LINAH NDORO

versus

EVIDENCE NDORO

and

THE MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE

GUVAVA J

HARARE, 13 JUNE & 24, 25 OCTOBER 2011 & 3 MAY 2012

FAMILY LAW COURT

**Opposed application**

Mr *C. Kwiriwiri*, for the applicant

Mr *Mapondera*, for 1st respondent

GUVAVA J: This matter was filed in this court as a court application. The applicant seeks an order in the following terms:

“1. House number 4 Mimosa, Westview also known as Stand 2986, Westview Kadoma shall be awarded to Laina Ndoro (Nee Mutimodyo) as the surviving spouse to the late Robert Ndoro, DR 828/09.

2. The first and final liquidation and distribution account, Annexure “D” shall be amended accordingly.

3. The first respondent shall pay the costs of this application in his personal capacity if he opposes this application.”

The facts which have given rise to this application are mainly common cause and may be summarised as follows. The applicant was married to the late Robert Ndoro who died intestate on 20 July 2009 (the deceased). They were married in terms of the Marriage Act [*Cap 5:11*] on 10 May 1990. The first respondent is the executor dative of the deceased’s estate. He is also the deceased’s son from an earlier relationship. The applicant is a teacher by profession. At the time of deceased’s death she was employed as a Deputy Head at St Eric’s Secondary School in Norton. At the time of his death the deceased was the registered owner of a certain piece of land known as stand 2986 Westview Kadoma also known as number 4 Mimosa Road, Westview, Kadoma (the property). Following the death of the deceased the first respondent was asked to live at the property as there was no one to look after it. When the first respondent prepared a First and Final Distribution Account he awarded the applicant a child’s share of the property which was owned by the deceased. The applicant claims that as the surviving spouse she is entitled to the whole property.

The first respondent opposed the application. He stated that at the time of the deceased’s death he had separated from the applicant who had instituted divorce proceedings against him. He submitted that she was no longer living at number 4 Mimosa Road Westview Kadoma with the deceased when he died and was thus not entitled to the whole property.

The only dispute this case was whether or not the applicant was residing at 4 Mimosa Road Kadoma at the time of his death. With the consent of the applicant and the first respondent I decided to hear oral evidence on this point in terms of Rule 239 (b) of the High Court Rules 1971 as amended.

The applicant gave evidence and testified that she married the deceased in terms of customary law in 1987 and later solemnised their marriage in terms of the Marriage Act [*Cap 5:11*]. They started living at 4 Mimosa Road Kadoma in 1991. In 2007 the applicant and the deceased had a misunderstanding such that she left the matrimonial home. She then went to stay at her brother’s house in Chegutu. She testified that she instituted divorce proceedings sometime in 2007 but they managed to resolve their problems and she returned home a few days later. Applicant was subsequently transferred to Norton where she is now employed as a deputy head. Soon after her transfer deceased fell ill and she took a month’s leave to nurse him. When she went back to work in February 2008 she too was unwell. She then stayed with her sister in Chegutu during the second term. After the second term her brother took her to Chinhoyi where he lives. She remained with her brother in Chinhoyi until she returned to work in June 2009. On that day she passed by the property in Kadoma picking up things she wanted to use in Norton. In July she received a call advising her that deceased had died. She used her Doves insurance policy to bury the deceased.

She further stated that she was entitled to the award of the whole property as she was living with the deceased at the time of his death. She further stated that she was only away due to work commitments in Norton and her ill health.

In cross examination it was apparent that she had not lived in Kadoma since she left in Februry 2008. She could not tell the court of any time when she went and spent a weekend in Kadoma with the deceased. The only occasion she recalled with clarity was the day she passed through and collected her things in June 2009. When questioned on how often she visited Kadoma after February 2008 she replied that she immediately fell sick. Whilst she had told the court that she had reconciled with the deceased in January 2008 she could not explain why she issued divorce summons in October and the deceased was served with summons in November 2008.

The applicant’s brother Benson Mutimhodyo also testified. He confirmed that the applicant and deceased had a disagreement in 2007 and he was involved in solving the dispute. He however stated that the issue was resolved a few days later. He denied any knowledge of divorce proceedings instituted by the applicant. He stated that the applicant did not stay at the matrimonial home after they had reconciled as she was unwell. He took her to Chegutu where she stayed at his house and he subsequently took her to Chinhoyi for better care and management. It was his evidence that the applicant still lived at the Kadoma house as some of her property was still there. He stated that when the deceased died he was asked to give a speech as the father in law.

The witness’s evidence did not take the applicant’s case any further. The effect of his evidence was to confirm that for most of 2008 and the whole of 2009 until the deceased died the applicant had not lived at the property in Kadoma. Apart from the dispute between the applicant and deceased in 2007 which he solved the witness appeared to have no real knowledge of what was taking place between the applicant and the deceased. According to his evidence he was unaware that the applicant instituted divorce proceedings in October 2008.

The last witness for the applicant was Choice Mundinzwa who was a tenant at the 4 Mimosa Road Kadoma at the relevant time. She now resides at 13 Mimosa Road, Westview Kadoma. She started to live at 4 Mimosa Road at the end of January 2008. At the time she started living on the property in January the applicant was present. She subsequently left and went to work in Norton. She testified that deceased was of poor health and the applicant took two weeks leave to come and look after him. She returned to work in February 2008. She further testified that the applicant would come to the house over weekends. She also stated that the applicant was in Kadoma over the April holiday in 2008.

In cross examination it became apparent that the witness was not telling the truth. In many respects her evidence was in direct contradiction with that of the applicant and all the other witnesses. For example she told the court that the applicant would frequently come home during school holidays and weekends. However the applicant told the court that she could not go to Kadoma because of her duties as deputy head and her ill health. It was also apparent that when deceased became seriously ill she contacted the first respondent and not the applicant because he was the one who was readily accessible.

