

IVY NDADZUNGIRA  
versus  
JOHN GONESE (In his capacity as the Executor  
of the Estate of late Edmond Gonese DR 1720/06  
and  
THE MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 4 and 20 June 2013

Family Law Court

**Opposed Application**

Ms R. Mukozho, for applicant  
Ms M.V. Chizodza, for 1<sup>st</sup> respondent  
No appearance for 3<sup>rd</sup> respondent

MAWADZE J: This is an apposed application for review in which the applicant seeks an order in the following terms;

“IT IS ORDERED THAT:-

1. The Distribution Plan authorised on the 3<sup>rd</sup> of March 2009 be and is hereby set aside.
2. That the inventory for the immovable properties of the deceased is hereby amended to include property No 10 Lomagundi Road, Avondale Harare.
3. The Master of the High Court is hereby authorised to distribute the Estate of the late Edmond Gonese in accordance with s 68F of the Administration of Estates Act [*Cap 6:11*] .
4. First respondent is to pay costs of suit”.

The facts of this matter giving rise to this application can be outlined as follows:-

The late Edmond Gonese who passed on intestate on 8 July 2006 was involved with three different women during his lifetime. The late Edmond Gonese first married one Lucky Gonese (Nee Jackson) in terms of the general law of Zimbabwe and that marriage was blessed with three children, Rodney (Born on 18 August 1977), Ruby (born in October 1980) and Robin (born on 11 February 1984). This marriage was dissolved by consent on 7 April 1993 by this court. The late Edmond Gonese and his first wife had acquired an

immovable property, a house known as Stand 41 Avondale Extension held under Deed of transfer 4832/84 which they acquired on 2 September 1984. This property is also known as No 110 Lomagundi Road Avondale, Harare (hereinafter the Avondale property). This property became the subject matter of the divorce between the late Edmond Gonese and his first wife in HC 1819/93. In terms of the consent paper which was incorporated as part of the divorce order granted on 7 August 1993 the first wife was to remain in occupation of the Avondale property until the youngest child was 18 years old after which the property would be sold and the proceeds shared equally between the first wife and the late Edmond Gonese. It is not an issue that at the time the late Edmond Gonese passed on he owned a 50% share in the Avondale property which forms part of his estate.

After this divorce the late Edmond Gonese entered into a customary law union with his second wife one SENIA PHILEMON in 1993 which marriage was later solemnised in 1995 in terms of the general law. This marriage was blessed with one child Ruvimbo. It is said that late Edmond Gonese has five children but I could not ascertain the details of the mother of the fifth child. As fate would have it the second wife Senia Philemon pre deceased the late Edmond Gonese as she is said to have passed on in 2002 (or 2004). It would appear that the late Edmond Gonese acquired the immovable property known as No 4 Christonbank, Mazoe (hereinafter Christonbank property) at the time he was married to Senia Philemon. After the death of Senia Philemon he remained in occupation of the Christonbank property.

The late Edmond Gonese then entered into a third relationship with the applicant which relationship is partially the subject matter of the dispute in this matter. According to the applicant she entered into a customary law union with the late Edmond Gonese on 10 January 2004 after initially cohabiting with him in 2003 soon after the death of Senia Philemon. The applicant said one Mr Matiza and a brother to the late Edmond Gonese one Philip Gonese travelled to Mutare home of the applicant where lobola was paid and all marriage rites at customary law performed. The marriage was however not registered, hence it remained a customary law union. The applicant stayed with the late Edmond Gonese at the Christonbank property from 2003 until his demise on 8 July 2006. No children were born out of this relationship. The first respondent disputes that the applicant was customarily married to the late Edmond Gonese and insists that she was simply a live in girlfriend. I shall later revert to this issue.

When the late Edmond Gonese passed on his estate was duly registered with the third respondent. The third respondent convened a meeting to appoint the Executor dative of the

estate of late Edmond Gonese. The applicant attended this meeting and she is listed among the participants as a surviving spouse. An elder brother to the late Edmond Gonese, one John Gonese, an Anglican priest was appointed as Executor Dative and issued with letters of administration on 14 May 2007.

It is not in dispute that the Executor advertised to all creditors and persons with claim against the estate on 27 July 2007 which claims were to be lodged by not later than 28 October 2007. It is not in issue that the First and Final Liquidation and Distribution Account was prepared. A disbursement of the Estate of the late Edmond Gonese was made by the two children Rodney and Ruby indicating that the Christonbank property be disbursed to Rodney and Ruvimbo in equal shares, the Peugeot 306 to Robin and that all funds and equipment be shared squarely among the three children, Rodney Ruby and Ruvimbo. The First and Final Liquidation and Distribution Account was advertised on 14 November 2008 and was signed by the first respondent on his capacity as the Executor Dative on 5 December 2008 and approved by the second respondent (the Master) on 3 March 2009.

