BRENDA MAXWELL
and
NOKUTHULA MOYO
versus
ESTATE LATE COLLIN MOYO
and
PHILANI MOYO
and
NOTHILE MOYO
and
NQOBILE MOYO
and
RODNEY MOYO
and
PERPETUAL MOYO
and
NATASHA MOYO
and
ETTY MOYO
and
THANDEKA MOYO
and
NKOSILATHI MOYO
and
RODWELL MOYO
and
SIMBARASHE MOYO
and
RUMBI MOYO
and
MITCHELL MOYO

MASTER OF HIGH COURT OF ZIMBABWE HC 5732/22
versus
PERPETUAL GWATI
and
NATASHA BUHLE MOYO
and
ETTY NTOMBIKAYISE MOYO
and
THANDEKA SANELISILE MOYO MAMBUDZI
and
NKOSIVATHI MOYO
and

RODWELL MATIMBA MOYO
and
SIMBARASHE MOYO
and
RUMBIDZAISHE RACHEL MOYO
and
NOTHANDO MICHELLE MOYO
and
PHILANI MOYO
and
NOTHILE MOYO
and
NQOBILE MOYO
and
RODNEY MOYO
and
NOKUTHULA MOYO
And
FREDDY CHIMBARI
In his capacity of the executor testamentary of the estate late Collin Moyo
and
MASTER OF THE HIGH COURT OF ZIMBABWE N.O

IN THE HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 26 September 2023, 18 October 2023, 1 November 2023, 15 January 2024, and 2 October 2024

Opposed Application

T Ndoro, for applicants in HC 5184/22
F Madondo for 6th to 14th respondents in HC 5184/22 and applicants in HC 5732/22
D. C Kufaruwenga for 2nd and 5th respondents in HC 5732/22

WAMAMBO J: Under HC744/23 this court rendered an order consolidating HC 5732/22 and HC 5184/22 These are the matter before me.

In HC 5184/22 the first applicant avers as follows:

She gave birth to a child whose father is Collin Moyo, Said child is the second applicant. Collin Moyo passed on and his estate is represented by the first respondent. I will hereinafter refer to Collin Moyo as the deceased. The second to fifth respondents are deceased's eldest children with two other wives. The sixth respondent is deceased's surviving customary law spouse. She is the mother of the tenth, eleventh and twelfth respondents. Seventh to fourteenth respondents are deceased's children, born of various wives. The fifteenth respondent is the Master of the High Court cited as the responsible authority for the administration of the estates.

On 27 February 2005 she entered into an unregistered customary law union with the deceased. The second applicant was born to the union on 20 March 2005. Deceased had a civil marriage to the first wife. From that marriage third, fourth and fifth respondent were born. The first wife died in 1999 and her estate was distributed under DR 1637/99.

Deceased died in 2021 and his estate was declared intestate and first respondent was appointed executor. While processes were underway a soldier's will was thrown into the fray. The will disentitled everyone else except the second to the fifth respondents. First respondent finalised a new interim administration and distribution account based on the soldiers will. The application seeks a declaration for second applicant to inherit from the deceased's estate.

The reasons given are as follows:

During his life time deceased ensured applicants and respondents were looked after. The 1989 will has been overtaken by events and does not reflect deceased's intentions 32 years after his death.

The will does not account for the multiple subsequent unions, births of more than ten children and acquisition of immovable property, acquired subsequent to the will. The will is out of touch with the life the deceased lived. The sixth respondent deposed to an opposing affidavit. She avers that she is the only surviving spouse of the deceased. Further that first applicant was in an unregistered customary law union with deceased for only one year. She avers that that deceased had ceased to be a member of the Zimbabwe National Army in 1997. She is of the view that an order should be granted in terms of the draft order, save that first applicant's name should be expunged as she does not qualify as one of deceased's wives. Seventh to fourteenth respondents chose to associate themselves with sixth respondent's opposing affidavit

Under HC 5732/22 Perpetual Gwati is the applicant, she is the sixth respondent in HC 5184/22. The second to ninth applicants are deceased's children with various wives. The first to the fourth respondent are the deceased's children whose names appear in the soldiers will. Fifth respondent is deceased's child with another wife, 6th respondent is the executor in deceased's estate. 7th respondent is the Master of the High Court in his official capacity. This is an application to set aside deceased's will in terms of s 14 of the High Court Act [*Chapter* 7:06]. She avers as follows in her founding affidavit:-

She is the only surviving spouse of the deceased. That union resulted in the birth of three children, the fifth to the seventh applicants. First to fourth respondents were born of other wives. The deceased joined the Zimbabwe National Army on 8 September 1980. He retired on 30 September 1997 and died in 2021. He died while not in service of the Army after more than one year of leaving the Army.

Second to ninth applicants deposed to affidavits associating themselves with first applicant's founding affidavit. Third respondent deposed to an opposing affidavit and avers as follows:

The deceased's will is not a soldiers will. Seventh respondent tested the validity of the will as per s 8 of the Wills Act. There is evidence showing that deceased intended to exclude all his other children except the four mentioned in his will. That is so because when deceased executed his will in 1989 he already had seven children, but chose to include only four of those seven children. Further upon his death in 2021 he had 13 children but did not amend his will. Deceased had freedom of testation. It was also contended that applicants should have appealed the decision of the Master instead of filing an ordinary application.

In oral argument before me counsel concentrated on the central and decisive issues and lengthy submissions were made. A close examination of the submissions however speak to the following. Is the will acted upon by the Master of the High Court a soldiers will? Is it valid or should it be vacated and the estate dealt with as an intestate estate.

While the parties as cited were many this caused some confusion in the filing of founding affidavits or opposing affidavits. The long and short of it however is that there were founding affidavits and opposing affidavits for both matters.

