

VIRGINIA WHACHA
versus
ISABEL RUPUNGU
and
BRIAN WHACHA (in his capacity as the Executor of the Estate late Josphat Whacha)
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 24 January 2017, 2 February 2017 and 9 November 2017

Civil Appeal

S M Hashiti, for the appellant
T R Mugabe, for the 1st respondent

CHITAKUNYE J. This is an appeal in terms of s 68J of the Administration of Estates Act [*Chapter 6:01*] against the Master's finding that the first respondent was a customary law wife to the late Josphat Whacha.

The brief background

In 1978 the late Josphat Whacha (herein after referred to as the deceased) married the appellant in terms of customary law. In 1997 their marriage was solemnised in terms of the Marriage Act [*Chapter 5:11*]. The marriage was blessed with four children.

However, before the solemnisation of the marriage between the deceased and the appellant in 1997, the deceased fell in love with the first respondent in 1986 and the two commenced an intimate relationship that resulted in the birth of Gertrude Whacha in 1989.

The facts show that the relationship between the late Josphat and the first respondent continued for many years to come and the two even acquired an immovable property in their joint names. It is apparent that despite being in a monogamous marriage as from 1997, the deceased continued the relationship with the first respondent to the time of his demise.

At his demise, as has become a headache to these courts of spouses who are never faithful to the dictates of the civil rites marriage they would have contracted, the issue of the status of the first respondent arose. The first respondent alleged that she was married to the deceased in terms of customary law whilst the appellant contended that the first respondent

was not married to the deceased. That dispute permeated to deceased's relatives as well as some agreed with the first respondent whilst others sided with the appellant.

As a consequence of the dispute an inquiry was held before the Master to determine the status of the first respondent. After hearing submissions from the two camps and perusing the documents tendered which included affidavits, correspondence and statements by relatives, the Master came to the conclusion that the first respondent was a customary law wife of the deceased. This therefore entailed that she was a beneficiary to the estate late Josphat Whacha as her marriage to the deceased was before the deceased and the appellant had upgraded their marriage to a civil rites [*Chapter 5:11*] marriage.

The determination by the Master did not go down well with the appellant hence this appeal. The grounds of appeal were couched as follows:

1. The Master erred in holding that it had been established that Isabel Rupungu was married to the deceased in 1986.
2. The Master erred in holding that the Affidavits by the deceased's blood siblings supported this fact when the affidavits stated that the deceased had married Isabel Rupungu in 1987.
3. The Master erred in holding that the "marriage list" produced by Isabel Rupungu supported her marriage to the deceased when the "marriage list" was dated 27 April 1991.
4. The Master erred in holding that the "marriage list" produced by Isabel Rupungu supported her marriage to the deceased when the amounts paid at the roora ceremony totalled less than the sum of Z\$2 000 stated in the affidavits by the deceased's blood siblings.
5. The Master erred in holding that the following were evidence of a customary marriage having taken place between the deceased and Isabel Rupungu:-
 - 5.1 That Isabel was introduced to the deceased's immediate family as his wife and customary rites were observed.
 - 5.2 That by the time the deceased is alleged to have customarily married Isabel Rupungu, the deceased had moved from Mt. Darwin to Mhondoro hence some relatives in Mt. Darwin might not know the type of life the deceased lived.
 - 5.3 That when the late Josphat Whacha died, the deceased's brothers went to inform Isabel Rupungu's family about his death [*kuridza mhere*] as per Shona custom.
 - 5.4 That the deceased's children would frequently visit each other.
 - 5.5 That there were family photos and postcards by Michael Whacha and medical aid cards.
 - 5.6 That the immovable property in Budiro had been jointly acquired by the deceased and Isabel Rupungu and was registered in their joint names.

6. The Master erred in not taking cognizance of the contents of undated letter written by Isabel Rupungu in which among other issues she did not address herself as the deceased's wife but his concubine and made specific reference to the Budiro property.
7. The Master erred in not taking cognizance that there was no proof of a customary marriage having taken place as required in the Shona custom.

As a consequence of the above grounds of appeal the appellant sought the setting aside of the Master's decision and its substitution with an order to the effect that the first respondent was not customarily married to the deceased, JOSPHAT WHACHA.

The first respondent opposed the appeal and contended that the Master did not err and the appeal should thus be dismissed with costs on a legal practitioner and client scale.

In their heads of arguments filed of record the parties maintained their respective stances. When the parties appeared for the hearing Mr *Hashiti*, for the appellant, sought to amend the Notice of Appeal so as to include an undertaking by the appellant to pay security for costs. He also sought to amend the relief sought to now read as follows:

“The appeal be and is hereby allowed with costs.

The decision of the Master of the High Court be and is hereby set aside and is substituted by an order remitting the matter to the Master for the hearing of oral evidence.”

