NAISON SEKERAMAYI

and

JULIUS MATSIKA SEKERAMAYI

and

JUDITH SEKERAMAYI

and

WINNIE SEKERAMAYI

and

FAITH RUDE SEKERAMAYI

versus

THE MASTER OF THE HIGH COURT

and

THE PROVINCIAL MAGISTRATE, HARARE

and

EASTER DZWOWA

and

NYARADZO PRISCILLA MUNANGATI MANONGWA

(In her capacity as Executrix Dative in the Estate of the late Lovemore Chipunza Sekeramayi)

HIGH COURT OF ZIMBABWE

ZHOU J

HARARE, 23 & 29 March 2017

**Opposed Application**

*N. Tsarwe,* for the applicants

*V. C. Maramba* for the 3rd respondent

ZHOU J: This is an application for the setting aside on review of the decision of the first respondent in terms of which the third respondent was held to have been married to the deceased Lovemore Chipunza Sekeramayi (hereinafter referred to as “the deceased”), and for a declaration that the decision of the second respondent in terms of which the third respondent was declared to be a spouse of the deceased was null and void. The application is opposed by the third respondent.

The first, third and fourth applicants are siblings of the deceased. The second applicant is a cousin brother of the deceased. The fifth applicant was a wife of the deceased. They were married in terms of the then African Marriages Act [*Chapter 238*] in 1982. The deceased died at Maseru, Lesotho, on 4 June 2014. His estate was registered with the office of the first respondent under DR 892/14. The third respondent was living together with the deceased at the time of his marriage. The true nature of their relationship is being disputed. Her case is that she was in an unregistered customary law marriage with the deceased. The applicants contend that she was merely cohabiting with him.

From the papers, the matter was referred to the Additional Master, T. Manhanzva, who came to the conclusion that he could not confirm the alleged unregistered customary law union between the deceased and the third respondent. The fifth respondent then proceeded to register the same estate of the deceased in the Magistrates Court under DRH 1009/14. It is not clear how that registration took place. What is apparent is that the matter ended up before a Magistrate, B. Pabwe on 1 October, 2014. The parties in that matter are stated as “Estate Late” being the applicant and “Lovemore Chipunza Sekeramayi” as the respondent. The “judgment” (which is altered in handwriting to read “decision”) of Mr Pabwe is expressed in two sentences as follows:

“The customary marriage between Esther Dzwowa to the late be and is hereby confirmed. Esther Dzwowa be and is hereby confirmed to have been customarily married to the late.”

It is difficult to understand how the matter ended up before the Magistrate. More seriously, the parties stated are non-existent. The applicant is not a legal persona while the stated respondent was deceased. Such proceedings could only be a legal nullity because there were no persons involved. The matter was between non-existent persons.

On 1 June 2015 a meeting was held which the first respondent presided over. The meeting deliberated on a number of issues. Regarding the immovable property in Chisipite, the minutes record that the executor was to verify the allegation that it had been donated to the deceased by his late father. It is recorded in the minutes that the property was registered in the name of the deceased and not that of the father. The first respondent advised the persons who attended the meeting that the deceased was being treated as having died intestate because there was no will which had been produced. He determined that the deceased had two wives, namely, the fifth applicant and third respondent. The two wives were to be the beneficiaries of the deceased’s estate while the deceased’s mother would be regarded as a dependent. Based on that he proceeded to distribute the assets of the deceased on the basis that the parties had failed to agree on a distribution plan. Although the minutes attached to the papers do not specifically record that, it is stated by the applicants, and is not disputed by the third respondent, that the first respondent proceeded to allocate an immovable property in Chisipite, Harare, to the third respondent. The minutes merely recite the provisions of the Act relating to a situation where the wives of a deceased man lived separately but makes no definite determination on the matter. The first respondent distributed the other assets between the fifth applicant and the third respondent in such a way that the fifth applicant would receive two thirds while the third respondent was to receive one third of the residue of the estate.

The instant application seeks to impeach the decision of the Master on the grounds of review which are summarized in the court application. In addition to contesting the relief which is being sought on the merits the respondents objected *in limine* to the determination of the matter on the merits on the following grounds: (a) that the application for review is improperly before this court as it was filed out of time in circumstances where condonation has not been sought and granted; (b) that the first, second, third and fourth applicants have no rights in respect of which they would be entitled to seek a declaratur given that they are not beneficiaries to the estate of the deceased as long as the deceased’s wives are there; (c) that there is material non-disclosure on the part of the applicants which vitiates the application. A fourth point raised, that the applicants were represented by a legal practitioner when the Magistrate made his decision that the third respondent was married to the deceased under customary law relates to the merits of the case and cannot be raised by way of an objection *in limine*. The declaratory relief was abandoned by the applicants, through their counsel at the hearing. The issue of the non-disclosure, as submitted by Miss *Maramba* for the third respondent is one that also pertains to the merits of the application, as it relates to the merits, save for the aspect relating to the dismissal for want of prosecution of a matter instituted by the third and fifth applicants under Case No. HC 9585/14. That application was dismissed for want of prosecution. The failure to disclose the dismissal of that case, while material, would not dispose of this matter wholly or in part even if the court accepted that there was such non-disclosure. It is a factor that would have to be considered together with the other factors relative to the merits of the application. Also, the issue affects only two of the five applicants.

