FATIMA MAGEDI
and
KENNEDY SAMURIWO
versus
RURAMAI SAMURIWO
and
YVONNE SAMURIWO
and
TINASHE SAMURIWO
and
A.CHITAUNHIKE (in his capacity as executor testamentary) NO
and
THE MASTER OF THE HIGH COURT NO

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 28 October 2013 and 8 May 2014

Opposed matter

C.Takaendesa, for the applicants
W. Bherebende, for 1st, 2nd & 3rd respondents
No appearance for 4th and 5th respondents

MAWADZE J: This is an opposed application in which both applicants seek relief in the following terms;

> "IT IS HEREBY ORDERED THAT
> 1. The alleged Will of Takavengwa Lovelace Samuriwo dated 2 December 1992 and accepted by the 5th respondent on 30 May 2012 be and is hereby declared as null and void.
> 2. The 1st, 2nd and 3rd respondents shall pay costs of suit at a legal practitioner and client scale."

The first applicant, Fatima Magedi is the surviving widow of the late Takavengwa Lovelace Samuriwo (the late Samuriwo). She entered into a customary law union with the late Samuriwo and apparently no children were born of this customary law union.

The second applicant Kennedy is the late Samuriwo's adult son born out of wedlock with another woman whose further particulars are not furnished by both applicants.

The first, second and third respondents are the late Samuriwo's adult children and beneficiaries of his estate. They were born out of the marriage between the late Samuriwo and the late Perpetua Samuriwo.

The fourth and fifth respondents are cited in their respective official capacities. The fifth respondent has provided a report as is required in terms of r 248 of the High Court Rules 1971.

The background facts of this matter are as follows;

The marital history of the late Samuriwo seems to be largely common cause except as regards the relevant dates. Firstly the late Samuriwo married the late Perpetua Samuriwo the mother of the first, second and third respondents. The type of the marriage is not stated but from what is alleged it was a registered marriage. The late Perpetua Samuriwo died in 2001 although the first applicant claims it was in 2005. I am more inclined to accept the version of the first, second and third respondents who are Perpetua Samuriwo's children and are likely to know better the date their mother passed on unlike the first applicant who was not yet married to the late Samuriwo by then.

After the death of Perpertua Samuriwo the late Samuriwo married Joseline Chiedza Mukupe in February 2003 in terms of an unregistered customary law union and the union was dissolved or ended in October 2009. No children were born out of this union.

The late Samuriwo then entered into a customary law union with the first applicant which union ended when the late Samuriwo passed on 29 February 2012. No children were born out of this union. The date the first applicant and the late Samuriwo entered into the union is in issue. The first applicant alleged it was in 2009 but the first, second and the respondents allege it was in 2011. This dispute in my view is immaterial to the issues to be resolved in this matter. The point is made that whatever the date (year) the first applicant and the late Samuriwo entered into the unregistered customary law union the first applicant is the widow of the late Samuriwo.

The late Samuriwo died testate on 29 February 2012. On 31 August 2012 the fifth respondent (the Master) accepted the last Will and Testament of the late Samuriwo which had been authored on 2 December 1992 when the late Samuriwo was married to the late Perpetua Samuriwo and they had already had the three children being the first, second and third respondents. The last Will and Testament (the Will) by the late Samuriwo is attached (a copy) to the applicants' founding affidavit as Annexure A to A3. As per that Will the late

Samuriwo bequeathed his entire estate to the first respondent Ruramai Samuriwo failing which the entire estate would devolve in equal shares between the second respondent Yvonne Samuriwo and the third respondent Tinashe Samuriwo, and also granting a life usufruct to his now late wife Perpetua Samuriwo in respect of the Bluffhill house in Harare.

It is not clear as to when the second applicant was born but his mother it seems was never married to the late Samuriwo. The first, second and third respondents allege that he was later introduced in to the family.

The first and second applicants seeks an order to have the Will of the late Samuriwo dated 2 December 1992 and accepted by the Master declared null and void. According to both applicants the basis for this is two fold;

i) that the Will was invalidated when the late Samuriwo contracted an unregistered customary law union or marriage with the first applicant either in 2009 as per the first applicant or in 2011 as per the first, second and third respondents.

ii) that the Will is probably fake as the Master accepted a photocopy and that no original copy was ever produced.

In this regard reference is made to the correspondence between the Master and the first applicant and also between the Master and the second respondent.

The application is opposed by the first, second and third respondents. The first, second and third respondents took two points *in limine* which I intend to dispose of first.

The first point *in limine* was that the application should be dismissed on the basis of the non joinder of the estate of the late Samuriwo itself which has a substantial interest in the matter. Mr *Bherebende* later withdrew this objection. That decision in my view was well founded as the executor testamentary of the estate of the late Samuriwo had been cited in his official capacity and represents the interest of the estate.

