

MARGARET SUMBURERU
versus
PRISCA CHINAMORA
and
THE MASTER OF THE HIGH COURT
and
WILBERT NYAMUPFUKUDZA N.O

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 21 SEPTEMBER 2012 & 21 FEBRUARY 2013

D. Ochieng, for the Applicant
S. Hwacha, for the Respondent

GUVAVA J: Do the dead speak from beyond the grave? In my view that is the question that this court must answer in order to determine this case. This is a matter which has remained unresolved for the past 15 years. In spite of leaving a will the parties have tried, without success, to ascertain the true intention of how the rights and benefits of the estate of the late Amos John Chirunda who died on 8 December 1997 should devolve.

The facts of this matter may be summarised as follows:

The applicant is the former wife of the late Amos John Chirunda (the deceased). The first respondent married the deceased in terms of customary law during in 1986. The second respondent is the Master of the High Court and is cited in his official capacity. The third respondent is the executor dative of the estate appointed by the second respondent.

It is common cause that on 9 December 1977 the deceased executed a will appointing applicant as the heiress of his estate. The will was never amended, varied or revoked until his death in 1997. The will in question was a simple one being just four paragraphs in length. For the sake of completion I will quote the will in full;-

“ 1, AMOS JOHN CHIRUNDA, do hereby revoke all past Wills and testamentary acts and declare this to be my last will.

I appoint my wife MARGARET CHIRUNDA (nee SUMBURERU) to be the Executor and Heiress to my estate.

In the event of my wife Margaret dying at the same time with me, I appoint my nephew HASTINGS CHIRUNDA and my sister ALICE CHIRUNDA to be joint Heir and Heiress to my estate in equal shares.

I reserve to myself the power from time to time and at all times hereafter to make all such alterations in or additions to this my Will as I may think fit, either by separate act or at the foot hereof, desiring that all such alterations or additions so made under my own signature and duly witnessed according to law, may be held to be as valid and effectual as if the same had been inserted herein.

Given under my hand at SALISBURY on this the 9th day of December, 1977.”

The deceased paid bride price under customary law for the applicant on 11 September 1977 following which the marriage was registered under the African Marriages Act. On 29 October 1978 the applicant and the deceased entered into a civil marriage in terms of the Marriage Act [Cap 37]. They had three children. On 22 July 1986 after a lengthy and acrimonious battle the applicant and the deceased divorced. In terms of their consent paper the deceased made a financial settlement on the applicant. The deceased thereafter married the first respondent in terms of customary law and they lived as husband and wife until he died in 1997. In February 1998 the applicant was invited to the Master’s office to register his estate in terms of his will. The applicant was issued with letters of administration in terms of the will. On 4 March 1998 the Master wrote to the applicant seeking to revoke the letters of administration on the basis that at the time of his death she was divorced from the deceased. The applicant declined to surrender the letters of administration. The first respondent thereafter instituted proceedings seeking to have applicant’s appointment as executor set aside. The application was dismissed by this court on the basis that the will was valid and the applicant had been properly appointed as executor in terms of the will. On appeal the decision of the court *a quo* was set aside by CHEDA JA on the basis that the wrong law had been applied in determining the matter. The Supreme Court held that the court should not have applied section 17 of the Wills Act [Cap 6:06] but that the proper law to be applied was the African Wills Act [Cap: 240]. Following this decision and on 19 April 2005 the Master decided to appoint an independent executor being the third respondent in this matter.

The second respondent proceeded to appoint the first respondent as the surviving spouse of the deceased’s estate. The children of the deceased objected to the appointment and formally lodged an objection with the second respondent. They argued that the first respondent was not married to the deceased and should not be appointed as the surviving

spouse. In order to get guidance on the matter the second respondent requested a magistrate to conduct an inquiry into the matter in terms of section 68(2) of the Administration of Estates Act [*Cap 6:01*]. The magistrate found that the first respondent had married the deceased in terms of customary law and confirmed her as the surviving spouse. Dissatisfied with the decision the matter was taken on appeal. This court determined that the inquiry had been conducted in terms of legislation which had been repealed and set aside the decision of the Magistrates Court as a nullity.

The applicant has now instituted these proceedings seeking the following relief:

- 1.“That the last will and testament executed by the late Amos John Chirunda on 9 December 1977 be and is hereby declared to be a valid testamentary instrument.
- 2.That the Master of the High Court be and is hereby directed to admit the said last will and testament to probate.
- 3.That the appointment of Wilbert Nyamupfukudza as Executor Dative by Letters of Administration issued to him by the Master of the High Court on 19 April 2005 be and is hereby set aside.
- 4.That the Master of the High Court be and is hereby directed to re-issue fresh Letters of Administration to Margret Sumbureru to enable her to Administer the Estate of the Late Amos John Chirunda.
- 5.That First Defendant (sic), being Prisca Chinamora, also known as Prisca Chirunda, pay the costs of this application.”

The applicant outlines in her Heads of Argument what she perceives as the issues for determination by this court as follows:

- “(a) Which law should be applied in determining the validity of the provisions of Amos Chirunda’s will in relation to the applicant?
(b) What does the law provide for in relation to the validity of the will?
(c) To what extent does the Administration of Estates Act [*Cap 6:06*] apply to this estate?
(d) What should be the next course of action in terms of the law?”

In my view the first issue raised should not have been raised as an issue at all as it was determined by the Supreme Court in case Number 55/02 wherein CHEDA JA held that the law to be applied is the African Wills Act [*Cap 240*]. The issues as raised in paragraphs (c) and (d) are seeking legal advice and it is not the function of the court to proffer legal advice to parties. This request for legal advice seems to emanate from the various issues and disputes which have been presented in the papers by the applicant. Of particular concern seems to be the issue of whether or not the deceased married the first respondent under customary law. However when one has regard to the order sought by the applicant it seems to me that these

are not issues for determination in the present proceedings and the sole issue before the court is whether or not the will executed by the Late Amos Chirunda on 9 December 1977 is valid.

In order to determine this issue the Supreme Court held that regard must be made to the provisions of the African Wills Act. The relevant provisions which relate to the execution of wills under that Act are sections 6 and 7 which provide as follows:

- “6. Subject only to the limitations imposed by this Act an African may, by will freely dispose of the ownership of immoveable property or any right attaching thereto.
7. The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will.”

It is quite apparent from the above provisions that the African Wills Act gave an African capacity to execute a will and to dispose of immoveable property. An examination of the Act however shows that it does not have a provision which is similar in wording to section 17 of the Wills Act [*Cap 6:06*]. It seems to me therefore that this court must determine the intention of the deceased when he made the will in order to ascertain its validity. In making such a determination the court must look at the wording of the will. A reading of the will shows that there can be no doubt that when the deceased made the will his intention was to benefit his wife. The second sentence of the will which is quoted in full above provides as follows:-

“I appoint my wife Margret Chirunda (nee Sumbureru) to be my executor and Heiress to my estate.”

It is common cause that the will was made soon after the deceased had paid customary bride price for the applicant. At the relevant time when the will was executed, customary law did not allow a wife to inherit from her husband. The deceased was clearly intent upon circumventing that aspect of customary law which was discriminatory of women and particularly wives. That was the mischief that he wanted to avoid in the event of his untimely death. It is clear to me that the deceased wanted to be certain that in the event of his death his property would not fall into the hands of his male relatives to the exclusion of his wife. However at the time of his death in 1997 the deceased and the applicant had divorced. She was thus no longer his wife and they had been so divorced for a period in excess of ten years. It is also common cause that upon divorce the applicant had been awarded a significant settlement. Could it have been deceased intention that the applicant would again inherit his estate upon his death since he did not revoke his will? In my view this could not have been

his intention. The mischief that he had sought to circumvent in his will no longer applied with regard to the applicant as she was no longer his wife. It seems to me therefore that once the applicant ceased to be his wife the will became invalid as it was no longer capable of enforcement.

On this basis alone I would find that the will was no longer valid and dismiss the applicants claim.

Even if I am wrong in making such a finding based on the fact that applicant was no longer deceased's wife it seems to me that I would still dismiss the application on the basis that the deceased's will became void upon his marriage to the applicant in terms of the general law in 1978. It is common cause that following the applicant's marriage to the deceased under customary law they subsequently registered their marriage in terms of the Marriage Act [*Cap 37*] (now *Cap 5:11*). Section 13 of the African Marriages Act [*Cap 238*] provided that an African who married in terms of the Marriage Act and who disposed of his property in terms of a will ceased to be governed by African customary law. The relevant provision provides as follows:

“The solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of spouses which shall be held and may be disposed of unless disposed of by will shall devolve according to African law and custom.”

It seems to me that the import of the above provision is that general law became applicable to the deceased. The law which was applicable to wills at the relevant time was the Deceased Estate Succession Act [*Cap 302*]. This explains in my view the reason why the African Wills Act did not have a provision that is similar to section 17 of the Wills Act.

Section 2 of the Deceased Estate Succession Act [*Cap 302*] provided as follows:

“Except in the case of a party to a joint will who has adiated, a will, other than a joint will of an intended husband and wife who thereafter married each other, executed by any person prior to marriage shall become null and void on marriage unless such person endorses on such a will that it is desired that the same shall remain in full force and effect. Such endorsement shall be duly signed and witnessed in the manner required in the case of a will”

Clearly the above provision nullifies any will other than a joint will which is made by a person before marriage. Although this provision was repealed by section 24 of the Wills Act the section goes on to state that the section shall continue to apply in respect of wills that were made before the 1st January, 1988 to the extent that the Wills Act does not apply to it.

The will by the deceased was executed in 1977 and in my view clearly falls within the provisions which were saved as the Wills Act does not apply to it. The deceased executed the will prior to his marriage to the applicant in terms of the Marriage Act. There is no evidence that the deceased endorsed the will as required by section 2 of the Deceased Estates Succession Act thus making the will null and void.

For the reasons stated above I make the following order:

The application is hereby dismissed with costs.

Messers Atherstone & Cook, Applicants legal practitioners

Messers Dube, Manikai & Hwacha, 1st Respondents legal practitioners