

SAMUKELO MHINDU [NEE NCUBE]
versus
ZACHARIA MUZONDIWA MACHOKOTO
and
NYARADZO FUNERAL SERVICES [PRIVATE] LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 27 June 2016 & 5 July 2016

Urgent chamber application

S. Mpofu, for the applicant
C. Chopamba, for the first respondent
Second respondent's attendance excused

MAFUSIRE J: This was an urgent chamber application over burial rights. The deceased was said to be the founder of a Christian denomination. The applicant was the surviving widow. Supporting her were some of her children with the deceased, as well as some pastors from the Church. The first respondent was the applicant's father-in-law. Supporting him were the members of the deceased's natural family. The second respondent was the funeral parlour at which the deceased's remains lay in state as the family did battle in court.

After almost two weeks of unrelenting combat, I dismissed the widow's application and directed that the deceased be buried at Glen Forest Memorial Park [*"Glen Forest"*]. Below are my reasons.

The case was an analogue of the extraordinary Biblical story of the Jewish King, Solomon, and the two harlots that fought over a baby¹. With the two of them locked in a ferocious and unyielding verbal tussle, the King, drawing from Divine wisdom, broke the impasse through a bizarre decree. The baby would be cut in half and the pieces given to them. Motherly instincts saved the day, and the baby. The fake mother opted for the death of the child. The true mother opted to surrender her parental rights in favour of life. Promptly, judgment was given in favour of the real mother.

¹ 1 Kings 3: 16 - 27

Regrettably, in this matter both sides remained unyielding, even in the face of my suggestion that the deceased's remains be cremated or buried by the State. That told me what exactly was stoking the legal fires – egos.

The applicant said she wanted the deceased's remains interred at Dodhill Farm in Chegutu, where the nucleus family had allegedly been staying in the days preceding his death [*“the Chegutu farm”* or *“the farm”*].

The first respondent said he was the patriarch of the extended family. After the deceased's demise the family court had convened and resolved to bury the deceased's remains at Glen Forest, a cemetery on the outskirts of Harare.

The second respondent said it was non-aligned. It would abide by whatever the court decided. On that basis, its further attendance in the proceedings was excused by mutual agreement, just about one of only two things the parties were able to agree on. The other was that the order of court would be final, not provisional, as had originally been prayed for.

The applicant's case, as I understood it, and in my own words, was this:

- 1 She had been married to the deceased for close to thirty years; two years under a customary union, and the remaining twenty eight under the Marriage Act, then *Chapter 37*, now *Chapter 5: 11*.
- 2 Being the surviving spouse, she had the exclusive spousal rights to decide where her late husband should be buried. Further, with her late husband, they had lived a Christian life divorced from the African customary laws and traditions. She put it this way:

“I am a Christian and believe in the Bible. When I married the deceased I became one with him. It is only I who should decide where my better half is buried. It is I who mourns being widowed after 30 years of marriage. It is I who has changed status from married to widowed. However, it should not be I who suffers to satisfy some unexplained ego.”
- 3 During his life time, the deceased himself had on numerous occasions expressed to her, their children and several other Church members, his avowed wish never to be buried in a town, but at the Chegutu farm.
- 4 She had suffered a lot, single-handedly nursing the deceased as he lay dying. It was she who had procured a burial order for the farm. It was she who was feeding the mourners that were gathered at the farm. It was she who was paying the bills from the second respondent. A grave had already been dug out at the farm.

In support of her case, the applicant attached eight other affidavits. Four were by members of the Church. Of those, three said they were pastors, and one said he was the chairman of the Church's board. Of the remaining four affidavits, two said they were sons of

the deceased; one said he was the deceased's "grandfather" [but from the description of the relationship, I discerned he was merely a paternal uncle]. The last affidavit was by a cousin of the deceased.

The central point in all those affidavits was that the deceased had expressed to them, at one time or the other, his wish never to be buried in town, but at the Chegutu farm.

On the other hand, the first respondent's case, as I understood it, and also in my own words, was this.

