

PLAXEDES BIRI
versus
JOSEPH CHARLES TSURO
and
JOSEPHINE TSURO
and
THE MASTER OF THE HIGH COURT
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 20 February 2009

Family Law Court-Opposed Application

J.C. Muzangaza, for the applicant
2nd respondent in default

KUDYA J: The applicant seeks the confirmation of the provisional order that was granted by this Court on an urgent basis on 10 December 2003. The urgent chamber application and the provisional order were not served on the first respondent. On 28 August 2008 the applicant applied for a date of set down of the matter. On 29 August 2008 the Registrar requested for proof of service of the provisional order on the first respondent. The applicant responded by filing a notice of withdrawal on 17 October 2008 as against the first respondent on the basis that she had not served the chamber application and provisional order on him.

The provisional order was worded in these terms:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the cession of rights in Stand 4780 Glen Norah A, Harare, from the estate of the late Dambi Michael Biri to second respondent be and is hereby set aside
2. That the first respondent be and is hereby ordered and required within 10 days of the grant or service of this order on him, in his capacity as the Executor in the estate of the Late Dambi Michael Biri, attend to the signing of all documents, and performance of all acts, necessary to effect cession of rights in Stand 4780 Glen Norah A, Harare , to the applicant

3. That failing compliance by first respondent with paragraph 2 hereof, the Deputy Sheriff for Harare be and is hereby authorized and empowered, in first respondent's stead, to sign the necessary documents to effect the aforesaid cession
4. That the third respondent be required to amend its records to reflect the content of this order
5. That the fourth respondent be and is hereby ordered and required to facilitate the aforesaid cession of rights in Stand 4780 Glen Norah A, Harare, into the name of the applicant
6. That the costs of this application be paid by the second respondent.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief:

1. That the second respondent be and is hereby interdicted from evicting or in any way interfering with the applicant's peaceful occupation of Stand 4780 Glen Norah A, Harare
2. That the second respondent be and is hereby interdicted from selling, donating, ceding or in any way alienating or encumbering the right, title and interest she presently holds in Stand 4780 Glen Norah A, Harare
3. That the fourth respondent be and is hereby interdicted from facilitating or giving effect to any attempt by second respondent to alienate or encumber the right, title and interest she presently holds in the aforesaid property

SERVICE OF PROVISIONAL ORDER

That this Provisional Order be served by the Deputy Sheriff on each of the respondents.

The effect of the withdrawal against first respondent results in his substitution by the second respondent in paragraphs 2 and 3 of the final order sought.

The late Dambi Michael Biri died on 2 July 1985. He married the second respondent by civil rites on 19 December 1953 at St. Paul's Mission, Murewa. Their union was blessed with six children. On his death that marriage subsisted.

The applicant averred that she met the deceased in 1974. He had been residing at Stand 4780 Glen Norah A Harare with four of his children and a younger brother, since 1972. She entered into an unregistered customary law union with the deceased in October 1975 and commenced to reside with him at the property in question. She bore him three children. She believed his story that he was divorced from the second respondent. She resided at the

property with the deceased, his younger brother, and their three children and for a short spell in the 1980s' with the first respondent, his son by the second respondent. The second respondent never set foot at the property in the 30 years that she separated from the deceased and 18 since his death.

On the deceased's death she did not register his estate. She became aware on 4 November 2003 that the property had been ceded to the second respondent by the City of Harare (fourth respondent) on the instructions of the Master (third respondent). She therefore launched the present proceedings on 2 December 2003. Apparently the second respondent registered the deceased's estate on 19 September 2001 and an edict meeting was held on 14 November 2001. The parties present were two sons of second respondent by the deceased, the second respondent's sister and the second respondent. The property in question was listed in the inventory as the major asset and was transferred to second respondent in terms of a certificate of authority issued by the Master on 21 February 2003. The applicant attached three supporting affidavits from the deceased's younger brother and her daughter with the deceased, and a neighbour. All confirmed that she was the surviving spouse of the deceased. The deceased's younger brother averred that the second respondent was "divorced" in the early 1970s' before the deceased was allocated the property in question.

