STANCILOUS MAJURU
versus
THE ESTATE LATE CAROLINE MAJURU
and
DARLINGTON MUCHENJE
and
FAITH MUNJERI
And
GODWIN MUNJERI
and
THE MASTER OF HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 17 February 2016 and 30 June 2016

Opposed Application

Z Kajokoto, for the applicant
2nd respondent in person
C Makanza, for the 3rd & 4th respondents

MWAYERA J: The applicant approached the court seeking invalidation of a will by his late wife Caroline Majuru. The will was accepted by the fifth respondent on 25 April 2013. The applicant was married to the testator the late Caroline Majuru, in terms of the Marriage Act [*Chapter 5:11*] in 1999. The applicant argued that the will dispossesses the applicant as a surviving spouse and it also fell short of fulfilling the formalities set out in s 8 of the Wills Act [*Chapter 6:06*]. The applicant presented argument that the failure to sign on all pages by the testator and failure to acknowledge signatures by the witnesses rendered the will void *abintio*. Further bequeathing of all property to other people to his exclusion rendered the will invalid. He argued his dispossession as a surviving spouse was contrary to public policy.

The application was opposed. The respondents argued that the application was out of time as the applicant became aware of the acceptance of the will in April 2013. A perusal of the record shows the application and not appeal as alluded by the respondents was filed in

October 2015. The application is for setting aside a will, as such the point *in limine* raised therefore cannot be sustained.

The applicant sought to rely on violation of s 8 of the Wills Act [*Chapter 6:06*] and that his dispossession as a surviving spouse was contrary to public policy. Section 8 (1) on formalities provides:

> "Subject to subsection (3) and (5), a will shall not be valid unless
> a) it is in writing
> b) the testator, or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing on the page concerned, and
> c) each signature referred to in paragraph (b) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time, and
> d) each competent witness either-
> (i) signs each page of the will, or
> (ii) acknowledges his signature on each page of the will, in the presence of the testator and one witnesses" ……..
>
> (5) where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or on amendment of his will the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act [*Chapter 6:01*] <u>even though it does not comply with all the formalities</u> for-(underlining my emphasis)
>
> (a) The execution of wills referred to in subsection (1) or (2) or
> (b) The amendment".

A close look at Annexure A p 11, the Will clearly shows compliance with formalities as required by the Act. The testator signed the will and so did the witnesses. The second witness signed on the second page for want of space. Even the address for the second witness is on the second page. The "will" annexure A appears to be in compliance with all formalities for making a will. In an event the Master has a discretion to accept a will even if it does not comply with all formalities. Section 8 (5) the Master has to be satisfied that the document was intended to be the testator's will. Annexure 'A' clearly spells out the intention of the late Caroline Majuru nee Chikuku. The Master's decision of acceptance of the will in the circumstances cannot be faulted on allegation of the will not complying with formalities of making a will.

The other ground for seeking invalidation of the will as presented by the applicant is that the will is contrary to public policy as it excluded him as a surviving spouse, s 5 (3) of the Wills Act seems to buttress this position. It reads:

> "No provision, disposition or direction made by a testator in his Will shall operate as to vary or prejudice the rights of –

(a) Any person to whom the deceased was married is entitled 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 persons".

On the face of it a will which disposes a spouse of his right to a joint estate and or his right to matrimonial assets would not be valid. It is important to note that the wording of the provision of s 5 (3) (a) does not seek to usurp the freedom of testation vested in a testator. The wording does not include property to which the testator has real rights. The testator has the freedom of testation hence the right and freedom to bequeath his or her assets to any person of their choice. The testator *in casu* bequeath assets and or shareholding in which she held title as well as bequeath property to which the applicant had contingent, personal and real rights. For instance it was conceded by the respondent's counsel that the deceased bequeath the matrimonial home to the exclusion of the applicant. It is the latter scenario which s 5 (3) (a) of the Wills Act seeks to redress. Section 5 (3) (a) of the Wills Act states that:

"No provision, disposition or direction made by a testator in his will shall (my emphasis) operate so as to vary or prejudice the right of any person to who 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".

It is apparent from the wording of 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 and not in sync with public policy. In this case the applicant was legally married in terms of the Civil Marriage. The freedom of testation is recognised in so far as it does not infringe on rights of a legally recognised surviving spouse. Section 5 (3) (a) of the Wills Act gives warning to a testator at the time of making a will not to delve into disposing property to which a legally recognised beneficiary such as a surviving spouse has personal, real and contingent rights and at the same time the section seeks to protect a surviving spouse from being disinherited under the realm of freedom of testation. It is apparent that although much of what happens in writing a will predates the moment of someone's death, the moment of death marks the beginning of the administration of the deceased estate. The will has to be in conformity with the prevailing laws. Section 5 (3) (a) of the Will Act refers to the person to whom the deceased was married as the one who ought not be prejudiced.

Further it is apparent from the evidence that the will bequeaths one of the properties to a none existent person Faith Munjeri and even further gives a life usufruct right of that

same none existent person. Such a situation taints the will with impropriety. That when read together with the exclusion of a surviving spouse on property in which he has rights negates the validity of a will.

Our laws on inheritance are clear on the rights and entitlement of a surviving spouse and beneficiaries. The Administration of Estates Act 6:02 and the Deceased Estates Succession Act [*Chapter 6:02*] are instructive. Further the Constitution makes it clear that in the spirit of protection of marriages and family the spouses have equal rights and obligations during marriage upon divorce and at death.

Section 26 (c) and (d) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 is instructive it states that:

> "The State must take appropriate measures to ensure that:
> (c) there is equality of rights and obligations of spouses during marriage and its dissolution; and
> (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."

To then turn around and sanction a will which disinherits and disposes the surviving spouse of not only assets but the matrimonial home would in my opinion not only be contrary to public policy but *ultra vires* the constitution and thus invalid.

It is common cause the applicant is the surviving spouse of the late Caroline Mujuru. It is also not in dispute that as a surviving spouse the applicant qualifies as a beneficiary to the late Caroline Majuru's estate. Further from evidence it is apparent property distributed by way of Will included that to which the applicant has rights. The dispossession of the applicant in the circumstances is contrary to public policy and unlawful rendering the will invalid.

Accordingly it is ordered that:

1 The application be and is hereby granted.

2 The will of the late Caroline Majuru accepted by Master of High Court on 25 April 2013 be and is hereby set aside.

3. The estate of the late Caroline Majuru who died on 17 March 2013 be dealt with as intestate.

4. Each party is to bear its own costs.

Kajokoto and Company, applicant's legal practitioners
Nyamayaro Makanza & Bakasa, 3rd & 4th respondents' legal practitioners