GRAHAM MUCHIYANI
and
CLEMENCE MUCHIYANI
and
MIRIAM MUCHIYANI
and
BARBRA MUCHIYANI
and
NOMATHEMBA MUCHIYANI
Versus
ESTATE LATE EMA MUDAWINI (represented by the Executrix Testamentary Siphathisiwe Muchiyani)
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 11 November 2016 & 3 August 2017

Opposed application

L Rufu, for the applicants
Siphathisiwe Mudawini, for the 1st respondent

CHITAKUNYE J. This is an application for the re-opening of the estate late Wilson Muchiyani Mudawini.

The applicants are some of the children of the late Wilson Muchiyani Mudawini (hereinafter referred to as the Late Wilson) who died intestate at Bulawayo on 7 February 1994.

The applicants alleged that the late Wilson was survived by two wives, namely their mother Flashia Mudawini, as the first wife and the late Ema Mudawini as the second wife.

The applicants' mother was blessed with 7 children of whom two are deceased whilst the late Ema Mudawini was blessed with six children.

At the time of his death the late Wilson, was the registered owner of an immovable property, namely, Subdivision H of Lot 11 of Montgomery under Deed of transfer number 3427/86, also known as Plot No. 11 Montgomery, Bulawayo. The late Wilson also had a communal home in Silobela, Kwekwe. This is the area where he was laid to rest upon his demise.

The applicants further alleged that after the death of their father, his two wives did not register his estate but agreed that the Bulawayo property would be for the children.

However, unbeknown to them the late Ema Mudawini registered and administered the estate of the Late Wilson and had the Bulawayo property registered in her name. The applicants stated that they only discovered this in 2015 after the late Ema's demise when they approached the Master of the High Court to register their late father's estate. Their mother had long gone to the United Kingdom on health grounds to live with one of her children and Ema had died. Only the children remained to deal with the estate of the late Wilson. When they approached the Master they were advised that their father's estate had in fact been administered to finality and that the record of the administration of the estate had been sent to the archives.

The record was retrieved from the archives at their behest. Upon a perusal of the record pertaining to the estate of the Late Wilson Muchayani Mudawini, they noted that the late Ema had misrepresented to the Master that she was the only surviving spouse of the late Wilson. They also noted that only the Children born to Ema and their late father had been listed as the children of the Late Wilson. The applicants thus alleged that both the late Ema and her first born son, Keith, gave false information that Keith was the eldest son of the late Wilson.

Due to the above false information Keith was treated as the heir to the estate of the late Wilson to the prejudice of the rightful heir. As heir, Keith purported to renounce his inheritance and nominated the late Ema as the one to inherit the Bulawayo property.

Further, as a result of this false information the Master issued restricted letters of Administration and the requisite Consent to transfer for the purpose of effecting transfer of the Bulawayo property into the names of Ema Mudawini.

Upon this discovery the applicant's launched this application seeking an order that:

1. The restricted letters of administration issued by the Master of the High Court on 21 June 2005 is set aside.
2. The Consent to Transfer being ED 16 issued by the second respondent on the 22 August 2006 be cancelled'.
3. The third respondent to reverse the Transfers done by the first respondent and the previous Deed in the name of the late Wilson Muchiyani Mudawini shall be revived.
4. The re-opening of the estate of the late Wilson Muchiyani Mudawini under DRB 1511/95
5. The appointment of a neutral executor by the second respondent.

The first respondent opposed the application.

In her opposition the first respondent contended that at the time of his death, the Late Wilson was survived by the late Ema as his only wife as he had divorced his first wife Flashia. In this regard she referred to a letter dated 28 September 1970 (Annexure B) in which the late Wilson was requesting his then employer to recognize Ema as his second wife so that she is accommodated in the police camp.

The first respondent denied that there was any misrepresentation by her late mother and Keith. She also questioned the logic of the applicants' bringing this application soon after her mother had died and not during her life time.

A careful analysis of the application betrays the first respondent's denial of any misrepresentation by the late Ema. The documents the parties attached to the application tended to confirm that indeed some material misrepresentation was made.

