

DENZIL LANGA RUZVIDZO
versus
CLEVER MANDIZVIDZA
and
STEPHEN NYANYIWA
and
NAUME MAKUMBE
and
HENRIETTA NYANYIWA
and
ITAI COLLIER
and
EDWARD NYANYIWA JUNIOR
and
NANCY NYANYIWA
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 28 MARCH 2021 & 6 JANUARY 2022

Opposed Application

R Nyamutowa, for the applicant
FT Majome, for the 2nd and 7th respondent
Ms T Muvambo, for the 3rd respondent
Mr JR Tsivama, for the 4th respondent
Mr TL Dhlakama, for the 6th respondent (not opposed)
No appearance for 8th respondent
No opposition filed by 1st & 5th respondents

TSANGA J: This is an application in which the applicant seeks a declaratur to be declared a legitimate beneficiary (*per stirpes*) in his late grandfather, Edward Nyanyiwa's estate. He died on the 10th of February 2019. Terence Nyanyiwa, applicant's father was a child of the late Edward Nyanyiwa, the latter whom he predeceased. Terence Nyanyiwa and Julia Ruzvidzo bore the applicant on the 22nd of December 1987. Both parents died when the applicant was still in primary school. At that time they had separated his mother having left his father some time in 1989. It is applicant's assertion that throughout his entire life he has known

himself as a Nyanyiwa and has known the respondents as his uncles and aunts. He also knew the late Edward Nyanyiwa as his grandfather.

However, it was at the stage of the first distribution account of the estate of the late Edward Nyanyiwa that the applicant was told to bring proof of being the late Terence Nyanyiwa's son. His predicament was that his birth certificate bears his late mother's surname. At the time this demand was made, the second respondent, Stephen Nyanyiwa who considers himself the father figure of the Nyanyiwas' had been willing to avail himself for the DNA test. The applicant, obviously miffed at the rejection by the family had refused to cooperate. He had, however, calmed down and reconsidered his position. The second respondent was no longer willing to dance to what he saw as the applicant's tune. Applicant's quest in this application, in the face of resistance by some members of the family, is that he either be declared to be the son of the late Terence Nyanyiwa and therefore grandson to Edward Nyanyiwa or in the alternative that second to sixth respondents be ordered to submit to a DNA test together with the applicant.

In terms of factors that would motivate the court to exercise its discretion in his favour, the applicant pointed to the following factual circumstances:

Sexual intercourse between Terence Nyanyiwa and Julia Ruzvidzo was not seriously disputed and no proof had been brought against the position. The onus was on those alleging that he was not Terence Nyanyiwa's son to prove their assertion. See *Kapfudza v Mushiri* HH 09/2011. Indeed in the face of the uphill task in providing such evidence, counsel for second and seventh respondent had abandoned the point *in limine* that this a case which could not be decided on papers. Also, the late Edward Nyanyiwa had accepted one hundred percent the applicant as his grandson. He had paid *mombe yechiredzwa*, a cow paid as a token of maintenance on behalf of his late son Terence, for applicant being raised by the Ruzvidzo family. This point was also not disputed. The applicant's grandfather had also given the applicant a piece of land in his rural homestead in Chiweshe. Furthermore, when applicant's father died, all his personal belongings were given to the applicant.

In fact since Terence had died when the applicant was still very young, all his personal belongings had been securely kept until he was old enough to have them. These items included his father's clothes, kitchen utensils, books and wardrobe among other personal items he used during his life time. The applicant's education and medical expenses were taken care of by the late Edward Nyanyiwa who was a man of means. All these factors were said to prove that the applicant is a Nyanyiwa as it could not have been his grandfather's philanthropy to give items

of sentimental value to a total stranger. Furthermore, applicant argued that the issue in the final analysis was not about paternity but about the late Edward's estate and how much the respondents will inherit if they exclude the applicant from inheriting his late father's share *per stirpes*. He argued that the court could factually make a declaratur that he was the late Terence Nyanyiwa's son based on the totality of the circumstances placed before it.

Ms Majome argued on behalf of the second and seventh respondents that the law does not provide for DNA testing for people who are not parents and that there is no law compelling adults to go for a DNA testing. She argued that the second respondent in particular was opposed to being compelled to undergo the test. The seventh respondent is a wife of the late Edward Nyanyiwa and is therefore not part of the DNA testing. Ms Muyambo for third respondent stated that her client would abide with the court's decision whilst Mr Tsivama for the fourth respondent argued that insufficient evidence had been placed before the court by the applicant that he is a grandson of the late Edward Nyanyiwa. He pointed out that the *mombe yechiredzwa* had been paid by a third party and not Terence himself. He also argued that the fourth respondent was never one of those who had requested for a DNA test in any event. Mr Dhlakama for the sixth respondent was not opposed to the declaratur sought.

