

EMILY MUTUNGURA
versus
LUCY GWATIPEDZA
and
NORREN MUTUNGURA
and
CONSTANCE MUTUNGURA
and
THE MASTER OF HIGH COURT
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 13, 21 and 25 July 2017 & 5 October 2017

Civil Trial (Family)

V Masaiti, for the plaintiff
J Dondo, for the 1st – 3rd defendants

MWAYERA J: The plaintiff instituted action proceeding seeking the following order:

1. That the first, second and third defendant transfer Stand 121 Muchenje Drive Mbare to the plaintiff, failure of which the deputy sheriff was to be empowered to sign documents necessary for such cession to take place.
2. That fifth defendant be ordered to sign cession documents, and
3. That first, second and third defendants be ordered to pay costs of the suit jointly and severally one paying the other to be absolved.

The defendants defended the action and filed pleadings thereto. The parties reached

common ground on issues to be referred to trial and reduced same in a joint pre-trial conference minute. Issues referred for trial are as follows:

1. Did first, second and third defendant disclose to the Master of High Court the fourth defendant that the plaintiff was married to the late Kenneth Mutungura and that the plaintiff was still alive.
2. Did first, second and third defendants fraudulently obtain certificate of authority to transfer Stand No 121 Muchenje Drive, Mbare to the defendants.
3. Whether or not the plaintiff is entitled to an order for transfer of Stand 121 Muchenje Drive, Mbare into her name on the basis pleaded.

At commencement of trial it was common cause that the plaintiff was legally married to the late Kenneth Mutungura in terms of the African Marriages Act [then *Chapter 238*] 5:07. The plaintiff is a step mother to the first, second and third defendants.

The brief history of the matter has to be put into perspective. The late Kenneth Mutungura was married to the first, second and third defendants mother in terms of civil rites on 18 November 1950. The defendants' mother and the late Kenneth Mutungura resided at the house in question 121 Muchenje Drive, Mbare. After the death of the defendants' mother Kenneth Mutungura married 2 other women before marrying the plaintiff in November 1962 under the African Marriage Act. The plaintiff and the late Kenneth Mutungura stayed at the house in question 121 Muchenje Drive up to 5 February 1990 when the late Kenneth Mutungura passed on. The couple was blessed with 6 children all majors at the time of the demise of the deceased Kenneth Mutungura. In 1997 the estate of Kenneth Mutungura was registered with the fourth defendant, the Master of the High Court. A certificate of authority was issued authorising transfer of the said property into the three defendants' names. The defendants by agreement transferred the property into the first defendants' name. It is this certificate of authority and subsequent transfer of the property which prompted the plaintiff to issue summons.

What falls for determination at the end of the day is whether or not the certificate of authority was fraudulently obtained, further for determination is whether or not the property should be transferred to the plaintiff.

The plaintiff's evidence was that she was married to Kenneth Mutungura and that she was not invited for the edict meeting at the fourth respondent's offices. She in a wavering

manner sought to have the property transferred to herself. I say wavering manner given she in evidence in chief and under cross-examination changed her stance to indicate that all she required was the right to continue staying at the house in question. She also told the court that the house was obtained before she got married to Kenneth at a time when the late was civilly married to the mother of the 3 defendants. She agreed such acquisition of the house was marriage based although she pointed out that the sale agreement was only brought into effect in 1982. It is apparent from the pleadings and plaintiff's evidence that her cause of action is that she was married to the late Kenneth Mutungura in accordance with the African Marriages Act [*Chapter 38*] in 1962. On the face of it she is a surviving spouse. The fact that comes to mind however, is that given the late Kenneth Mutungura died intestate on 15 February 1990, his estate was to be regulated by customary law. I must mention that the evidence of the plaintiff's witness Lina Mutungura was on common cause aspects. She confirmed the plaintiff's marriage and the transfer of the property to the first defendant after obtaining a certificate of authority.

The law governing late Kenneth Mutungura'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.

In terms of the law then, the plaintiff was not an heir to the late Kenneth Mutungura and as such cannot inherit the house from the deceased. See *Dokotera v The Master and Ors* 1957 (4) SA 468.

The law applicable at the relevant time does not support the plaintiff's claim to have property transferred into her name.

Section 69 (1) of the Administration of Estates Act [*Chapter 3:01*] states

"If any African who has contracted a marriage according to African law or custom or who being unmarried, is the offspring of parents married according to African law and custom, dies, intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged."

This is further fortified by provisions of s 13 of the African Marriages Act and s 6 of the Primary Court Act which make it clear that customary law of succession governed inheritance of all properties belonging to Africans.

The unsubstantiated claims by the plaintiff that she was a vendor and thus send her children to school enabling her late husband to pay off for the house did not take the plaintiff's

case any further given she accepted that she got married to the late Kenneth Mutangwa when the house in question had already been allocated to him on the strength of the Marriage Certificate issued to the late Kenneth Mutungura and Letty Novembe the mother of the three defendants. I must mention that the court takes judicial notice of the then existing housing allocation system which was anchored on marital status.

Given the evidence of the second defendant Noreen Mutungura the other basis of the plaintiff's claim that the certificate of authority was fraudulently obtained falls off. It was clear the defendants and relatives approached the Master to register the estate. The plaintiff's marriage certificate and their late mother's marriage certificates were availed. The local authority documentation tallied with evidence of the house in question having been allocated on the basis of the marriage certificate of the late Kenneth Mutungura and the defendant's mother.

The certificate of authority was properly issued. The first, second and third defendant agreed to register the property in the first defendant's name. In the absence of evidence to show that the defendants did not disclose the existence of the plaintiff whose marriage certificate was availed to the Master it becomes difficult to impute fraud on the part of the defendants.

The plaintiff has the onus to prove on a balance of probabilities that the defendants fraudulently obtained a certificate of authority and that she is entitled to transfer of the property in question into her name. Given the obvious history of acquisition of the property and the fact that the late Kenneth Mutungura passed on in 1990 and thus the estate fell for administration in terms of customary law, the relief of transfer of property into the plaintiff's name is incompetent. Further, I am inclined to align myself to the reasoning in *Alex Chimhowa and Others v Joyce Chimhowa and Others* (HH 183/12) ZLR (2) 471, in so far as the court sought to clarify the legislative noble intention in intestate succession statutes. The intention of protecting widows and their minor children. In the *Chimhowa* case it was stated that "The legislature intended to protect in the case of widows the property acquired during the subsistence of their marriage to the deceased persons. The protection benefited not just the widows but their minor children as well. It was not the legislature's intent to extend this protection and privilege to persons outside the marriage within which such property might have been acquired." (Underlining my emphasis)

In the *Chimhowa* case it was clearly spelt out that spouses and children of second marriage are only entitled to assets acquired during the second marriage. In the present case it is apparent the house in question was acquired during the subsistence of the defendant's mother's marriage to the late Kenneth Mutungura. In the absence of evidence to justify the claim for transfer of the house to herself the plaintiff shifted from her claim of transfer to claim right of life usufruct. She however, did not formally plead this shift or seek to amend pleadings and prayer such that at the end of submission of all evidence the court has to decide whether or not there was a legal basis on which the house acquired before her marriage was to be transferred to the plaintiff. The evidence adduced does not support the plaintiff's claim.

The plaintiff has not proved her claims on a balance of probabilities and as such the claim ought to fail. The plaintiff is staying in the house in question and the defendants the step daughters acknowledge her as a step mother who also sired children with their father and has been staying at the house from the time of her marriage. Given the evidence placed before me and the relationship of the parties it is my considered view that each party should bear its own costs.

Accordingly it is ordered that

- (1) The plaintiff's claim is dismissed.
- (2) Each party is to bear its costs.

Musunga & Associates, plaintiff's legal practitioners
Dondo & Partners, 1st, 2nd & 3rd defendants' legal practitioners