

WINNIE MAKWARA
and
BETHELEM MAKWARA
and
AZARIA MAKWARA
versus
GRACE CHITURA
And
OLIVER MASOMERA
(In his capacity as Executor of the Estate Zebediah
Mudimu Makwara)
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 5 October 2017 and 7 March 2018

Opposed Matter

D C Kufaruwenga, for the 1st – 3rd applicants
E. Ngwerewe, for the 1st respondent
Ms T. Figu, for the 2nd respondent

MWAYERA J: On 5 October, 2017 after reading documents filed of record and hearing counsel I gave an order in favour of the applicant. The written reasons for my disposition are laid out herein.

The applicant sought review of the decision of the Master (3rd respondent) on three grounds of illegality and procedural irregularity. The applicant attacked the decision of the Master of holding the first respondent as the sole beneficiary of the Estate of late Zebediah Mudimu Makwara. Secondly, the applicant attacked the decision of the Master of allocating house no 17 Glamis Road, Hatfield Harare to the first respondent alone whereas deceased has other 4 surviving spouses and 41 children. The applicant also cited procedural irregularity alleging the third respondent, the Master, declined to accept evidence that the immovable property awarded to the third respondent was acquired by the deceased and his first wife without any contribution of the third respondent who was no yet married to the deceased at the time of acquisition.

The brief history of the matter has to be put into perspective. The estate of late Zebediah Mudimu who passed on on 18 May 2007 was registered with the Master third respondent who awarded the immovable property No. 17 Glamis Road Hatfield Harare to the first respondent in the distribution plan. This brought about an impasse with the applicants the children of the late Zebediah Mudimu Makwara. It is worth noting that the late Zebediah Mudimu Makwara in his life time had married 8 wives and sired 41 children. The immovable property in contention was acquired by the deceased in 1981 whereby at that time he was not yet married to the first respondent but to Faina his first wife. The deceased's first wife passed on in 1989. The deceased divorced his 6th and 7th wives. At the time of his death he had 5 spouses including the first respondent who happened to be his 8th wife. The deceased was survived by 41 children including the first to third applicants. Also worth noting is that after the demise of the deceased the first respondent had an intimate relationship with Caleb Makwara, a grandson to the deceased and his first wife. The relationship resulted in birth of a child.

The respondent raised a point *in limine* that the applicants have no *locus standi* to bring the application before the court. At hearing the respondents abandoned the point *in limine* as it could not be sustained since the applicants as children and beneficiaries of the deceased had the relevant *locus standi*.

What fell for determination in this matter can be summarised as follows:

1. Whether or not the applicants adopted the correct procedure in bringing the present application before the court.
2. Whether or not the grounds for review raised are competent grounds for review.
3. Whether or not the third respondent erred by awarding the immovable property to the first respondent as her sole and exclusive property.

It is clear the applicant in seeking relief approached the court by way of review as provided from in section 26 and 27 Of the High Court Act [*Chapter 7:06*].

Section 26 states "subject to this Act and any other law the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunal and administrative authorities with Zimbabwe". The decision of the Master in befitting circumstances is subject to review. Section 27 of the High Court Act outlines grounds upon which proceedings or decisions may be brought for review.

Section 27 provides as follows:

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be
 - (a) absence of jurisdiction on the part of the court, tribunal or authority concerned.

- (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned as the case may be.
 - (c) gross irregularity in the proceedings or the decision.
- (2) Nothing in subsection (1) shall affect any other law relating to review of proceeding or decisions of inferior courts, tribunals or authorities".

