

MARGARET CHIROWODZA
versus
FREDDY CHIMBARI
and
THE MASTER OF THE HIGH COURT
and
SABRINA CHIROWODZA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 November 2016

Opposed Application

S. Mpofu, for the applicant
T. Madotsa, for the 3rd respondent

CHITAKUNYE J. This is an application for an order declaring one of the immovable properties jointly owned by applicant and her late husband Mapheous Chirowodza matrimonial property.

In 1981 the applicant and the late Mapheous Chirowodza were married to each other in terms of the African Marriages Act, (*Chapter 238*) [now *Chapter5:07*].

In 1993 they had their marriage solemnised in terms of the Marriages Act [*Chapter 37*] in what applicant termed upgrading from a *Chapter 238* marriage to a *Chapter 37* marriage.

Unbeknown to the applicant her late husband married Sabrina Tatira in 1987 in terms of the African Marriages Act.

During the subsistence of the marriage applicant and her late husband acquired two immovable properties which are registered in both their names. These are Stand 8567 Area 14 Old Highfield, Harare and Stand 6846 Zimre Park, Ruwa.

In 2001 applicant went to the United Kingdom (herein after referred to as the UK) in search of employment leaving her husband and children behind. She alleges this was by mutual agreement. The husband and the children lived in the Zimre Park, Ruwa house, (herein after referred to as the Ruwa property) till his death on 24 June 2011.

The late Mapheous Chirowodza's estate was duly registered with the office of the Master of the High Court under DR1658/11. The first respondent was appointed executor dative of the estate late Mapheous Chirowodza.

The first respondent prepared a first and final administration and distribution account wherein the two immovable properties were dealt with in terms of s 68 F (2) (b) of the Administration of Estates Act [*Chapter 6:01*]. In terms of the distribution plan, neither of the surviving spouses was awarded either of the immovable properties.

The applicant inquired why she had not been awarded the deceased's 50% share in the Ruwa property as it was her matrimonial property. She was advised that this was because she was not living in that property at the time of her late husband's death.

In terms of the draft distribution plan the first respondent intended to distribute her late husband's half share in that property amongst applicant, second wife Sabrina and seven of the deceased's children.

It is this distribution plan that prompted applicant to launch this application for court to declare that the Ruwa property is her Matrimonial property and so her husband's half share therein must be awarded to her.

The first and second respondents did not deem it necessary to respond to the application despite service of the application on them. It would thus be assumed they have no objections to the order being sought and are prepared to abide by any order the court may grant.

The third respondent opposed the application. In her opposition she seemed not to apply her mind on a number of issues such that she ended up offering bare denials without any elaboration or substantiation. For instance in response to the assertion by applicant that she married deceased in 1981 in terms of the African Marriages Act [*Chapter 238*], the third respondent simply stated that:

"This is denied and the applicant is put to the proof thereof"

In response to the assertion that the deceased married the third respondent in terms of the African Marriages Act, [*Chapter 238*], which fact was unknown to applicant at the time, 3rd respondent simply stated that:

"This fact is unknown to the respondent."

Surely how could a fact pertaining to her own marriage be unknown to her? It was in fact her case that she married the deceased in 1987 in terms of the African Marriages Act.

The third respondent denied that the applicant lived at the Ruwa property or that her household goods were at that property. She did not however proceed to say who lived in this house with deceased during his lifetime.

The manner in which the third respondent chose to respond to the application was such that she did not rebut the assertion by applicant that she was in the United Kingdom for employment purposes only and that her matrimonial home was in Zimbabwe. The third respondent could also not rebut the assertion by applicant that from the time her late husband and children moved to the Ruwa house after her departure for the UK she would come on vacation and join her family in that house for the duration of her vacation. In short, that had become the couple's nest.

The applicant further asserted that the decision to move to the Ruwa house before it was completed was made by herself and her husband. They changed their matrimonial home from the Highfield house to the Ruwa house hence whenever she came back to see the family she would go to Ruwa. The Ruwa house became their permanent place of abode as a family.

It is in these circumstances that applicant argued that the Ruwa house must be considered the matrimonial home; her physical absence was due to a mutual agreement for her to go and work in the UK in order to raise resources for the completion of the house and other family needs.

It is pertinent to clarify the status of applicant's marriage to the late Mapheous Chirowodza in terms of the Marriages Act, [*Chapter 5:11*]. In as far as that marriage was solemnized after the third respondent had already married the deceased in terms of the African Marriages Act, it follows that such marriage ought to be treated as customary marriage. In this regard s 68 (4) of the Administration of Estates Act, [*Chapter 6:01*] provides that:

“A marriage contracted according to the Marriages Act [chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purpose of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]:

Provided that, for the purposes of this Part, the first-mentioned marriage shall be regarded as a customary- law marriage.”

It thus follows that the Marriage solemnized on 22 January 1993 shall be treated as a customary law marriage for the purposes of this application.

