

MIRIAM DZIVA ELIAS DIKINYA
versus
PRECIOUS CHAKASIKWA N.O.
and
MASTER OF THE HIGH COURT
and
ROY GEORGE TINASHE DIKINYA
and
RUNYARARO CAROL CHARMAINE DIKINYA
and
TERRENCE GIFT DIKINYA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 12 February & 9 May 2018

Opposed Application

T. Govere for the applicant
Miss C. Malaba for the first respondent
Miss M. Mutero for the third and fourth respondents

ZHOU J: The applicant is the surviving spouse of the deceased George Dikinya who died at Harare on 16 March 2016. The first respondent is the Executrix Testamentary of the Estate of the Late George Dikinya (hereinafter referred to as “the deceased”). The third and fourth respondents are children of the deceased. The instant application is for an order declaring the last will and testament of the deceased to be null and void and for the setting aside of the appointment of the first respondent as well as the firm of attorneys of which she is a senior partner as Executrix Testamentary or for such appointment to be declared null and void. The inclusion of the law firm in the draft order is misplaced as it is not cited as a respondent and, in any event, was not appointed as the Executrix Testamentary by the letters of administration. The applicant further seeks the annulment of the letters of administration issued by the second respondent appointing the first respondent to be the Executrix Testamentary. Finally, the applicant prays for an order directing

the second respondent to convene a meeting with the applicant and the other interested persons for the purpose of appointment of an executor of their preference or for the appointment of an independent executor dative by the second respondent, and costs of suit on the scale of legal practitioner and client. The costs are being sought against the first respondent in her personal capacity.

During argument Mr *Govere* for the applicant conceded that the claim for costs against the first respondent personally was unjustified. The concession was properly made, as the facts do not point to any special conduct that would justify such a punitive order of costs against the first respondent for conduct which she engaged in in the course of exercising her duties as executor.

The facts upon which the application is founded which can be deciphered from the largely argumentative founding affidavit, considered together with the other evidence tendered, are as follows. The deceased executed a Last Will and Testament on 20 July 2006. The will was signed at Nairobi in Kenya. At the time that the will was executed the deceased was living together with the applicant in an unregistered union. On 30 June 2009 the deceased and the applicant were married in terms of the Marriage Act [*Chapter 5:11*].

The declaration that the will is invalid is being sought the following grounds:

1. That the will, having been signed in Kenya, was not signed before a notary public;
2. That the names of the witnesses are not identified;
3. That the will disinherits the surviving spouse of what she is entitled to inherit at law; and
4. That the will was invalidated by the subsequent marriage of the testator to the applicant.

The applicant further seeks the removal of the first respondent from her position as the executrix on the basis of the allegations of improper conduct set out in the founding affidavit. This issue can be easily disposed of. The court does not lightly remove an executor in the absence of evidence of serious misconduct that would prejudice the estate, see *The Master v Moyo NO & Ors* 2009 (1) ZLR 119(H); *Van Niekerk NO v Master of the High Court* 1996 (2) ZLR 105(S). In the present case the factual allegations upon which removal of the first respondent is being sought are disputed. The dispute of facts cannot be resolved on the papers. It is therefore proper that the matter be determined on the basis of such of the facts averred by the applicant which are not being disputed by the respondent or are common cause. The delay in the payment of maintenance to the applicant has been adequately explained by the first respondent. That delay does not constitute misconduct that would justify the removal of an executor. The fact that the applicant was not seen

by the executor when she went to her offices has been explained on the basis that the applicant made attempts to see the executor without making an appointment in advance of the proposed meeting. Again the conduct of the first respondent in refusing to see the applicant in those circumstances does not amount to misconduct and certainly not conduct that would warrant her removal as executor of the estate of the applicant's deceased husband.

Regarding the alleged invalidity of the will on account of the absence of a notary public's seal, Mr *Govere* for the applicant conceded that there is no requirement at law for a will to be signed before a notary public. That ground of complaint is not sustainable. Equally, there is no requirement that the full names of the witnesses should appear *ex facie* the text of the will. Their signatures are sufficient to confirm that they witnessed the signing of the will by the testator. The ground that the will disinherited the surviving spouse is difficult to follow, in that at the time that the will was executed the applicant was not a spouse of the deceased. The two of them were not married them. In any event, even where the will purports to donate the matrimonial home and household effects to which a surviving spouse would be entitled at law such a will would have to be read subject to the provisions of the law so that only the portions of the will which contravene the provisions of the law, as opposed to the entire will, would be invalidated.