This court took the view that to put everyone's mind at ease DNA test should be conducted drawing DNA from those willing. Whilst there was some effort to get this going, several months elapsed with no firm action by those respondents that would be needed to actually avail themselves for the test doing so. The parties were summoned and advised that having heard the full arguments and the effort at getting the parties to submit to a DNA test having hit a brick wall, this court would now make its decision on the papers filed of record and the arguments submitted by the parties.

Analysis

There is no doubt that that during his life time the deceased Edward Nyanyiwa regarded the applicant as his grandson. The facts put forward speak as much to this acceptance as his grandson. These facts include not only that Edward Nyanyiwa paid "*mombe yechiredzwa*" on his son's behalf but equally important that the late Terence's clothes and items were inherited by the applicant. Not only that, but the late Edward also gave the applicant a piece of land. It is unfortunate that there have been unnecessary efforts to claw back this recognition, borne out of greed than any common sense. The totality of the circumstances speak to the applicant as being the child of Terence Nyanyiwa and the grandchild of Edward Nyanyiwa.

As stated in the case of *V v A* 1984 (2) ZLR 139 (SC)

“The proper approach is to look at the totality of the surrounding circumstances and independently established facts. If it appears that a number of these facts and circumstances point, albeit without overwhelming individual force, in one direction, then the sum of their collective force may be said, in a proper case, to amount to corroboration sufficient to show a balance of probability in that direction”.

In the circumstances, the applicant is therefore successful in the declaratur sought in the main.

As regard costs, it is important to bear in mind that the estate of the late Edward Nyanyiwa is not in any way to blame for the litigation that ensued in this case. The present litigation had its genesis in the challenge to the first distribution account of his estate when some of the respondents questioned the applicant’s paternity. At that point the second respondent who appears to have been at the lead of demanding the test was willing to put himself forward for the paternity test. The applicant was understandably miffed against the backdrop of the factual circumstances to his paternity which supported that he was born of Terence Nyanyiwa. He was therefore not willing to do so at one time but changed his mind and sought cooperation for the DNA test. The second respondent, according to the applicant, had refused to turn up for these tests.

It is, however, also noteworthy that as far as this application is concerned, at least four of the respondents are not opposed. The first and fifth respondents did not file any opposition. The third respondents will abide by the decision of the court whilst the sixth respondent consents to the declaratur sought. The seventh respondent is a spouse to the late Edward Nyanyiwa. To the extent that the second and fourth respondents are opposed, their opposition is totally lacking in merit. The Master’s report does not help much in resolving the dispute alleging as it does insufficient facts on that office’s involvement in rejecting the applicant as beneficiary. Against the backdrop of the facts, I find that the case is a proper one for a declaratur. The applicant is clearly an interested party who has all along been regarded as a Nyanyiwa.

I do think that this is a case where only the applicant’s costs should be borne by the executor from the estate of the late Edward Nyanyiwa. There is no justification for depleting the residue of the estate by any of the other beneficiaries. It is important that parties do not unnecessarily refuse to cooperate or to recognise a beneficiary who was fully accepted by the deceased himself during his lifetime under the expectation that costs for so challenging will be borne by an estate. This is a case where some of the respondents simply behaved badly out of greed when the owner of the property during his lifetime had shown nothing but gracious

recognition of his grandson during his lifetime. In the circumstances, the following order is granted.

It is ordered that:

1. The applicant be and is hereby declared to be the son of Terence Nyanyiwa and therefore grandson to Edward Nyanyiwa.
2. The first respondent is hereby ordered to add the applicant's name on the list of beneficiaries in Estate Late Edward Nyanyiwa DR 471/19 to inherit *per stirpes* in his father Terence Nyanyiwa's place.
3. Costs of suit for the applicant shall be borne by the 1st respondent in his capacity as Executor detective for the estate of the late Edward Nyanyiwa DR 471/19.

T Pfigu, Applicant's Legal Practitioners

J Majome Curator for Chakanyuka and Associates, 2nd, 3rd and 7th Respondents' Legal Practitioners

Sawyer and Mkushi, 4th Respondent's Legal Practitioners

Musunga & Makaka Legal Practitioners, 6th Respondent's Legal Practitioners