The applicant's borne of contention is that from the date of the edict meeting to date the first respondent has not involved her in the affairs of the estate of the late Edmond Gonese. She was not involved or consulted in the preparation of the inventory of the assets of late Edmond Gonese. The applicant said she only discovered on 29 November 2011 when she visited the second respondent's offices to check on the progress of the estate that:-

- (i) an inventory of both the movable and immovable property Annexure B including the Christonbank property and Avondale property had been compiled by the first respondent on 29 August 2006 and that another inventory had also been prepared purportedly in respect of the estate of the Edmond Gonese and late Senia Philemon on 29 August 2008 which inventory included the Christonbank property and the Peugeot 306.
- (ii) that the Distribution Plan of the estate of late Edmond Gonese totally excluded her as a beneficiary moreso in respect of the Christonbank property. The applicant said this Distribution plan inexplicably excluded the Avondale property and the beneficiaries thereof.

The applicant's contention is that she is entitled to benefit from the estate of the late

Edmond Gonese either in form of ownership of the Christonbank property or a usufruct over the same property because she lived together with the late Edmond Gonese until the time of his death at the Christonbank property.

I now turn to the grounds of review as outlined by the applicant:

“Grounds for Review

- (a) the executor wilfully and intentionally omitted me as a beneficiary of No 4. Christonbank where I reside before and after the death of my husband whom I was customarily married although we did not have children.
- (b) The distribution plan is not valid in that it does not reflect the immovable property that belonged to the late Edmond Gonese in that the property No, 110 Lomagundi Road Avondale, Harare was wilfully and intentionally omitted and its beneficiaries have been concealed.
- (c) The fact that I was not included in the distribution plan results in it violating s 68 F (g) of the Deceased Estates Act (*sic*)”.

The first issue to exercise my mind is whether it is appropriate for the applicant to approach this court by way of review. The estate of the late Edmond Gonese is being administered in terms of Part III A – Estates of persons subject to customary law, specifically s 68 A(i); of the Administration of Estates Act [*Cap 6:01*] which provides:-

“68 An Application of Part III A

- (1) Subject to subs (2) this Part shall apply to the estate of any person to whom customary law applied at the time of his death.”

It would appear from the complaint raised by the applicant that she takes issue with the second respondent’s decision to approve the inheritance plan in the form of the First and Final Distribution and Liquidation Account which excluded her as a beneficiary and also excludes some of the deceased’ assets. One would be inclined to believe that the applicant should have proceeded in terms of s 68 J of the Administration of Estates Act [*Cap 6:01*]:-

“68J Appeals against decisions of Master

Any person who is aggrieved by any decision of the Master in terms of this Part may appeal against the decision to the High Court within the time and manner prescribed in rules of the court”.

Both Ms *Mukozho* for the applicant and Ms *Chizodza* for the first respondent were not able to meaningfully address the court on this point. In the absence of a proper argument on the point I am constrained in making a definite finding on the issue. It may be correct that the provisions of s 68J of the Administration of Estate Act [*Cap 6:11*] do not preclude a party aggrieved by the Master's decision to approach this court by way of review. I turn to this court's powers of review as provided for in the High Court Act [*Cap 7:06*].

In terms of s 26 of the High Court Act [*Cap 7:06*] the High Court has power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. The decision by the Master to approve the First and Final Distribution and Liquidation Account is an administrative function. Section 27 of the High Court Act [*Cap 7:06*] provides for the grounds of review. From the issues raised by the applicant I am of the view that the applicant has approached this court in terms of s 27(1) (c) of the High Court Act [*Cap 7:06*] which states:-

“27 Grounds for review

- (1) Subject to this Act any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be -
- (a) .....
  - (b) .....
  - (c) gross irregularity in the proceedings or the decision”.

The broad submissions by the first respondent in opposing this application are captured in this heads of argument as follows:-

- “1. It is submitted respectfully that the applicant has no *locus standi in judicio* to seek to be a party to a joint estate that belongs to a couple that has predeceased on the premise that she was a customary law wife.
2. It is respectfully submitted that the applicant seeks a review which review cannot be competently ordered by this honourable court. Instead this honourable court can use its discretion to issue an order in the form of a declaration of rights.
3. It is trite law that a party that claims to be a surviving spouse can only inherit in terms of general law in particular in terms of Act No 6 of 1997 and not in terms of customary law (*sic*).
4. It is common cause that a party that puts their other out of pocket by dragging them unnecessarily to court must pay the costs of such litigation on a punitive scale.”

I now proceed to address these issues in the context of the applicant's grounds for review.

The first point taken *in limine* by the first respondent is whether the applicant has *locus standi in judicio* to bring this application. It is incorrect to suggest that the applicant seeks to be a party to a joint estate but that these proceedings are in relation to the estate of the late Edmond Gonese. The applicant claims to be a beneficiary in relation to Edmond Gonese's estate on account of being a surviving spouse in terms of s 68(1) of the Administration of the Estate Act [*Cap 6:01*]. The applicant contends that she was customarily married to the late Edmond Gonese at the time of his death and that the type of the marriage was a customary law union. For the purposes of Part IIIA of the Administration of Estates Act [*Cap 6:01*] a customary union is regarded as a valid marriage. Section 68(3) provides as follows:-

“68(1) .....

