

CLAUDIUS CHUMA  
and  
ELIJA CHUMA  
and  
STANLEY CHUMA  
versus  
ISHMAEL CHUMA  
and  
AUGUSTINE CHUMA  
and  
MUSIIWA CHUMA

HIGH COURT OF ZIMBZBWE  
MANGOTA, MWAYERA JJ  
HARARE, 19 March 2014 and 2 April 2014

*J Nyarota*, for the appellants  
*E.Z.Mapendere*, for the respondents

MANGOTA J: On 26 January, 1978 Stephen Nyoni Chuma, a businessman, died intestate. He left behind five wives and twenty children amongst them the respondents and the appellants' father, one Ephraim Chuma who was the deceased's eldest son.

Following the death of his father, Ephraim Chuma took over the control and management of the deceased's business which, at the time and according to the appellants, consisted of a small general dealer's shop. The respondents' submission on that matter was that the business which their late father left behind at the time of his death comprised:

- (i) One bottle store
- (ii) Four (4) general dealer's shops
- (iii) Four (4) grinding mills-and
- (iv) A store-room as well as the following movable assets:
- (v) Six (6) motor vehicles
- (vi) Two hundred and seventy eight (278) herd of cattle
- (vii) Fifty eight goats – and
- (viii) Fourteen (14) ploughs.

What the deceased left behind at the time of his death, it is evident, remains a highly contested matter which cannot be resolved on the papers which are before the court. Its resolution can only be achieved through, and after, a proper enquiry into the same, in the court's view.

The manner in which Ephraim Chuma took charge of his late father's estate is not clear. The appellants submitted that their father inherited his late father's estate in terms of the African Wills Act of 1969 which applied to estates of persons who died intestate at the time. They insisted that their father inherited the estate of his late father in his individual capacity. They, in that regard, referred the court to s 6 of the Act which provided that:

“The heir at African Law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African not devised by will.”

It is on the basis of the cited section as read with the remarks of BEADLE CJ. (as he then was) who, in *Matambo v Matambo* 1969 (3) SA 717, gave a clear interpretation of s 6 of the Act that the appellants argued that their father who was the deceased's eldest son inherited, in his individual capacity, the deceased's estate. They submitted that, from the estate which devolved to him, their father went on to build a butchery, an eating house and a bottle store. They stated that their father extended the small general dealer's shop which his late father left him into a bigger shop than what was left to him.

The respondents maintained that the estate of their late father did not devolve to their eldest brother. The appellants' father, they argued, held the estate of their late father in a representative capacity. They stated that he held the estate in that capacity subject to certain customary restrictions which pended the finalisation of the estate. Customary restrictions, according to them, referred to the duty which the parties' custom placed on the appellants' father to support other members of the family in such a manner as if the deceased was still alive. They, in this regard, referred the court to the case of *Moyo v Moyo* 1990 (2) ZLR 81 (SC) wherein the phrase 'certain customary restrictions' was defined and its meaning clarified.

Whether the appellants' father, as the eldest son of his late father's children, inherited the estate of the deceased or held the same in a representative capacity for members of the deceased's family is a matter which the court is called upon to decide. The appellants' father, it is noted, managed his late father's estate for a stretch of twenty years running. Unfortunately for the parties to this dispute, he died in 1998. He, like his late father, died intestate.

The appellants did not register the estate of their late father, Ephraim Chuma, from the time of his death to date. The respondents, on the other hand, registered the estate of their late father, Stephen Nyoni Chuma, in 2011. They did so under Certificate of Authority number DR.GK 51/2011.

The registration of the estate of the late Stephen Nyoni Chuma lies at the centre of the parties' dispute. The appellants implored the court *a quo* to set aside the certificate of authority which had been issued in favour of the respondents. They argued that the estate which the respondents registered did not belong to Stephen Nyoni Chuma but to their father Ephraim Chuma. The court ruled against them in that regard as a result of which they filed this appeal.

The case authority and the now repealed African Wills Act which the appellants cited do, in some way, support the argument which the appellants advanced on this matter. Their case would have remained a neat and undisputed matter if their late father had been nominated by members of the deceased's family as the executor dative of his late father's estate. The respondents stated that there was no occasion that they ever met as members of the deceased's family on the issue. They denied having ever appointed the appellants' father to the position of executor dative of their late father's estate. The appellants, on their part, could not and did not produce the certificate of heirship which nominated their father as the executor dative of his late father's estate. In the absence of that evidence, therefore, it cannot be claimed, as is being done by the appellants, that the estate of the late Stephen Nyoni Chuma devolved to the appellants' father. It did not.