- 1 The applicant should not hold herself out as the only one who had suffered an irreplaceable loss. As the father of the deceased, he too had lost a son of fifty-five years.
- 2 Under African culture, the remains of a deceased family member are interred by his or her own people. The decision is not made by one person. It is a collective family decision that involves the surviving spouse and the broader family of the deceased.
- 3 In the wake of the death of the deceased, members of the extended family, including the deceased's other children, his six surviving siblings, his aunts and uncles, had convened a family court and resolved that the deceased be interred at Glen Forest.
- 4 Contrary to the applicant's claims that she and the deceased had lived a Christian life, somewhat divorced from African customary laws and traditions; that he had expressed a wish to be buried at the Chegutu farm; that as the wife of thirty years, she had the exclusive spousal right to determine the place of burial; and so on, the decision by the extended family to bury the deceased at Glen Forest had been informed by a number of factors that all militated against the applicant's claims. They were these:
 - Apart from the applicant's five children, and despite contracting a Christian monogamous marriage with the applicant, the deceased had sired fifteen other children with several other women, one of whom was his official second wife;
 - The deceased himself had also expressed a wish that he be buried where his parents would be buried, and had, to this extent, bought burial places at Glen Forest where his late mother had already been interred and where one other grave remained available;
 - The deceased could not possibly have expressed a wish to be buried at the Chegutu farm which was a property of government that had been allocated to him in terms of the land reform programme, but over which he had no title deed, and therefore no security of tenure, and to which the nucleus family had just moved only in the last three months;
 - In contrast, Glen Forest was an official cemetery recognised nationwide and to which every member of the deceased's family, both nucleus and extended, could have unhindered access at all times

- Without security of tenure, and coupled with the possibility that the applicant could re-marry and opt to live elsewhere with her new husband, the Chegutu farm was the most inexpedient burial place.
- 5 Under African culture and custom, the applicant had married into the family of the deceased to which she had become part of, and together with her, the decision as to where the deceased's remains had to be buried could not be hers alone, but that of the family members together.
 - 6 The applicant's spousal rights had terminated on the death of the deceased, and so no single person had exclusive rights to the remains of a deceased person because they were not an item of property.
 - 7 There was an equally large number of mourners, both from the family's rural home as well as from other places, that had gathered at the first respondent's home in Mufakose, Harare.

In support of his case, the first respondent also attached eleven other affidavits. Five were by the deceased's sisters. Two were from the deceased's brothers; one from a paternal aunt; one from a "father" [in reality a paternal uncle]; and the last two were allegedly by two children of the deceased, a boy and a girl. However, it later turned out that these alleged children were not the deceased's biological offspring, but the children of one of his brothers who had predeceased him. The deceased was said to have "adopted" them.

All the supporting affidavits had standard wording. The deponents purported to confirm the first respondent's depositions. They all objected to the deceased being buried at the Chegutu farm in support of burial at Glen Forest.

That basically was the case before me.

Whilst other jurisdictions, like Kenya and South Africa, have dealt with a number of cases of a similar nature, it seems in this jurisdiction this case is the first of its kind. I have sampled a few of those foreign cases:

*Virginia Edith Wambui Otieno v Joash Ochieng Ougo & Anor*² was decided in the Kenyan High Court in 1986. The case pitted a deceased's widow and members of his extended family led by one of his brothers. Both the deceased and the applicant had been prominent members of the Kenyan society and had been successful lawyers.

The applicant, the widow of the deceased, a Kikuyu, claimed exclusive burial rights by virtue of her being the surviving spouse and the fact that with her husband, a Luo, they

² Civil Case No 4873 of 1986; [1987] eKLR

had severed all ties with his tribal customs and traditions. She also claimed that the deceased had expressed a wish that he be buried at their matrimonial place.

The clan members claimed burial rights on the basis of tribal customs that dictated that the clan had exclusive burial rights over a member. The court found that the deceased had not severed his Luo customs and traditions and that he had expressed a wish to be buried at his clan home. The widow lost.