(2) .....

(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnised in terms of Customary Marriages Act [*Cap 5:07*] and any reference in this Part to a spouse shall be construed accordingly”.

The question to be answered therefore is whether on the facts of this matter the applicant can be deemed to be a surviving spouse.

The first respondent's argument that the applicant was just a live in girlfriend with the late Edmond Gonese cannot possibly be true. At the edict meeting on 21 November 2006 where the first respondent was appointed as the Executor Dative of the estate, the applicant is identified as “wife”. The applicant was one of the persons who participated in the deliberations which culminated in the appointment of the first respondent as the Executor Dative. The minutes of the meeting held by the second respondent on 21 November 2006 at the Master's office clearly indicates that the following persons attended:

- “1. John Gonese - brother
2. Ivy Ndakongera - wife
3. Ruby Gonese - daughter
4. Brian Philemon - guardian of minor child Ruvimbo Gonese”.

From the facts of this matter the applicant is the same person as Ivy Ndakongera.

The second respondent's notes (See p 48) clearly state that the issue of "spouse-ship" was not disputed by the attending parties. This means therefore that the first respondent who was present did not object that the applicant was a surviving spouse ("wife"). One would wonder therefore why the first respondent is now singing a different tune. The applicant in her founding affidavit clearly outlines how she entered into a customary law union with the late Edmond Gonese in 2004 and stayed with him as his wife at number 4 Christonbank Mazoe until his demise in July 2006, and that she has remained in occupation of the said property. In addition to this Phillip Gonese a brother to the late Edmond Gonese has deposed an affidavit (See p 46 of the record) confirming that the applicant was customarily married to the deceased Edmond Gonese. This position is also confirmed by the second respondent ("the Master") in the report made in terms of r 248 of the High Court Rules 1971 (See p 70 of the record) in which the second respondent clearly states that the applicant was married by the deceased in an unregistered customary law marriage, which marriage according to the Administration of Estates Act [*Cap 6:01*] is valid. The evidence on record clearly show that even the first respondent accepted the applicant as the surviving spouse. It is therefore disingenuous for the first respondent to try and argue otherwise.

The applicant has shown that she is a beneficiary to the estate of late Edmond Gonese as a surviving spouse. The applicant therefore has *locus standi in judicio* to institute these proceedings.

Having made the finding, it follows to reason that the applicant's rights in relation to the estate of the late Edmond Gonese are governed by the provisions of Part III A of the Administration of Estates Act [*Cap 6:01*] and to some extent the Deceased Estates Succession Act [*Cap 6:02*].

In terms of s 68 D (2) (b) of Administration of Estates Act [*Cap 6:01*] the applicant should have been consulted by the first respondent in drawing up the inheritance plan and her approval sought. This was not done. In terms of s 68 D (1) of the said Act the first respondent should draw up an inheritance plan which does not only include all the assets of the deceased but be guided by the provisions of s 68 F in particular s 68 F (2)(d)(i) of the Administration of Estates Act [*Cap 6:01*].

From the foregoing I am satisfied that the applicant has shown that she was omitted as a beneficiary of the Christonbank property which property she resided with the deceased as his wife during his life time and has remained in occupation of the said property. The applicant has also shown that the distribution plan excludes the late Edmond Gonese's 50% share interest in the Avondale property and does not disclose the beneficiaries thereof. It is clear that the first respondent has disregarded the applicant's rights as provided for in both the Administration of Estates Act [*Cap 6:01*] and Deceased Estates Succession Act [*Cap 6:02*]. This omission has unfortunately been approved by the second respondent. The second respondent has conceded as much. There is therefore gross irregularity in the manner the first respondent executed his duties as the Executor of the Estate of the late Edmond Gonese and the decision of the second respondent to sanitise this gross irregularity is improper. This court has the duty to safeguard the interests of the beneficiaries to the estate in question. It is clear that the distribution plan drawn up by the first respondent and approved by the second respondent need to be reviewed and regularized before transfer of ownership of the property to listed beneficiaries. This is to avoid causing irreparable prejudice to potential beneficiaries.

The applicant has clearly made a case for the relief sought.

As regards the costs, I am of the view that this is a matter the first respondent should not have opposed, moreso in view of the second respondent's report. It is unfortunate that the first respondent has not demonstrated the objectivity expected of an executor in such matters. I am in the circumstances inclined to order the first respondent to pay the costs of this application.

In the result it is ordered that:

1. The distribution plan authorised on 3 March 2009 by the second respondent be and is hereby set aside.
2. The inventory of the immovable properties of the deceased Edmond Gonese be and is hereby amended to include the deceased's interest in the property number 110 Lomagundi Road, Avondale, Harare.
3. The Master of the High Court of Zimbabwe be and is hereby directed to administer the Estate of the late Edmond Gonese in accordance to s 68 F of the Administration of Estates Act [*Cap 601*].
4. The first respondent shall pay the costs of the application.

*Sinyoro & Partners*, applicant's legal practitioners

*M V Chizodza-Chineunye*, 1<sup>st</sup> respondent's legal practitioners