property. They disputed payment of City of Harare municipal rates in United States Dollars on the basis that it is a local obligation payable in local currency. defendants submitted that if plaintiff desires to purchase the first defendant's half share, she ought to do so and pay the full value for it.

On the Tafara property, they submitted that it was purchased from an acquaintance of the Plaintiff and first defendant during the subsistence of their marriage. Further that the purchase price was paid from a loan taken by first defendant which he repaid in full from his income. They stated that at the time of the purchase, the plaintiff and first defendant were in the United Kingdom and for the sake of convenience the property was registered in second defendant's name. They further stated that second defendant was appointed by first defendant as his nominee to enter into the agreement of sale. They disputed that the Tafara property is co-owned and stated that the Plaintiff is not entitled to a half share of it.

First defendant counter claimed seeking an order that the Mufakose property be sold and the proceeds shared equally between him and the Plaintiff. He valued the property at eighteen thousand dollars, (US\$ 18 000). He stated that the Mufakose property was acquired through the contributions of both parties as plaintiff entered into the agreement of sale whilst first defendant paid the purchase price from income he generated while he was still working and resident in Zimbabwe. According to first defendant, plaintiff attaches great sentimental value to this property therefore he is agreeable to her purchasing his half share valued at US\$ 9000. First defendant proposed that in the event that plaintiff wants to buy out his half share, she must make an offer to pay within seven (7) days from the date of judgment and pay the

US\$ 9000 within one calendar month from the date of agreement with first defendant failing which the property shall be sold and the proceeds shared equally between them. They prayed that plaintiff be ordered to pay costs of suit.

In her replication plaintiff denied that the Westlea property and the Mufakose property were jointly acquired by the parties. She stated that she purchased the Westlea property as the sole property of their daughter Joy Nyasha Diya in whose name the property is registered. Plaintiff also stated that she acquired the Mufakose property under the Pay for Your House Scheme for civil servants and paid more than 50% of the purchase price prior to the marriage to first defendant. She stated that she paid the balance of the purchase price after marriage and acquired rights therein in her own name as her sole and exclusive property as was originally intended. She averred that though title to the Tafara property is not yet registered at the Deeds Registry Office, the parties are the beneficial holders of all the rights, title and interest in it. Further that second defendant was appointed to act as nominee for both parties at the instigation of first defendant. Concerning the Hatfield property, she confirmed that the lumpsum payment received from her employer settled part of the purchase price. She however stated that the balance of the purchase price was settled using borrowed money which she eventually paid off on her own after first defendant had deserted the matrimonial home. She disputed that first defendant contributed to the purchase price of the Hatfield property. She stated that first defendant was fully aware of the improvements and repairs that were required to preserve and enhance the value of the Hatfield property but did not do anything so she ended up doing them, and is entitled to claim the expenses incurred in connection with the jointly owned property regardless of whether they were agreed expenses or not. She insisted that the rates paid to the City of Harare municipality, from a base outside Zimbabwe are recoverable in the currency in which she settled the bills. She indicated that the Hatfield property has over the years largely been unoccupied or occupied by tenants who defaulted their rent obligations and ran away without settling their obligations. She stated that the property has been vacant since 2017 and disputed having received rentals from 2012.

Plaintiff disputed that the first defendant paid for the purchase of the Tafara property and stated that it was paid using funds borrowed in her name. Further that the parties were to pay off the loan together but she subsequently paid off the loans on her own after first defendant abandoned her. In her plea to the first defendant's counter claim, she denied that the parties ever intended to create a joint ownership of the Mufakose property. She stated that first

defendant did not contribute to the purchase of the Mufakose property and is not entitled to a share thereof. She prayed for the dismissal of the counter claim with costs.

JOINT PRE-TRIAL CONFERENCE

A Joint Pre-Trial Conference was held. The following issues were referred to trial.

1. HATFIELD PROPERTY

- a) What renovations, improvements and maintenance works were carried out by the Plaintiff on the property and the costs thereof?
- b) What expenses were incurred by the Plaintiff in respect of the caretaker and the gardener?
- c) The quantum of the electricity bills and municipal charges paid by the Plaintiff.
- d) Whether the 1st Defendant is liable for the expenses incurred by the Plaintiff under (a), (b) and (c) and whether these are payable in United States of America Dollars and should be deducted from the 1st Defendant's share due on the dissolution of the joint-ownership of the property.
- e) Whether the property was used for business purposes and the amount earned therefrom, if any.

