VENENCIA CHIMINYA

versus

ESTATE LATE DENNIS MHIRIMO CHIMINYA

and

PASSIVELY NYASHA CHIMINYA

and

THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE

MWAYERA J

HARARE, 18 February 2015 and 12 March 2015

**Opposed application**

Applicant in person

Miss *B R Munyere*, for the 1st & 2nd respondents

 MWAYERA J: In this application the applicant a widow and surviving spouse to the late Dennis Chiminya approached the court seeking an order that the will by the late Dennis Chiminya her husband be disregarded and set aside and that the only property of the estate, house number 2421 Egypt, Highfield be and is hereby awarded to the applicant who is the surviving spouse.

 The brief background to the case is that the applicant was customarily married to the late Dennis Mhirimo Chiminya on 24 August 1971 as per the marriage certificate attached as annexure A on p 5. Before the death of Dennis Mhirimo Chiminya he executed a will on 5 November 2005. Upon Dennis Mhirimo’s death on 11 June 2013 the will was subsequently registered and accepted by Master of the High Court who directed that the estate be wound up in terms of the accepted will. The will bequeath the matrimonial home house number 2421 Egypt line Highfield to the grandson of the deceased one Tapiwanashe Dennis. It also bequeath other property like a shop in Chivhu to the step son of the applicant that is the son of the deceased and further bequeath two bicycles to the other son. Hupenyu Chiminya. Further there was distribution of cattle. The shop was not an issue for it was disposed of by sale before the death of the testator.

 The applicant sought to challenge the validity of the will on the basis that

1. Assets acquired in 2006 appeared on the will which was executed in 2005 namely the bicycles.
2. That the deceased bequeathed the only matrimonial home to her exclusion
3. That she was the surviving spouse in terms of s 3A of Deceased Estate Succession Act [*Chapter 6:02*] she ought to be awarded the matrimonial home as the surviving spouse.

The first and second respondents opposed the application on the basis that there is a valid will whose provisions thereof are capable of being carried out as long as they are not contrary to law and or public policy. The respondents also sought to rely on an argument that a wife married customarily cannot inherit from the husband’s estate if the husband dies testate. This argument from the legal practitioner, in my view found no support in law and precedent as will be demostrated.

First and foremost the supreme law of this country outlaws any legal provisions that are discriminatory s 56 (1) and (3) of the Zimbabwe Constitution Amendment (no. 20) Act 2013 is instructive it reads:

“**56. Equality and non-discrimination**

1. All persons are equal before the law and have the right to equal protection and benefit of the law.
2. ……………………
3. Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.”

The supremacy of the Constitution is clearly confirmed in Chapter 1 s 2 of the constitution which reads:

“1.This constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct in consistent with it is invalid to the extent of the inconsistency”

The respondent sought to rely on the fact that the applicant was customarily married and that the husband in his will did not bequeath the matrimonial home to her hence she had no right or entitlement to the home.

This position in my view is inconsistent and *ultra vires* the constitution.

It is important in determination of this matter for one to look at the circumstances of the case and *juxtapose* them to the constitutional provisions and relevant legislative provisions.

The Deceased Estates Succession Act [*Chapter 6:02*] buttresses entitlement of surviving spouses and outlines inheritance principles on matrimonial home and household effects. Section 3A is opposite it reads:

“The surviving spouse of every person who on or after the 1st November 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate:

1. The house or other domestic premises in which the spouses or surviving spouses, as the case may be, lived immediately before the person’s death and
2. The household goods and effects which immediately before the person’s death were used in relation to the house or domestic premises referred to in paragraph (a) where such house, premises, goods and effects form part of the deceased’s estate.”

I am alive to the fact that the Deceased Estates Succession Act [*Chapter 6:02*] deals with intestate success. Suffices to mention at this stage that I have alluded to it in so far as it is in conformity with the constitution and in so far as it recognises the surviving spouse right to inheritance. In the same manner the Wills Act [*Chapter 6:06*] recognises the surviving spouse’s rights by having provisions such as s 5 (3) (a) which recognises rights of a surviving spouse and seeks to protect inheritance right of a surviving spouse even were the other spouse dies testate.

Section 5 of the Wills Act [*Chapter 6:06*] deals with power to make dispositions by Will.

Section 5 (3) (a) reads

“No provision, disposition or direction made by a testator shall operate so as to vary or prejudicing the rights of any person to whom the deceased was married to a share in the deceased’s estate or in the spouse’s joint estate in terms of any law governing the property rights of married persons; or”

Women regardless of marital status have a right to equal protection by the law and also have a right to own property. The legislature has made commendable in roads on deceased estates such that one failed to understand how the respondent’s legal practitioners sought to justify disinheritance of a surviving spouses on basis of having a registered customary law marriage. Even an unregistered customary law union is recognised for inheritance and proprietary right purposes. The Administration of Deceased Estate Act 6:01. Part 2 A thereto deals with estate of persons subject to customary law.

Section 68(3) reads

“A marriage contracted according to customary law shall be regarded as valid marriage for the purposes of this Act notwithstanding that it has not been solemnized in terms of the customary marriage Act [*Chapter 5:07*] and any reference to spouse shall be construed accordingly.”