The last issue that merits consideration is the effect on the validity of the will of the marriage of the deceased to the applicant. As noted above, the execution of the will predates the marriage of the applicant to the deceased.

Section 16 of the Wills Act [*Chapter 6:06*] provides as follows:

"16. Effect of testator's subsequent marriage on will

- (1) Subject to this section, a will shall become void upon the subsequent marriage of the testator.
- (2) ...
- (3) ...
- (4) Where it appears from a will that when it was made the testator was expecting to be married and that he intended that –
 - (a) the will should not become void upon the expected marriage; the will shall not become void upon that marriage . . ."

All the parties through their legal practitioners cited extensively the case of *Savanhu v Heirs Estate Savanhu* 1991 (2) ZLR 19(S). In that case at p. 23B-E GUBBAY CJ articulates the rationale for the above provision in the following terms:

“It is plain to me that by enacting the provision in question the lawmaker was minded to alter the common law in accordance with which a will is not revoked by the subsequent marriage of the testator. See *Ludwig's Executors* (1848) 2 Menz 452; *Shearer v Shearer's Executors* 1911 CPD 813, *Braude NO v Perlmutter & Ors* 1969 (2) RLR 103(AD) at 109C; 1969 (4) SA 101(RA) at 106. It was appreciated that the operation of such a principle would cause injustice and untold hardship. So in 1929 a change in the law was effected by the introduction of s 2 of the former Deceased Estates Act, presently superseded by s 16(1) of the Wills Act. Its object is to afford some measure of protection to the new spouse of the testator who had been previously married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous or potentially polygamous matrimonial union to one of monogamy. It envisages a necessary change, brought about by the subsequent marriage, to the status of both the spouse and the testator to that of a married person – from a bachelor, divorcee or widower in the case of the man, and from a spinster, divorcee or widow in the case of a woman. It is designed to avoid a situation in which the will of one of them, which pre-dates the subsequent marriage, makes no provision for the other’s new spouse.”

The above passage illustrates that the justification for the provision is to ensure that the new status created by the subsequent marriage is catered for in terms of benefitting from the estate of one’s spouse. Put in other words, the rationale is that the new status created by the subsequent marriage should not be subjected to the consequences of a will that was executed before it came into existence save to the extent permitted by the provisions of s 16 outlined above.

The parties through their legal representatives debated at length the question of whether the marriage of the deceased and the applicant of 30 June 2009 was a “subsequent marriage” within the contemplation of s 16 of the Wills Act. The applicant contended that it was a subsequent marriage. On the other hand, Miss *Malaba* and Miss *Mutero* for the respondents argued that it was not a “subsequent marriage” but merely an up-grading of an existing marriage. The parties cited the same *Savanhu* case, *supra*, to support their respective positions. In the *Savanhu* case the testator and the surviving spouse had been married under African customary law in terms of the then African Marriages Act [*Chapter 105*] before they entered into a civil marriage in terms of the Marriage Act [*Chapter 37*]. That feature fundamentally distinguishes the instant case from the *Savanhu* case. In the present case the applicant and the deceased were not married at law at the time that they contracted their marriage in terms of the Marriage Act [*Chapter 5:11*]. Their marriage certificate clearly describes them as divorcees. There is no evidence even of an unregistered customary law union but even if such evidence was there it would not elevate the union to a valid marriage. Even the statement by the deceased in his will that “the union is recognizable in common law”, quite apart from it being incorrect, does not clothe the union with the legal validity of a marriage, for registration of a marriage is a constitutive aspect of a marriage.

While some of the consequences of an unregistered customary union, such as the legitimacy of the children born out of it and the duty to maintain the wife, are treated as if they emanated from a valid marriage by express statutory provision, the unregistered customary union remains a union and not a marriage at law. The union “is an invalid marriage except for certain purposes . . . For all other purposes except those stated above (and any other purposes provided for by statute), a customary law union is legally invalid. . .” W. Ncube, *Family Law in Zimbabwe*, pp134-135. The following remarks by GUBBAY CJ in the *Savanhu* case, *supra*, p. 23F-G, show that the reasoning in that case applied only to a registered customary law marriage which the parties converted into a civil marriage by having it solemnized in terms of the Marriage Act:

“But the right given to Africans who have already contracted **a registered customary union** to contract a second marriage under the Marriages Act without having the first dissolved, does not mean that their second marriage has the effect of rendering void any pre-existing will. For there has been no change in status of the testator from an unmarried to a married person, and it is the existence of that very change that the legislative intendment is aimed at.”(emphasis added).