In the administration of the estate the executor is expected to take cognisance of this legal position.

In terms of s 68 D of the Act an executor is required to draw up a distribution plan. That plan should deal with the conservation and application of the net estate for the benefit of the beneficiaries, distribution of all or any part of the estate to the beneficiaries, the sale or disposal of any property in the net estate for the benefit of all beneficiaries and maintenance of any beneficiary. In drawing up the plan the executor is enjoined to consider principles set out in subsection (2) of s sixty-eight F to the extent that they are applicable. He is required to consult the deceased person's family and the beneficiaries and endeavour to obtain the beneficiaries agreement to his proposed plan.

In casu, the executor drew up the plan. The applicant was aggrieved by the plan hence this application whilst the third respondent accepted the plan. The plan acknowledged that the property belonged to the late Mapheous Chirowodza and applicant under title deed no. 10268/99. Each spouse therefore owned a 50% share in the property. It is the 50% owned by the deceased in this property and in the Highfield property that the executor sought to distribute amongst the two wives and the children. In that bid he awarded applicant, as senior wife, two shares, one share to the third respondent as the second wife and the remainder to be divided amongst the children in equal shares. This was in terms of s 68 F (2) (b) (i) of the Act.

Neither of the two immovable properties was awarded to the applicant because the executor deemed that she was not living in the houses at the time of the deceased's death.

It is this rationale that applicant sought to challenge and argued that the Ruwa property must be held as the matrimonial house and so it should be awarded to her as that is the house she lived in at the time of the deceased's death.

Section 68 F provides guidance to the Master in resolving disputes over inheritance plan. In this regard s 68 F (2) states that:-

“The Master shall be guided by the following principles, to the extent that they are applicable, when determining any issue between an executor and a beneficiary in terms paragraph (c) of subsection (3) of section sixty-eight E-

‘(a)

(b) Where the deceased person was a man and is survived by two or more wives and had one or more children-

(i) One-third of the net estate should be divided between the surviving wives in the proportions two shares to the first or senior wife and one share to the other wife or each of the other wives, as the case maybe; and

(ii) the remainder of the estate should devolve upon

A. his child; or

B. his children in equal shares;

as the case maybe, and any of their respective descendants per stirpes,

(c) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the

- following property, in addition to anything they are entitled to under paragraph (b)-
- (i) where they live in separate houses, each wife should get ownership of or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person's death, together with all the household goods in that house;
 - (ii) where the wives live together in one house at the time of the deceased person's death, they should get joint ownership of or, if that is impracticable, a joint usufruct over, the house and the household goods in that house.”

In distributing the estate, the executor acted in terms of s 68 F (2) (b) of the Act. The applicant on the other hand argued that the executor ought to have awarded her the deceased's 50% in the Ruwa property in terms of s 68 F (2) (c) of the Act.

The issue for determination is whether the applicant lived in the Ruwa property at the time of deceased's demise to entitle her to the Ruwa property as envisaged in s 68 F (2) (c) (i) of the Act.

The applicant's version as already alluded to was to the effect that she left for the UK in 2001 to work for the family. The Ruwa house had no roof, no tiles, flooring and other basic aspects for it to be habitable. Those aspects had to be attended to for the house to be habitable. Whilst in the UK she sent money to her husband for the completion of the house to make it habitable. In 2003 when she came for about 4 weeks the house was still not complete but as a family they decided to move to that house albeit it was not complete. After moving into the Ruwa house she returned to the UK to continue working and sending money for the completion of the house. Whenever she came to Zimbabwe she would go and join the family at the Ruwa house. That had become the nest for the couple.

When the husband died in 2011 she came for the funeral and stayed at the Ruwa house. It is in that Ruwa house that her personal belongings have remained since 2003 when they moved there.

It is in those circumstances that applicant insisted that the Ruwa property be declared the matrimonial property and be awarded to her.

The third respondent on the other hand contended that the property must be dealt with as per the plan by the executor. She contended that applicant was not living in the Ruwa property but was in the UK.

I did not however hear her to be denying that applicant's stay in the UK was for the purpose of employment in order to raise money for completing the construction of the Ruwa property and fending for the family. I also did not hear her denying that whenever applicant came back from the UK on vacation she would join her family at the Ruwa house.

In the circumstances, of importance is the interpretation to be accorded to the phrase ‘lived in’ in section 68 F (2) (c) (i) of the Act.

In Black’s *Law Dictionary*, 4th ed live in is defined as: to live in a place, is to reside there, to abide there, to have one’s home. To reside may be taken to mean to live in a place permanently. (Webster’s *Universal Dictionary & Thesaurus*)

In deciding whether in the circumstances obtaining applicant is covered by the provisions of s 68 F (2) (i) of the Act, it is pertinent to bear in mind the intention of the legislature.

