DANIEL TIMM
and
TRACY WALTON (nee TIMM)
and
MICHEAL TIMM
versus
IAN EDWARDS
(In his capacity as Executor Testamentary of the Estate of the Late Rodney Jamieson Timm)
and
HEILA MAGADELINA STRYDOM
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE; 12 June 2023 & 27 March 2024

Family Law Court
Opposed Application

D Ochieng, for the applicants
R Mutanga, for first respondent
B. M Machanzi, for second respondent
No appearance for third respondent

WAMAMBO J: In this opposed matter applicant seeks an order couched as follows:

1. The application for a declaratory order be and is hereby granted.
2. The last will of the late Rodney Jamieson Timm executed on 30 June 2015 be and is hereby declared invalid and of no force and effect.
3. The letters of Administration issued by the third respondent to the first respondent on 26 October 2021 be and are hereby revoked and annulled.
4. All acts carried out by the first respondent with respect to the administration of the estate of the late Rodney Jamieson Timm, pursuant to the last will dated 30 June 2015 be and are hereby declared invalid and of no force and effect.
5. The first respondent shall pay applicant's costs of suit on the ordinary scale.

At the center of this dispute is a will, executed by Rodney Jamieson Timm (testator) who died on 10 August 2021. On 30 March 1972 Rodney Jamieson Timm got married to Maryna Sophia Strydom in the then Salisbury (now Harare) in terms of the Marriage Act, 1964. The couple was blessed with three children who are the applicants in this matter. On 30 June 2015 the testator executed a will wherein he nominated first respondent as the executor testamentary of his estate. He also bequeathed the majority of his assets to the second respondent. Maryna Timm the applicants' mother died in New Zealand on 21 April 2019. On 27 December 2019 the testator got married to the second respondent in terms of the Marriage Act [*Chapter 5:11*].

The testator's will was lodged with the third respondent and letters of administration were issued appointing first respondent as executor testamentary to the testator's estate. The estate was registered under DR no 4076/21.

The resolution of this matter lies with the interpretation of the Wills Act [*Chapter 6:06*], in particular section 16.

Applicant's case

The will of the testator was invalidated by his subsequent marriage to second respondent. Section 14 of the High Court Act [*Chapter 6:06*] grants the High Court power to enquire into and determine any existing, future or contingent right or obligation upon application by an interested person. Section 30(1) of the Administration of Estates Act [*Chapter 6:06*] provides *inter alia* that letters of administration granted to a person as testamentary executor are subject to revocation or annulment upon proof to the satisfaction of the High Court that the will is null.

More particularly and emphatically reference was made to section 16 of the Wills Act [*Chapter 6:06*] which reads as follows:

> "16 Effect of testator's subsequent marriage on will
>
> (1) Subject to this section, a will shall become void upon the subsequent marriage of the testator.
> (2) A joint and mutual will shall not become void upon the subsequent marriage of a surviving testator and
> (a) to the extent that the will effects a massing of the estate or any property of the joint testators, and
> (b) if the surviving spouse has accepted some benefit under the will before his subsequent marriage.
> (3) A will made by a man who is married under a system permitting polygamy shall not become void if while still so married to one or more wives he marries another wife.
> (4) Where it appears from a will that when it was made the testator was expecting to be married and that he intended that: -

(a) the will should not become void upon the expected marriage, the will shall not become void upon that marriage.
(b) a particular disposition or provision in the will should not become void upon the marriage: -
    (i) that disposition or provision shall take effect notwithstanding the marriage and
    (ii) any other disposition or provision in the will shall take effect also unless it appears that the testator intended the disposition or provision to become void upon the marriage

(5) A will shall not become void upon the subsequent marriage of the testator to the extent that the will disposes of property which would not have gone to the spouse or issue in the subsequent marriage if the testator had died intestate."

Mr *Ochieng* for the applicants made reference to the decided cases of Jane *Mapenzauswa* v *Tayengwa Dugmore Muskwe & 3 Others* HH 48/08, *Macfoy* v *United Africa Company Limited* 1961 (3) AU ER 1169 (PC) and *Katirawu* v *Katirawu & Others* HH 58/07.