The decision sparked heated debate and ignited controversy. One side of the debate condemned the ruling as retrogressive and a negation of the gains that women had achieved by unshackling themselves from oppressive African tribal customs and traditions.

*Fanti v Boto & Ors*³ was decided in the South African Provincial Division of Cape of Goodhope in 2007. The applicant claimed burial rights of the deceased woman ahead of the deceased's mother, the first respondent. Crucial to the ultimate decision of the court was the question whether or not there had existed a marriage, in true Xhosa custom, between the applicant and the deceased, on the basis of which the applicant could be regarded as a legitimate son-in-law. Despite his claim that he had paid some form of dowry, or bride price, or *lobola*, the court's finding was that there had never been a true marriage between the applicant and the deceased. The applicant lost.

*Ramonare v Mollys' Funeral Parlour & Anor*⁴ was decided in the South African Free State High Court in 2009. The deceased had died partly testate and partly intestate. The contestants over his body were the intestate heir and customary widow, backed by the clan family, on the one side. On the other side were the testamentary heir and deceased's paramour with whom he had cohabited till death. The intestate heir and customary widow won the burial rights. The court's decision was based on a finding that in law, an heir would be entitled to decide the burial place for the remains of a deceased. African customary law was held to be applicable to the extent that it did not conflict with the South African Law of Succession. The intestate heir and customary widow had the customary law behind her.

*M.N. v H.Z.S & Ors*⁵ was decided in the High Court of South Africa in 2014. It pitted a putative brother-in-law against the blood brother of the deceased who claimed to be the heir of the deceased and the leader of the deceased's natural family. The deceased had cohabited with the first respondent for thirty years but there had never been any formal marriage

³ [2008]2 All SA 533; 2008 [5] SA 405

⁴ [2009] ZAFSHC 83; Case No 4277/09

⁵ Case No 940/2013

between them. But to all intents and purposes, the deceased had been regarded as the first respondent's wife. Together with the first respondent, the deceased had established a matrimonial home in the first respondent's home area. At no stage during the subsistence of the putative marriage had the applicant raised the issue of a bogus marriage. When the deceased died, she had been in the care of the first respondent.

Dismissing, the applicant's claim to being the deceased's heir, and finding that she had expressed a wish to be buried at the first respondent's home, the court held that the burial rights lay with the first respondent.

*Martha Wanjiru Kimata & Anor v Dorcas Wanjiru & Another*⁶ was decided in the High Court of Kenya in 2015. The case featured, on the one side, a putative daughter-in-law with whom the deceased had cohabited. With the deceased, the applicant had had a daughter together. On the other side of the legal contest were the deceased's mother and some clan members. The *Edith Wambui Otieno* case was one of several reference cases relied upon. It was held that the law applicable to burial disputes for the time being was customary law since there was no statute law in place as yet. The putative daughter-in-law lost.

A number of South Africa cases such as *Ramonare* above, and *Mahala v Nkombombini & Anor*⁷, which the court in *Ramonare* referred to, seem to have held firmly that the heir of the deceased is the person who decides on the arrangements surrounding the burial, in the absence of an explicit indication in a Will.

In casu, none of the parties mentioned any Will as might have been executed by the deceased. Section 3 of the Deceased Estates Succession Act, [Chapter 6: 02], says that the surviving spouse of a person who dies wholly or partially intestate is the intestate heir of the deceased spouse. However, it is clear that the provision is concerned with the devolution of certain matrimonial assets, and not the question of burial rights.

In *Mahala*, the court said that in light of certain constitutional developments, in particular, the fact that the principle of primogeniture [i.e. an exclusive right of inheritance of the eldest son] was in violation of the right to equality guaranteed under the Constitution, the court should not follow existing authority to the effect that it was the heir of the deceased, necessarily male, who had the right to bury the deceased. The issue was to be decided upon general principles. It was said the wishes of the deceased's widow should carry greater weight. But some regard also had to be given to the wishes of the deceased's broader family.