2. TAFARA PROPERTY

- f) Whether the 1st Defendant is the sole holder of the rights, title and interest in the property;
- g) If not, whether the Plaintiff should buy the 1st Defendant out.

3. MUFAKOSE PROPERTY

- h) Whether the property is jointly owned by the Plaintiff and 1st Defendant;
- i) If not, whether it should be awarded to the plaintiff.

THE TRIAL

The trial consisted of the evidence of two witnesses. At the opening of the plaintiff's case, Mr Madya advised the court that the claims for the costs of electricity and rates paid to City of Harare were being abandoned as the amounts were worthless considering that the time it would take to go through them does not justify the cost. Plaintiff was the first to testify in her case. Her evidence was as follows. She is resident in the United Kingdom. On 17 September 2017 a decree of divorce was given by a court in the United Kingdom. During the subsistence of her marriage to the first defendant, the parties acquired properties including number 37

Winston Road, Hatfield. The property was acquired in 2006 and is registered in the names of both parties. Though the first defendant is entitled to 50% of the value of the property, she is seeking to be reimbursed 50% of the expenses she incurred in renovating and improving the house. She produced as exhibits the invoices for the expenses which she stated to amount to \$49 881.50. She stated that after the renovations and improvements, the parties had the property valued separately. Her valuer placed the property's value at \$120 000 whilst first defendant's valuer put it at \$115 000. She implored the court to consider the median value and share the property on a 50-50 basis. She indicated that there was no income from the house as the tenants were not paying rentals and now her brother was staying at the house. From 2017 there was no tenant and she tried to offer accommodation as a business but it has not worked. She pointed out that there are additional expenses of the gardener and caretaker amounting to \$3420 as at the time of issuing summons and that she has paid further amounts after the issuing of summons at the rate of \$120 per month.

She testified further that the Tafara property was purchased in 2005 when, on one of her visits to Zimbabwe, she was advised that her aunt had decided to settle in the rural areas and wanted to sell her house to her. She borrowed the equivalent of £1300 from her friend. She went back to the United Kingdom before the house was paid for. The house was paid for and her brother, Samson Chitiyo, signed the agreement of sale. The house was transferred as a donation to second defendant after her brother was physically abused by first defendant. She requested that the house be transferred to the parties' children but first defendant refused. Samson Chitiyo has been staying at the Tafara property since 2005. She disputed that first defendant paid the purchase price and indicated that despite the fact that he did not contribute anything to the purchase price, she was willing to give him 50% of its value. The property was valued at between \$19 000 and \$20 000 in 2021.

Plaintiff also testified on the acquisition of the Mufakose property. She stated that between 1988 and 1995 she was working at the Ministry of Health. She joined the Pay for Your House Scheme and her contributions were deducted from Salary Service Bureau. She did not contribute when she went to college and her file was closed. After college she started working for a non-governmental organization. When she was about to get married, she started looking for accommodation but because she has albinism no one offered her accommodation. At times negative comments about her and her condition would be said in response to a request for accommodation. She received help and her Pay for Your House Scheme contributions were reactivated. She stated that first defendant was not supportive in her quest for assistance to get

a house, accusing her of using her disability. Further that at the time she was doing research and her earnings in United States of America dollars were deposited in first defendant's account. She also stated that she was allocated a house in 2003 and the authorities refused to register it in both their names. Plaintiff stated that she contributed over \$100 000 before marriage. She submitted that first defendant should not benefit from the property as he had criticized her and accused her of using her disability to get the house. She indicated that she was raising the parties' children without any contribution from first defendant, and that she has suffered financial abuse and was being taken advantage of when the marriage subsisted. She stated that she sought maintenance in 2017 due to the fact that first defendant had neglected his obligations towards the family. She prayed that she be allowed to retain all the properties and pay out first defendant.

During cross-examination she insisted that first defendant did not contribute anything to the acquisition of the Mufakose property, and that none of the properties had tenants paying rentals. She pointed out that first defendant's brother who is now in the United Kingdom was staying at the Hatfield property whilst her brother was at the Tafara property and that from 2018 to date there is no tenant in the Hatfield property. Further that the Mufakose property is occupied by her sister. That was the plaintiff's case.

First defendant gave evidence on his behalf. He confirmed that he is resident in the United Kingdom where the parties were divorced in 2017. He stated that at the time the Hatfield property was acquired, the parties were resident in the United Kingdom and a mutual friend was taking care of the property from acquisition until around 2014. In his view, there were tenants after 2014 but he never got a share of the rentals as he understood them to be for maintenance and service of the property. He stated that the balance from the rentals would be used when the parties came for holiday. He disputed being consulted when improvements were effected. He stated that the property was being used for commercial purposes offering bed and breakfast therefore the proceeds therefrom should pay for the renovations. He insisted on getting his half share without any deductions.