The second respondent opposed the application. She disputed the applicant's averment that the first respondent was appointed the executor of her late husband's estate. She attached the certificate of authority of 21 February 2003 which authorised her to administer her late husband's estate and transfer the property in issue into her name. She was issued with the certificate of authority after she had advertised for debtors and creditors in both the Herald and Government Gazette. She denied that the applicant was a wife to her late husband and averred that she lived with him in adultery. She further averred that the house was allocated to her late husband in 1972 and she contributed towards its purchase from her salary as a teacher. Her husband chased her away from the house when the applicant intruded into their marriage. She was not divorced by her husband and their marriage subsisted until his death.

In his heads of argument, Mr *Muzangaza*, for the applicant urged me to set aside the appointment of the second respondent as the executor of her late husband's estate and proceed to declare the applicant as the rightful inheritor of the house in question. He asked me to follow the case of *Pedzisayi & Anor v Pedzisayi & Anor* HH 81/2004 where two customary law mistresses of the deceased husband successfully petitioned this Court to set aside the

executorship of his widow. BHUNU J held that she had acquiesced in the polygamous set up for two decades, had not set foot on the farm, had not contributed to the development of the farm-a factor that the two mistresses had done. He ordered the appointment of a neutral executor to oversee the administration of Pedzisayi's estate. Mr *Muzangaza* urged me to disregard the provisions of the Administration of Estates Amendment Act No. 6 of 1997 but have recourse to the dictates of justice and equity.

As I understand it, to disregard the law amounts to inequity. See *Commissioner of Taxes v C W (Pvt) Ltd* 1989 (3) ZLR 361 at 372C-D and *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 63A. It is not clear to me which legal regime Mr *Muzangaza* contends applies to the applicant's case. Her position is best suited to customary law. At customary law, at the time of the death of the deceased, a wife could not inherit from her husband. See *Guzuzu v Chinamasa NO & The Master* 1983 (2) ZLR 61(H) at 64E-F; *Moyo v Moyo* 1990 (2) ZLR 81(S) and *Murisa NO v Murisa* SC 41/92. His male issue had a preference right of inheritance over his female issue See *Vareta v Vareta* SC 126/90 and *Magaya v Magaya* 1999 (1) ZLR 100 (S). Spouses only inherit in terms of the general law. The general law is captured in Act No. 6 of 1997. Under general law, the applicant is a concubine and not a wife. Mr *Muzangaza* conceded that under general law, an unregistered customary law union is not recognised as a marriage. In my view, the applicant lacks the legal standing to bring the present application. She has no *locus standi* to approach the court to stop the lawful actions of a wife married in terms of civil rites for whom the assumption that general law applies is evident from her marriage regime and the subject matter under consideration.

The grounds of justice and equity set out in the *Pedzisayi* case have no room in the present case. In any event, the second respondent completed her executorship on transfer of the property in issue to the beneficiary approved by the Master, who as it happened was herself. By operation of law she ceased to be the executor of her late husband's estate on fulfilling her mandate. She was discharged from that office. It is not in my view legally feasible, in circumstances as presented by the applicant, once she has been discharged to set aside her appointment. There is nothing to set aside.

The next issue for determination revolved around her bid to be declared as a beneficiary in the deceased estate. She could be a potential beneficiary were she a surviving spouse. In the face of a prior subsisting civil rites marriage to another woman, her union with the deceased is not recognized as a marriage. She does not fall into the surviving spouse category and is

therefore not a potential beneficiary to the deceased's estate. The fact that she resided with him on the property in issue since 1975; was regarded by some of his relatives as his wife and bore him three children; that the second respondent did not set foot thereat after 1975 or enforce any rights and entitlements she may have had would not alter the law which treats her relationship with him as concubinage. On his death, the law gives his lawfully wedded wife preference rights over those which she enjoyed as his mistress.

In the circumstances of this case, there is no room for setting aside the cession of rights from the second respondent to the applicant. The right, title and interest in the property is simply beyond the reach of the applicant.

Accordingly, it is ordered that:

1. The provisional order granted by this Court on 10 December 2003 be and is hereby discharged.
2. The applicant shall pay the second respondent's costs of suit.

Muzangaza Mandaza & Tomana, the applicant's legal practitioners