Drawing from principles enunciated in the above cases Mr Ochieng submitted the following: -

The applicants have a direct and substantial interest in the validity or otherwise of the will and this is not in dispute. At the time the testator executed his will he was still married to Maryna Timm and their marriage was terminated by the death of Maryna Timm on 21 April 2019. The subsequent marriage between the testator and second respondent was entered into about four years after the testator executed his will and about eight months after the death of Maryna, his first wife.

There is no express provision in the will to the effect that the testator expected to be married to the second respondent and that he intended his will not to become void upon the expected marriage. There is also no express wording in the will that the appointment of first respondent as executor testamentary would not become void upon the testator's subsequent marriage.

The testator in the will does not refer to the second respondent as his wife or surviving spouse. He also does not refer to second respondent as his daughter but refers to her as his niece. The testator was already married to Maryna and was not contemplating a marriage to second respondent. It follows that the testator only considered marriage to second respondent after the death of Maryna.

First respondent's case

The testator's will dated 30 June 2015 is valid at law and should not be set aside. The subsequent marriage between the testator and the second respondent did not invalidate the said will and his (first respondent's) appointment as executor is valid at law and should not be set

aside. The will conforms to the requirements of a will as set out in section 8 of the Wills Act [*Chapter 6:06*]. The first respondent argued that the will was not invalidated by the subsequent marriage for the following reasons:

At the time of execution of the will the testator and second respondent had stayed together as man and wife for twenty years.

The relationship between the two reflected that the testator intended to marry second respondent.

The majority of his assets were bequeathed to second respondent reflecting that he expected to marry her.

The testator had separated from Maryna Timm who was now based in New Zealand.

Within 8 months of Maryna Timm's death the testator married second respondent reflecting that the testator had no intentions save to marry the second respondent.

First respondent made reference to the cases of *Miriam Dziva Elias Dikinya* v *Precious Chakasikwa & 4 Others* HH 242/18, *Eddison Mudiwa Zvobgo* v *Cecil Madondo NO* HH 96/2000, *The Master* v *Moyo & Others* 2009 (1) ZLR 119 H, *Van Niekerk NO* v *Master of the High Court* 1996 (2) ZLR 105 (5) and the *Katirawu* case cited by the applicant and referred to earlier in this judgment.

Second respondent's case

While second respondent's case is also mounted upon an interpretation of section 16 of the Wills Act, she differs with the applicant on how it should be interpreted.

Second respondent related to the guidance offered in interpreting section 16 (1) of the Wills Act through *Savanhu* v *Heirs of Savanhu* 1991 (2) ZLR 19 (SC).

Mr Machanzi for second respondent was of the firm view that section 16 (1) of the Wills Act is meant to provide for the spouse in the subsequent marriage. He submitted that the subsequent spouse is included in the will so the will remains valid.

In the mind of the testator, second respondent was his wife a fact known to Maryna Timm. The subsequent marriage between the testator and second respondent confirms that the testator at all material times including at the time of executing the will had every intention to marry second respondent.

The testator lived with the second respondent for twenty years, meaning in their own minds they were married.

Including second respondent in his will means the testator intended to marry her.

In his will the testator never addressed Maryna as his wife.

Reference was also made to section 71 (2) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 and section 5(1) (a) of the Wills Act [*Chapter 6:06*] which deal with the rights of a person to *inter alia* dispose of his property. The case of *Chigwada* v *Chigwada & Others* SC 188/20 was also cited as authority that a Court should not write a will for a testator but should give effect to the testator's intention.

Application of the law to the facts

In *Savanhu* v *Heirs Estate Savanhu* 1991 (2) ZLR 19 SC GUBBAY CJ at p23 B - E said the following on the enactment and intention of section 16 (1) of the Wills Act:

> "It is plain to me that by enacting the provision in question the lawmaker was minded to alter the common law in accordance with which a will is not revoked by the subsequent marriage of the testator. See *Ludwig* v *Ludwig Executors* (1848) 2 Meriz 452. *Shearer* v *Shearer's Executor* 1911 CPD 813, *Braude NO* v *Perlmutter & Ors* 1969 (2) RLR 103 (AD) at 109C 1969 (4) SA 101 (RA) at 106 it was appreciated that the operation of such a principle would cause injustice and untold hardship. So in 1929 a change in the law was effected by the former Deceased Estates Act, presently superseded by s 16 (1) of the Wills Act. Its object is to afford some measure of protection to the new spouse who had been previously married and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous or potentially polygamous matrimonial union to one of monogamy. It envisages a necessary change brought about by the subsequent, marriage to the status of both the spouse and the testator to that of a married person_, from a bachelor, divorcee or widower in the case of the man, and from a spinster, divorcee or widow in the case of a woman. It is designed to avoid a situation in which the will of one or each of them, which predates the subsequent marriage makes no provision for the other's new spouse."

