

TOKOZANI MAZVIMBAKUPA (DHLIWAYO)
versus
THE MASTER OF THE HIGH COURT
and
ZAMBE NYIKA N.O.
(In his capacity as Executor Dative of Estate Late Shepherd Gwasira)
and
SHIELA GWASIRA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 20 February & 27 March 2024

Opposed Matter

Mr *T S Musundire*, for the applicant
No appearance for first respondent
Ms *T Nyamidzi*, for the second respondent
Mr *T W Nyamakura*, for the third respondent

MUCHAWA J: This is a court application for a declaratory order in which the following order is sought:

IT IS ORDERED THAT:

1. The application for a declaratory order be and is hereby granted.
2. The applicant be and is hereby declared to have been married customarily to Shepherd Gwasira, and that she be declared a surviving spouse to the Estate Late Shepherd Gwasira.
3. The Late Shepherd Gwasira/deceased's estate is declared to be governed by customary law.
4. The third respondent be and is hereby ordered to pay costs of suit.

The first respondent, the Master of the High Court, is cited in his official capacity as the one responsible for administration of deceased estates.

The second respondent is cited in his capacity as executor of the estate of the late Shepherd Gwasira.

The third respondent is cited in her capacity as a surviving spouse of the late Shepherd Gwasira.

The applicant's submissions

The applicant, in support of her claim, submitted that she is a surviving spouse of the late Shepherd Gwasira as she was married customarily in a ceremony held at Number 27 Makazhi Road, Karoi on 6 October 2007. One Simbayi Cogen Gwasira, a brother to the deceased is alleged to have been present at this ceremony and his supporting affidavit is attached as Annexure "A".

Further a supporting affidavit of the applicant's uncle, one Willard Mahlaba is also attached confirming that the customary marriage ceremony did happen as alleged. It appears as Annexure "B". A *roora* list is attached as Annexure "C" confirming the same position.

The applicant avers that the deceased went on to give her House Number 31 Helena Marlborough, Harare in which she resides as he wanted to avoid animosity between the applicant and the third respondent. Annexure "QE" an interpleader notice and claimant's founding affidavit (the deceased) is attached thereto as establishing this position.

A child, Rudo Evia Gwasira was born to the applicant and the deceased and her birth certificate is attached as Annexure "D". Several wedding pictures of family members are attached as Annexure "E" series as proof that the applicant and her daughter were acknowledged and embraced as family and in particular that she was a spouse.

Additionally a further supporting affidavit from the deceased's son, Munyaradzi Gwasira is attached as Annexure "F", which is alleged to confirm that the applicant was a spouse to the deceased.

A judgment in divorce proceedings between the deceased and one Sophia Gwasira is attached as Annexure "G" and is said to show that the deceased was a polygamist and she was one of the wives.

It was contended that the applicant has a direct interest in the estate of the late Shepherd Gwasira as she was customarily married to him. Her interest is said to be real, in the circumstances.

The case of *Hosho v Hasisi* HH 491/15 was relied on to argue that there is adequate proof in the applicant's evidence to show that the process of *roora* payment involving key representatives of both families did occur and such representatives have attested to the process having occurred as outlined above and appearing in annexures attached thereto.

The Constitution of Zimbabwe, 2013 in s 26(a) is relied on to argue for the necessary protection of any children and spouses of a deceased person as well as s 68(3) of the

Administration of Estates Act [*Chapter 6:01*] which recognised a union contracted in terms of customary law rites.

The applicant therefore prays for the granting of the draft order set out above.

Second Respondent's Submissions

The second respondent's counsel indicated that the second respondent has no vested interest and would abide by the ruling of the court.

Third Respondent's Submissions

Mr Nyamakura opened his submissions by pointing out that this matter is replete with disputes of fact. For their resolution the court was urged to follow the case of *Moyo v Zvoma N.O. & Anor* 2011 (1) ZLR 395 in which the court adopted the Plascon Evans rule and held that disputes of fact must be resolved against the party who adopted the application procedure fully aware of the attendant disputes of fact. The final order, it was argued, could only be granted in application proceedings if the facts alleged by the applicant together with the admitted facts, justify it. See also *Savanhu v Marere N.O.* 2009 (1) ZLR 320 @ 324.

The authenticity of the *roora* list, Annexure "C" is questioned. It is questioned who authored it and whether listed amounts were indeed paid. Further, it is said not to accord with what is generally paid in Zimbabwe for *roora*. The applicant is said not to have dealt with this in her answering affidavit but instead admitted that in proceedings under HC 4789/23 she did not attach this list and she therefore did not have adequate proof in support of her claim. This current list is alleged to have been hastily prepared therefore.