The second point *in limine* taken is that there are serious material disputes of facts in this matter which cannot be resolved on the basis of the papers filed. It was submitted that both applicants chose the wrong procedure by approaching the court by way of a court application in view of serious disputes of facts in the matter. The major disputes of facts referred to being the date the late Samuriwo entered into an unregistered customary law union with the first applicant and whether the Will accepted by the Master is not the original one. I am not persuaded by this submission. There are no material disputes of fact in this matter as

the issue to be resolved like the basis for the invalidation of the Will is of a legal rather than factual nature. The authenticity of the Will can be resolved on the papers by simply referring to the very useful and detailed Master's report. The points *in limine* taken by the first, second and third respondents lack merit and are dismissed. I shall therefore proceed to deal with the merits of the matter.

A point was taken in argument by Mr *Bherebende* for the first, second and third respondents that this application should be dismissed for want of compliance with the provisions of s 8 (6) of the Wills Act [*Cap 6:06*]. It provides as follows,

> "(6) Any person who is aggrieved by a decision of the Master may appeal to an appropriate court within thirty days of being notified of the decision of the Master" (emphasis mine)

The point was taken in argument although it had not been raised by the first, second and third respondents in the papers. I allowed the point to be argued as it is a question of law. It is common cause that the applicants approached this court for relief well after the thirty day period. The provision relied upon by Mr *Bherebende* is not applicable in this case as it related to an appeal.

The applicants are not approaching this court on the basis of s 8 (6) of the Wills Act [*Cap 6:06*]. It is also not mandatory that any person who challenges the validity of a will should do so by way of appeal. The applicants opted to challenge the validity of the Will by way of a court application which challenge be based can on many other grounds not necessarily the Master's decision. It is therefore clear that *in casu* the Will is being challenged on the basis of the alleged subsequent marriage and that the copy filed may be fake as it is not an original form. This challenge is being made through a court application and not by way of appeal. The argument raised by the first, second and third respondents as regards the thirty day period provided for in s 8 (6) of the Wills Act [*Cap 6:06*] is inapplicable on the facts of this case.

I now turn to the question of whether the Will accepted by the Master is a fake one as it is allegedly in photocopy form and that no original copy was produced. This point should not detain us at all. All what the applicants are saying is that the Will should be fake because it is not original form. The applicants do not refer to any provision in the Wills Act [*Cap 6:06*] which provides for such a requirement.

The requirements for a valid Will are provided for in s 8 (1) (a) to (d) of the Wills Act [*Cap 6:06*]. There is no specific requirement that the Will should be in original copy form, although generally that would be desirable. In fact s 8 (5) of the Wills Act [*Cap 6:06*] gives the Master power to accept a will for the purposes of the Administration of Estates Act [*Cap 6:01*] even in circumstances the Will does not meet the requirements in s 8 (1) or (2) and s 9 (2), (3) and (4) of the Wills Act [*Cap 6:06*]. On this basis alone I am not persuaded by the argument taken by the applicants in this regard. The applicants did not specify the basis at law for the Will to be deemed invalid if it is not in original form.

Assuming that I may be wrong in the finding I have made, the Master's report dated 12 July 2013 put the matter to rest. The Master accepts and acknowledges the apparent error which may have been made by a junior officer in the Master's Office as regards the communication referred to by the applicants between the Master's office and the first applicant and the Master's office and the second respondent. It is however important that all officers in the Master's office no matter their seniority should always appraise themselves of the facts of each case and where appropriate seek guidance from the Master before transmitting wrong and harmful information to interested parties in matters related to deceased estates. I however do not believe that where such an error is detected and is clear a party can seek to capitalise on an error to overturn the validity of a Will as the applicants are determined to do.

The Master in the report filed of record clearly states that the original Will was filed as a Live Will in 1992 with the Master's office and that the Will the Master considered and accepted *in casu* is an original Will and not a photocopy. The Master pointed out that the Live Will never went missing. The fact is supported by a letter written to the late Samuriwo by A.J.A. Peck legal practitioners (see pp 51 of the record) which states as follows;

> "Your Will
> We have to advise that your Will was registered at High Court under reference L.W.263/92 dated the 10th of December 1992"

The letter in question is dated 16 December 1992. Its authenticity has not been put into issue. The argument by the applicants that the Will accepted by the Master is probably fake and in photocopy form lacks merit and is dismissed.

This leads me to that issue which is whether an unregistered customary law union (or marriage although I prefer the word union) entered between the first applicant and the late

Samuriwo invalidates the Will. The applicants' position is that it invalidates the Will whereas the first, second and third respondent argue that it does not invalidate the Will. Surprisingly both parties rely on the same provision s 16(1) of the Will Act [*Cap 6:06*] in support of each party's position. This dispute therefore can be resolved on the basis of the interpretation of s 16 (1) of the Wills Act [*Cap 6:06*] which provides as follows;

> "16. Effect of testator's subsequent marriage on Will
> (1) Subject to the section, a Will shall become void upon the subsequent marriage of a surviving testator"

The applicants submitted that the Will made by the late Samuriwo became void when the late Samuriwo entered into a customary law union with the first applicant in 2009 or 2011 which Will had been made on 10 December 1992.

