

PETER NYANDORO
versus
CHRISTOPHER MUKOWAMOMBE
and
JULIA MUKOWAMOMBE
and
MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 16, 17 July, 2 November 2009 & 23 September 2010

Mr *Nyapadi*, for the applicant
Ms *Mutero*, for the 1st & 2nd respondents

GUVAVA J: The applicant in this matter was married in terms of customary law to one Alice Mukowamombe in April 1986. In 2001 the applicant moved out of the matrimonial home and commenced to live with another woman as his wife. Alice Mukowamombe (hereinafter referred to as the deceased) died intestate on 11 June 2007. She was survived by three children two of whom she had with the applicant. Following her death the first respondent, who is her brother, registered her estate and was duly appointed as executor. The deceased estate comprised of an immovable property in Kuwadzana which she had purchased from the Ministry of Public Construction and National Housing by virtue of her employment in the Zimbabwe Republic Police. Following his appointment as executor of the deceased's estate the first respondent proceeded to administer the estate to the exclusion of the applicant. He prepared a distribution plan wherein he sought to bequeath the property to himself and the deceased's three children.

The applicant thus filed this application seeking an order that he be declared the deceased's surviving spouse and that the appointment of first respondent as the executor together with the distribution plan he had made be set aside.

The application was opposed by the first respondent primarily on the basis that at the time that the deceased died the applicant was no longer her husband and that he was therefore not entitled to benefit from the estate.

At the hearing of the court application it was apparent to me that there was a clear dispute of fact regarding whether or not the applicant was still married to the deceased at the

time of her death. With the consent of both parties I proceeded in terms of r 239 (b) of the High Court Rules, 1978 as amended, which allows a court when hearing an application to hear oral evidence.

The applicant testified that he married the deceased in terms of customary law in April, 1986 and they had two sons. In December, 1994 they purchased an immovable property, namely stand 10382A Kuwadzana from the Ministry of Public Construction and National Housing in their joint names. He stated that he never dissolved his marriage with the deceased although in 2003 he married a second wife as he is perfectly entitled to do under customary law. He continued to live with both women as husband and wife until the deceased's death in 2007. He stated that he was present at the deceased's funeral and provided all the traditional things like the "fuko" and two goats which were consumed at the funeral. In cross examination he stated that he left the Kuwadzana home in 2003 but he continued to look after his children by paying for their school fees and providing groceries. He stated that he would go to the Kuwadzana house about four times a month to be with the deceased and the children He stated that he continued to have sexual relations with the deceased as husband and wife during this period. He reiterated that he never at any stage gave the deceased a divorce token (gupuro) in terms of customary law.

The applicant gave his evidence well. He was clear and concise in his testimony and was prepared to answer all questions put to him. In my view he was not shaken in cross examination and he was a credible witness.

The next witness was Sergeant Jaison Mapfumbate. He testified that he knew the deceased as a workmate as they worked together at the Harare Magistrates Court from 1995 to 2000. He attended the deceased's funeral since he is a Chaplin for the Zimbabwe Republic Police. He confirmed that the applicant was present at the funeral. In cross examination he told the court that apart from the applicant having told him that he was asked to buy a beast at the funeral as a son in law he was not present when the discussion took place.

The witness was an honest witness who merely confirmed the presence of the applicant at the deceased funeral. He did not try to exaggerate his role at the funeral nor testify about what he did not know even in circumstances where suggestive questions were put to him. I believed the witnesses testimony. With this evidence the applicant closed his case.

The first respondent testified as follows. The deceased was his sister and was the first born in their family. At the time of her death she was living at stand number 10328A in

Kuwadzana with her three children. When she married the applicant she had a child from a previous relationship. He stated that after the applicant moved out of the matrimonial home in 2001 he would visit the deceased and on all the occasions that he was there he never saw the applicant. The applicant did not visit the deceased after she fell ill and was in hospital. He also did not assist at her funeral. He stated that although he was present at the funeral he was not asked to perform any functions of a son in law nor did he render any financial assistance because he was no longer regarded by the family as married to the deceased. In cross examination the witness failed to explain the discrepancy between his testimony and the evidence in his opposing affidavit. In the opposing affidavit the witness had stated that the applicant did not attend the deceased's funeral however in evidence and probably after having heard the clear evidence by Jaison Mapfumbate he changed his testimony and conceded that he had been present. He however denied that applicant had been asked to perform any rituals as a son in law. He however confirmed that no "gupuro" had been paid by the applicant to his sister as a divorce token but he went on to explain that it was not necessary as he had never paid lobola but only a small token called "tsvakirai kuno". When questioned by the court he stated that the deceased had called him and their aunt and advised that she was no longer interested in the relationship but she had not given the applicant "gupuro". He also confirmed that once a person has paid "tsvakirai kuno" he is considered at customary law as a husband. This witness was in my view, not a truthful witness. He lied about the fact that the applicant did not attend the deceased's funeral and only changed his story when he realized that there was overwhelming evidence from an independent witness. He was evasive about the applicant's marital status with his sister. It was only after protracted questioning that he admitted that he was her customary law husband. It was apparent to the court that his testimony was clouded by what he perceived as ill treatment of his sister by the applicant.

