

ANESU GRACIOUS CHIDUZA  
versus  
THE MASTER OF THE HIGH COURT  
and  
NYIKA ZAMBE N.O  
(In his capacity as executor of the  
Estate Late Sherperd Gwasira DR 1429/20)

HIGH COURT OF ZIMBABWE  
MUCHAWA & DEME JJ  
HARARE; 17 January & 9 February 2023

### **Civil Appeal**

Mr *O T Gasva*, for the appellant  
No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

**MUCHAWA J:** This is an appeal against a determination of the Master of the High Court of 20 January 2022 which is made in terms of s 68 J of the Administration of Estates Act, [Chapter 6:01] as read with r 95 of the High Court Rules, 2021.

The late Shepherd Gwasira died intestate on 29 August 2020 and a dispute arose after it had been submitted that he was survived by five wives. One of the spouses had obtained a confirmation of spouse ship from the Mutare Magistrates Court which was set aside by the High Court and this necessitated an inquiry to be held in terms of s 68 G of the Administration of Estates Act.

The inquiry found that the late Shepherd Gwasira had a registered customary marriage with one Sheilla Gwasira. It was also undisputed that he had had an unregistered customary law union with the late Nedy Mutingondo. An Ms Sophia Njanika was said to have been married to the late Shepherd Gwasira but they had divorced by the time of his death. The status of two alleged marriages was under inquiry. One was that of Tokozani Mazvimbakupa and it was found that this met the requirements of a customary law union and she was recognized as a spouse. It was only the appellant's request to be considered as a surviving spouse which was said to have no semblance of a customary law marriage. This is the source of grief for the appellant.

There are two grounds of appeal lodged before us as follows;

1. The Master of the High Court grossly erred in finding that there is no semblance of a customary marriage between appellant and the deceased Sherpherd Gwasira and disregard (sic) evidence furnished to his office which established that the appellant was in an unregistered customary union with the late Shepherd Gwasira.
2. The Master of High Court grossly erred in finding that the appellant was not a surviving spouse of the late Shepherd Gwasira despite it having being established factual (sic) and by customary law requirements that indeed an unregistered customary union existed between the appellant and the late Shepherd Gwasira.

It is prayed that upon the success of the appeal, either that, the whole judgment of the court *a quo* be set aside and the matter be remitted to the first respondent for a hearing de novo before a different Assistant Master. Alternatively, the appellant wants the decision appealed against to be set aside and that this be substituted with a finding that she qualifies as a surviving spouse and second respondent pays costs on an attorney client scale.

Though the respondents did not oppose this appeal, the appellant's counsel was asked to motivate the court for the granting of the appeal. Mr *Gasva* submitted that though there are two grounds of appeal, they deal with the same issue. In essence that appellant is alleging that there was an error as the first respondent did not consider the evidence provided by the appellant which proved that an unregistered customary law union existed. The determination is alleged to be silent on why such evidence was not considered sufficient. The evidence relied on are affidavits from five people who confirm having participated at the marriage ceremony. In particular, the first respondent is said not to have commented on the affidavit on record p 52 from the "*munyai*" or go between. Other affidavits appear on pp 35, 36, 37 and 38 of record. The appellant's write up on pp 49 to 51 which is said to detail how she stayed with the deceased as husband and wife was said to have never been disputed. Mr *Gasva* even went as far as saying that the second respondent had acknowledged knowing about the appellant and that she was staying with their late brother at the farm and she had been introduced to them. When asked to show the court such confirmation and when his attention was drawn to p 6 where the second respondent had said they were only cohabiting, he withdrew his submission.

As to the applicable law, Mr *Gasva* referred the court to the cases of *Kurambakuwa v Mabaya* SC 158/87 and *Chapendama v Chapendama* 1998 (2) ZLR 18. It was argued that since the bride price had been paid and appellant's uncle, one Mapira was the negotiator and she had been living with the deceased in a permanent, stable and intimate relationship for close to six years, a customary law union did exist. The rest of the submissions in the heads of argument set out the rights of a surviving spouse in such a case as this one. That, however is not the dispute. The issue to decide is whether the appellant provided adequate evidence to prove the existence of a customary law union between her and the late Shepherd Gwasira.

The case of *Hosho v Hasisi* HH 491/15 is a more recent case and it dealt extensively with the subject before us. In that case Honourable TSANGA J had this to say;

“In terms of the relevant law impacting on widows, Section 68 (3) of the Administration of Estates Act [*Chapter 6:01*] recognises a union contracted according to customary rites notwithstanding that it has not been formally solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]. As such, the absence of a marriage certificate is not at all fatal to the recognition of such a union when it comes to inheritance. The law is very clear in its protection of widows not just in the Administration of Estates Act but in the new Constitution<sup>1</sup> as well as well as other significant human rights instruments we have ratified.”

She continues as follows;

“However, where a party relies on an unregistered customary union, central to asserting widowhood and claiming the protection accorded widows under relevant legislation, is proof that such customary union indeed existed. The subject matter of a customary marriage is clearly one to which customary law applies. I say ‘marriage’ for while it is often referred to as a customary law union to distinguish it from a registered customary marriage, in reality at least customarily, it is for all intents and purposes, a marriage.

For a marriage to qualify as a customary marriage, certain cultural practices which involve the payment of *roora/lobola* are attendant upon its formation. Payment consists of a lump some payment of money (called *rutsambo* among the shona) as well as cattle though increasingly the money equivalent is paid in today's society. Its payment is part of the culture for the majority of the citizens who adhere to customary ways of marrying.”

It is not just proof of payment but also the process which has to be considered;

“The process of paying *roora/lobola* and the ceremony itself involves key representatives from both families, as well as other people who can attest to process having taken place. Furthermore, in today's reality there is also often documentary evidence in the form of a book of record kept by the receiving and paying families respectively of what has been paid and what remains owing.”

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<sup>1</sup> Constitution of Zimbabwe Amendment ( No.20) Act 2013

Though the appellant claims that *lobola* was paid for her, her evidence suffers the major gap of having none of the deceased's key representatives having been present at the ceremony. All the affidavits are from her relatives. On p 35 she tries to explain why there was no representative from the deceased's family by saying that it was because he had had four wives already before her and they wanted to avoid conflict and disruptions and division amongst the brothers who were already divided amongst the other wives. She however says that soon after the marriage ceremony she was introduced to all the relatives and other wives when they would meet in hospital. Something does not add up here. This was not a man with one wife taking on a second one. He already had four others. So why would there be any conflict? And why was her marriage ceremony only, made low key yet the late had involved his relatives in all the other four marriage ceremonies? And why would she be later introduced to all relatives if there was an attempt to avoid conflict?

The second respondent gave evidence at the inquiry that he had called the appellant and asked her if she had been married to the deceased and she said that she had not. Simbai Gwasira, a brother to the deceased gave evidence he had been informed by the deceased that the appellant was his girlfriend and she was allowed to stay on the farm to enable her to complete her piggery project before being let go and unfortunately he had passed on before this had happened. He refuted the claim that any of the relatives had been introduced to the appellant as a wife of the deceased and stated that none of the relatives had participated at the alleged marriage ceremony.

Whereas all the other families of the other four wives had received the customary "*kuridza mhere*" token which is paid to the in-laws to announce the death of their son in law, none had been paid to the appellant's family.

The affidavit on p 36 of record is that of the appellant's brother who confirms that *lobola* was paid for the appellant on 30 April 2016. He explains why the documentary evidence on p 32 which is a confirmation of the payment of *lobola* by Shepherd Gwasira for the appellant was only signed by appellant's side of the family. It is said that this was purely for their own documentation. The affidavit on p 37 is from the appellant's aunt whilst that on p 38 is from her sister. The three are co signatories to the *lobola* lion p 32. If this record was just for their own documentation, why would all three sign in confirmation? The record of payment unfortunately seems to emanate from the appellant's family only and they are the ones who kept it too.

All the appellant's write up which is on pp 49 to 51 shows clearly is that the appellant was living with the deceased and he generously supported her financially and in educating her and making sure she got relevant skills in piggery and financed the start- up of the project. She also got support to start a poultry project. She even enrolled for a degree and the deceased funded all her studies. He is said to have generously supported the appellant's relatives too. Such evidence does not assist the appellant to overcome the hurdle of proving that indeed an unregistered customary law union existed between them. All it does is show that he generously and with foresight, set her up to be independent even when he was not around.

At the inquiry held on 24 November 2021 there were about fourteen relatives of the deceased and none of them spoke up in support of the appellant's claim of being a surviving spouse and that she had been introduced to any of them as a wife as she alleges. Even the uncle or "cousin brother" to the deceased whom she claims to have been staying with at the farm did not speak up in her favour.

Payment of *roora /lobola* remains the most cogent and valued proof and indicator of a customary union/marriage particularly when it has not been formally registered. In this case the appellant's evidence is less than satisfactory to prove that she is indeed a surviving spouse of the deceased for all the gaps I have pointed out. There is therefore no merit in this appeal. The appeal was not opposed and there is no need for an order of costs.

Accordingly this appeal be and is hereby dismissed with no order as to costs.

**MUCHAWA J:**-----

**DEME J:** agrees-----

*Mbano Gasva & Partners, appellant's legal practitioners*