

OTILIA GWIMBI

And

ALECK GWIMBI

And

ANGELINE GWIMBI

And

AMELIAH GWIMBI

And

ALLEN GWIMBI

Versus

MOLLY GWIMBI

And

**MOLLY GWIMBI (cited herein in her official
Capacity as the executor dative in the estate late
Nyika Gwimbi)**

And

**THE ADDITIONAL MASTER OF THE HIGH COURT
DRBY 531/06**

And

THE BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 11 MARCH, 12 MAY & 12 JUNE 2008

Nzarayapenga for applicants

Ms E Sarimana for 1st respondent

No appearance from 2nd and 3rd respondents

Opposed Court Application

KAMOCHA J: When the matter came up for argument on the appointed date the legal practitioners representing the parties informed the court that

they had agreed that the 2nd, 4th and 5th applicants be removed from this matter and requested that it be endorsed that each of them receives a bovine beast from the 1st and 2nd respondents which beasts form part of the residue of the estate of the late Nyika Gwimbi.

The rural home of the late Nyika Gwimbi shall be allocated to the 1st respondent. The two children of the 1st respondent shall also each be allocated a bovine beast from the residue of the estate.

The 3rd applicant passed away. As a result, the bovine beast which was to be allocated to her shall be allocated to the 1st respondent.

The court accordingly makes an order by consent to that effect. That being the case the court must resolve the dispute between the 1st applicant, hereinafter referred to just as applicant, and the respondents.

In this application she seeks an order in the following terms:-

“It is ordered that:

- (1) the proceedings under DR BY 531`/06 be and are hereby declared null and void; and
- (2) 1st respondent to pay costs of suit on an attorney-client scale.”

The circumstances giving rise to this case are that the applicant was once married to one Nyika Gwimbi but their marriage was dissolved by this court on 11 November 1988. At the dissolution of the marriage applicant was awarded by way of a proprietary settlement, the sum of \$1 639,50, which was to be payable to her free of interest at the rate of \$35,00 per mensem. The property at the centre of the dispute is house number 30337 Entumbane, Bulawayo.

I must pause here to observe that the amount of \$1 639,50 for the Entumbane house must have been very substantial at that time. According to the applicant it was the market value of the house at that time.

Although it is not clear when Nyika Gwimbi died there is evidence that he had started living in the house in question with Molly Gwimbi – the 1st respondent since 1982 when applicant and deceased separated pending a divorce. The 1st defendant has been living there to date.

The applicant alleged that the deceased never paid her the sum of \$1 639,50 for the house because she and the deceased had subsequently entered into a verbal

agreement wherein the deceased had agreed to cede his rights, title and interests in the said house to her for the benefit of the four children and herself. She claimed that deceased had in fact promised to effect the transfer of the house into her name, although he never did until he died.

Applicant argued that although it has taken her 18 years to claim the house she was still entitled to claim it in terms of section 7 of the Matrimonial Causes Act at any time. The court was referred to the case of *Moyo v Moyo* 1999 (2) ZLR 265. But that case goes further to lay down a time limit within which a claim should be lodged. A period of 9 years was considered to be unreasonable. Other authorities even suggest that a period in excess of six years is unreasonable. A period of 18 years is therefore grossly unreasonable.

Moreover *in casu* applicant was fully aware that the 1st respondent started living in the said house with the deceased prior to his death since 1982 and did nothing about the matter. She only purported to assert her rights long after the deceased had died.

When considering the question of costs, I hold the view that this is a proper case for an award of costs on a punitive scale. The applicant has been deliberately untruthful in the way she dealt with this whole matter. She claimed that she was the surviving spouse of the deceased until a divorce order was produced which belied her story. Her story that she latter entered into a verbal agreement with the deceased is in all probability false because if there was any truth in it she would not have waited for 18 years to assert her rights.

She also tried to mislead the Master of this court by claiming as a surviving spouse of the deceased. She even produced an invalid marriage certificate. A person who chooses to behave in this fashion and puts other people into unnecessary legal costs deserves to pay costs on a punitive scale.

Consequently, having found that the application is devoid of any merit I would dismiss it with costs on an attorney and client scale.

Messrs Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Coghlan & Welsh respondent's legal practitioners