PAULA NDAKAZIVA MUNYUKWI
versus
THE LATE ESTATE OF ABRAHAM RUSHAMBE NDUNA
(Represented by the executor testamentary Stephen Rugwaro)
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 May 2014

Opposed application

S Machingauta, for the applicant
S. Rugwaro, for the 1st respondent

CHITAKUNYE J. The applicant and the late Abraham Rushambe Nduna (herein after referred to as the late Nduna) were involved in an unregistered customary law union. The late Nduna died on 26 May 2011. The deceased left a duly executed will. In the will the testator nominated Steven Rugwaro as Executor.

After the death of the late Nduna, Steven Rugwaro convened a meeting comprising Abraham Nduna's family, applicant and applicant's legal practitioners for purposes of reading the will left behind by the late Nduna. The applicant was not one of the beneficiaries.

Dissatisfied with her exclusion applicant launched this application seeking an order that:-

1. The last will and testament of Abraham Rushambe Nduna dated 5 October 2011 be and is hereby nullified
2. The estate be and is hereby ordered to be distributed intestate
3. The applicant be and is hereby appointed *executrix dative* of the estate
4. The first respondent to pay costs of suit

The application was premised on the provisions of section 5(3) (a) of the wills Act, chapter 6:06, which provides that:-

> "No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons."

The applicant alleged that as at the time of late Nduna's death the two of them were married in terms of customary law and so she is the surviving spouse. As a surviving spouse she should not have been left out. The will should thus be declared null and void.

The first respondent opposed the application. In his opposition first respondent raised a preliminary point to the effect that the application was premature as the estate late Nduna had not yet been registered and Steven Rugwaro had not yet been appointed executor, in terms of the Administration of Estates Act, [*Cap* 6:01].

On the merits respondent contended that applicant was no longer married to the late Nduna at the time of his death. The two had long ceased living together as husband and wife.

On the preliminary point, though respondent asserted that the estate had not yet been registered I did not hear him to deny the case number referred to by applicant showing that the estate was in fact registered as DR989/12 Harare. The issue on the preliminary point is whether the application is properly before this court.

The registration of the estate was not in itself an automatic grant of letters of administration to the executor. However on the date of hearing Counsel for first respondent indicated that he was withdrawing the point *in limine*. He however did not confirm that he had been duly appointed executor in terms of the Administration of Estates Act.

No letters of administration were referred to in the application. It is clear that applicant's application was purely based on the reading of the will and not that the will had been placed before the Master. Section 23 of the Administration of Estates Act provides that:-

> "The estates of all persons dying either testate or intestate shall be administered and distributed according to the law under letters of administration to be granted in the form B in the Second Schedule by the Master to the testamentary executors duly appointed by such deceased persons, or to such persons as shall, in default of testamentary executors, be appointed executors dative to such deceased persons in manner hereinafter mentioned."

Section 24 (1) then states that:-

> "In all cases in which any deceased person has by will or codicil duly appointed any person to be his executor, the Master shall, upon the written application of such executor, forthwith grant letters of administration to him as soon as such will or codicil has been registered in the office of the Master."

The above sections clearly show that a deceased person's estate must be represented by an executor or executrix duly appointed and issued with letters of administration by the Master.

Where letters of administration have not been issued appointing an executor, that office is vacant. The fact that a testator has in his will nominated an executor does not automatically clothe that executor with letters of administration. The Master must still appoint and issue letters of administration. As was aptly noted by KUDYA J in *Estate Wakapila* v *Matongo & Others* 2008 (2) ZLR 43 (H) at p 44 F-G,

> "The provisions of ss 23,24 and 25 of the Administration of Estates Act give preference to the appointment as executor by the Master of the person nominated in the testator's will. It is only where the nominated person has predeceased the testator, declined the appointment or has the appointment challenged that the Master is precluded from issuing him with letters of administration."

In casu when the applicant instituted this application Mr Rugwaro had not yet been issued with letters of administration. To that extent the estate late Nduna had no duly appointed representative.

The nomination of Mr. Rugwaro as executor had not been challenged before the Master. In fact the Master had not even been seized with a contest for the office of the Executor yet the application before me has the effect of setting aside Mr. Rugwaro's nomination and in its place the appointment of applicant as executrix.

I am of the view that applicant cannot circumvent the Master's role in this manner. The Administration of Estates Act clearly gives the Master a key role which cannot be circumvented wily – nilly. The challenge to the will raised by applicant is one that should be raised with the Master as he considers the appointment of an executor. If for some reason applicant is not happy with the Master's decision then the matter can be brought before this court in terms of the Administration of Estates Act.

I am of the view that this application cannot succeed. It must be dismissed with costs. As the parties proceeded to argue on the merits I will proceed to deal with that as well.

The main issues are:-

i) whether at the time of the late Nduna's death applicant was married to the late Nduna;

ii) Whether the will by the late Nduna should be nullified;

iii) if so, whether applicant should be appointed executrix dative of the estate late Nduna.

It is common cause that the late Nduna and applicant lived as husband and wife in terms of customary law. Their relationship was not solemnised in terms of any marriages Act; it was thus an unregistered customary law union. In her application the applicant does not challenge the capacity of the late Nduna to make a will. She does not challenge the authenticity of the document as a properly executed will. The applicant seeks the nullification of the will and her appointment as executrix purely on the basis that she ought not to have been excluded from benefitting from the will as she claims to be the surviving spouse.