A beneficiary in the same Act in s 68 includes surviving spouses. It defies logic therefore for one to distinguish the applicant’s spousal status on basis that she contracted a registered customary marriage. The fact that it is even registered makes it certain she is a surviving spouse. The applicant certainly does not derive her rights from the survival of the deceased but has rights by virtue of being a surviving spouse.

Interestingly the respondents accept that the applicant is a beneficiary but argued she cannot inherit because the testator disposed of his property in the manner he liked. The argument was presented that the applicant’s right as a beneficiary was prefixed on survival of her spouse and that the moment he died she was not clothed with any right as regards the matrimonial home. I found these submissions as not only unpalatable but not in sync with the progressive 21st century legislation. 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) (a) 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 emphasize 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 has personal rights against the owner of the house. The provisions 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 recognised beneficiary. In the *Estate Wakupila* v *Matongo* there seems to be an assumption that contigent rights are not included because the only time which matters is the execution of the will. On the contrary all rights personal, real and contigent are covered in the manner s 5 (3) of the Will Act is couched. The use of the words deceased’s estate instead of testator’s estate suggests that contigent rights were considered by the legislature. It is apparent that the mention of any person to whom the deceased was married denotes it happens at the time the deceased is dead. Equally mention of share in the deceased’s estate that happens only when the spouse is deceased.

It is appreciated that marriage regimes in Zimbabwe in the absence of ante nuptial contract are out of community of property. The wording of s 5 (3) of the Wills Act falls for scrutiny here. The relevant section outlaws any disposition in a will which prejudices the rights of a person to whom the deceased was married. The section does not seek to define marriage. It is trite a customary law marriage is a recognised marriage for proprietary, inheritance and maintenance rights. The section further talks of a share in the deceased’s estate. Naturally surviving spouse by virtue of being a surviving spouse is entitled to a share of the deceased’s estate.

Finally the section talks of right in terms of any law governing the property rights of married persons. The relevant section does not seek to distinguish the law as such it is inclusive of customary law. To this extent therefore the circumstances of the applicant are distinguishable from the *Estate Wakapila* v *Matongo* supra.In *casu* the applicant was customarily married to the deceased under the African Marriage Act [*Chapter 5:07*] she in her capacity as a surviving spouse has rights to the deceased’s estate or in the spouses joint estate.

 It is clear from s 5 (3) (a) of the Wills Act that any provision made by a testator to the extent that it prejudices the rights of a legally recognised beneficiary is invalid. Section 5 (3) (a):

“No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the right of any person to who the deceased was married to share in the deceased’s estate or in the spouses’ joint estate in terms of any law governing the property rights of married persons; or..”

It is clear from a reading of this section that a testor cannot make a disposition that affects the other spouse’s rights. The will as it stands is not in sync with public policy and the legal position as far as marriages and deceased estates are concerned. There is no legal basis for holding a will which seeks to disinherit a legally recognised beneficiary as valid.

Our constitution and legislation on deceased estate and inheritance in so far as it recognises the rights of a surviving spouse in the deceased estate tallies to a great extent with convention of the elimination of all forms of discrimination against women, in particular the protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa article 20 and 21. Article 21 (1) on rights to inheritance reads:

“A widow shall have the right to an equitable share inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house”

To this end the right and freedom to testation cannot be viewed as absolute to the extent of eroding the proprietary and inheritance rights of a legally recognised surviving spouse.

Section 5 (3) (a) of the Wills Act in my view protects a surviving spouse from being disinherited under the realm of a testator disposing of his property the way he deems fit regardless of the surviving spouse’s personal and contigent rights.

The respondent also argued that the complaint was lodged out of time. For this proposition they sought to rely on the Wills Act s 8(6)

“Any person who is aggrieved by the decision of the Master may appeal to an appropriate court within thirty (30) days of being notified of the decision of the Master.”

The argument was that the will was accepted by the Master on 10 March 2014 and the application was lodged on 23 May 2014 about 2 ½ months later.

Assuming the respondent was right in the observation the reading of the relevant section clearly shows by the use of the word may that the court can exercise its discretion depending with the circumstances of the case. The applicant argued that she only came to know of the acceptance after she came to make enquiries with the Master’s office. I find no reason why I should not believe the applicant’s version that she did not wilfully defy the 30 day period. In any event s 8 (b) of the Will Act does not talk of 30 days from the day of the acceptance of the will by the Master but from the day the aggrieved party is notified of the Master’s decision.

To this end therefore the applicant is within her rights to make the present application. The applicant has revealed that the acceptance of the will disinheritated her as a surviving spouse. Such a scenario has no legal basis on which to stand on and as such the will cannot be held as valid. *In casu* it is not in dispute house number 2421 Egypt is the only matrimonial home which the surviving spouse is at law entitled to. Any disposition against that would be an illegality and also contrary to public policy.

Accordingly it is ordered that:

1. The provision of the will of Dennis Mhirimo Chiminya which disposes of house number 2421 Egypt, Highfield Harare be and is hereby declared invalid.
2. The only property of the estate the matrimonial home 2421 Egypt, Highfield, Harare be and is hereby awarded to Venencia Chiminya the surviving spouse.
3. The second respondent pays the costs of the suit.

*Hungwe & Partners*, respondents’ legal practitioners