ROSELAND R. SENDERAI
versus
BYRON SYMEONOGLOU (In his capacity as Executor Testamentary in Estate Late CHRISTOPHER CHIRUME TAWENGWA)

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 24 May 2017

OPPOSED MATTER

F. Siyakurima, for the plaintiff
F. Nyakatsapa, for the defendant

MUNANGATI-MANONGWA J: On 24 May 2017 I granted the applicant's application to set aside a clause in the last will of her late husband which clause deprived her a full share of the matrimonial home. In the process I awarded her the matrimonial home with each party meeting its own costs. I delivered an *ex tempore* judgment and having been requested for written reasons I hereby furnish same. Suffice to say that this matter counts towards the statistics of cases where wills are being challenged for non-compliance with relevant legislation. Whilst intestate estates have caused problems as families wrangle over inheritance due to the fact that the deceased would not have done a will stating who gets what, testate estates seem to have a fair share of problems with bequests being challenged. It is thus important for those making their wills to be conscientised on how to be able to express their wishes in a will in a manner that is compliant with the applicable legislation.

The facts of this matter are as follows: The applicant customarily married one Christopher Chirume Tawengwa in 1992 and they had one child who is surviving. The said Christopher Chirume Tawengwa (hereinafter referred to as "Mr. Tawengwa" or "the deceased" interchangeably) died in March 2016 having been married to the applicant for 24 years. Parties herein are agreed that indeed applicant is the surviving spouse.

It is common cause that Mr Tawengwa had in 1993 bought applicant an immovable property namely Stand 686 Highlands Estate Township of Lot 423, Highlands Estate of Lot 22 of Greendale also known as 80 Montgomery Road Highlands, Harare. The property is registered in applicant's name. Mr Tawengwa had also bought immovable properties for some of his children and relatives. It is not in dispute that the now deceased had suffered a condition in 1994 which left him paralyzed from the waist down and was wheelchair bound, but that did not prevent him, with assistance from the family members, to run a somewhat successful business. Mr. Tawengwa had executed a will in 2005 which was followed by a Codicil executed on the 11th March 2008. It is clause 3 of his Codicil that has led the applicant to approach this court.

Clause 3 of the codicil provides as follows:

> "I direct that all properties owned by me at the date of my death save those specifically bequeathed under the terms of this my will shall be sold and the proceeds shall form part of the residue of my estate. Likewise all shares I may own at the date of my death in companies together with any shares in my late father's business shall be sold and the proceeds added to the residue of my estate"

Apparently Stand 406 Colne Valley Township, 24 of stand 20 Colne Valley Township of Lot A of Colne Valley commonly known as 16 Willowmead Lane, Colne Valley, Chisipite, which both parties agree is in fact the matrimonial home, is not covered by any specific bequest which makes it liable to be sold and form part of the residue. Mr. Tawengwa had in his codicil gone on to provide how the residue was to be distributed between his wife the applicant (she getting 16%), his children (from different mothers), his brother, nephews, nieces and his grandsons. Aggrieved by this distribution, applicant sought to have the clause set aside and claimed that the matrimonial home be awarded to her. At the hearing the applicant raised a point *in limine* that only one respondent was properly before the court being the seventh respondent hence there was no opposition from the other respondents due to a technicality. The respondents' legal practitioner conceded to that hence only the seventh respondent remained as the recognised respondent. Suffice that Mr Symeonoglou the executor in the estate of the late Christopher Chirume Tawengwa had indicated that he was to abide by the court's ruling.

The applicant's case is that, having been married to the deceased for 24 years, it being accepted that she is a surviving spouse, having stayed in the property for 24 years till the death of her husband, and having contributed to the renovation and development of the property she is entitled by law to inherit the property and not to a share. Mr *Siyakurima* for the applicant submitted

that the provisions of clause 3 of the deceased's will were prejudicial to the applicant's rights as a surviving spouse on the basis that the will seeks to disinherit her. Further the provision is contrary to legislative provisions being s 5(3) of the Wills Act [*Chapter 6:06*] which prohibits testators from dispositions or directions that prejudice the rights of a spouse in the deceased estate. Further that s 68 of the Administration of Estates Act [*Chapter 6:01*] recognized the applicant as a spouse as she was married in terms of customary law in which case applicant was entitled in terms of s 3A of the Deceased Estates Succession Act[*Chapter 6:02*] to be awarded the matrimonial home. The applicant also sought to rely on provisions of s 26 of the Constitution of Zimbabwe Amendment (No 20) which provides that the state must take appropriate measures to ensure that there is equality of rights of spouses in marriage and at its dissolution and in the event of dissolution of marriage either through death or divorce provision should be made for the necessary protection of children and spouses.

