

TEDRETA NDANGA
versus
MARGARET SHAMBARE
and
TOMPSON SHAMBARE
and
THE EXECUTOR (MUNANGATI & ASSOCIATES) N.O
and
THE MASTER OF HIGH COURT N.O
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 11 October 2016 and 2 February 2017

Opposed Application

R Mabwe with Z W Makwanya, for the applicant
N Chikowore, for the 1st & 2nd respondents

MWAYERA J: The applicant approached the court seeking for a declaratory order to be declared a spouse of the late Linus Chirimba Shambare for purposes of Administration of Estates Act [*Chapter 6:01*]. Further the applicant sought to be declared the sole beneficiary of immovable property and improvements thereon, on property number 28 George Road, Hatfield, Harare.

The brief background of the matter is that the late Linus Chirimba Shambare married the first respondent Margaret Shambare under the Civil Marriage Act [*Chapter 5:11*] in 1963. The marriage subsisted at the time of death of late Mr Linus Chirimba Shambare. The deceased passed on in 2013, and he died intestate. The estate was then registered with the fourth respondent, the Master, for it to be administered in terms of intestate succession. The fourth respondent appointed an executor who for purposes of inheritance recognized the first respondent as the surviving spouse on the basis that the customary marriage conducted by the

applicant and the late Linus Chirimba Shambare was invalid as it was preceded by a civil marriage. The issues that fell for determination are:

- (1). Whether or not the applicant is a surviving spouse by virtue of her customary marriage to the late Linus Chirimba Shambare, which marriage was preceded by a civil marriage.
- (2). Whether or not the applicant should be declared the sole beneficiary of the remainder of Lot 2 and 3 Block C Hatfield Estate Township, Salisbury otherwise known as 28 George Road, Hatfield, Harare.
- (3). Whether or not the applicant should be declared the sole beneficiary of the rural home in Seke Chief Mudimu Village Ward 2, Seke.

All the issues hinge on marriage as defined in the context of our law in general and as defined by inheritance laws. It is common knowledge that a marriage is a legal Act whose existence and utterance to life is determined by the law and equally its demise is determined by law. Generally there are three types of marriages recognized in Zimbabwe, namely Civil marriage which is a monogenous type of marriage. This is under the Marriages Act [*Chapter 5:11*] This is the marriage defined by the learned author Welshman Ncube in his book *Legal Resources Foundation* (1989) at p 137 as;

“A marriage can be defined as a sui generis contract by which two persons of the opposite sex, who are not only competent to marry generally but are also competent to marry each other, consent to marry each other in terms of a ceremony prescribed by law before a marriage officer thereby conferring upon themselves a legal status of a public character and clearly between themselves a legal relationship by virtue of which they are obliged to remain so married to each other until their marital relationship is dissolved either by death of one or both of them or by an order of court of competent jurisdiction.”

This type of marriage given its monogamous nature renders any other marriages contracted after it null and void. There is the polygamous type of marriage under the African Marriages Act [*Chapter 5:07*]. This gives room for other subsequent marriages. The third type is the unregistered customary law union which by nature is not registered and open to other marriage contracts being entered into.

Generally our laws of inheritance recognize all the marriages as valid for inheritance depending with the circumstances of each case. The Administration of Estate Amendment Act No. 6 of 1997 is instructive. Section 68 (3) of the Act states:

“A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this part, notwithstanding that it has not been solemnized in terms of Customary Marriages Act [*Chapter 5:07*] and any reference in this part to a spouse shall be construed accordingly. Provided that such a marriage shall not be regarded as valid for purposes of this part if when it was contracted either of the parties was married to someone else in accordance with the marriage Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse.”

Clearly there is a rider to the validity of the customary marriage which occurs after a civil marriage for the obvious reason, the civil marriage is monogamous and does not give room to other marriage. I agree with the sentiments of TAKUVA J in the case of *Lucy Ncube v Marble Ncube and Ors* HB 132 – 14 wherein he stated the following in relation to s 68(B)

“This section is crystal clear in its meaning. It does not give the court any discretion on the matter. Its import is that once a party is married in terms of the Marriage Act, any subsequent “marriages” are invalid. A customary law marriage can only co-exists with a monogamous marriage when the former precedes the latter and not vice versa”

The Supreme Court equally echoed the same sentiments when it had occasion to interrogate the provisions of s 68 (3) in *Makwiramiti v Fidelity Life Assurance* 1990 (2) ZLR 471 (S) it was stated that

“Having chosen to marry, in terms of civil law, the deceased waived his customary privileges in respect of polygamy. He is precluded from marrying another person, not only under the general law, but under customary law as well. He suffered absolute in capacity to marry”

In *Makwiramiti* case, two women presented themselves as surviving spouses and thus claimed pension benefits. Only the spouse married to the deceased in terms of the Marriage Act was accorded the relief while the woman who, subsequent to the civil marriage conducted a customary marriage was not accorded the relief as such subsequent marriage was invalid.