It is important to recognise that for one to be a surviving spouse the parties must have been married as at the time of the deceased's death.

In casu, the pleadings in case number HC 9974/11 show that at the time of late Nduna's death the two were no longer living as husband and wife even as per customary law. Whatever relationship had existed between them had ceased. In response to the late Nduna's claim for eviction from Stand No. 641 Mandara (also known as No. 5 Rushett Way, Mandara, Harare) and his assertion that their relationship had ended, applicant confirmed that the late Nduna had given her a token of divorce per customary law but she could not be evicted till they have shared what she termed matrimonial property. For instance in paragraph 3 of her plea in HC 9974/11 she said, *inter alia*, that-

> "… plaintiff and Defendant's marriage subsisted for 12 (twelve) years until on 18th October 2011 one week after the filing of the present summons when Defendant received a divorce token from plaintiff."

And in paragraph 5 she went on to say, *inter alia*, that:-

> ".. Defendant is entitled to occupation of the matrimonial house until such time when the matrimonial estate is shared between plaintiff and Defendant."

The nature and extent of applicant's claim in that case shows clearly she is alleging the existence of a *tacit universal partnership* for the 12 years duration of their union. Her claim is thus based on her contribution during the subsistence of that *tacit universal partnership* and not a share of assets of the spouses in terms of the Matrimonial Causes Act chapter 5:03; the nature of her claim is foreign to customary law. Nowhere in that case did she allege that the unregistered customary law union still subsisted.

Clearly her claim was in terms of general law. She cannot therefore seek to invoke customary law at this stage.

It may also be noted that in terms of s 2 of the Wills Act a marriage is defined as:–

> "marriage' includes a marriage solemnised in terms of the Customary Marriages Act [*Cap* 5:07]. "

> Thus to the species of the Civil or General Marriages is included marriages solemnised in terms of Customary Marriages Act.

It is in respect of these recognised marriages that s 5(3) of the Wills Act speaks to in stating that: -

> "No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property of married persons."

The term- 'in terms of any law governing the property rights of married persons' seems to refer to the Matrimonial Causes Act. It should be common cause that the Matrimonial Causes Act, [*Cap* 5:13] is not applicable to parties in unregistered customary law unions. See *Chapendama* v *Chapendama* 1998 (2) ZLR 18.

I do not believe this section refers to persons in *tacit universal* partnerships whether still subsisting or dissolved as in this case. As already noted in both this case and in HC 9974/11 applicant's contention is not based on joint ownership but on contributions during the subsistence of the partnership. It is thus clear that provisions of s 5 (3) are inapplicable in this case.

In a bid to bolster her case applicant sought to also rely on section 68G of the Administration of Estates Act. That section pertains to the determination of whether customary law applied to a deceased person and how such determination should be conducted. In citing this section applicant seemed to turn a blind eye to s 68A (2) of the same Act which states categorically that:-

> "This Part, other than section sixty-eight C, shall not apply to any part of an estate that is disposed of by will."

In my view this puts paid to any argument based on provisions in Part 111A of the Administration of Estates Act. As there is a will it follows this part is not applicable except in relation to inheritance of customary articles by the heir.

I am of the view that based on the above applicant cannot succeed at all. I am of the view that at the time of the late Nduna's death applicant was no longer 'married' to late Nduna. Their unregistered union had long ceased. Applicant was thus not a surviving spouse. As a consequence, the will cannot be nullified on the ground that the testator left out applicant. As applicant was not the surviving spouse she cannot be appointed executrix dative on the basis of being the surviving spouse.

The respondent asked for costs on a higher scale. The basis for seeking costs at a higher scale include the fact that applicant had previously withdrawn a similar application in case No. HC 6585/12 based on the same facts and opposition papers. When the applicant launched this application she ought to have realised the futility of her actions.

I have had occasion to peruse case no. HC 6585/12 and I noted that the applicant's papers therein are exactly as filed in this case and so were the opposition papers. The only differences pertain to dates of preparing and filing the papers. In this application applicant made no disclosure whatsoever of that previous application and its fate. No effort was made to explain the necessity for this application when a similar application had been withdrawn upon cite of opposition papers. It was imperative for applicant to have disclosed the previous application and explain the reasons for the present application if she was *bona fide* in her persistence.

Another point raised was that the applicant ought to have realised she had no case as she knew that she was not engaged in a valid marriage and therefore she had no right to challenge the validity of the will.

It was also contended that this application was made despite advise that she had no case at all in view of the stark reality of her relationship with the late Nduna having been terminated which termination she acknowledges in case HC 9974/11.

After an analysis of the arguments on this I am inclined to agree with Counsel for the respondent.

It may also be noted that in spite of the clear provisions of the law requiring a deceased estate to be represented by a duly appointed executor who has been issued with letters of administration. Applicant prematurely brought this case and could just not justify such haste.

The respondent was forced to defend the matter even before letters of administration had been sought and granted.

Accordingly the application is hereby dismissed and the applicant will bear the costs of suit on the legal practitioner/client scale.

Tavenhave & Machingauta, applicant's legal practitioners
Baera & Company, first respondent's legal practitioners.