The applicants acted within legal bounds to bring an application for review in a matter in which they questioned the legality of the decision of the respondent as well as the procedural irregularity occasioned by snubbing the interests of all other beneficiaries. It is clear s 68, of The Administration of Estate Act [*Chapter 6:01*] prescribes that anyone dissatisfied by the decision of the Master ought to lodge an appeal. Section 68 J is not worded in peremptory language. It reads "any person who is aggrieved by any decision of the Master in terms of his part may appeal against the decision to the High Court within the time and manner prescribed in rules of court". The section does not by any chance oust the review powers of this court neither does it take away the parties right to choose recourse to remedy their grievance. Given that clear discretionary manner in which s 68 J is worded one cannot be faulted for opting for review. See *Msomi v Abrahams and Another 1981* (2) SA 256 at p 261 A when Honourable PAGE J stated

"The mere fact that a statute provide extra-judicial remedy in the form of a domestic appeal or similar mechanism which would afford the aggrieved party adequate relief does not give rise to such a necessary implication, in the absence of further conclusive implications to the contrary, it will be considered that such extra judicial relief was intended to constitute an alternative to and not a replacement for review by the courts, bearing in mind that there is always a presumption against a statute being construed so as to oust the jurisdictions of the court completely...."

A reading of s 27 of the High Court Act clearly shows it is permissible for a party to use common law principles of review in seeking redress from the court. I subscribe to the sentiments of Gwaunza JA in *Gwaradzimba NO v Gurtna NO SC 10/15* when she remarked:

"My understanding of this provision (referring to section 27 of the High Court Act) is that the High Court Act contemplates and permits review proceedings that are brought before it in terms of any other law."

The applicants in raising disquiet in the manner the third respondent the Master handled and decided the distribution of their late father's estate procedurally approached the court for review. The applicant approached the court on three grounds of review namely illegality, irrationality and procedural impropriety. These are recognised grounds for review. See *Council for Civil Service Unions v Minister for Civil Service [1984] 3 A4 GR 935 (HL)*, *Masuka v Chitungwiza Town Council and Another 1998 (1) ZLR, Rushuga v Minister of Local*

Government 1987 (1) ZLR 15 and see also *Telecel Zimbabwe v Attorney General of Zimbabwe* SC 1/14.

In the present case the applicants argued they were not given an opportunity to state their case, as provided for by the law in s 68 F of the Administration of Estates Act [Chapter 6:9] s 68F (b) provides in determining any issue between an executor and a beneficiary the Master shall ensure that executor and the beneficiary concerned are afforded a reasonable opportunity to state their respective cases” failure by a tribunal *a quo* to observe procedural rules that are laid down in the legislative instrument by which its jurisdiction is conferred amounts to procedural irregularity. Lord DIPLOCK in *Council for Civil Service Unions supra* in defining procedural impropriety remarked

“I have described the third head as procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under his head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice....”

The applicants were not given chance to argue and present their case as is provided for in s 68 F (1) (b) of the Administration of Estate Act [Chapter 6:01] that on its own would amount to a procedural irregularity which falls for redress by way of review. The other grounds of review as presented by the applicant relate to the legality and rationality of the third respondent’s decision which was anchored on interpretation of s 68 (F) (2) (c) (1).

The concept of legality as a ground for review in my view encompasses the correct understanding and interpretation of the law that regulates the decision process. The legality or otherwise of the decision should not be viewed in isolation with the principle of rationality nor reasonableness. If the decision reached by the tribunal is outrageous in defiance of logic then irrationality properly stands as a ground for review.

In casu given the brief historic background of the matter, it is apparent the house awarded to the first respondent by the third respondent was acquired in 1981 way before the first respondent got married to the deceased. The first respondent only married the deceased in 1994 and she is the 8th wife. The third respondent ought to have considered the practicality or otherwise of awarding an immovable property acquired before the marriage of the first respondent. The award was for her to be the sole beneficiary to the exclusion of the other surviving spouses and 41 children. The house was not acquired during the subsistence of the

first respondent's marriage but during the subsistence of the applicant's late mother's marriage to the late Zebediah Mudimu Makwara.

In the case *Chimhowa and others v Chimhowa and Ors* 2011 (2) ZLR 471 the Honourable Judge President CHIWESHE lucidly laid down the law on inheritance in protection of widows and children in a just manner. He remarked:

"In my view the legislature intended to protect in the case of widows that property acquired during the subsistence of their marriage to the deceased persons. The protection benefitted not just widows but their minor children as well. I do not perceive the legislature's intent to be to extend this protection and privilege to persons outside the marriage within which such property might have been acquired....."

For these reasons I would conclude that the protection afforded to surviving spouses in terms of inheritance is limited to those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose estate is under distribution. In particular a surviving spouse cannot by right claim any right to matrimonial property acquired outside their own marriage. To allow that would be against public policy and conscience to deprive the children of deceased persons the common law right to inherit from their parents merely because at some stage the surviving parent had remarried."

One cannot rewrite such clear thought frame when considering the circumstances of this case. It is not only irrational and outrageously unreasonable to award the immovable property acquired before the first respondent's marriage to the first respondent as a sole beneficiary. It is also illegal given the deceased is survived by 4 wives and 41 children.

See also *Jessis Chinzou v Oliver Masomere* HH 593/15 wherein CHITAKUNYE J denied a widow, *inter alia*, exclusive inheritance of immovable property which was acquired after the widow had separated from the deceased.

The third respondent, by awarding the first respondent 17 Glamis Road Hatfield, as her sole and exclusive property which was acquired prior to her marriage acted irrationally. The third respondent ought to have examined the practicality of such an award. If he had fully ventilated and examined the applicant's submissions on acquisition of the property and the status of beneficiaries then a different conclusion would have been reached. The decision of the third respondent in this regard is contrary to reasonableness and the law. Even if one was to have recourse to s 68 F (2) (c) (1) of the Administration of Estates Act [*Chapter 6:01*] the decision of awarding the property to the first respondent as her sole and exclusive property flies foul in the eyes of the law because of the impracticability of the decision. Section 68 F reads:

"Where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property

(1) Where they live in separate houses each wife should get ownership of or, if that is impracticable a usufruct over the house she lived in at the time of the deceased person's death, together with all the house hold goods in that house." (underlining my emphasis)

It is not a fact that the first respondent is the only surviving spouse of the deceased. Further even if she was, the law places an obligation on the third respondent the Master to examine the practicality of awarding the immovable property to the first respondent before making a final decision. Clearly in circumstances of this case where the property was acquired prior to the first respondent's marriage the question that hovers is on what basis was the sole exclusive award made. This is more so when one considers that the deceased is survived by 41 children inclusive of applicant, the children of deceased and his first wife with whom he acquired the home. The impracticality of the award of sole and exclusive right to the first applicant is further made apparent by the fact that at the time of death the first respondent was living with the late husband and other wives in Botswana. Number 17 Glamis was a home for all the wives as they moved from Zimbabwe to Botswana with the businessman husband.

The children from different mothers survived the deceased and are beneficiaries to their father's Estate. The fact that the property was acquired prior to the tenure and subsistence of the first respondent's marriage is a clear indication of the impracticality of the decision of the third respondent. The third respondent appears to have paid cursory attention to the objection raised as regards the distribution plan. The investigative role as provided by law if properly carried out would have revealed and put in the fore the acquisition of the property in issue. This would have shown the impracticality of awarding the respondent the property as her sole and exclusive property.

The applicants have properly approached the court on clearly spelt out grounds of review namely, irrationality, illegality and procedural irregularity.

The application for review is accordingly granted as follows:

It is ordered that:

1. The third respondent's directive together with the second respondent's distribution plan, both of which awarded House No. 17 Glamis Road, Hatfield, Harare to the first respondent as her sole and exclusive property, be and is hereby set aside.
2. The second respondent is directed to compile a fresh distribution plan which awards House No. 17 Glamis Road, Hatfield, Harare to the deceased surviving children and third respondent is directed to ratify the distribution plan.
3. The second respondent is further directed to compile a fresh distribution plan in para 1 which grants a life usufruct over House No. 17 Glamis Road, Hatfield, Harare to the deceased's surviving spouses.

4. The costs of this application shall be borne by the first respondent on an ordinary scale.

Dzimba Jaravaza & Associates, applicants' legal practitioners
Chatsanga & Partners, 1st respondent legal practitioners
T. Pfigu, 2nd respondent's legal practitioners