In *Jane Mapenzauswa* v *Tayengwa Dugmore Muskwe* (*supra*) KUDYA J (as he then was) found that the testator on the facts of that case made a will contemplating a civil marriage to the applicant in that case and did not intend its invalidation by the marriage. The reasons that KUDYA J (as he then was) gave in the main for the decision are found at p5-6 as follows:

> "It seems to me that the intention of the testator can be discerned from the wording of the will. He referred to the applicant three times, by name and called her my "surviving wife". The civil marriage was contracted just less than 6 months after the will was executed. He made three bequests to her in the will, he therefore provided for her. He called her his surviving wife even though she was not yet legally his wife. At that time in law she was his girlfriend. He obviously desired that she become his future wife. He was then 79 years old. He had children from his previous marriage that he felt he owed a filial duty to provide for. He also wished his future wife to benefit from his only major asset together with his descendants in the proportion which he believed did justice and fairness to them all. In my view this demonstrates that he made the will in contemplation of his pending civil marriage to the applicant. He therefore did not intend that his will be invalidated by that marriage."

In interpreting section 16(1) of the Wills Act ZHOU J in *Miriam Dziva Elias Dikinya* v *Precious Chakasikwa & 4 Others* (*supra*) at p5 said the following:

> "For that reason the provisions of s 16(1) of the Wills Act would apply to them. The next question is whether having regard to the will itself, it appears that the testator was expecting to be married and intended that the will should not become void upon the expected marriage. The use of the conjunctive word "and" in joining subsection 4, and paragraph (a) thereof means that the requirements must be established namely: -
>
> (i) That the testator was expecting to get married when he made the will and
> (ii) That he intended that the will should not become void upon the expected marriage."

When the testator made the will, he was lawfully married to Maryna. There is nothing on record to reflect an attempt at divorcing or instituting proceedings to divorce her. The will was executed in 2015, before Maryna died. The long relationship between second respondent and the testator speaks to the fact that the testator did not contemplate marriage to the second respondent. Had he done so such marriage would have been entered into much earlier. For instance the testator could have divorced Maryna and married second respondent. The fact that the marriage between the testator and second respondent was entered into after four years of executing the will shows that the testator when he executed the will had no intention to marry second respondent and did not intend the will to remain valid after the marriage.

I also find that although the testator made provision for second respondent in his will Maryna was bequeathed with an equal share to second respondent.

I find nothing in the wording of the will to suggest a contemplation of marriage to second respondent and the intention that the will would remain valid after the said marriage.

The *Mapenzauswa* case *supra* is not on all fours with this case. Among other differences was the specific reference to the applicant, therein as a "surviving wife" and the short period between the execution of the will and the subsequent marriage.

In this case between the execution of the will and the subsequent marriage was an extant marriage with the partner in that marriage also being provided for. I find in the circumstances that the will is invalid. Flowing therefrom are the consequences of the revocation of the letters of administration and the acts of the executor pursuant to his position as executor testamentary.

Disposition

To that end l find that the applicant's application succeeds. The issue of costs follows the successful party and I find no reason to depart from that well established principle.

It is ordered as follows: -

1. The application for a declaratory order be and is hereby granted.
2. The last will of the Late Rodney Jamieson Timm executed on 30 June 2015, be and is hereby declared invalid and of no force and effect.

3. The Letters of Administration issued by the third respondent to the first respondent on 26 October 2021 be and are hereby revoked and annulled.
4. All acts carried out by the first respondent with respect to the administration of the Estate of the Late Rodney Jamieson Timm, pursuant to the last will dated 30 June 2015, be and are hereby declared invalid and of no force and effect.
5. The first respondent shall pay applicants costs of suit on the ordinary scale.

WAMAMBO J:……..

Atherstone & Cook, applicants' legal practitioners
Sinyoro & Partners, first respondent's legal practitioners
Maruwa Machanzi Attorneys, second respondent's legal practitioners