In *Chimhowa & Others v Chimhowa & Others* 2011 (2) ZLR 471 at 475 G - 476 C CHIWESHE JP had this to say on the legislation in question:

“In reading the legislation governing deceased estates in so far as the rights of spouses are concerned, it is important to bear in mind the intention of the legislature, bearing in mind that this branch of the law has in the last decade been the subject of much debate and controversy. A number of amendments have been brought to bear to this branch of the law. The chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of deceased persons to plunder the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases the culprit relatives would not have contributed anything in the acquisition of such immovable and movable properties. This is the mischief that the legislature sought to suppress in introducing the provisions such as s 35 A of the Deceased Estates Succession Act and s 68F of the Administration of Estates Act and the Deceased Persons Family Maintenance Act, [Chapter 6:03].”

The interpretation given must thus be such that the surviving spouse or spouses and children are not made destitute or homeless when they had a home during the deceased’s lifetime. It is in this light that the law guarantees them of the shelter they lived in before deceased’s demise.

In instances where a couple has been living apart for sometime it is important to ascertain the nature of such separation before determining whether such separation would disentitle a spouse to the protection envisaged in the aforementioned pieces of legislation.

In *Jessie Chinzou v Oliver Masomera and Others* HH 593-15 the applicant had separated from the husband for about 37 years. She only surfaced after his death and laid a claim for the only immovable property available. The relationship of husband and wife had ceased as each had been leading their own life for 37 years. On pp 6-7 of the cyclostyled judgment I opined that:-

“... even applying the purposive approach it cannot be said applicant lived in the house immediately before deceased’s death. She had been there 37 years ago. Her absence was not because she had gone for employment or for such other activities as would still entitle her to

come back upon completion. I do not think it was the intention of the legislature that either of the spouses, who had lived on separation for such a long period as 37 years, in a situation I would describe as de facto divorce, would be entitled to come back at the demise of the other spouse and be awarded the house as his/her exclusive property to the exclusion of children of the marriage and subsequent unions who had been born and lived at the house. I am of the view that one should have links of living as husband and wife prior to the deceased person's death."

In casu, applicant clearly showed that marital links were still there. Her stay in the UK was for purposes of employment only and not that she had abandoned or deserted her matrimonial home and husband. It was by mutual agreement that she went to work in the UK to raise money for the family. Whenever she came on vacation she went to that property as the matrimonial property. It is the home she always had the intention to return to even when she was working abroad. That was her permanent residence where she kept her personal property herein Zimbabwe. Her sojourn in the UK was for employment purposes. She maintained her place of domicile or permanent residence as Zimre Park, Ruwa.

It cannot be said that when a bird leaves its nest to fetch material to complete the construction of the nest or to fetch food it forfeits the right to its nest. In the same vein applicant cannot be said to have forfeited the right to be deemed to be living in the property in question just because she had gone to fetch resources for the completion of the construction of the house and other family needs. Thus the term 'live in' or 'lived in' in s 68 F must be interpreted in such a way as to maintain the protection of a spouse who has temporary gone away on employment or other activities in search of the needs of the family. If a contrary interpretation were to be given great injustice would occur as spouses would find themselves without the very shelter whose construction and furnishing they had gone out to seek resources for. Such a scenario would defeat the noble intention of the legislature which includes providing protection and security of living quarters for the surviving spouse and minor children.

I am thus of the view that the Ruwa property is the Matrimonial Property applicant lived in with the deceased as husband and wife. It is the property they made their nest and so the deceased's share in this property should be awarded to applicant as her sole and exclusive property.

The third respondent's contention against such an award was without merit. As already alluded to she did not deny that it is the property applicant would go to and stay with her family whenever she came on vacation. She could not with any credence deny that applicant's personal property is in fact kept there.

In the third respondent's heads of argument effort was made to raise new issues that were not in the respondents opposing affidavit such as her purported indirect contribution to the property and that she was not aware the property was jointly owned. These aspects were clearly an afterthought whose relevance to the issue at hand was difficult to comprehend.

It was never the third respondents' contention that she had been staying at the property in question or even at the Highfield property. It would appear she had her own nest where she met with the deceased.

Clearly in my view the third respondent's opposition to the application is unsustainable.

Costs

The applicant asked for costs against the third respondent on the attorney client scale. Counsel for applicant argued that the third respondent's opposition was unnecessary and served to put applicant out of pocket. He argued that had there been some merit in the opposition, the respondent could have filed a counter application to secure her interests.

Upon an assessment of the matter it is my view that costs on a higher scale are not warranted. The issue involved clearly required court's intervention and guidance. It is an issue that may continue to be raised by parties due to the nature of our society and the need for court to move with the times and ensure that the legislature's intention to protect property rights of spouses at the demise of the other is not lost.

Accordingly, it is hereby ordered that;

1. Stand 6846 Zimre Park, Ruwa be and is hereby declared as the matrimonial home of the late Mapheous Chirowodza and Margret Chirowodza;
2. The applicant is declared the sole beneficiary of the deceased's half share in the above property in her capacity as the wife who lived in that house.
3. The third respondent shall bear the costs of this application.