The question I have to answer is whether a customary law union or an unregistered customary law marriage is regarded as marriage for the purposes of the Wills Act [*Cap 6:06*].

Section 2 of the Wills Act [*Cap 6:06*] defines what is a marriage for the purposes of that Act as follows,

> "'Marriage' includes a marriage solemnised in terms of Customary Marriages Act [*Cap 5:07*]"

The applicants argue that the definition of marriage referred to above does not exclude an unregistered customary law marriage as this is not specifically stated. I do not find favour with this rather weird interpretation.

It is trite that a civil marriage contracted after the execution of a Will invalidates that Will. See in re *Savanhu* 1990 (2) ZLR 177 (H) (although the case does not deal with this specific point and is distinguished from this case).

In the case of *Mapenzauswa* v *Muskwe & Ors* 2008 (1) ZLR 376 (H) at 379 F-H to 380 A KUDYA J in explaining the genesis of the enactment of s 16 (1) of the Wills Act [*Cap 6:06*] referred to the case of *Savanhu* v Heirs Estate Savanhu 1991 (2) ZLR 19 (S) at 23 B-E in which GUBBAY CJ sets out the legislative basis for promulgating s 16 (1) of the Wills Act as follows;

> "It is plain to me that by enacting the provision the lawmaker was minded to alter the common law in accordance with which a Will is not revoked by the subsequent marriage of the testator. See *Ludwig* v *Ludwig's Executor* (1848) 2 Menz 452; *Shearer* v *Shearer's Executors* 1911 CPD 813; *Brande NO* v *Perlmutter & Ors* 1969 (2) RLR 103 (A) at 109 C; 1969 (4) SA 101 (RA) at 106. It was appreciated that the operation of such a principle would cause an injustice and untold hardship. So in

> 1929 a change in the law was effected by the introduction of s 2 of the former Deceased Estates Act, presently superceded by s 16 (1) of the Wills Act. Its object is to afford some measure of protection to the new spouse of the testator who had been previously married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous matrimonial union to one of monogamy. It envisages a necessary change, brought about by the subsequent marriage, to the status of both the spouse and testator to that of a married person – from a bachelor, divorce or widower in the case of a man and from spinster, divorce or widow in the case of a woman. It is designed to avoid a situation in which the Will of one or each of them, which predated the subsequent marriage, makes no provision for the other's new spouse".

The question which arises is whether the protection referred to by Chief Justice GUBBAY has been extended in our law to those women who opt to marry in terms of an unregistered customary law marriage like in this instant case.

The position of the law in my view currently is that an unregistered customary marriage is not a marriage generally in the eyes of the law except when such specific recognitions is given by a particular statute or enactment. Section 3 of the Customary Marriage Act [*Cap 5:07*] makes the point very clear and it provides as follows;

> "3. Marriages not to be valid unless solemnised
> (1) Subject to this section, no marriage contracted according to customary law including the case where a man takes to wife the widow or widows of a deceased relative shall be regarded as a valid marriage unless-
> (a) Such marriage is solemnised in terms of this Act"

The limited recognition given or afforded to an unregistered customary law marriage is provided for in s 3 (5) the Customary Marriages Act [*Cap 5:07*]. It provides as follows;

> "(5) A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, <u>for purposes of customary law and custom</u> relating to status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage" (emphasis is mine)

Despite the progressive legislative provisions enacted since independence and positive judicial activism the legal disabilities suffered by women who opt to marry under the unregistered customary law marriage remain in the various spheres of our law. As an example the Matrimonial Causes Act [*Cap 5:13]* is not applicable in relation to such unregistered customary law marriages as such women would have to find some cause of action under general law if they are to benefit from the matrimonial estate outside "maoko property" at the dissolution of such a union.

It is my view that s 16 (1) of the Wills Act [*Cap 6:06*] has only extended the said protection to those women married in terms of registered customary law marriage [*Cap 5:07*]. I do not believe that the legislature in s 2 of the Will Act [*Cap 6:06*] intended to include unregistered customary law marriages. If that is the case then the definition would simply have referred to customary law marriages excluding the need for registration. It would be absurd for the applicants to state that the definition of a marriage in the Wills Act [*Cap 6:06*] does not exclude unregistered customary law union or marriages. While one may make a case for the need for legislative intervention to protect those women who enter into unregistered customary law marriages to be protected by the provisions of s 16 (1) of the Will Act [*Cap 6:06*], I do not share the view that the law as it is now provides for such protection. The protection has only been extended to those married in terms of registered customary law marriages as provided for in [*Cap 5:07*].

My finding is that the customary law union or marriage which the first applicant entered into with the late Samuriwo did not invalidate the Will made by the late Samuriwo on 10 December 1992 prior to this union.

In conclusion I hold the view that the Will is valid. Accordingly the application is dismissed with costs.

Charamba & Partners, applicants' legal practitioners
Messrs Bherebhende Law Chambers, 1st, 2nd & 3rd respondents' legal practitioners