The next witness was Hardlife Tafadzwa Mukowamombe. He was the deceased's eldest son. He stated that the applicant is his step father. He told the court that at the time of his mother's death the applicant was not staying with them as he had moved out of the home in 2001. He stated that from the time that he moved out the applicant only came returned two months after his mother's death and tried to move in with them. He confirmed that the applicant was present at the deceased's funeral though he did not see him perform any rituals. In cross examination he stated that he did not view applicant as a caring father and thus did not want him to inherit his mother's house. He however stated that he had no ill feelings towards

the applicant and explained that during the time he lived with them he would give him food when the deceased denied him for not providing for the family.

In my view this witness's evidence was both credible and believable. He was honest about not wishing the applicant to inherit his mother's house but was also fair in that he had no ill feelings towards the applicant. He would smuggle food to him when the tension at their home was at its worst. I have no hesitation in accepting his evidence.

Emilia Mukowamombe was the next witness. She testified that the deceased was her elder sister. She stated that the applicant did not visit the deceased when she was ill or when she was admitted in hospital. She further stated that although he attended the funeral she did not know whether or not he conducted any rituals. In cross examination she stated that as far as she was aware the applicant and the deceased had dissolved their union. At the time of deceased's death they were no longer on speaking terms. She stated that to her knowledge, when a customary union is over, one party just leaves. She had heard of the word "gupuro" a long time ago when she was still a child and did not think it had any application to present day relations.

Gladys Guri told the court that the deceased was her young sister. The applicant had children with her. She stated that the applicant and the deceased were no longer staying together at the time of her death. She was present at the deceased's funeral and attended the family meeting. She stated that the applicant was not present at that meeting and was not asked to perform any rituals as a son in law. In cross examination she stated that she is married in terms of customary law. She also stated that if she and her husband want to dissolve the marriage the one party just leaves. She stated that she is aware of the practice of paying "gupuro" but the deceased did not pay any and neither did the applicant.

Two traditional chiefs testified in this case. They were Joseph Magayo who is known as chief Hata and Mark Nyaada who is known as chief Makoni. The two chiefs were from the districts where the applicant and the first respondent live. They were called to clarify the position relating to dissolution of customary marriages. Although they were from different parts of the country they were both agreed that a marriage at customary law can only be dissolved by the tendering of "gupuro". They were both adamant that "gupuro" is not paid in private but is paid through a go between (munyai) or "tete". If no "gupuro" has been paid the parties are merely separated and not divorced. They were also of the opinion that in practice the period of separation was not of any significance. Chief Makoni however went further and

stated that the position can be altered if the wife marries someone else as under customary law a woman cannot have two husbands. The second marriage thus has the effect of dissolving the first one even though no "gupuro" may have been paid.

The evidence by both the applicant and the respondent and their witnesses showed that that the applicant and the deceased separated between 2001 and 2003. At the time of their separation their relationship had deteriorated to such an extent that the applicant was sharing a bed with one of the children whilst the deceased slept on the floor. There were frequent quarrels and the deceased got to a point when she would deny the applicant food as she alleged that he was not supporting the family. It was also apparent that when the applicant eventually moved out there was no family meeting to resolve the dispute and neither party gave the other "gupuro". Whilst the applicant sought to show that they were still communicating and he would go and visit her from time to time it was clear from the testimonies of Hardlife Mukowamombe, Gladys Guri and Emma Mukowamombe when I believed, that this was not the position. The applicant and the deceased had clearly separated at the time of her death as the applicant did not even visit her when she was sick. In determining the matter before me however the issue of whether or not they were still communicating was of little relevance as both chiefs stated that in cases where "gupuro" had not been paid the parties remain married. I had no difficulty in accepting their evidence in this respect as it is totally in line with the legal position as set out in the case of *Pasipanodya v Muchoriwa* 1997 (2) ZLR 182 (S). MUCHECHETERE JA when dealing with a similar part stated as follows at page 184 of his judgment:

"This is because in my view the marriage was not dissolved - a marriage under an unregistered customary law can be dissolved under customary law either by giving the wife "gupuro" or before a customary law court. The parties merely separated. On separation, there was no proper distribution of the F matrimonial property. "