Mr *Hashiti's* argument in this regard was premised on the fact that upon perusal of the record of proceedings, the notice of appeal and the grounds of appeal, he noted that the Master's decision was based on affidavits tendered and submissions made. Apart from the affidavits, other submissions were not on oath. He also noted that the deponents of the affidavits were not subjected to cross examination or any form of testing of the contents of the affidavits despite apparent contradictions and inconsistencies in the affidavits. It was also apparent that most of the grounds for the appeal were on the facts and not on points of law. He thus opined that no proper inquiry was conducted from which the Master could have made a proper decision.

Counsel submitted that, in as far as there were material disputes of fact, it was incompetent for the Master to rely on the untested affidavits. In this regard he referred to *Jirira v Zimcor Trustees Ltd & Anor* 2010 (1) ZLR 375 (H) wherein MAKARAU JP (as she then was) alluded to the fact that it was incompetent to rely on affidavit evidence where there are disputes of fact. Instead the proper road to take is to conduct oral proceedings, allow the leading of oral evidence, cross examination and re-examination. This is so because affidavits cannot be put on a scale to determine which one is more truthful than the other.

The same may be said of the unsworn statements that the Master considered in his decision making process. The veracity of such statements was not tested despite the contents thereof being disputed.

It was as a result of the above that Mr *Hashiti* opted to seek a remittal of the matter back to the Master for the Master to conduct a proper inquiry as envisaged under the relevant Act.

Mr *Mugabe* for the respondent, on the other hand, contended that the appeal should proceed as it is as, in his view, the Master conducted the inquiry in a proper manner and so his findings cannot be faulted. In his submissions he as much conceded that the appeal was on findings of facts as against findings of law. Counsel contended that he was opposed to the matter being remitted to the Master. He contended that the issue between the parties had in fact started as an action matter in this court whereby the first respondent was seeking a declarator confirming her status as a surviving spouse of the late Josphat Whacha. The same factual dispute the appellant now wants referred back to the Master arose. After the parties appeared for a pre-trial conference the appellant's counsel recommended that the matter was a proper case for a Master's inquiry. That recommendation was accepted hence the parties appeared before the Master.

By the time the action matter was set down for trial the Master had made his decision and this appeal had been lodged. When the action matter was set down for trial the trial judge was informed of this appeal and the trial did not take place. The first respondent's counsel later withdrew the trial matter (HC 9774/13).

In as far as this matter is on appeal counsel argued that the option available is for this court to dismiss the appeal.

Upon perusal of the record of appeal and hearing counsel we noted that the real dispute pertained to the manner in which the Master came to a conclusion of fact despite the inconsistencies in the documents before him and lack of *viva voce* evidence to clarify the inconsistencies, apparent contradictions and disputes of fact.

In this regard it is noted that in appellant's heads of arguments filed on 10 May 2016, the appellant noted that the issue before the court was based mostly on findings of facts and very little on the law applicable. A number of factual inconsistencies in the documents tendered are then pointed out.

Counsel for the first respondent acknowledged the fact as much when in his heads of arguments he alluded to the fact that the appeal was based solely on findings of fact.

The appellant's argument in seeking a remittal to the Master was basically that there was no proper inquiry upon which a proper finding of fact could have been made due to inconsistencies in the affidavits and other documents tendered without being subjected to interrogation. This was a case requiring oral evidence to be led from witnesses to clarify the apparent inconsistencies and contradictions. It was in that regard that Mr *Hashiti* suggested a remittal of the matter to the Master for a proper inquiry to be held as the best way forward to resolving the contested issue.

What was glaring to us was that there were indeed some inconsistencies or contradictions which could have been attended to had the deponents to those affidavits given oral evidence and been cross examined.

The record of proceedings shows that the Master accepted the documents tendered and there was no interrogation of the deponents or authors of the documents.

The question that arises is whether a proper inquiry was held or not? If not whether the matter should be referred to the Master for a proper inquiry or this court can simply dismiss the appeal as lacking merit.

It is trite that an inquiry is basically an investigation to establish the truth on a particular issue. In *casu*, it is common cause that the main issue before the Master was whether the first respondent had been customary married to the late Josphat. In this regard members of the Whacha family were not in agreement hence the need for evidence to be led.

In *Chivise v Dimbwi* 2004 (1) ZLR 12 (H) MAKARAU J (as she then was) held that:

“... the validity or otherwise of a customary marriage is not tested by how long it has endured but by whether certain formalities and rituals at customary law have been performed. ...”

Thus where there is alleged an unregistered customary law marriage an officer seized with the matter has to ascertain whether the customary requirements for a valid customary law marriage were met. One of the key elements to a customary law marriage is the issue of *roora*.

In *casu*, those alleging that the first respondent was customarily married to the deceased deposed to affidavits stating that the marriage took place in 1987. However a marriage *roora* list tendered in support of that assertion was dated 27 April 1991. There was no clarification on the inconsistency between the year the marriage took place and the year for the marriage list. In any case that marriage list does not state that it was in respect of the marriage of the first respondent to Josphat Whacha. It is merely titled “Roora for Isabel.”

Equally whilst some stated in their affidavits that a sum of Z\$2000.00 was paid no clarification was made as to why the items indicated on the marriage list as ‘paid’ total only

Z\$480-00. Whilst the first respondent's counsel termed such anomalies as petty, that is not so. The ceremony of payment of Roora is a crucial indicator of whether there is a marriage or not. It would have been prudent for the witnesses to clarify what they meant by saying that the marriage took place in 1987 when their roora list is for 1991. Two dates said to be legible on the original roora list are 27 April 1991 (at the top left hand corner) and 30 August 1991 (at the bottom left hand corner) and no explanation was proffered for the two dates.

It is my view that the Master ought to have called for proper evidence to be led. The deponents of the affidavits should have been called to give oral sworn testimony after which they would be cross examined on the apparent inconsistencies in their depositions and to also answer on the disputed aspects of their evidence.

'The Whacha Family statement' is another document whose evidential value was not clear. This statement was not deposed to as an affidavit but somehow a commissioner of oaths endorsed his signature and stamp. This statement is signed by three members of the Whacha family. One is not sure who amongst the persons cited gave that statement or purported to be executing it before a commissioner of oaths. In my view this statement ought to have been put under scrutiny in cross examination.

There is also an acknowledgement by the Master that extended family members of the Whacha family were the ones mostly not acknowledging the first respondents' marriage, yet these members were not made to give sworn testimony. The question that arises is: how did the Master rank the commissioned affidavits *vis -a -vis* the unsworn submissions made on behalf of those not for the marriage?

Upon our inquiry with counsel for the first respondent, as he had participated in the proceedings before the Master, he conceded that the proceedings before the Master were indeed conducted in an informal manner. He further stated that the record of proceedings before this court was not an accurate reflection of what actually happened. In response to court's questions he now alleged that the witnesses had in fact been cross examined though they had not taken the oath. His assertion in this regard is however not supported by the sequence of recordings as reflected in the record of proceedings.

What is evident from the record of proceedings is that the Master relied on documents tendered and submissions made by counsel. In my view the nature of the dispute of facts required a formal and not informal inquiry. It was evident that the issue of the validity or otherwise of the customary law marriage was viciously contested within the Whacha family itself and any resolution thereof needed the giving of *viva voce* evidence from which the

presiding officer would then make a proper finding after considering the credibility of those who would have testified on oath or affirmed before him/her. To simply rely on affidavits and unsworn statements was, in the circumstances, improper. The dispute of facts involved could not be resolved by simply relying on the affidavits and unsworn statements of the contestants.

In *Jirira v Zimcor Trustees Ltd & Anor (supra)* at 378E-F MAKARAU J aptly noted that where the nature of the dispute is such that it cannot be proved on paper and by affidavit:-

“It requires the parties to give oral evidence and to be examined on their evidence to find out where the truth lies. It is a case, in my view, that will ultimately turn on the credibility of the witnesses and affidavits have no colour save the colour of the paper on which they are typed. There is no proven way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other.”

In *casu*, there is no way of ascertaining the veracity of the affidavits and statements filed of record or even of resolving inconsistencies and contradictions within the documents themselves. This is a matter that clearly cried out for oral evidence with the witnesses being cross examined on their testimony.

I am of the view that when the matter was referred to the Master the intention was that a proper inquiry be conducted with the parties giving oral evidence and being subjected to rigorous cross examination such that the credibility of each witness is determined.

The first respondent's counsel submitted that the issue of the procedure adopted by the Master should have been brought as an application for review and not an appeal. Indeed where the challenge is based on procedural irregularities the expected procedure is to seek a review.

It is, however, my view that the circumstances of this case are such that a dismissal of the appeal on the basis of the wrong procedure will not do justice between the parties. There is need for the parties to revisit the process and for the Master to conduct a proper inquiry.

Further, as the first respondent had already withdrawn her court action in HC 9774/13 before this court; a dismissal of the appeal would not resolve the factual dispute between the parties. The factual dispute must be resolved so that the estate late Josphat is properly wound up.

I thus find that there is merit in the request for the matter to be referred to the Master for a proper inquiry to be conducted preferably by a different officer.

Accordingly the appeal will be allowed to the extent that it allows the remittal of the matter to the Master for a proper inquiry to be conducted.

In the result it is ordered that:

1. The appeal be and is hereby allowed with each party to bear their own costs.

2. The decision by the Master be and is hereby set aside and the matter is referred back to the Master for a proper inquiry to be conducted.
3. Each party will bear their own costs.

F G Gijima and Associates, appellant's legal practitioners
Nyakutombwa Mugabe legal Counsel, 1st respondent's legal practitioners