KAREN BOTE
versus
SILAS DUNE N.O
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE 27 June 2019 & 11 July 2019

Unopposed Court Application

F Nyangani, for the applicant

MANZUNZU J: This court application was set down on the motion roll on 27 June 2019.

The applicant seeks an order in the following terms;

> "1. Clause 8 of Edward Taashure Mabhiza's will be and is hereby declared null and void.
> 2. The 1st respondent be and is hereby ordered to award Karen Bote the property known as number 103 Svinurai Township, Dema, Seke.
> 3. The 2nd respondent be and is hereby ordered to approve a distribution plan which complies with clause 2 of this order.
> 4. The 1st respondent to pay costs of suit."

The background to this matter, according to the applicant's version is that, the late Edwrad Taashure Mabhiza (hereinafter referred to as the "deceased") died testate on 8 October 2009. The applicant claims was customarily married to the deceased. She had an unregistered customary union. She considered herself as a second wife since the deceased was already married to one Ennet Mabhiza (Ennet) whom she recognised as the first wife. She however does not explain the type of marriage between Ennet and the deceased. The applicant says following her husband's death Ennet had challenged the validity of her customary marriage in what she described as "a prolonged battle".

She however said that she was surprised at a meeting before the Master on 1 November 2018 when Ennet conceded that she (applicant) was customarily married to the deceased. She said the result of that meeting was contained in a letter by the Master to her attorneys dated 15 November 2018.

I will recite hereunder the contents of that letter:

"RE: ESTATE LATE EDWARD TAASHURE MABIZA-INQUIRY ON MARITAL STATUS BETWEEN KAREN BOTE AND NOW DECEASED EDWARD T. MABHIZA

We acknowledge receipt of your letter dated 2 November 2018.

Reference is made to a special meeting held on the 1st of November 2018 whereat parties confirmed that Karen Bote''s marriage to the deceased is undisputed. Both parties were univocal to the fact that the deceased is survived by two wives namely Ennet Mabhiza and Karen Bote. However, it came out that the born of contention was on distribution of the Estate Assets which ordinarily the executor has to distribute in accordance with status governing estate. Submissions adduced by all parties suggest that at the time of death the deceased was survived by two wives.

It is therefore our finding that both Ennet Mabiza and Karen Bote be treated as spouses.

Yours faithfully

D. Gutu
For Master"

The applicant did not attach a copy of the letter by her attorneys which was being responded to by the Master. The letter by the Master refers to "the parties" but we do not know who is being referred to as the parties.

On the basis of this letter she re-affirmed her position that she was one of the surviving spouses.

The applicant said at all material times she was resident at No. 103 Svinurai Township, Dema, Seke (hereinafter referred to as "the property") which home she considered as her matrimonial home. She does not dispute that the property belong to the deceased and is part of the estate.

Clause 8 of the deceased's Will deals with that property. It reads;

"I bequeath Stand number 103 Svinurai Township, Dema, Seke to my executor and all my children in equal shares, share and share alike.
It is my wish that this property be retained as my family residence which shall not be subject to any sale agreement.
The Executor shall have the duty to administer this property."

Nowhere in the Will has the testator bequeathed any of his property to the applicant.

It is because she considers herself as surviving spouse that she feels the property should have been bequeathed to her.

She therefore seeks the protection of the law by asking the court to strike out clause 8 of the Will and proceed to award her the property. In advancing his client's case the counsel

for the applicant, in the written heads, relied on s 26 (a) of the Constitution of Zimbabwe which reads;

> "**26 Marriage**
> The State must take appropriate measures to ensure that-
>
> (a) ……
> (b) …….
> (c) …….
> (d) In the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses."

Section 5 (3) of the Wills Act, [*Chapter 6:06*] was also relied upon and it reads:

> "**5 Power to make dispositions by will**
> (1) ……..
> (2) ……..
> (3) No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of-
> (a) Any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married person; or
> (b) Any person to receive any property, maintenance or benefit from the testator's estate in terms of any law or any award or order of court; or
> (c) Any creditor in respect of any debt or liability payable from or attaching to the testator's estate;
> except in so far as such variation or prejudice is brought about with the consent of the person or creditor concerned or through the exercise by him of a right of election."

The last statutory provision relied upon was s 68 (3) of Administration of Estates Act, [*Chapter 6:01*] which was cited in part which part states that;

> "(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [*Chapter 5:07*], and any reference in this Part to a spouse shall be construed accordingly:"

This section has a proviso which was deliberately omitted by counsel and I shall demonstrate later in this judgment why it was omitted.

Case law was also relied upon. The case of *Nathan Hosho* v *Lilian Hasisi* HH 491-15 where a passage was picked from TSANGA J's judgment where she stated:

> "In terms of the relevant law impacting on widows, s 68 (3) of the Administration of Estate Act [*Chapter 6:01*] recognizes a union contracted according to customary rites notwithstanding that it has not been formally solemnized in terms of the Customary Marriages Act [*Chapter 5:07*]. As such, the absence of a marriage certificate is not at all fatal to the recognition of such a union when it comes to inheritance."

The case of *Venencia Chiminya* v *Estate Late Dennis Mhirimo Chiminya & Ors,* HH 272/15 where MWAYERA J stated:

> "The case of Estate Wakapila v Matongo and others 2002 ZLR 43 sought to illustrate that a spouse customarily married would not inherit were the deceased spouse would have died testate and made dispositions by way of will. Whereas it is important to uphold wills in the interest of fulfilling of a testator's wishes, the mischief of disinheriting the legal and rightful beneficiary is what s 5 (3) of the Wills Act [*Chapter 6:06*] is about and seeks to cure. I respectfully do not agree with the reasoning in that case Est Wakapila v Matongo where it sought to emphasise that only rights existing at the time a will is executed may not be eroded. It is my considered view that a spouse though not an owner had personal rights against the owner of the house. The provision of a will can only be struck out at the time of implementation and not at the time of execution. The legislative intention in enactment of s 5 (3) of the Wills Act cannot be ignored for clearly the section gives warning bells and pre warns a testator not to touch or interfere with the right of a spouse or legally recognized beneficiary."

Faced with these facts and written submissions a number of issues arose in my mind which called counsel for applicant to address the court on. I invited counsel for oral submissions to beef up his written submissions.

The starting point is that our courts do recognize freedom of testation. Therefore, any limitation brought about by the law must carefully be applied. The courts must not at the slightest moment of any complaint readily interfere with a Will especially if such interference results in disinheriting those beneficiaries bequeathed with the property. Interference must be done only in clear cases which are justified by the law.

The grey areas in this case for which I called counsel for the applicant to address me on were:

(a) whether applicant had established that she was a spouse to the deceased
(b) why all beneficiaries or at least known beneficiaries clearly revealed in the will were not cited as parties
(c) whether the relief sought particularly paras 2 and 3 of the draft order were appropriate
(d) Non- disclosure of material facts in the application by the applicant.
(e) whether personal service is not called for in a matter of this nature.

<u>Was Applicant a Spouse</u>:

The onus was on applicant to satisfy the Court that, at law, she is a spouse. It was argued that applicant was a spouse whose origins is from a customary union. Reliance was put to the Master's letter which was recited earlier on in this judgment.

By her own admission applicant admits she was the second wife. She however does not disclose the type of marriage between Ennet, the first wife, and the deceased. She has kept it a secret. She cannot claim ignorance because she says there was a "prolonged battle" with Ennet when Ennet was fighting that there was no valid customary law union between her and the

deceased. Certainly during that battle Ennet must have disclosed the type of marriage she had with the deceased. Applicant chose not to tell the court the nature of such marriage, even if she did not know, at least what Ennet claimed what it was. Such non-disclosure, in my view, was deliberate in order to hide information detrimental to her case.

In written submissions by her counsel, part of s 68 (3) of the Administration of Estates Act was cited and deliberately left out the following proviso,

> "provided that such a marriage shall not be regarded as valid for the purpose of this Part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriage Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse." (my own underlining)

In my view, the omission of the proviso from the mother section was deliberate. I say so because its clear that the applicant was chameleonically careful on where to tread with her information. She would not dare say something which defeats her case. The proviso to s 68 (3) of the Administration of Estates Act is clear in that any purported marriage, customary or otherwise which comes in the face of a valid monogamous marriage is invalid. This explains why she has been economic with the truth by omission. The dicta of the cases cited by counsel are correct in recognizing customary union as a marriage for the purposes of administration of estates, but that is where such union has been found to be valid. A marriage which is null and void cannot accrue rights afforded by the law under the Wills Act or Administration of Estates Act.

I asked counsel to comment on the import of the case of *Ndanga* v *Shambare & Ors*, 2017 (1) ZLR 154. He did not appear to have read it. But in this case MWAYERA J held that a civil marriage contracted under the Marriage Act [*Chapter 5:11*] renders any other marriage contracted after it null and void. That is the correct position of the law.

The applicant had, therefore, a duty to show that her marriage is not such marriage contracted after a civil marriage contracted between Ennet and the deceased.

I cannot hold her to have discharged the onus upon her to prove that she is a surviving spouse. The onus cannot be discharged by mere production of a letter written by the Master. We are not told why Ennet after fighting a prolonged battle with applicant would suddenly have a change of heart. Even applicant could not explain except to say she was also surprised.

Non-joinder of Parties:

My second point with counsel was non-joinder of parties. The first reaction by counsel was that the only interested party was the executor until I drew his attention to clause 8 which bequeathed the property to the executor and all the children in equal shares. His argument was

that the executor would cater for the interests of the beneficiaries. Even then, Ennet is not a direct beneficiary of clause 8 of the Will but is an interested person by virtue of her being a surviving spouse. Counsel also expressed that it was difficult for the applicant to hunt and identify all the children. I do not think so. Applicant said she was part of the family hence one would expect her to know her own or husband's own children. In any event the Will identifies the children by name. A relief sought by the applicant has far reaching consequences on beneficiaries, hence cannot be granted without fulfilling the cardinal principle of natural justice that of *audi alteram partem* rule. No good reason has been given why they were not cited as respondents. They have a constitutional right to be heard. Such a material omission is fatal to this application.

The relief sought:

I drew the attention of counsel to the effect of striking out clause 8 of the Will. I expressed the view that if clause 8 were to be struck out its effect was that it releases the property from the Will and the released property will be subject to administration by the Master as intestate. For the court to proceed and award the property to applicant and direct the Master to approve a distribution plan will amount to the court usurping the functions of the Master in circumstances which are not warranted. Counsel conceded with my observation and applied to amend the draft order by deletion of paras 2 and 3 thereof.

Even with that amendment, I did not find the application to be cured of my earlier observations.

Non-Disclosure of Material Facts

In the case of *National Social Security Authority* v *Capital Bank Corporation Ltd & 3 Others*, HH 6-19, though it was an application brought on urgency, I had occasion to remark a non-disclosure of material facts as follows,

> "It is expected that those who bring matters on urgency have a duty to disclose all the material facts including those they consider unfavorable to their case. This is for the simple reason that the court must be put in a full picture of the facts in order to do justice to the parties. More often than not courts lean in favour of parties who are honest than the dishonest ones. Dishonesty may either be by commission or omission."

I then in that case cited the case of *Centra (Pvt) Ltd* v *Pralene Moyas & Anor* HH 57/12 which expressed similar sentiments.

This observation applies in all applications. This case suffers from non-disclosure of material facts. I have already alluded to some of them. Applicant did not find it necessary to

lay down facts upon which she claims a customary law union. Her evidence falls short of proving this very important point which if proved gives her the *locus standi*.

Service of application

Striking a clause in a Will is a drastic remedy which calls for personal service of the application on the respondent. I*n casu* service was by a clerk in the employ of the applicant's legal practitioners. Service was on a Mrs Mtumbwa who was said to be a responsible person without stating how she is related to the respondent. The first respondent is cited in his official capacity which even became more necessary for personal service. While one might say the service was in terms of the Rules because service was on a responsible person. The question is why is the recipient said to be a responsible person without description of the relationship between the two. It is not enough to state that one is a responsible person without more. The justice of this case demands that service must be personal.

For the defects which I have noted, while it is not in the interest of justice to dismiss the application, the matter must be struck off the roll. Accordingly;

IT IS ORDERED THAT

1. The matter is struck off the roll with no order as to costs.
2. In the event that the applicant decides to proceed with this application there shall be joined as part of the respondents, Ennet Mabhiza and all the children as identified in the Will.
3. The application shall be served personally by the Sheriff on each respondent unless where an order for substituted service has been obtained.
4. The applicant shall disclose all the material facts of this application.

Nyangani Law Chambers, applicant's legal practitioners