It is, for instance, common cause that the late Wilson was married to Flashia and had seven children with her. He then married the late Ema and had six children with her. From the dates of birth of the children from the two marriages it is clear the late Wilson had two wives at some point. The issue of whether the late Wilson had divorced his first wife or not cannot be answered by annexure B to the 1st respondent's opposing affidavit. I say so because in that letter the late Wilson was primarily seeking permission to stay with his

second wife in the police camp. In that letter he indeed referred to the first wife as a former wife as they had separated. However, separation is not the same as divorce. In the absence of proof of divorce it is unsafe to assume that the late Wilson and Flashia had divorced. They may have had matrimonial problems and separated but that is not evidence of divorce even at customary law.

It is however my view that not much turns on the status of Flashia as the applicants are not seeking that she be awarded a share. The applicants' case revolves around the conduct of the late Ema and Keith in misrepresenting to the Master that only the late Ema and her children were the surviving beneficiaries of the late Wilson. This is an aspect the first respondent could not sufficiently refute. She could not deny the existence of these other children who were much older than Keith and the fact that in terms of the Death Notice and the declaration by the Late Ema these children were not mentioned at all.

The importance of the status of the late Ema and Keith at the time the estate of the Late Wilson was registered in DRB 1511/95 is epitomized by the fact that the issue of intestacy heir was to be determined from the date of the late Wilson's death. See *Nyathi & Another* v *Ncube & Others* 2011 (2) ZLR 156 (H).

The question is: who was the rightful heir as at the time of the demise of the late Wilson?

It is pertinent to note that Statute law has made inroads into the common law of intestate succession especially with the coming into effect on 1 November 1997 of the Administration of Estates Amendment Act, No. 6 of 1997. We now have section 3 A of the Deceased Estates Succession Act [*Chapter 6:02*] which provides for the surviving spouse to inherit from his or her deceased spouse. It is important to note that before 1 November 1997 when s 3 of Act 6 of 1997 came into effect the then section 68 (1) of the Administration of Estates Act provided that:

> "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 or customs, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which they belonged."

It is trite that under both Shona and Ndebele customary law, the heir to a deceased estate was the eldest surviving son of the deceased. See *Chaumba* v *Chaumba* 2002 (2) ZLR 51 (S) and *Magaya* v *Magaya* 1999 (1) ZLR 100 (S).

In *Vareta* v *Vareta* SC 126/90 the Supreme Court held that one attribute of customary law is that generally the eldest son is the natural heir of his father's estate. Further in *Murisa* v *Murisa* 1992 (1) ZLR 167 (S), court reiterated that at customary law, a widow had no right to inherit from her husband's estate and therefore could not be appointed heir to her deceased husband's estate *ab intestatio*. The court went on to hold that the rightful heir was the deceased's eldest son.

In *casu*, the intestacy occurred on 7 February 1994 when the late Wilson died without leaving a will. This was before the promulgation of Act 6 of 1997 which brought about the new succession regime which came into effect on 1 November 1997. In terms of customary law therefore the eldest surviving son of the Late Wilson Muchiyani Mudawini was the rightful heir.

The documents filed of record show that the late Wilson was survived by about 13 children of which at least 4 were sons. The eldest of those sons was Clemence Muchiyani born on 14 July 1956, followed by Graham Muchiyani born on 19 July 1963. Keith Muchiyani born on 14 October 1967 was the third in the line of male children born to the late Wilson. He was then followed by Henry Muchiyani.

It is thus beyond doubt that at the demise of Wilson, Clemence was the eldest son and so the probable heir. In terms of the succession law then obtaining he would have been entitled to inherit the estate of the late Wilson in his personal capacity. It would appear that the Late Ema and Keith being mindful of this decided to falsify information.

The misrepresentation is reflected in the Death Notice dated 13 November 1995(annexure H). In that notice, Keith, in purporting to be the heir, listed only the names of himself, Siphathesiwe Muchiyani and Gilmour Muchiyani as the children of the late Wilson. These are some of the children born of the late Ema. None of the children born of Flashia were disclosed.