In the present case the late Linus Chirimba Shambare after contracting a civil marriage with the first respondent entered into an unregistered customary law union with the applicant. Such purported marriage is a nullity and cannot be accorded the same status as the civil marriage which subsisted up to the demise of Mr Linus Chirimba Shambare. The obvious reasons being as provided by the relevant section that a customary marriage preceded by a civil marriage is invalid. If the marriage is invalid then there is no basis on which to found the surviving spouse status as sought by the applicant in a move suggestive of equating the subsequent customary law union to the civil marriage between the first respondent and her late husband. The same reasoning was adopted in *Timbe v Ngonidzasho Family Trust* HH9-10 where the first marriage

was in terms of the Marriage Act [*Chapter 5:11*] and the subsequent “marriage” was under customary law union. It was concluded that the second marriage under such circumstances was a nullity. It does not qualify even for limited purpose of administration of estates where through legislative intervention some recognition has been afforded to customary marriages. It should be noted that the recognition of customary law union or marriage as a valid marriage for inheritance purposes is to ensure that people living in marriage are afforded equal treatment and protection by law. The history leading to enactment of Act 6 of 1997 recognising customary law union for inheritance cannot be whisked away. It was against the back drop of spouses being driven out of their matrimonial homes after the demise of their spouses and being rendered not only homeless but propertyless. It was noticed that the majority of the people in customary union were the elderly first wives who were brought to risks by the enterprising young ladies more astute and alive to rights and hence would quickly tie the knot with the man under civil rites. These circumstances depict a situation where the customary marriage preceded the civil marriage and as such need for protection of such customarily married spouse. The circumstances of this case do not present such a scenario where the customary law marriage occurred first. In circumstances where the customary marriage/union preceded or predated the civil marriage our courts have accommodated such marriages. See *Sibanda v Sibanda* HB86-13 and *Ndlovu v Ndlovu and Ors* HB 11-10.

In the present case it is apparent the opposite of *Sibanda* and *Ndlovu* cases *supra* occurred. The respondent was married to the deceased in terms of the Marriage Act [*Chapter 5:11*]. The marriage subsisted until the demise of Mr Shambare and thus giving the first respondent the surviving spouse status. The first respondent’s version that the property in which the applicant was residing, for which the latter sought to be declared the sole beneficiary was purchased through joint effort of herself and the late Mr Shambare was not refuted. Further that completion of purchase of that property was through a mortgage bond by her husband was not disputed. That state of affairs coupled with the fact that the civil marriage of the first respondent preceded the purported customary law marriage of the applicant to the late Shambare in 1981 deals the applicant’s claim a heavy blow. She cannot be declared a surviving spouse and she equally cannot be declared the sole beneficiary of the properties claimed. The applicant is not a

surviving spouse and even if she stayed with the late Mr Shambare she cannot seek to whisk away entitlements of other beneficiaries by seeking to be declared the sole beneficiary.

Intestate succession is governed by the Constitution of this country which is the supreme law and also by the Deceased Estate Succession Act [*Chapter 6:02*]. Section 3A and 3 is relevant in so far as it defines spousal rights and inheritance and also descendants, parents and brother or sister. The argument by the applicant in the face of such clear legislation has no legs on which to stand. The surviving spouse is entitled to inherit out of the free residue of estate, the matrimonial home and effects and is further entitled in terms of the law to inherit if there is further property, then the spouse and children inherit specified statutory legacies. See *Dzomonda and Others v Chiponda Others* 2014 (2) ZLR 473 and *Elsie Bhila v The Master of High Court and Ors* HH 549-15.

The inheritance laws clearly provide for other beneficiaries like descendants. Descendants by definition include children, offspring and progeny. Section 81 of the constitution of Zimbabwe Amendment (No.20) 2013 is very clear on the rights of children and that any matter concerning them requires the application of the notion of the best interests of the children being paramount. It follows that the disqualification of the applicant as a surviving spouse given her purported customary marriage which was preceded by a monogamous civil marriage does not disqualify her children and the late Linus Chirimba Shambare as beneficiaries of their late father's estate. It is a fact though, that the association of the applicant and the deceased who had not severed ties with the respondent was bigamous and illegal. The union cannot be legalized by the death of the late Shambare. The customary marriage was invalid since it came into being after a civil marriage and as such the applicant cannot be clothed as a surviving spouse. Given the unchallenged links and contribution of the surviving spouse and the deceased and that, the property was acquired during the subsistence of the civil marriage, there is no legal justification for declaring the applicant the sole beneficiary of the Hatfield and Seke property. This is moreso given there are other beneficiaries for example descendants of the late Linus Chirimba Shambare.

The application is accordingly dismissed with costs.

Chinawa Law Chambers, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioner