

DAINA HWATA

versus

VONGAI HWATA

(in the capacity as the Executor Dative of Estate late Enos Hwata – DR636/02)

and

MINISTER OF LANDS AND RURAL RESETTLEMENT

and

MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE

MWAYERA J

HARARE, 22 June 2017 & 2 November 2017

Opposed Matter

Mr F G Gijima, for the applicant

Advocate C Kachambwa, for the respondent

MWAYERA J: The application hinges on a dispute pitting two related deceased estates as will be revealed from the brief history of the matter. The applicant approached the court seeking an order that farm 119 Zowa Zvimba (hereafter referred as to as the farm) is an undistributed asset of late estate John Hwata DR704/92. The applicant argued that the farm did not at any point devolve to the estate of late Enos Hwata and thus it should be inherited and administered by the applicant who is the surviving spouse of the estate late John Hwata. The first respondent in opposition argued that the farm was inherited by her late husband, Enos Hwata in his capacity as the first born of the late John Hwata. Further that the estate late John Hwata was administered by her late husband Enos Hwata to finality with the farm being awarded or devolving to the late Enos Hwata in his capacity as the sole heir by operation of law.

The brief history of this matter has to be put into perspective. The applicant's husband, the late John Hwata passed on in 1991. The late Enos Hwata, the eldest child of the late John Hwata

was appointed the heir in accordance with customary law as the late John Hwata died intestate. The first respondent is a wife to the late Enos Hwata.

We therefore, have a mother in law suing her daughter in law in her capacity as Executrix dative in the estate of Enos Hwata. The late Enos Hwata inherited the farm in question from his father. Put differently the applicant in this case is seeking reopening of the late husband's estate which has wound up 22 years back. The Master's report though not binding is instructive.

What falls for determination here is whether or not the applicant has a cause of action properly pleaded to warrant the reopening of the late John Hwata's estate and have the farm revolve on her as a surviving spouse. I propose to discuss the cause of action in relation to pleadings latter after briefly alluding to points *in limine* raised.

The point *in limine* of prescription raised cannot be sustained for the obvious reason that the estate in contention that of John Hwata was governed by customary law. What is important is that the application has to be brought within reasonable time. The late Enos Hwata was appointed Executor and no issue arose as he was the eldest child. Things came to a head when Enos Hwata also passed on after having inherited the property in his personal capacity as heir by operation of law. The issue then arose upon Enos Hwata's death and appointment of the first respondent Vongai Hwata as the Executrix dative. Given that turn of events one cannot say the 22 years was unreasonable time for it is not precisely 22 years continuous period but it should be noted it is the period from which Enos Hwata died that the conflict arose. Akin to these issues of prescription is the assertion that applicant waived her rights. The issue of waiver cannot be looked at in isolation but in conjunction with the obvious fact that Enos Hwata's death sparked off disgruntlement. Prior to Enos Hwata's death there was no contention about his heir-ship and inheritance as per the applicable law then. It is my considered view that the points *in limine* raised in this case cannot be sustained so as to warrant dismissal of the application.

This matter hinges on propriety or otherwise of administration the estate of John Hwata. The law governing John Hwata's estate given his date of death prior to the coming in of the Deceased Estates Succession Act [*Chapter 6:02*] which came into operation in 1997 is customary law. The law applicable then s 69 (1) of Administration of Estate Act [*Chapter 3:01*] states

“If any African who contracted a marriage according to African law or custom or who being unmarried, is the offspring of parent's married according to African law and custom, dies,

intestate his estate shall be administered and distributed according to customs and usages of the tribe or people to which he belongs.”

Section 6 of Primary Courts Act 6 of 1981 makes it clear that customary law of succession governed inheritance of all property belonging to Africans see *Dokotere v The Master and Ors* 1957 (40 SA 468. Being a wife to the late John Hwata would then not clothe the applicant as heir to the Estate of the late John Hwata in terms of the applicable law then. I am alive to the legislative in roads made on intestate succession which have positive succession rights on surviving spouse. Even our Constitution Act 2013 recognizes rights of spouses and beneficiaries and even disallows any discriminatory law brought about by virtue of custom and gender. However, it is clear the law did not by bringing in progressive legislation seek to bring about absurdity and opening of flood gates to levels which cannot be resolved through giving a retrospective effect to law. The late John Hwata’s estate was properly administered by application of law. Enos Hwata, the eldest son was appointed heir and no doubt inherited in his personal capacity. The late Enos Hwata transferred the farm into his name as per the cession on page 40 of the record. The farm revolves on Enos Hwata’s estate and the promulgated intestate succession Acts are applicable in so far as surviving spouse and beneficiaries are concerned. A close look at the applicant’s argument is that because she is the surviving spouse to John Hwata the farm should revolve around her or that the estate be reopened. That is the applicant’s cause of action, being the wife of the late John Hwata which unfortunately has no legal basis on which to stand. That she is a surviving spouse is of no consequence given the applicable law. She is a surviving spouse but at the time he passed on the applicable law was customary law.

The applicant by being a wife did not qualify as heir to the late John Hwata her husband. The eldest son Enos Hwata was appointed as heir and he administered his father’s estate. It would be worth nothing that there is a difference between claiming maintenance as a beneficiary under the deceased family Maintenance Act and seeking to reopen a properly wound up estate so as to have the estate revolve on the applicant given the disqualification of heir-ship by the operational law. Reopening the estate would still require application of the law in force at the time of death. Given this is some 22-25 years back in the absence of a cause of action, I find no reason why a properly administered estate should be reopened.

The relief sought by the applicant is ill conceived and it has no legal basis on which to stand. Given the late John Hwata died in 1991 before the administration of estates Act no 6 of 1997. Effectively then being a surviving spouse did not qualify the surviving spouse as heir with rights to administer the late John Hwata's estate.

Even if one was to assume the applicant was entitled to inheritance under the current regime of law. It is worth noting that the applicant would not be entitled to acquire property acquired during the subsistence of another spouse's marriage to the late John Hwata.

It is apparent from papers that when the farm was acquired the late John Hwata was lawfully married to the late Elizabeth Hwata and not the applicant. If the late John Hwata had died after the coming into effect of Act 6 of 1997 then the farm would have rightly devolve to the late Elizabeth Hwata and children and other beneficiaries as property acquired during the subsistence of that marriage. See *Alex Chimhowa and Others v Joyce Chimhowa and Others* (HH 183/12) ZLR (2) 2011 471. In this case the farm does not fall for distribution. The farm was inherited by the late Enos Hwata in his lawful and rightful capacity as heir and eldest child of the late John Hwata. The late Enos Hwata administered and wound up the estate before he passed on. The first respondent was appointed as executrix in the estate of Enos Hwata and she happens to be the surviving spouse of the late Enos Hwata. The farm, 119 Zowa Zvimba, having been lawfully inherited by the late Enos Hwata cannot be termed undistributed assets in the estate of late John Hwata DR704/92. This flows from the common cause aspects that Enos Hwata as the eldest child inherited the property, the farm in question, and he sought by the cession to transfer the property to himself before he died. The inheritance by Enos Hwata was well rooted in the customary law. See *Seva and Others v Dzuda* 1992 (2) ZLR 34 (S) at p 36 KORSAN JA in interpreting s 6A of the then Customary Law and Primary Court Act. Had the following to say:

“This provision in my view is self-evident and beyond question and require no interpretation and explanation. It states in unambiguous language that where there is in testation, the heir at African Law of any deceased Africa succeeds to any immovable property of the deceased in his personal capacity. (Underlining my emphasis)

The heir does not hold such property in trust for any member or members of the family of the deceased. He succeeds to it as if the property was his own and is entitled to exercise all rights of an absolute owner in respect thereof.”

The same sentiments which apply with some force, in this case were echoed by CHITAKUNYE J in *Chari v Motsi and others* HH 215/11 at p 4 he held that:

“As heir and in accordance with the legal position then obtaining, he inherited immovable property in his individual capacity. In this regard s 6 A of the Primary Courts Act 6 of 1981, which was the law obtaining before the promulgation of Act 6/97, provide that:-

‘The heir at customary law of any deceased person whom customary law was applicable shall succeed in his individual capacity to any immovable property or any rights authority thereto forming part of the estate such deceased person and not devised by will.’ (Underlining mu emphasis)

A farm qualifies as any immovable property this is what the late Enos Hwata as heir ,inherited from his father and the farm became his to deal with as he pleased.

In terms of customary law a single heir, the eldest son, failing which eldest daughter or descendants would be entitled to inherit in their personal capacity and clearly without any debate a surviving spouse or widow under customary law would not qualify as heir. For the applicant to then seek reopening of the late husband’s estates wound up in terms of the then applicable law on basis of being a surviving spouse is untenable. In any event, it is clear Act 6 of 1997 does not apply in the estate of the late John Hwata who died in 1991. The heir at customary law does not include a surviving widow. See *Matambo v Matambo* 1969 (3) SA 717 and also *Murisa v Murisa* 1992 (1) ZLR 167 (S) wherein EBRAHIM JA referred to DUMBUTSHENA J’s decision in *Chinawa v Mangwende* 1987 (1) ZLR 228 (S) and held that “whilst this was a progressive judgment, as far as it went, it did not go so far as to say a widow could be appointed heir *ab intestato* to her deceased husband’s estate.” The *Chinawa* case gave extended heir rights to female blood relative of the deceased African but it did not recognise the capacity of a wife or widow to be appointed heir and succeed the estate of her husband.

Given the clear position of the then applicable law and that the estate of the late John Hwata was properly administered culminating in Restricted Letters of Administration DR No. 704/92 for transfer of the farm to Enos Hwata, the Estate John Hwata was lawfully wound up. The Master’s report compiled and filed on 17 January 2017 is opposite and it confirms the estate was wound up in terms of the law. The heir Enos Hwata inherited the immovable property in his personal capacity and did not hold it in trust for any members of the family. He was free to deal with the property in the manner he deemed appropriate. Enos Hwata, transferred the property to himself. Upon his death that is, the late Enos Hwata, the property, in his case the farm would revolve on the late Enos Hwata’s Estate. The farm does not qualify as undistributed asset of John Hwata for it was properly and legally distributed. The farm rather falls under the Estate Enos Hwata who was married to the

first respondent in terms of General Law. The first respondent has rights as a surviving spouse to her late husband Enos Hwata's estate in terms of the current applicable law. However, that is not the matter before me.

What is clear is that the applicant's request to reopen the late John Hwata's estate, on the basis that farm 119 Zowa, Zvimba was not distributed and that she is a surviving spouse and as such amendment of the Administration of Estates Act 6 of 1997 should apply in the administration of the estate of late John Hwata, is not tenable at law. The Act has no retrospective application. In any event the farm in question was distributed lawfully when the estate of the late John Hwata was wound up about 25 years ago. There is no legal basis for reopening the estate. The application must fail.

Accordingly it is ordered that,

The application is dismissed with costs.

F G Gijima & Associates, for applicant's legal practitioners
Dube Manikai & Hwacha, 1st respondent's legal practitioners