The supporting affidavit of Simbai Cogen Gwasira is attacked by pointing out that in recorded minutes of meetings held by the second respondent, he had participated and professed ignorance of the alleged marriage. Such minutes appear in HC 910/22 and both the applicant and Simbai Cogen Gwasira had not objected to same. A letter had even been written by the second respondent to applicant's erstwhile legal practitioners pointing out the conflicting statements.

Applicant is also alleged to have sought to rely on an affidavit by one Brighton Gwasira before the magistrates court and in HH 94/23 which affidavit has been omitted in this case. The said Brighton has distanced himself from that affidavit and it turns out that he was only 17 years old at the time and is a distant relative.

One Ephraim Gwasira and Samuel Kapfumvuti who were used by the deceased consistently as "vanyai" in his marriages to the third respondent, Neddy Mutingondo and Sophia Njanike have professed ignorance of the applicant's alleged marriage.

The third respondent has attached as Annexures “F1” to “F3” affidavits by Ephraim Gwasira and Samuel Kapfumvuti and Annexure “G1” an affidavit by Zambe Nyika, deceased’s blood brother. They all confess ignorance of the existence of this marriage.

It is pointed out too that earlier on, the applicant approached the Mutare magistrates’ court without notifying all interested parties and clandestinely obtained confirmation on her status as surviving spouse. This was set aside under HH 552/21. Interestingly the applicant has not brought the same evidence she had placed before the magistrates court, in particular affidavits of Omer Gwasira and Leven Gwasira. It is argued that this might mean that the two knew nothing of the alleged marriage.

House Number 31 Helena Marlborough is said to be registered in the name of the deceased and not in the applicant’s name. She is said to have been allowed to stay there so that the child born to the affair would be in comfortable accommodation as the deceased loved all his children equally.

The third respondent denies that the child Rudo Eva Gwasira was born to the applicant and her deceased husband during the alleged customary marriage. This is so because the child who was born on 27 January 2006 prior to the alleged *roora* ceremony which happened on 6 October 2007. It also pointed out that at that time of the child’s birth, the applicant was still married to her now ex-husband as per the marriage certificate attached as Annexure “J”.

The pictures of family events are explained away as the deceased’s attempt to integrate the child into the Gwasira Family. The applicant is said to never have been introduced to the family as a wife of the deceased and even the deceased’s sisters have deposed to affidavits professing ignorance of the applicant’s marriage.

The fact that the applicant was provided with accommodation is said not to point to the existence of any marriage as this was the deceased’s manner of dealing with his girlfriends who included one Gracious Chiduzza whose claim to being a spouse was dismissed by the court in a judgment HH 94/23. She too had been provided with accommodation by the deceased.

The court was urged to cautiously deal with the affidavit of Munyaradzi Gwasira who firstly gives the date of the marriage as 2006 yet the applicant says it was October 2007. Munyaradzai who was born on 19 March 1991 is said to have been only 15 years old in 2006. As a minor, it is averred that he could not have been aware that the applicant was married.

Munyaradzi who was legally represented before the first respondent and in the subsequent application for review cannot, it is argued, successfully say that he made his first

statement under oath due to duress in which he professed ignorance of the existence of the marriage. See Annexure “K”.

The attempt by the applicant to rely on a divorce judgment between the deceased and one Sophia Njanike is said to be unhelpful to the applicant as it relates to proceedings not before the court. The third respondent states that the deceased lied, as he was used to, that he had 5 wives. The applicant is challenged to list the 5 wives as the deceased is no longer here to speak for himself. The judgment makes reference to one Neddy Mutingondo and the applicant as “both alleged wives.” They were in fact not found to be wives. It was just an allegation.

The affidavit of the deceased in the interpleader proceedings is said to support the assertion that the applicant was a mere girlfriend and not a wife as the deceased did not boldly state that she was his wife. He only said that he frequently visits the applicant and puts up for a night or two.

It was further argued that the third respondent does acknowledge the existence of other wives such as Sophia Njanike and Neddy Mutingondo and is therefore not malicious.

It was prayed that the application be dismissed.

The Law

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 ritucus at customary law have been performed.”

In *Hosho v Hasisi* HH 491/15 the position was set out more explicitly as follows:

“..... 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.