On the Mufakose property he stated that he paid for plaintiff to be registered for the Pay For Your House Scheme after marriage and that he continued to pay the instalments until the house was finally allocated to her. He stated that he should be paid half the value of the house. He stated further that when the Tafara property was acquired he had been left taking care of a two months old baby together with plaintiff's sister. And that when the Tafara property was acquired he had three jobs but plaintiff was not working. He proposed that he gets the Tafara

property, buying out plaintiff and a half-share of the Hatfield property whilst plaintiff gets the Mufakose property and buys him out of the Hatfield property.

During cross-examination he was asked why plaintiff's testimony was not seriously challenged and his response was that he believed that she had her time to testify and his would come. Asked why he had not challenged the receipts of the expenses he had been served with over two years prior to the trial, his response was that he thought the issue should not come into court as he was not consulted. That was the first defendant's case.

ANALYSIS

Plaintiff's claim is for the termination of the joint-ownership of property by herself and first defendant. As at the time of issuing out summons, they were no longer husband and wife, having previously been divorced outside Zimbabwe, and as such the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] do not apply. See *Lafontant v Kennedy* 2000 (2) ZLR 280 (S). It is trite that where two persons own immovable property in undivided shares there must be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when the parties were married to each other at the time ownership was acquired. Jones *Conveyancing in South Africa* 4 ed p 118 states:

“Where transferees acquire in equal shares it need not be stated in the deed that they acquire ‘in equal shares’, as this fact is presumed in the absence of any statement to the contrary”.

Three properties are in contention in this case. Each is considered below in the light of the evidence given by the parties.

THE HATFIELD PROPERTY

It is common cause that this property is jointly owned and both parties accept that it should be distributed equally between them. The only issue in contention is whether or not from first defendant's share, 50% of the expenses specified by plaintiff should be deducted. First defendant did not dispute that plaintiff incurred expenses in maintaining, renovating and improving the property. His argument is simply that he is not liable to pay half of the expenses for three reasons. The first is that he was not consulted as he ought to have been, the second is that there were rent paying tenants at the property and such rentals should be channeled to those expenses and thirdly that the expenses of the gardener and caretaker were not necessary.

a) Whether or not first defendant was consulted prior to the expenses being incurred.

A consideration of the evidence of the parties leads to the inescapable conclusion that first defendant was consulted prior to the expenses being incurred. First and second defendants' Bundle of Documents contain an email sent by plaintiff to the first defendant in 2014 in which plaintiff indicated that a rental of £700 would be realized from the property. She however went on to state that sometimes all the money from rentals went towards repairs. She gave examples of the repairs as a new septic tank that was being built and that a new water tank needed to be purchased. She indicated that the costs of maintaining the property were to be shared between them. Considering the costs of maintenance, she proposed that the property be sold and the proceeds shared equally. She invited first defendant to discuss the issues she raised in her email. Defendants produced this email and plaintiff was questioned on it. The response to the email was not produced. Plaintiff's evidence that first defendant stated that he would not contribute to the expenses because on divorce plaintiff would get everything since she had the children was not challenged in cross-examination. Further, her evidence that she advised him of the need to maintain the house and he did not do anything was also not challenged. It is trite that what is not challenged is taken as admitted. I therefore find that first defendant was consulted prior to the expenses being incurred.

In any event, even if he had not been consulted, he cannot benefit from the current state of the house without contribution as that would be unjust enrichment.

b) Whether or not there were rent paying tenants at the property which rentals should be channeled to those expenses.

Plaintiff's unchallenged evidence was that after 2017 there was no tenant at the property. It was also not disputed that the renovations and improvements were done after the dissolution of the marriage. Defendants sought to rely on an email in which Plaintiff was offering to share £700 from rentals between them. The email was written in 2014 and does not prove that there was still a tenant at the time the renovations and improvements were done. Defendant's testimony was to assert that there were always tenants including those for bed and breakfast but he had no proof. It is trite that the burden of proof rests upon a party who substantially asserts the affirmative of the issue. See *Nyahondo v Hokonya & Others* 1997 (2) ZLR 457. First defendant had the onus of proving the occupation of the property by rent paying tenants. He did not discharge it. I therefore find that there were no rent paying tenants at the property after 2017 and therefore there were no rentals to be channeled to improving and renovating the Hatfield property.

c) Whether or not the expenses of the gardener and caretaker were necessary.

Plaintiff's evidence was that the yard is big and a full-time gardener was needed. Further that the gardener was maintaining the garden and the caretaker was maintaining the house. This evidence was not challenged and is therefore taken as admitted. I therefore find that it was necessary to have a gardener and a caretaker to maintain the garden and the house. First defendant has not made any case against contributing to the expenses incurred by the plaintiff in maintaining and renovating the house. Plaintiff's claim accordingly succeeds.

TAFARA PROPERTY

Plaintiff, in her summary of evidence and oral testimony stated that this property was purchased from her aunt and was paid through money borrowed from her friend's husband. Further that she repaid the borrowed money in the United Kingdom. She also stated that her aunt wanted to keep the house within the family, and her brother, Samson Chitiyo signed the agreement of sale and took residence in the property. She stated that first defendant objected to the involvement of her brother and the house was registered in the name of second defendant. She stated that the intention on acquisition was that it be jointly owned. Plaintiff was not questioned on the acquisition process. The focus of the cross examination was on her brother and why a rent paying tenant was not in occupation of the house.

The defendants' summary of evidence acknowledged that the house was bought from Plaintiff's relative. However, first defendant claimed that he paid the purchase price from a loan he took and that the property is not jointly owned. The defendants' summary of evidence further stated that second defendant would testify and lead evidence to the effect that he was appointed by first defendant to enter into an agreement of sale on his behalf and that first defendant paid the purchase price from loans he took out. In his oral testimony, first defendant did not talk about how the purchase price was paid. He did not talk of obtaining loans to pay the purchase price. Second defendant was not called to testify. During cross examination, first defendant admitted that the property is jointly owned. He confirmed that the agreement of sale was signed by Plaintiff's brother and not by second defendant. This was contrary to the claims in the pleadings. The departure from the pleadings was not explained. The closing submissions are silent on the issue. I find that first defendant was not candid and honest with the court. He has endeavoured to mislead the court and I will have regard to that fact in deciding on the fate of the Tafara property. Generally, courts frown at litigants who are not candid with the court.

Plaintiff claims a sentimental attachment to the Tafara property. Defendants' closing submissions mainly focus on disputing the sentimental value to plaintiff. No justification is provided for disputing the sentimental value. A submission is made which makes one suspect that the defendants do not appreciate what sentimental value is. They stated;

“From the evidence led it is clear that the Plaintiff's relatives have been occupying the Tafara house since its acquisition to date. As such, one would conclude that the Plaintiff is just but trying to secure unwarranted accommodation for her relatives. The court must surely frown upon this behavior.”

The Online Dictionary defines sentimental value as the value of an object deriving from personal or emotional associations and memories rather than material worth. The undisputed evidence is that Plaintiff bought the house from her aunt. Defendants confirm that her relatives have been in occupation ever since its acquisition. What more evidence is required to prove personal and emotional memories and associations? Plaintiff's claim in this respect succeeds.

MUFAKOSE PROPERTY

Defendants counter-claimed and stated that the Mufakose property is co-owned and the co-ownership must be dissolved by selling the property and sharing the proceeds equally between them. In the alternative, he proposed that the plaintiff may purchase his half share valued at \$9000. Defendants' summary of evidence stated that first defendant contributed his income from two jobs as a freelance auto-electrician and a college lecturer to pay the purchase price whilst the plaintiff was still a university student. First defendant's evidence was that he paid \$10 000 for plaintiff to be registered in the Pay for Your House Scheme in 2001. He paid small instalments and in 2003 a house was identified for them. He stated that they were asked to pay the balance and he continued paying as he had income. Under cross examination, he stated that he did not remember plaintiff's salary getting into his account even though she used to keep his card. He accepted that plaintiff's evidence was not challenged and stated that it was because he knew he would have his chance to state his side of the story.

Plaintiff stated in her summary of evidence that by the time she married first defendant, she had contributed more than 50% of the cost of the housing unit that was eventually allocated to her. Further that she defaulted under the scheme when she went to university and resumed making payments thereunder after leaving university. She stated that she intended to acquire the house for herself and did not at any stage intend to acquire that property for the benefit of the first defendant who was not in the picture then. She further stated that after marriage, first defendant made a small contribution on her behalf to assist her. Further that first defendant was

the one managing the family finances as her salary went straight into his account. In her oral testimony, plaintiff testified that she joined the Pay for Your House Scheme before marrying the first defendant and contributed for a while, and that she stopped contributing when she went to college. Further that after college she tried to get accommodation but was being ridiculed because of her condition. She stated that she got married and continued to be ridiculed therefore she pestered Dr Parirenyatwa and another person for assistance until she was readmitted into the Pay for Your House Scheme. She stated that first defendant ridiculed her for using her condition to get a house. She further stated that she made contributions until a house was allocated to her and that some of the contributions were from earnings as a researcher which were deposited into first defendant's account.

It is clear that there is a dispute as to whether the property is jointly owned or not. Even though the parties were married at the time the property was allocated to the Plaintiff, they are now divorced. Plaintiff's position was that the property was never intended to be jointly owned. The Married Persons Property Act [*Chapter 5:12*] governs the property rights of married persons in the following terms: -

“2 Community of property excluded from marriages after 1st January, 1929, except where agreements made to the contrary

(1) Community of property and of profit and loss and the marital power or any liabilities or privileges resulting therefrom shall not attach to any marriage solemnized between spouses whose matrimonial domicile is in Zimbabwe entered into after the 1st January, 1929, unless such spouses shall, by an instrument in writing, signed by each of them prior to the solemnization of their marriage and in the presence of two persons, one of whom shall be a magistrate, who shall subscribe thereto as witnesses, have expressed their wish to be exempt from this Act”

The property in contention is in the name of the plaintiff. The parties' marriage was solemnized after 1st January 1929. There was no instrument in writing signed by the parties in which they expressed the desire to have community of property. In *Chigwada v Chigwada & Others* SC 188/20 it is stated that parties to a marriage out of community of property are legally entitled to own and dispose of property in their individual capacities. The onus was on the defendant to prove that at the time the property was acquired, there was community of property. He did not get anywhere near discharging that onus. I find that the Mufakose property is solely owned by the plaintiff and is not subject to distribution. The counter claim fails.

DISPOSITION

It is ordered that; -

1. The joint ownership by the Plaintiff and First Defendant of two immovable properties in Harare, namely, Subdivision B of Lot 208 Block C Hatfield Estate, situate in the District of Salisbury, measuring 4 776 m², also known as No.37 Winston Road, Hatfield, Harare and Stand No. 4443 New Tafara, Harare be and is hereby terminated.
2. Both properties are to be evaluated by a valuer agreed to by the parties within thirty days of this order failing which the Registrar of the High Court will appoint one from his list of valuers and both parties will share the costs of the valuation equally.
3. HATFIELD PROPERTY
 - a) The Plaintiff be and is hereby ordered to pay the 1st Defendant 50% of the value of the Hatfield property less
 - (i) any capital gains tax duly assessed by the Zimbabwe Revenue Authority
 - (ii) \$24 940,75 ,being 50% of the expenses incurred by the Plaintiff in improving and renovating the property
 - (iii) 50% of the costs of having a gardener and a caretaker at the property from the date the summons were issued to the date of payment.
4. The 1st Defendant be and is hereby ordered and directed to transfer his one-half undivided share in Subdivision B of Lot 208 Block C Hatfield Estate, situate in the District of Salisbury, measuring 4 776 m², held under Deed of Transfer No. 6654/2006 to the Plaintiff against payment of 50% of the value of the Hatfield property less any capital gains tax duly assessed by the Zimbabwe Revenue Authority, by the Plaintiff.
5. In the event that the 1st Defendant fails to sign all such documents as may be required of him by conveyancers appointed by the Plaintiff and/or attending to the Zimbabwe Revenue Authority interview for capital gains tax assessment within 10 days of being called upon to do so, the Sheriff of the High Court of Zimbabwe be and is hereby authorized to sign all such documents on his behalf and to attend the interview on his behalf.
6. TAFARA PROPERTY
7. The Plaintiff be and is hereby ordered to pay the 1st Defendant the sum of 50% of the value of the Tafara property.
 - a) The 2nd Defendant be and is hereby ordered to attend at the City of Harare Department of Housing Offices to sign the necessary papers within 10 days of being called upon to do so, failing which the Sheriff of the High Court of Zimbabwe be and is hereby authorized to sign such papers on his behalf at 1st Defendant's expense.
8. The counter claim by the 1st Defendant regarding the MUFAKOSE PROPERTY be and is hereby dismissed.
9. 1st Defendant be and is hereby ordered to pay costs of suit.

Wintertons, plaintiff's legal practitioners.

Dube, Manikai & Hwacha, defendants' legal practitioners.