The first respondent testified that he was born on 15 February 1982. He was staying with his mother in Chitungwiza until 1993 when he moved to Kadoma to stay with the applicant and the deceased. In 2007 the applicant moved out and started living in Chegutu. He then moved out in 2008 and made arrangements for a maid to look after his father as the applicant was not coming home. He stated that as far as he was aware the applicant came back home on two occasions from the time she moved out. The first occasion was to collect a bedroom suite which was in the girl’s bedroom. On the second occasion she came in the company of her brother and collected kitchen utensils and a kitchen table and chairs. During the last four days of the deceased’s life he was seriously ill. Someone phoned the applicant and she arrived on the night that he died. After the death of the deceased they decided as a family that the first respondent should move back into the house as there was no one to look after the property. At the time there were two tenants who were staying in the cottage. He confirmed that Choice was one of them.

The witness gave his evidence well and despite lengthy and vigorous questioning he was not shaken in cross examination. He indicated that he moved out of the house when he got married but moved back to the property from 2007 to early 2008. He was however staying in the cottage. He reiterated that from the end of 2007 when the applicant moved out she only came back on two occasions. He stated that he could not lie against the applicant as he loved her as a mother as she had looked after him from the time he was ten years old. He was however adamant that at the time the deceased died the applicant had ceased to live with them in Kadoma. His evidence was to a large extent corroborated by the applicants own evidence when she stated that she did not go to Kadoma from 2008 to June 2009 as she was sick.

Ishmael July testified that he lives in Gweru and the deceased was his uncle. He was a regular visitor at Kadoma as deceased did not have anyone to look after him. He would go there every weekend and on all the occasions he did not see the applicant. He testified that he met the applicant on only one occasion when she came to the house to collect her plates. In May 2009 the deceased started showing signs of serious illness. He saw the applicant on the date deceased died. In cross examination the witness stated that he was present at the house when the applicant came to collect her plates. The deceased was very ill and he had gone to Kadoma to visit him.

In determining a dispute of fact the court is obliged weigh the conflicting stories and decides on a balance of probabilities which of the two stories is true. The court in making a determination will evaluate the evidence and the credibility of the witnesses. The applicant’s story in my view was riddled with contradictions between her evidence and that of her witnesses. She was evasive on a number of issues. Indeed when questioned in cross examination she could not give a straightforward answer on how often she went to Kadoma. The first respondent’s story on the other hand was both credible and believable. It was corroborated in a number of respects by the applicant’s own evidence when she conceded that she had not gone to Kadoma due to ill health. It was quite apparent from all the evidence that after about February 2008 the applicant stopped living in Kadoma and only went back to the matrimonial home in June 2009. The reason for going there was not to visit deceased who was ill but to collect things she required for her use in Norton. The fact that she was no longer living in Kadoma is also in my view supported by the summons which the applicant issued in October 2008. The date of issue of the summons which was stamped by the Registrar of the High Court completely contradicts the applicant’s evidence that the summons were issued in 2007. I did not believe her when she stated that the delay in issuing the summons may have been caused by the lawyers as she had only given instructions in 2007 when they had a dispute. In my view if the time difference had been a couple of months the applicant’s explanation may have been plausible. But the summons was issued almost a year later. It seems to me that if the applicant and the respondent had indeed reconciled and were living together the applicant would not have instituted divorce proceedings at that stage. In my view it bolsters the first respondent’s case that the applicant and the deceased had separated and were no longer living together. It was also telling that the applicant’s brother, Benson, denied any knowledge of the summons and yet according to their evidence the applicant was living with him in Chinhoyi and was said to be seriously ill at the time the summons was issued.

I have also considered the fact that the applicant stated that she failed to go to her matrimonial home during this time because she was so ill that she had to go and live with her brother in Chinhoyi. However the applicant did not produce any documentary evidence of her illness. It would have been assumed at the very least that she would have produced sick leave forms since she was away from work for such a long time or a doctor’s letter to indicate that she was under his care for the period in question. A letter from the hospital where she was undergoing treatment would also have served the purpose. The only reasonable explanation why the applicant did not produce any documentary proof of the extent of her illness is that the applicant was not as ill as she has said she was or did stay in Chinhoyi for the length of time she stated. The conclusion I have reached is supported by the application for special leave which was produced by the applicant relating to the period 2 to 18 September 2008 wherein the applicant stated that she would be at 4175 Nharira Avenue Norton. She does not say that she will be in Chinhoyi where she told the court she was staying during this time.

The law relating to the position of a spouse where the deceased dies intestate is set out in s 3A of the Deceased Estates Succession Act [*Cap 6:02*] which provides as follows:

“The surviving spouse of every person who dies wholly or partially interstate shall be entitled to receive from the free residue of the estate, the house or other domestic premises in which the surviving spouse, as the case may be lived immediately before the persons death”

In order for a spouse to inherit the house they must show that they lived in that house immediately before the deceased’s death. The applicant in my view has failed to show that she lived at 4 Mimosa Road Kadoma immediately before the death of the deceased. The evidence shows that she had left the property. She was not just staying in Norton because of her work commitments but she had separated from the deceased. However it was clear from the evidence that during the period February 2008 to June 2009 she passed through the property once for a few minutes in order to collect her belongings. This cannot be said to be living at the residence particularly in view of the fact that she had issued summons for divorce in October. I therefore have no hesitation in accepting the first respondent’s evidence that the applicant was no longer living at the property in question and can find no basis to interfere with the First and Final Distribution Account made by the executor.

I therefore make the following order:

The application be and is hereby dismissed with costs.

*Hungwe & Partners*, applicant’s legal practitioner

*Mapondera & Company,* 1st respondents legal practitioner