⁶ Civil Appeal No 94 Of 2014 [2015] eKLR

⁷ 2006 [5] SA 524 [SE]

In *Martha Wanjiru Kimata & Another* above, reference was made to another Kenyan case⁸ wherein the court said:

“In the social context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.”

Both the South African and Kenyan courts seem to have recognised the overwhelming importance of local customs and traditions over burial rights. That was the basis of the decision in *Edith Wambui Otieno* and several other cases in Kenya, and *Fanti v Boto* above, and several others in South Africa.

The cases also established that the wishes of the deceased, as to the choice of his or her burial place, have to be taken into account where this is practicable. In *Martha Wanjiru Kimata & Another* above, the Kenyan High Court said, at paragraph 19 of the judgment:

“It is trite that there cannot be property in a dead body and a person cannot dispose of his body by Will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must, so far as practicable be given effect, so long as the same is not contrary to custom nor contrary to the general law or policy.”

Undoubtedly, the new constitutional ethos in Zimbabwe is to eliminate all forms of gender discrimination and to promote equality between the sexes. For example, cultural practices, customs and traditions that may be inconsonant with the new constitutional values ought to give way. Section 17 of the Constitution governs gender balance. The State must promote full gender balance. It must promote the full participation of women in all spheres of society on the basis of equality with men. Gender discrimination and imbalances resulting from past practices and policies must positively be rectified.

On marriage, the Constitution says, in s 26, the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution. In the event of dissolution of a marriage, whether through death or divorce, provision should be made for the necessary protection of any children and the spouse.

⁸ *Ruth Wanjiru Njoronge v Jemimah Njeri Njorongo & Another* [2004] eKLR

But the promotion and preservation of cultural values is also part of the new constitutional ethos. Section 16 requires the State and all institutions and agencies of government, at every level, to promote and preserve cultural values, practices and traditional institutions which enhance the dignity, well-being and equality of Zimbabweans.

In my view, when it comes to deciding burial rights over a deceased person, there is no single overriding factor. When a person dies, whether male or female, ideally the relatives, comprising the nucleus family, the extended family and close clan members, should sit down and agree on how best to give their departed relative a befitting and dignified send off. Fighting over burial rights is a negation of everything decent. It demeans the dignity of the deceased.

However, my synthesis of the case authorities above, the new constitutional dispensation, the present state of the law, and the arguments advanced by counsel in this matter, is that where burial rights are contested the following principles, considered cumulatively, should apply:

- i] An heir to the estate of the deceased has some colour of right in the determination of the burial place for the deceased person. In terms of the Deceased Estates Succession Act, [*Chapter 6: 02*], the surviving spouse of every person who dies either wholly or partially intestate is the intestate heir. But this is only in relation to certain specified assets. The right of the heir in relation to burial rights, is not exclusive.
- ii] The voice of the surviving spouse of a deceased person in regards to the place of burial for the deceased carries greater weight than all other voices. However, regard must always be had to the wishes of the deceased's broader family.
- iii] The wishes of the deceased, during his life time, as to the choice of his or her burial place, if proved by cogent evidence, have to be taken into account, but only in so far as it is practicable to do so. Otherwise they are not binding.
- iv] The customs, traditions and cultural practices or values of the broader family or community to which the deceased belonged, should be taken into account in the burial arrangements of the deceased in so far as they are not in conflict with the general laws of the land, the Constitution and the values under it.

The above list is by no means exhaustive, or prescriptive. If and when the relatives fail to agree, and they surrender their fate and that of the body of the deceased to a court, I consider that, as was said in *Mahala*, each case will have to be decided on its own set of facts. There can be no hard and fast rules. Common sense ought to prevail at the end of the day. A balance must be struck between, or amongst, the competing interests.