In the letter dated 6 September 2001 addressed to Advocate Nyoni, Keith Muchiyani purported to forfeit his position of heir to his mother in these terms:

> "I, Keith Muchiyani, wish to advise you that I would like to forfeit my position as heir to the estate of the late Mr W M Mudawini handing the position over to Mrs Ema Mudawini (nee Ncube) the widow of the deceased." (annexure 'I')

Armed with this false information the late Ema and Keith approached the Assistant Master's office and completed a declaration form, Form A M H C 5 (annexure K) whereby

the late Ema declared, *inter alia*, that she was the only surviving spouse of the late Wilson and that the children of the deceased were as follows:

1. Zivengwa Muchiyani;
2. Siphathesiwe Muchiyani;
3. Gilmour Mudawini ;and
4. Keith Muchiyani.

This declaration was not true. Nevertheless, as a result of the above misrepresentations, on 24 August 2005, the late Ema was issued with restricted letters of administration appointing her Executrix dative in the estate of the late Wilson Muchiyani for the sole purpose of effecting transfer of Subdivision H of Lot 11 Montgomery, Bulawayo into her name in terms of the letter of renunciation dated 6 September 2001 authored by Keith (annexure 'i' quoted above).

It is clear from the above that the late Ema and Keith knowingly and deliberately misrepresented to the assistant Master in order that they inherit the immovable property in question.

The second respondent in his report on this matter stated, *inter alia*, that:

> "A perusal of the record shows that the one party was not faithful to the family agreement and as such there is need for us to go back to the drawing board."

The above concession is well made as clearly the late Ema Mudawini and Keith Muchiyani's conduct was fraudulent and intended to deprive other potential beneficiaries of their rightful claim. In any case, as at the intestacy on 7 February 1994, the heir to the estate of the late Wilson Mudawini was Clemence Muchiyani and not Keith.

As regards the applicants' prayer it is my view that a re-opening of the estate late Wilson is necessary in spite of the passage of time since his demise. Clearly, as articulated by the applicants, the family had reached a certain understanding on the estate of the late Wilson which the late Ema and Keith clandestinely breached and had the immovable property inherited by the late Ema without the knowledge and participation of other potential beneficiaries. In the process they also lied that Keith was the eldest son of the late Wilson when they knew that that was not true. Such fraudulent conduct is a valid ground for setting aside whatever was done despite the passage of time.

The letters of administration issued to the late Ema on 21 June 2005 must be set aside so that the estate of the late Wilson is administered afresh by an independent executor

appointed by the Master. This entails the nullification of the consent to transfer that had been issued by the second respondent and the subsequent transfer of the immovable property to the late Ema.

In the circumstances of this case it would be prudent for the Master to ensure that most, if not all of the surviving children of the late Wilson and other potential beneficiaries are made aware of the decision to re-open the estate and that proper family consultation should be done in terms of the Administration of Estates Act, [*Chapter 6:01*].

Accordingly it is hereby ordered that:

1. The letters of administration issued by the Master of the High Court on 21 June 2005 appointing Ema Mudawini as Executrix Dative in the estate of the late Wilson Muchiyani Mudawini be and is hereby set aside.
2. The consent to Transfer, being ED 16, issued by the second respondent on 22 August 2006 be and is hereby cancelled
3. The third respondent be and is hereby directed to reverse the transfer done by the late Ema Mudawini back into the names of the late Wilson Muchiyani Mudawini under DRB 1511/95 in respect of a certain piece of land being Subdivision H of Lot 11 of Montgomery situate in the District of Bulawayo previously held under Deed of Transfer No. 3427/86 dated 7 November 1986.
4. The second respondent shall reconvene an edict meeting for the purposes of the appointment of an independent executor.
5. For the avoidance of doubt, the immovable property cited above shall not be considered as part of the estate of the late Ema Mudawini till such time the estate of the late Wilson Mudawini is properly wound up.
6. Each party shall bear their own costs of this application.

Dzimba Jaravaza & Associates, applicants' legal practitioners