

LILY LILIAN NYAMUSHANYA
and
MICHELE SHAMISO NYAMUSHANYA
(Represented by Lilian Nyamushanya)
and
NGONIDZAISHE L.T. NYAMUSHANYA
and
PROSPER Z NYAMUSHANYA
(Represented by Lydia Imedi)
and
DENATIOUS NYAMUSHANYA
(Represented by Tendai Nyahwai)
versus
RODGERS MATSIKIDZE N.O (cited here as in his
Capacity as Executor Dative in the Estate of the late
Phythias Nyamushanya
and
LAWRENCE NYAMUSHANYA
and
KINGSTONE NYAMUSHANYA
and
PHYTHIAS TAKUDZWA NYAMUSHANYA
and
ASTRID NYAMUSHANYA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 5 October 2017 & 18 October 2017

Opposed Matter

Mr I Mataka, for the applicants
Mr R F Nyamayemombe, for the respondents

MATANDA-MOYO J: Applicants sought the setting aside and nullification of the last will and testament of Pythias Nyamushanya executed at Mutare on 29 November 2006. First applicant sought to be declared the sole beneficiary of the matrimonial property namely Stand 1716 Umtali Township also known as No 7 Bain Drive Morningside, Mutare and an order that the other properties in the last will and testament for the late Pythias Nyamushanya be shared equally amongst all the beneficiaries named in the will including fourth and fifth respondents herein.

The first applicant submitted that she is the sole surviving spouse of the late Pythias Nyamushanya and that at the time of his death she resided at Number 7 Bain Drive Morningside. The first applicant considers the above property to be the matrimonial home.

The first applicant submitted that her late husband left a will which disinherited her of the matrimonial home. She submitted that such disinheritance was contrary to s 5 (5) (3) of the Wills Act [*Chapter 6:06*] and as such could not be allowed to stand.

Applicants also submitted that the deceased Pythias Nyamushanya in his will disinherited fourth and fifth applicants who are his biological children born out of wedlock. Applicants considered such disinheritance unjustifiable. They alleged that such disinheritance of fourth and fifth applicants was contrary to the Constitution of Zimbabwe.

Applicants alleged without specifying, that company assets were included in the will. Without specifications this court shall not deal with that allegation. There is no basis established in the founding affidavit for such allegation.

The respondents opposed the relief sought firstly on the basis that the property in question is not matrimonial property. Respondents alleged that the house was bought by the deceased together with his late wife. The first applicant contributed nothing towards the acquiring of such property and as such could not lay any claim on it. Respondents denied that the will qualifies to be set aside. The will represents the wishes of the deceased and was properly executed. Respondents however conceded that the first applicant was the surviving spouse to the deceased. The respondents urged the court to uphold the principle of freedom of testation. Respondents also submitted that the mere fact that fourth and fifth applicants could always seek maintenance from the estate, weighs in favour of upholding the will.

Section 71 (2) of the Constitution grants every person the right to deal with his property as he wishes. It provides:

“Subject to section 72 every person has a right to acquire, hold, occupy, transfer, hypothecate, lease or dispose of all forms of property either individually or in association with others.”

It is correct that the writing of a will is a type of disposal of property and in terms of the above section a testator has a right to dispose of his property in the manner he deems fit. This is what is known as the doctrine of freedom of testation which gives power to a person to make a will and testament specifying whatever heirs they choose.

Our courts generally places importance on the principle of freedom of testation and have always leaned in favour of upholding the final wishes of a testator and without compelling evidence the law presumes that a will is valid and accurately reflects the wishes of the person who wrote it.

Like any other rights this right is not absolute. Section 86 of the Constitution places limitations on these rights. Section 86 (1) provides:

“The fundamental rights and freedoms set out in this chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.”

Where women are concerned s 80 of the Constitution has placed limitation to rights where those rights infringe the rights of women. It provides, “traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.”

Section 5 (3) (a) of the Wills Act [*Chapter 6:06*] also places limitations on the right to freedom of testation. It provides:

“No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of -

- (a) any person whom the deceased was married to a share in the deceased’s estate in terms of any law governing the property rights, of married persons.”

It is common cause that the first applicant was married to the testator. The surviving spouse is generally entitled to the house or other domestic premises in which the spouses or surviving spouses as the case may be lived immediately before the person’s death. See s 3 A of

the Deceased Estates Succession Act [*Chapter 6:02*], *Linah Ndovo v Evidence Ndoro and Anor* HH 198/12 and *Freddy Chimbari N O v Simbarashe Madzima and 4 Ors* HC 418/10.

The present will by the testator had the effect of disinheriting the widow of such a matrimonial home. The will thus prejudices the rights of such widow which disinheritance is contrary to the law. It is against that very same mischief that section 3 A of the Wills Act was enacted.

The first applicant was the sole surviving spouse and was staying at the property in question at the time of her husband's death. The solution is the setting aside of that part of the will that disinherits first applicant.

The fourth and fifth respondents are children of the deceased and everyone is agreed to that fact. I know of no law which prohibits the testator from disinheriting children. See s 5 (2) of the Wills Act as read with s 71 of the Constitution. However in terms of the law before the distribution of the estate such children are entitled to maintenance from the Estate of their late father. Since the parties are agreeable to the amended distribution plan which includes the children I see no reason to temper with such agreement.

In the result I order as follows

1. The portion of the will dealing with the matrimonial home is set aside and first applicant is declared the sole beneficiary of the matrimonial property namely stand Number 1716 Umtali Township also known as No. 7 Bain Drive, Morningside, Mutare.
2. The fourth and fifth respondents are to benefit as per the distribution plan presented.

Chambati, Mataka & Makonese, applicants' legal practitioners
Mugadza, Chinzamba & Partners, for the 4th and 5th respondents' legal practitioners