What can be stated with some degree of certainty, though, is that the appellants' father, as the eldest son of his late father, assumed control and management of the deceased's business which he treated as his own when, in law and in fact, it was not. The respondents' position on this matter is pertinent. They argued, and correctly so, that the appellants' father held the estate of their late father in a representative, and not individual, capacity. They stated, through the supplementary affidavit of one Mugwira Muhaso, that the estate of the late Stephen Nyoni Chuma was not, at the time of his death or at anytime thereafter, registered according to the law. Mr Muhaso said he was the deceased's younger brother. Paragraphs 6 and 7 of Mr Muhaso's affidavit are pertinent. They, in part, read:

“All these listed items were in full operation before the death of Stephen Nyoni Chuma. His first born Ephraim Chuma was living his own life after a misunderstanding with his late father and his father ruled that Ephraim Chuma should refrain from his father's operations. So Ephraim Chuma was living his own life during his father's lifetime.

After the death of Stephen Nyoni Chuma, we the younger brothers of Stephen Nyoni Chuma called upon Ephraim Chuma to come back home and lead the operations of the business together with his younger brothers. Some of his younger brothers were still young and needed to go to school but some of them did not get this privilege. Ephraim Chuma dictated that his younger brothers and sisters should work in the shops for their

livelihood; therefore none was educated up to ‘O’ level ----- the highest level of education they attained was grade 7.”

Mr Muhaso’s testimony was not controverted in any way. The court, therefore, accepts it as given. Mr Muhaso alluded to an occasion when members of the deceased’s family made an effort to distribute the deceased’s estate during the lifetime of Ephraim Chuma. He stated that the effort in question was made in the presence of the chief of the area wherein the deceased’s family members were residing. It was his testimony that, when family members raised the matter which related to the distribution of the deceased’s estate with Ephraim Chuma, the latter acknowledged the importance of the matter and he requested the chief to allow him to go and arrange the distribution of the deceased’s estate with Stephen Nyoni Chuma’s brothers, Mr Muhaso included. He stated that when all members of the deceased’s family had gathered to deliberate on the distribution of the estate, Ephraim Chuma indicated to the members who were then present that he was willing to have the estate distributed to the deceased’s family members. The estate was not distributed as, according to Muhaso, Ephraim Chuma told the meeting of family members that there were liabilities which were outstanding and which, he said, required to be cleared before the distribution exercise was proceeded with.

This is the long and short of Muhaso’s testimony which was not disputed by the appellants. That testimony shows, in a clear and unambiguous language, that Ephraim Chuma did not inherit his late father’s estate. He, as has already been stated, simply assumed control and management of his late father’s business which is, or was, the estate’s major asset.

The estate which the respondents registered in 2011 is a result of the combined effort of their late father, Stephen Nyoni Chuma, and their late brother, Ephraim Chuma, who is the appellants’ father. Strictly speaking, therefore, the appellants cannot claim the entire estate as their own. Equally, the respondents cannot claim the whole estate as their own. That is so because of the observed and stated fact which is that the two estates – that of the late Stephen Nyoni Chuma and that of the late Ephraim Chuma - became, due to passage of time and the latter’s concerted work upon them, one and the same estate.

In the court’s view, therefore, the interests of justice to the parties will be best served if the matter is referred to the court of first instance which court is enjoined to go into a proper inquiry with a view of establishing:

(a) the value of the estate of the late Stephen Nyoni Chuma as at the date of his death i.e.

26 January, 1978

- (b) the value of the assets of the late Ephraim Chuma as at the date that he took over and started to manage the estate of his late father. In this regard, the court will make every effort to identify and define Ephraim Chuma's assets as at the mentioned date. Those assets do, in the court's view, constitute his estate when he died in 1998 – and
- (c) the residue which is an accumulation of the work of Ephraim Chuma and his siblings on the estate of his late father taken together with the assets which he held at the time that he assumed control and management of his late father's estate. Once the two estates have been properly identified and defined as relating to each of the two deceased persons, three distribution plans will be drawn along the following lines:-
- (i) the estate of the late Stephen Nyoni Chuma will be shared amongst his wives and children, the appellants' father included,
  - (ii) the estate of the late Ephraim Chuma will be shared amongst his wife, or wives and his children – and
  - (iii) the residue which accumulated from the date which Ephraim Chuma took control and management of the estate of the late Stephen Nyoni Chuma will be distributed amongst Stephen Nyoni Chuma's wives and his children, the appellants' father included. He was, after all, the driving force behind the realisation of that residue.

The court remained alive to the fact that this was a fairly complex case which, to all intents and purposes, was on all fours with the cited case of *Matambo v Matambo* which, because of its complexity, was referred to the court of first instance for a proper inquiry to be instituted with a view to resolving the parties' dispute. *In casu*, each party entertained a genuine, but mistaken, belief that it was entitled to the estate of the late Stephen Nyoni Chuma to which it was not. The justice of the case, therefore, does, in the court's view, demand that each party meets its own costs.

The court has considered all the circumstances of this case. It, accordingly, makes the following order:

- (1) that the certificate of authority which the court *a quo* granted be, and is hereby, set aside
- (2) that the court *a quo* conducts an inquiry
- (3) that each party pays its own costs.

*Magodora & Partners*, respondents' legal practitioners

MWAYERA J agrees \_\_\_\_\_