As for the question of the application having been filed out of time, the requirements of the rules are trite. Order 33 r 259 of the High Court Rules, 1971 provides that any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred. The minutes which are attached to the applicants’ application show that the meeting at which the impugned decisions were made was held on 1 June 2015. The instant application was filed on 16 July 2015. That date falls within the period of eight weeks. The application was therefore instituted timeously.

In dealing with the grounds of review I will not necessarily follow the order in which they are summarized in the court application. The first issue that I wish to consider is the alleged gross irregularity which arose from the Master’s alleged acceptance of the judgment of the Provincial Magistrate Pabwe that the third respondent was customarily married to the deceased. The minutes do not suggest that the first respondent relied on the decision of the Provincial Magistrate when he came to the conclusion that the third respondent was married to the deceased. Significantly, however, there is nothing to show what evidence was placed before the first respondent to enable him to come to the conclusion that the third respondent was the deceased’s wife. The only statement which refers to the third respondent was made by the fourth respondent, and is recorded as follows: “Ms Munangati submitted that according to her findings Faith and the late Lovemore had separated for more than 20 years and Esther was living with the deceased up to the time of death. However, it would appear that Esther had a bad relationship with the relatives of the deceased.” There is nothing in that statement which suggests the existence of an unregistered customary law marriage. Living together is not the same as being married. After all, the fourth respondent was merely reporting on what she had also found and not what she had personally witnessed in relation to the relationship between the deceased and the third respondent. The conclusion by the first respondent that the deceased had two wives is therefore not based upon any evidence which was placed before him. That is where the gross irregularity would arise, in the sense that in the absence of evidence the conclusion was so grossly unreasonable that no reasonable person who had applied his mind to the matter before him would have come to that conclusion. Indeed, even the third respondent herself is not reported to have placed any evidence of the alleged relationship before the Master at that meeting.

The other ground of review relied upon by the applicants is that the first respondent did not have the jurisdiction to determine whether or not the third respondent was married to the deceased person. There is no explicit provision in the Administration of Estates Act [*Chapter 6:01*] which gives the Master the power to determine who is or is not a spouse of a deceased person. He, as illustrated above, made that determination. However, the powers given to him under s 68F to resolve disputes between beneficiaries and the executor would necessarily involve ascertaining the relationships of the beneficiaries to the deceased. That, in my view, would include determining whether a particular person was a spouse of the deceased.

The other decision of the first respondent which the applicants complain of is the awarding of the Chisipite immovable property to the third respondent. The only reason given is that the third respondent lived in that house at the time that the deceased died. Nothing is said about whether there is another immovable property of value which the fifth applicant would inherit. To disinherit a woman who is legally married to the deceased on the basis that she did not live in the house without considering where she would live is, in my view, grossly irregular. There is no indication as to what other property was owned by the deceased other than that immovable property and the household goods at that house. The decision to award the third respondent the immovable property is also difficult to justify when one considers that the Master had earlier on advised that the question of how that immovable property was registered in the name of the deceased was to be established by the executor.

I am not satisfied that there is evidence of bias on the part of the first respondent on the papers filed in this case. While the decision to award the Chisipite immovable property to the third respondent can be impeached on the ground of gross unreasonableness, it does not show impartiality. It simply illustrates a failure to apply the mind to the relevant considerations, including the fact that the fifth applicant was the only woman who had a registered marriage with the deceased, and the fact that no other immovable property of value was found to be available to her if the Chisipite property is to be allocated to the third respondent. Also, the first respondent did not even apply his mind to whether he was giving the third respondent ownership of the Chisipite property or a usufruct. As noted above, the minutes do not reflect the precise decision of the first respondent in relation to that property other than the recital of the legal provisions.

As for the costs, there is no reason why these should not follow the result. The third respondent has strenuously opposed the relief which is being sought by the applicants even though the decision which was sought to be set aside is that of the first respondent.

In all the circumstances of this case, the application ought to succeed with costs.

In the result, IT IS ORDERED THAT:

1. The decision of first respondent to declare that the third respondent was a surviving spouse of the deceased Lovemore Chipunza Sekeramayi be and is hereby set aside.
2. The allocation of the immovable property located at No. 31 Hindhead Avenue, Chisipte, Harare, to the third respondent be and is hereby set aside.
3. The first respondent is directed to convene a meeting and call for evidence from witnesses regarding the status of the relationship between the third respondent and the deceased and, thereafter, direct the Executor to distribute the estate of the deceased in a manner that does not prejudice the fifth applicant’s rights in respect of the immovable property referred to in paragraph 2 hereof.
4. The third respondent shall pay the costs of this application.

*Tadiwa & Associates*, applicants’ legal practitioners

*Maposa, Ndomene & Maramba*, third respondent’s legal practitioners