The respondents submitted in argument that "gupuro" is no longer a requirement for dissolving a customary law union because custom is dynamic and has become obsolete. The respondent submitted that this position is confined by the fact that every shona person goes through the traditional marriage ceremony when they marry even if they go on to register their marriages under general law but very few of them tender "gupuro" when they divorce. In my view however, this argument could not be sustained. Firstly, the two traditional leaders who gave evidence were quite categorical in this regard as they testified as to the practice which is done in their communities at present. While they came from different parts of the country they

were both of the same view that where parties have married in terms of customary law then their union can only be dissolved in terms of customary law. Secondly, the respondents argument that “gupuro” was no longer relevant as modern society was in my view self defeating because Africans who then subsequently register their marriages in terms of general law do not pay “gupuro” to dissolve their marriages because they have decided that they do not wish customary law to apply to them and thus there is no requirement for them to tender “gupuro” when they dissolve their marriage. They have made an election for the general law to apply to them and they obviously approach the court for an order dissolving their marriage. The position is entirely different where parties have remained married in terms of customary law. In my view they have made a clear election that they wish that customary law applies to them. Parties married under general law prove their divorce by producing a divorce order. How would persons married under customary law prove that they have dissolved their marriage if “gupuro” was not paid and accepted? In any event the approach suggested by the first respondent is completely alien to customary law which demands that on marriage relatives from both sides gather to witness the payment of lobola and on divorce too the divorce token is paid in the presence of witnesses. Further the lobola is paid to the family of the bride and it is unimaginable that the dissolution of the marriage could be without the involvement of the family. Whilst it was accepted in this case that the applicant had not paid lobola but only "tsvakirai kuno" evidence was led to the effect that once this has been paid the applicant is recognized as a customary law husband.

The submissions by the respondents counsel that the court should take into account that under general law a marriage is presumed to have broken down where the parties have lived apart for a period of 12 months did not take the matter any further because under general law where parties have not divorced and were living apart the surviving spouse is recognized as a surviving spouse for the purpose of inheritance.

It seems to me therefore that the applicant has established that he was the customary law husband of the deceased at the time of her death and is entitled to such a declaration.

The next issue to be determined is whether the first respondent should be removed as executor of the estate. It is trite that a beneficiary to an estate may apply at common law for the removal of an executor. It is not in dispute that being the surviving spouse of the deceased the applicant is a beneficiary of the estate. The basis upon which he can seek the removal of first respondent is if he can show that his continuance in office will not auger well for the

future welfare of the estate and the beneficiaries. (see *Katirawu v Katirawu* HH 58/07). The decision by first respondent, as executor, to have the immovable property left by the deceased shared by him in conjunction with the minor children was clearly wrong. He was not a beneficiary to the estate in the light of the fact that deceased was survived by her three children. It seems to me that the best interest of this estate would be best served by the appointment of an independent executor who would be able to look objectively at the interests of all the beneficiaries. The deceased was survived by three children two of whom she had with the applicant. The interests of these three children must be catered for. She also left a surviving spouse who is entitled to a share in the estate although he is now staying with another wife. The new executor must balance all these interests and come up with a distribution plan which takes cognizance of the fact that at the time of her death the applicant was now living elsewhere. In my view the incumbent executor would find it very difficult to weigh these conflicting interests in a balanced way especially if one takes into account the stance he had already taken in relation to the distribution of the property. It is for these reasons that I would accede to the applicants claim that the first respondent be removed as executor.

The distribution plan which was made by the incumbent executor was also faulty as it did not take into account the provisions of s 68 of the Administration of Estates Act [*Cap 6:01*]. There is need therefore for the new executor to come up with a new distribution plan for the estate. The executor would have to investigate in my view whether the applicant is indeed a co-owner of the house in question. This issue was not properly canvassed in these proceedings as the thrust of the dispute was whether or not the applicant was a surviving spouse. In making the distribution plan he should be guided by the provisions of s 68 D and particularly s 68F (e) which deals with the situation such as the present where the applicant had more than one wife at the time of deceased's death.

The applicant did not seek costs in this matter and I will thus not make an order for costs.

I accordingly make the following order:

1. The applicant be and is hereby declared the surviving spouse of the Late Alice Mukowamombe.
2. The first respondent is hereby removed as executor of the estate Late Alice Mukowamombe.

3. The distribution plan made 24 September 2007 is hereby set aside.
4. The Master shall as soon as practically possible call for a meeting for the appointment of a neutral executor.
5. Each party will bear their own costs.

Muza & Nyapadi, applicant's legal practitioners

Legal Aid Directorate, 1st respondent's legal practitioners