The seventh and only respondent opposed the application on the basis that her mother was also a surviving spouse although the mother had chosen not to contest the will. She stated that the will was valid and the testator's wishes had to be followed to the letter. Most important according to her was that the applicant had not been disinherited as the deceased had before his death bought a house for the applicant which is registered in applicant's name. Mr *Nyakatsapa* for the respondent submitted that the clause complained of did not disinherit the applicant in that she got a bigger share together with her child who got a 12 % share. He argued that the deceased wanted to provide for his other children and other dependants and make sure that all his family members were taken care of and the applicant as well. As the applicant is provided for by having a house in her name and gets a share from the estate there is no prejudice envisaged by s 5(3) of the Wills Act.

Mr *Nyakatsapa* urged the court to consider that what s 3A of the Deceased Estates Succession Act refers to is a scenario where a party dies wholly or partly intestate, in that regard the provisions thereof are not applicable *in casu* as the deceased died testate. The deceased having died testate the contents of the section are not applicable and hence the applicant cannot inherit the house. That being so clause 3 of the will which is at the centre of this dispute must stand and the estate distributed as per the will so Mr *Nyakatsapa* submitted

In determining this matter the interpretation of the provisions of s 5(3) of the Wills Act is pertinent. The section reads:

> "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 to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons; or"

The section is not only specific but is peremptory. I interpret this to mean, in no circumstances does the law allow a testator expressing his final wishes in the distribution of his assets to carry out that exercise in a manner which will change, affect, reduce benefit or cause loss to spousal rights accruing to their spouse by virtue of the existing laws that govern the proprietary rights of married persons. Thus the legislature ring fenced the rights of a spouse taking away part of the freedom enjoyed by a testator in making dispositions.

As MWAYERA J aptly puts it in *Chiminya* v *Chiminya* HH272/15 at p6

> "…the right and freedom to testation cannot be viewed as absolute to the extent of eroding the proprietary rights of a legally recognized surviving spouse."

If therefore clause 3 of the deceased's will has the effect of eroding the proprietary rights of applicant then it cannot stand, it has to fall for want of compliance or falling foul of the stated provision. It is common cause that the clause complained of shares the matrimonial home between the applicant, deceased's children, grandchildren and nephews. The question to be answered becomes, "does such a distribution prejudice the surviving spouse." The answer cannot be provided before it is known what it is that a surviving spouse is entitled to at law. That the applicant is a surviving spouse has never been in dispute hence there is no need to go into the provisions of s 68(3) of the Administration of Deceased Estates Act. Although the respondent had in her opposing affidavit stated that her mother who is out of the country is also a surviving spouse she categorically stated that she is not contesting the will and in any case there is no evidence to the fact that there are two surviving spouses. Most importantly, the respondent's mother is not before the court. In that regard, the applicant remains the only surviving spouse recognized by the court. That being so, the question becomes what law governing the property rights of married persons is being referred to in s 5 of the Wills Act, that which cannot be contravened by the testator in his endeavor to distribute his wealth in his will.

Once it is accepted that the applicant is the surviving spouse, automatically certain benefits provided by the law accrue to her by virtue of that status. These benefits are entrenched, they are

as of right. With regards to immovable property s 3A of the Deceased Estates Succession Act [*Chapter 6:02*] provides as follows:

> **"3A Inheritance of matrimonial home and household effects**
> The surviving spouse of every person who, on or after the 1st November, 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate ·
> (*a*) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death; and
> (*b*) the household goods and effects which, immediately before the person's death, were used in relation to the house or domestic premises referred to in paragraph (*a*); where such house, premises, goods and effects form part of the deceased person's estate."