In casu, my decision to dismiss the widow's application in favour of burial at Glen Forest was informed largely by common sense. Given the ferocious and unrelenting legal contest that almost drove me to consider cremation or State burial as possible options, I eventually opted for Glen Forest. I considered it the most expedient under the circumstances. My reasons were these:

- 1 Contrary to the applicant's claims, spousal rights do not grant the surviving spouse the exclusive right to decide the burial place for a deceased person.
- 2 There is nothing in the Marriage Act, under which the deceased and the applicant had been married, that prescribes or preserves any right or obligation of the spouses beyond the dissolution of the marriage by death. The "**till-death-do-us-part**" vow or rite common in most, if not all, Christian denominations, and which, by s 26 of that Act, is evidently permissible, seems to confirm that the rights and obligations of married couples terminate on death. A surviving spouse is even free to re-marry.
- 3 Equally, contrary to the first respondent's claims, the natural or extended family of a deceased person does not have exclusive rights over burial rights.
- 4 Glen Forest is a nationally recognised burial place. It is some 25 kilometres on the outskirts of Greater Harare. It is accessible. Every member of the deceased's family would have unhindered access at all regular times.
- 5 If the deceased had indeed expressed a wish, during his life time, as to his choice of a burial place, there was no cogent evidence placed before me as to what exactly that wish was. Claims by both parties seemed manifestly contrived. In this

regard, I was reminded of the remarks by the court in the *Edith Wambui Otieno* case above, that:

“.... I agree with the sentiments expressed by Mr *Kwach*⁹, that a man of the deceased’s standing could not have bent so low as to discuss his private matters with his law clerk. The plaintiff by calling this witness and the several others to testify that the deceased expressed the wish to be buried at Matasia, portrays the deceased as a hypochondriac, and a man who almost spoke nothing else, save his burial wish.”

- 6 In fact, on a preponderance of probabilities, it seemed unlikely that the deceased *in casu* had expressed a wish to be buried at the Chegutu farm. Among other things, it was only in the last three months or so that he and his nucleus family, comprising the applicant and their five children, had reportedly settled there in spite of the claim that the farm had been allocated to them in 2003.
- 7 The applicant did not quite refute the first respondent’s assertion that in spite of having contracted a monogamous Christian marriage with the applicant, and that despite having founded a Christian denomination, the deceased’s marital life resembled anything but Christian. Among other things, he had sired fifteen other children out of wedlock with several other women. Incidentally, on this issue, in the process of disputing that the two children that had deposed affidavits in support of the first respondent were not the deceased’s biological children, but that of his late brother, the applicant, wittingly or unwittingly, disclosed during the proceedings that the deceased had two other children with some other woman who was said to be in support of burial at the Chegutu farm. This other woman seemed to have been recognised as an official second wife of the deceased.
- 8 In all the circumstances, burial at Glen Forest would be less divisive as compared to burial at the Chegutu farm. I accepted the first respondent’s argument that only the applicant and her children had access to the farm. Furthermore, with no title over the property, there seemed to be no security of tenure. And even though the thought or suggestion that the applicant could well re-marry, and move away to live elsewhere with her new husband, might have sounded unpalatable or in bad

⁹ Counsel for the clan members

taste, and possibly improbable under the circumstances, nonetheless, it was not an absolute impossibility, and certainly not an inapposite consideration.

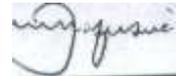
At the end of the day I issued the following order:

“IT IS HEREBY ORDERED THAT

- 1 The application be and is hereby dismissed.
- 2 Burial Order No 6646/16 issued on 16 June 2016 in respect of the deceased, Marko Mhindu, designating Dodhill Farm, Chakari Road, Chegutu, as the place of burial for the deceased, is hereby set aside, and the Registrar of Births and Deaths is hereby authorised and directed to issue a replacement Burial Order designating Glen Forest Cemetery as the place of burial for the deceased.
- 3 Unless agreed otherwise by the parties, the first respondent shall bear all the costs associated with the burial of the deceased at Glen Forest Cemetery.
- 4 Each party shall bear their own costs to this application.”

Despite the first respondent’s apparent success, I did not consider the applicant’s claim to have been so unreasonable as to warrant an order of costs against her.

5 July 2016



Munangati & Associates, legal practitioners for the applicant
Thondhlanga & Associates, legal practitioners for the first respondent