.....certain cultural practices which involve the payment of *lobola* are attendant upon its formulation. Payment consists of lump sum payment of money (rutsambo among the Shona) as well as cattle though increasingly the money equivalent is paid in today’s society.....

..... the process of paying *lobola* and the ceremony itself involves key representatives from both families, as well as other people who can attest to the 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.”

In *casu* there is indeed a *roora* list indicating that it was for the marriage of the applicant and the deceased. It does not however show what was paid and what was outstanding. The list, as conceded, omits certain cultural practices which are attendant, such as *matekenya ndebvu*, *chiuchiro* and *ndiro*, amongst other things.

The question of the key representatives from the deceased' family is not properly resolved on the papers. As shown in the supporting affidavits of the deceased's close relatives, such as his sisters and his usual *vanyai*, they were not part of this delegation. Applicant relies on an affidavit by one Simbayi C Gwasira who claims to have been present at this marriage. This runs contrary to his averments in a meeting before the second respondent wherein he professed ignorance of the existence of the marriage.

In the interpleader proceedings, the deceased in relation to the applicant who was the judgment debtor says:

“All the listed attached property however is not the property of the judgment debtor. I can state and confirm that I bought all of that property. I have to emphasise that the judgment debtor and I never had a wedding and as such she never got any gifts in the form of household property from anyone.”

He does not claim to have customarily married the applicant. This is how he characterises their relationship:

“I have a child with Tokozani Mazvimbakupa (judgment debtor) with whom I fell in love after she divorced her previous husband in 2005.”

He goes further to say she was accommodated at 31 Helena Marlborough, Harare to live with her three children sometime in 2006 so they could have a better life and a descent (sic) home environment.

In the minutes of the meeting before the second respondent Simbayi Cogen Gwasira is recorded as Mambo Makoni. On p 54 of record, he expressly stated that one Luka Mavura was the witness to the applicant's marriage and negotiated *lobola* payment. Surprisingly this Luka Mavura is not mentioned by the applicant at all.

In the next meeting before the second respondent, it is recorded that Luka Mavura had refused that he witnessed the proceedings of applicant's customary marriage to the deceased. It is again Simbayi Cogen Gwasira who suggested that one Ephraim Gwasira and Samuel Kapfumvuti be consulted on this issue. These two refuted any knowledge of, or participation in the alleged marriage.

Interestingly it is at the meeting of 17 February 2021 that the executor noted that applicant had submitted a divorce order from her previous marriage to Mazvimbakupa. The question exercising my mind is whether she was divorced in October 2007 when *roora* was allegedly paid for her by the deceased. Was she qualified to be married under an unregistered customary law marriage?

Though the deceased said that he fell in love with her when she divorced her husband, he seems to have been labouring under the misconception that separation and divorce are the same. They are not. See *Sakutombo v Master of the High Court & Ors* HH 5/22.

In this case, the applicant's evidentiary facts on the customary law marriage are less than satisfactory. I agree that the evidence of the applicant as measured against that of the third respondent, and my own analysis point to huge disputes of fact. In *Jirira v Zimcor Trustees Ltd & Anor* 2010 (1) ZLR 375 (H), MAKARAU JP (as she then was) alluded to the fact that it is incompetent to rely on affidavit evidence where there are disputes of fact. A party should take the road of oral proceedings in order to allow the leading of oral evidence, cross examination and re-examination as affidavits cannot be put on a scale to determine which one is more truthful.

I am proceeding therefore as set out in the cases pointed to by Mr *Nyamakura* in *Moyo v Zvoma N.O. & Anor* (supra) and *Savanhu v Marere N.O.* (supra). In the latter case it was held as follows:

“The appellant chose to proceed by way of a court application to claim the order of specific performance against the first respondent. As the proceedings were by way of court application and there were disputes of fact, the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order – *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635B.

As the court *a quo* was not satisfied as to the inherent credibility of the factual averments in the appellant's affidavit, and the first respondent's denial was not found to have been patently false, it correctly held that it could not grant the order sought.”

In *casu* I am not satisfied as to the inherent credibility of the factual averments in the appellant's founding affidavit and the supporting affidavits and other documentary evidence she has attached. I also find that the third respondent's denial that the applicant was not a wife but only a girlfriend is not patently false.

In the circumstances I cannot grant the relief sought by the applicant.

Accordingly the application be and is hereby dismissed with costs.

Warara & Associates, applicant's legal practitioners
Mvingi & Mugadza Legal Practitioners, second respondent's legal practitioners
Bere Brothers, third respondent's legal practitioners