In the present case the applicant and deceased were not married but were divorced at the time that they contracted their marriage. Their status changed to being “married” once their marriage was solemnized. For that reason the provisions of s 16 (1) of the Wills Act would apply to them. The next question is whether, having regard to the will itself, it appears that the testator was expecting to be married and intended that the will should not become void upon the expected marriage. The use of the conjunctive word “and” in joining subsection (4) and paragraph (a) thereof means that these two requirements must be established, namely,

- (i) that the testator was expecting to get married when he made the will, and
- (ii) that he intended that the will should not become void upon the expected marriage.

In casu the deceased was not contemplating any marriage to the applicant when he executed the will. If anything, he was under the mistaken belief that his union with the applicant was a valid marriage at law, hence the statement in the will that the union was recognized under the common law. As stated above, such a union is not recognized as a valid marriage under the common law. It is recognized as if it were a marriage only for certain purposes, but that is under the general law as expressed by statutes. The common law of Zimbabwe knows no unregistered customary union. There is nothing in the will to suggest that the deceased intended to marry the

applicant then. The fact that about three years later he married her does not change the conclusion for the expectation to marry for the purposes of the statutory provision must be gathered from the will itself and not from the parties' subsequent conduct. My conclusion in respect of the first requirement effectively disposes of the second requirement. The deceased may have intended that the will remains extant in that relationship of an unregistered customary union but there is no basis for transposing that intention to the new status created by a marriage that appears not to have been within the contemplation of the testator at the time that he executed the will.

The respondents made reference to the case of *Mapenzauswa v Muskwe & Ors* 2008 (1) ZLR 376(H), particularly to the passage which appears at p 381E-G. In that case this court did not decide the question of whether the civil marriage which the parties contracted was a "subsequent marriage" for the purposes of s 16(1) of the Wills Act. That distinguishes the *Mapenzauswa* case from the present case in which I have found that there was a subsequent marriage. Further, the *Mapenzauswa* case turned on the factual finding that the will was made in contemplation of a marriage. Indeed, in that case the parties married within six months after the will had been executed. *In casu*, as noted above, there was no expectation of a marriage. Instead, the deceased proceeded on the assumption that he was already married to the applicant. The fact that the parties only married almost three years after the will had been executed is another distinguishing feature which shows that the deceased was not quite expecting to marry the applicant at the time that he executed the will. Thus for a period of about three years after the execution of the will the parties lived under the status of unmarried divorcees who were in an unregistered union. The proprietary consequences upon the death of one of them differ fundamentally from the proprietary consequences which ensue upon the death of parties married under the Marriage Act.

Consequently, there is nothing to avoid the consequence that the will became void upon the marriage of the deceased to the applicant on 30 June 2009.

As for costs, the respondents partially succeeded in contesting some of the grounds upon which the application was founded. The allegations against the first respondent upon which her appointment was sought to be revoked were successfully challenged by the respondents. On the other hand, the applicant has succeeded in showing that the will was invalidated by the subsequent marriage of the deceased to the applicant. The effect of finding that the will was invalidated will

be to invalidate the appointment of the second respondent as executrix. In the light of the foregoing, it is only fair that each party bears its costs.

In the result, IT IS ORDERED THAT:

1. The Last Will and Testament executed by the Late George Dikinya at Nairobi, Kenya on 20 July 2006 became void upon the marriage of the Late George Dikinya to the applicant on 30 June 2009.
2. The Letters of Administration issued by the second respondent on 22 August 2016 in terms of which the first respondent was appointed Executrix Testamentary of the Estate of the Late George Dikinya are declared to be null and void.
3. The appointment of the first respondent as the Executrix Testamentary in respect of the Estate of the Late George Dikinya is declared to be null and void.
4. The second respondent is directed to set in motion the process for the appointment of an Executor to administer the Estate of the Late George Dikinya.
5. Each party shall bear its own costs.

Govere Law Chambers, applicant's legal practitioners

Kantor & Immerman, first respondent's legal practitioners

Sinyoro & Partners, third, fourth and fifth respondents' legal practitioners