

CHRISTINE GOREMUSANDU
and
GODFREY NEVISON MAHENGA
versus
EUNICE AGNES CHITAMBARA
and
MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 18 May 2014 and 12 June 2014

Opposed application

T. Masendeke, for applicants
Ms V.C. Maramba, for 1st respondent

MWAYERA J: Acquisition of property if done above board certainly assists the human race to live comfortably. It is what happens between the relations of the deceased which is worrisome and cause for concern. The intended comfort brought about by acquisition of material things invariable turns into volatile squabbles with the living claiming they have more rights than all the other people and claiming they were the closet to the deceased or departed.

The opposed application before me was occasioned by disagreement over a deceased estate. The applicant sought for an order that

1. The marriage between the Late Godfery Zakeo Mahenga and Eunice Agnes Chitambara be and is hereby declared null and void.
2. The customary union between Godfrey Zakeo Mahenga and Christine Goremushandu be and is hereby declared valid for the purpose of winding up of the estate of the late Godfery Zakeo Mahenga.
3. The appointment of Eunice Agnes Chitambara as the Executrix of the Late Godfrey Zakeo Mahenga be and is hereby declared void.
4. The estate is hereby reopened for the proper appointment of the Executrix and redistribution of the matrimonial assets of the estate.

5. The transfer of ownership of Stand 525 Mabelreign Township Harare and Subdivision 4 of Hippo Valley Estate, Chiredzi into Eunice Chitambara's name be and is hereby declared null void and that the Registrar of Deeds and the Ministry of Lands, Lands and Resettlement endorse on their respective registered that cancellation.
6. That the first respondent pays the costs of this application.

It was apparent from papers and during submissions that the applicant insisted the application was properly before the court because prescription could not attach since the applicant's claim was that she was customarily married to the deceased and as such claim was based on customary law. Clearly the applicant is seeking to apply the Administration of Estates Act [Cap 6:01], the Deceased Estate Succession Act [Cap 6:02] which clearly points the law the applicant seeks to apply is general law. The Prescription Act [Cap 8:11] would then come into play and the relief sought has prescribed. The Act gives the claim prescribes after 3 years. Even if one was to go by when the debt became due it is on record the second applicant once approached the courts on the same matter showing he had knowledge of his father's death and registration of the estate. The coming in 8-9 years after the winding up of the deceased estate cannot be viewed as reasonable in the circumstances more so given the lack of clarity on applicant's claim. The first applicant simply claims she was customarily married to the deceased and chose not to commit herself on the allegation that she was separated from the deceased and was married to Dzikamai Katsidzira and bore a child. She cannot surely have her cake and eat it the same time. For her to argue she was not given "gupuro" divorce token yet she was married to another man a factor she did not dispute clearly portrays lack of genuineness on marriage. She could not have been married to both men. Her marriage to Katsidzira marked divorce with the deceased. The Estate was registered advertised and accounts allowed to lie for inspection. No objection was raised and then distribution occurred. No complaints or application was lodged as prescribed in s 29 (1) of Administration of Estates Act [Cap 6:01]. About 8-9 years down the line the applicant approaches the court for redress with no reasonable explanation for the delay. There is no clarity in the applicant's claim given her separation from the deceased Godfrey Zakeo Mahenga and that the house was in the name of the deceased. Having pointed out the delay of 8-9 years in bringing action is unreasonable in the absence of an application for condonation of delay the application is dealt a fatal blow.

The parties addressed further that the matter is *resjudicata* since this court disposed of the same matter based on the same facts on HC4755/12. The second applicant was ruled to have no legal basis to claim 525 Mabelreign and that he had no right to Plot 5 Subdivision of Hippo Valley Estates Chiredzi which was allocated to the deceased in his personal capacity under the land resettlement programme. The late Godfery Zakeo Mahenga had no real rights to the property in question and as such it could not accrue to the deceased estate. See *Matsinde v Nyamuku* 2006 (2) ZLR 2000. It was spelt out that the transmissibility of rights or action depends on whether they are rights or action in *rem* or *personna*. The late Manhenga acquire land through government resettled program and thus had personal rights. The matter brought in by the second applicant apart from being rendered fatal by prescription is also *resjudicata*. Further it is apparent as conceded by Mr *Masendeke* for applicant the relief sought calling upon the Ministry of Lands to cancel the offer letter and re allocate Plot 5 of Hippo Valley Chiredzi is not tenable. Obviously the relevant Ministry has a direct and substantial interest in matter. It would be incompetent for the court to allow the matter to proceed without the joinder or judicial notice of proceedings to that party. The case of *Anabas Services (Pvt) Ltd v Ministry of Health and Ors* 2003(1) ZLR247 is quite instructive.

It is also important to mention in passing that it emerged in submissions that the applicant was seeking to have the marriage of the first respondent to the late Godfrey Zakeo Mahenga nullified. Our law is very clear that the existence of a customary law marriage cannot nullify a civil marriage or existence of any other marriage. The order sought is therefore not competent given the legal position. The position remains an unregistered customary law union cannot cause annulment a civil marriage. If anything the marriages can co exist. Without necessarily delving in detail into merits of this case for the obvious reason that the matter has been disposed of by points *in limine*, it is worth noting that if the first applicant was in a relationship to Dzikamai Katsidzira and bore a child Tafadzwa Chelsea Katsidzira. There is no issue of marriage to the late Godfery Zakeo Mahenga, and there is no debate about pinning a claim on respondents or even the estate of the late Godfrey Zakeo Mahenga. It is apparent that about 9 years after the winding up of an estate the applicants sought to approach the court for reopening of the “Estate of Late Godfrey Zakeo Mahenga” which part is not cited in the proceedings. The squabble is centred on property which applicants feel has to be redistributed. From both written and oral submission it became apparent that the first applicant’s matter could not be entertained beyond the raised points in *limine*. The respondents clearly and conclusively showed the matter had not only prescribed

but that there was a snag of non joinder of the relevant parties. Further in respect of the second applicant the application has not only been rendered fatal by prescription but also non joinder and the fact that the matter is *res judicata*. The same question was decided on and the matter involved the same parties. It is clear from the foregoing there is no need to go beyond the points in *limine* as they have conclusively disposed of the matter.

Accordingly it is ordered that the applicant's claim

- (1) Be and is hereby dismissed.
- (2) The applicants are to pay the costs of this suit jointly and severally the one paying the other being absolved.

Muzenda & Partners, applicants' legal practitioners
Thlodhana & Associates, 1st respondent's legal practitioners