The form format and contents of the will at the centre of this matter are of importance. The will appears at page 49 to 50 of the consolidated record. It is a standardized will printed by the Government printer and with a ZNA annotation on the right hand corner. It has portions to be filled in of "Will no", "No", "Rank", "Name" and "Marital status" at page 49. At page 50 appears deceased's name his nominated executor and the bequeathing of the whole of his estate "movable and immovable wheresoever situate" to his "children Rodney Moyo, Nothile Moyo, Philani Moyo and Nqobile Moyo".

The will is dated 8 June 1989 and is signed by the testator and two witnesses. The first question to be answered is, is the will a soldier's will? The rest will flow from the first answer.

Section 10 of the Wills Act defines the parameters under which a soldier's will is made and the issue of its validity. It becomes clear that a soldier's will can only be made a person while "on active service".

Active service is defined as follows in Section 10 (1) of the Wills Act:

> "active service" means full time employment with or as a member of any branch of the Defence Forces of Zimbabwe or the armed forces of Zimbabwe or the armed forces of any other country allied to or associated with Zimbabwe at a time when: -
> a) Zimbabwe is at war or
> b) the forces concerned are engaged in the suppression of armed rebellion or insurrection either in Zimbabwe or in any other country in support of the government of that other country"

Section 10(3) of the Wills Act provides as follows:

> "(3) A soldier's will shall be valid if the testator dies while on active service or within one year after he has ceased to be on active service"

There was no evidence or proof tendered that deceased at the time he died was on active service. Documentary evidence attached reflects that the will was executed on 8 June 1989 see p49 – 50 of the record. At p136 appears deceased's death certificate which reflects that he died on 8 January 2021. At p147 appears a document emanating from the Zimbabwe Army Pay and Records dated 18 August 2022. It reads as follows on the pertinent portion:

> "This letter serves to confirm that the above-mentioned General Officer was attested into the Zimbabwe National Army on 08 September 1980 and separated with the organization on 30 September 1997 after having served for a period of 17 years and 23 days."

From the above it is reflected that deceased left the Zimbabwe National army on 30 September 1997. At the time of his death, he was no longer on active service. There is moreover no document or testimony that speaks to Zimbabwe, being at war or deceased being a member of the forces suppressing armed rebellion or insurrection as provided for in section 10(1) of the Wills Act.

As if that was not enough the Master of the High Court did not accept deceased's will as a soldier's will. According to the Master of the High Court's letter at p155 dated 16 May 2022 deceased's will was accepted on the twin basis that it came from a "credible source" the ZNA "where the late was employed" and meets formalities as provided for in section 8 of the Wills Act.

Section 8 of the Wills Act speaks to ordinary wills. By ordinary I mean wills other than soldier's wills, will made during epidemics and oral wills. The formalities as spelt out in section 8 of the Wills Act are as follows:

> "8(1) Subject to subsections (3) and ((5) a will shall not be valid unless: -
> (a) It is in writing, and
> (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) (i) each competent witness either signs each page of the will or
> (ii) acknowledges his signature on each page of the will, in the presence of the testator and of the other witness."

In the instant case although the consolidated index identifies the will as being at pages 49 to 50 the following becomes clear:

At page 49 appears the force number, rank, name and marital status. This information is not obligatory to a will as per section 8 of the Wills Act. In any case at page 50 are the full details of the testator, his,wishes the date of execution and his signature and that of two witnesses.

It is not lost to me that the Master of the High Court under section 8(3) of the Wills Act can accept a document as a will if so satisfied even if the document does not satisfy the formalities. The Master pointed out and indeed was on course to accept the will. As pointed out in argument if any person was not satisfied with the decision of the Master the appropriate cause of action was an appeal with 30 days of notification of the Master's decision.

This matter did not come as an appeal as per section 8(6) of the Wills Act. I find in the circumstances that the Master of the High Court correctly and validly accepted the deceased's will.

The will is valid and there is no need to have it set aside. As will be noted from the draft orders sought from both cases the result intended is for either the declaration that the will is invalid and/or its setting aside. I am in agreement with the argument that a testator has freedom of testation. That he has no obligation to include the wives or children under his will. A will cannot be set aside because a wife or child feels they should have been included as beneficiaries.

In the case of *Chigwada* v *Chigwada* SC 188/20 the Supreme Court said the following at page 20:

> "The law of testamentary disposition proceeds on the principle that because of freedom of testation the matter relating to succession to the deceased's estate shall be as determined by the testator in his will or her will. _ _ _"
>
> "Wills silence family disputes relating to the inheritance of the deceased's spouse's estate. They embody the actual wishes of the deceased concerning the disposition of his or her property. They should not be lightly interfered with."

There is no indication whatsoever in this case that deceased intended to amend his will or did amend his will. From 1989 when he executed the will to his demise in 2021, he had ample time to amend the will. I need not attach much importance to the arguments that the deceased's will was overtaken by events and other like arguments as they have no basis at law.

For the aforementioned reasons I find that the relief as sought in both HC 5184/22 and HC 5732/22 is without merit and should be dismissed. On costs l am of the view that the issues that stood for resolution are for the benefit of the parties in the distribution of the deceased assets. I find in the exercise of my judicial discretion that each party should beer its own costs.

I order as follows:

In HC 5184/22

1. The application be and is hereby dismissed with each party paying its own costs

In HC 5732/22:

1. The application be and is hereby dismissed with each party paying its own costs.

WAMAMBO J: .....

Saidi Law Firm, applicants' legal practitioners in HC 5184/22
Rufu, Makoni Legal Practitioners, applicants' legal practitioners in HC 5732/22
Kufaruwenga, Kajevu and Zihanzu, second to fifth respondents' legal practitioners in HC 5184/22 and first to fourth respondents in HC 5732/22