Both legal practitioners appearing in this matter were agreed that the mischief which the legislature intended to curb through the above provision was the rampant practice that resulted in widows being thrown out of the matrimonial home hence remaining homeless after the death of the spouse. That being so, whilst the section speaks of a person who dies intestate or partly testate I do not believe that the legislature intended to exclude those who died testate as Mr *Nyakatsapa* sought to persuade the court to believe. This is further supported by the fact that s 5(3)(a) of the Wills Act prohibits the testator from making bequests that prejudice the inheritance rights bestowed upon a spouse through other legislated provisions. The legislature could not have intended to discriminate against the spouse of a person who died testate. Clearly the essence of clause 3 of the Will in issue is to deprive applicant her right to inherit the matrimonial home as provided in s 3A above. To allow clause 3 of the deceased's Will to stand would be tantamount to defeating the legislature's intention to protect surviving spouses.

I am fortified in my finding by the fact that s 56 of the Constitution of Zimbabwe Amendment (No 20) Act 2013 (hereinafter referred to as "the Constitution") provides for equal protection and benefit of the law to all persons at the same time granting the right not to be treated in an unfairly discriminatory manner. As a surviving spouse the applicant has to benefit from the protection against disinheritance so afforded to others who are entitled to benefit from the inroads made by the amendment to the Deceased Estates Succession Act [*Chapter 6:02*]. I find that the protection advocated for spouses in Section 26 of the Constitution in the event of dissolution of a marriage through death is partly lived through the provisions of Section 3A of the Deceased Estates Succession Act [*Chapter 6:02*]. It is thus the duty of the courts to breath life into the provisions of the Constitution through interpretation of legislation in line with the spirit of the Constitution.

Regard being made to the legal provisions referred to above, clause 3 of the deceased's will cannot be sustained.

It is common cause that during his lifetime the deceased had bought the applicant a house which is duly registered in her name. I will not speculate the reason for that move. The argument by Mr *Nyakatsapa* for the respondent that the deceased provided for the applicant by leaving No 80 Montgomery Road Highlands to applicant hence she was not disinherited has no basis and cannot hold as applicant holds that property in her personal right and that has got nothing to do with the benefits that accrue to her by virtue of her new status that of a "surviving spouse." In any case deceased had also bought properties for his children during his lifetime and still bequeathed properties to them irrespective. The mention of applicant's property in the Will is neither here nor there as the deceased could not have bequeathed No 80 Montgomery Road Highlands to the applicant since it is and has always been her personal asset. I am to emphasis that, the fact that applicant owns another property in her own right does not take away her spousal rights to her husband's estate. It is those spousal rights which she is asserting and the law squarely supports the assertion of those rights in so far as a spouse is not allowed to disinherit his or her spouse especially pertaining to that which is provided for by the law as his or her entitlement from the estate.

Equally the argument by Mr *Nyakatsapa* that the applicant is going to get a bigger share of the proceeds of the matrimonial home going by the provisions of clause 3 of the will does not make the bequest right . The fact remains a testator cannot in his Will prejudice the rights of the spouse to whom he is married.

Given the aforegoing, and it being conceded that the house in question is the matrimonial home , I found it proper just and in accordance with the law that the order that applicant was seeking be granted. The legal practitioners together agreed that they will not be any prejudice if the property goes straight to the applicant as it will turn to be the same thing even if the executor were to deal with it, he is still going to deal with the property as the matrimonial home therefore going or being awarded to the applicant. This was in order.

On the issue of costs, Mr *Nyakatsapa* had convinced the court that in the exercise of its discretion it must take note of the fact that the opposition itself was not out of malice, the seventh respondent duly believed that given that she is a beneficiary to the estate, coupled with the

sentiments that the Master had expressed, she felt that she had a basis for opposing the application. I also took cognizance of the fact that the relationship between the applicant and the seventh respondent is that of mother and child and it being in the court's discretion to decide on the issue of costs, I considered that this is a case where each party should bear their own costs. Accordingly I granted the following order:

1. The disposition of immovable property namely a certain piece of land situate in the District of Salisbury called stand 406 Colne Valley Township, stand 24 Colne Valley Township of Lot 18 of Lot A of Colne Valley of Rich fontein measuring 5 847 squares meters made in terms of clause 3 of the last Will and Testament of Christopher Chirume Tawengwa be and is hereby declared null and void.
2. The applicant be and is hereby awarded the immovable property namely a certain piece of land situate in the District of Salisbury called stand 406 Colne Valley Township , stand 24 Colne Valley Township of Lot 18 of Lot A of Colne Valley of Rich fontein measuring 5 847 squares meters.
3. Each party to bear its own costs.

S Makonyere legal practitioners, appellant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners