

PATRICIA DARANGWA N. O (In her official capacity as the executrix Dative of Estate Late Juliet Munjeri.)

v

- (1) **ELLA MUNJERI**
(2) **OLIVER NAKOMA (In his capacity as Executor Dative For Estate Late Bookwet Jonathan Munjeri)**
(3) **MASTER OF THE HIGH COURT N.O.**
(4) **REGISTRAR OF DEEDS N.O**
(5) **GLADYS GWESHE.**

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 11 & MAY 23, 2016

G Sithole, for the applicant.

S Mpofo, for the first respondent.

No Appearance for the second to the fifth respondents.

Before **UCHENA JA**, in chambers in terms of r 5 of the Rules of the Supreme Court, 1964.

The applicant is the executrix dative of the estate late Juliet Munjeri. Juliet Munjeri was the late Bookwet Jonathan Munjeri's customary law wife married to him in terms of a registered customary law marriage. Bookwet Munjeri was allegedly already married to Ella Munjeri the first respondent in terms of the Marriage Act Chapter 37 now [*Chapter 5:11*]. The record is not clear on the correct status of Ella as it talks about the need for them to go back to court about custody of their children and difficulties in establishing whether or not she had properly divorced the late Bookwet. In his last will the late Bookwet describes Ella as his divorced wife.

The second respondent is the executor dative of the estate of the late Bookwet Munjeri. The third respondent is the Master of the High Court cited in his official capacity. The fourth respondent is the Registrar of Deeds also cited in his official capacity. The fifth respondent is the late Bookwet's customary law wife married to him under an unregistered customary law union.

The applicant applied for condonation of the late noting of an appeal to this Court against the judgment of the High Court which declared Ella Munjeri the late Bookwet Jonathan Munjeri's surviving spouse. Ella prevailed in the High Court because it accepted her claim that she was still married to the late Bookwet Jonathan Munjeri in terms of a monogamous marriage at the time of his death. However the way she conducted herself prior to his death, and after she registered his estate, tell a different story. She left him between 1979 and 1980 and married a Mr Mupfumira with whom she had a daughter. That union was terminated in 1985. It was succeeded by her marriage to a Mr Dzova with whom she is still staying and had children with. She remained in that union till Bookwet died on 13 October 2002. On his death she registered his estate as the surviving spouse but abandoned it when the late Juliet, Munjeri send to the Master an affidavit challenging her status. On realising the challenge from Juliet Ella chickened out of the race for appointment as executor of the late Bookwet's estate in the capacity of surviving spouse. Subsequent to Juliet's affidavit Ella was on 9 July 2003 in writing invited to an edict meeting. She endorsed on the face of the letter of invitation the following:

“Please close the file. Thank you. Mrs E. T. Munjeri”

The Master's office thereafter invited her to edict meetings on two further occasions, on 7 August 2003 and 25 November 2003. On 17 December 2003 Ella wrote a second letter to the Master in which she said;

“I have decided to close this file. I am no longer interested anymore. Thank you for sending this letter to me. Thank You. Yours faithfully E. T. Munjeri (Mrs).”

The late Juliet Munjeri thereafter registered the estate and administered it till its distribution account was confirmed by the Master on 1 September 2006. Ella kept her silence till soon after Juliet’s death on 13 July 2013, when she resumed her claims to the late Bookwet J. Munjeri’s estate. During Bookwet’s life time Ella wrote him letters complaining about his allowing their children to visit her at her matrimonial home with a Mr Dzova. She on a number of occasions reminded him of their divorce and her now being someone else’s wife, and to go back to court where he had been granted custody if he no-longer wanted the children’s custody.

The applicant in her founding affidavit explained that the delay was not wilful. The respondent relying on an affidavit by its legal practitioner alleged that the applicant had been timeously informed of the court’s judgment. This is disputed in the applicant’s affidavit leaving one party’s word against the other. The applicant’s explanation for the delay is that the judgment of the court *a quo* was reserved. She expected the Judge’s Clerk to notify her of the date the judgment was to be delivered as is the practise of all superior courts. It is common cause that the Judge’s Clerk did not send such notices to the parties. That makes the applicant’s explanation for the delay reasonable.

The applicant intends to raise the following issues on appeal;

1. That the court *a quo* erred by failing to appreciate that the 1st respondent’s application was not properly before it because the 1st respondent had failed to seek a review of the 3rd respondent’s decision to confirm the final distribution and liquidation account in the estate of the late Bookwet Munjeri within thirty days from 1st September 2006 as required by section 52 (9) of the Administration of Estates Act [*Chapter 6:01*].

2. That the 1st respondent had waived her rights through her two letters to the Master.
3. That the court *a quo* grossly misdirected itself both on the facts and on a point of law in failing to appreciate that the 1st respondent's own admissions that the marriage between her and the late Bookwet Jonathan Munjeri had been dissolved by the High Court coupled with proof of a subsequent registered customary law marriage between the deceased and the late Juliet Munjeri, constituted sufficient evidence to prove that the marriage between 1st respondent and the deceased was lawfully dissolved.
4. The court *a quo* erred and misdirected itself in disposing of the matter on the papers filed by the parties without having regard to the Master's report as envisaged by Rule 248 (1) (a) of the High Court Rules and/or hearing oral evidence to clarify material disputes of fact.

In respect of the proposed first ground of appeal the applicant applied for the order granted by the High Court more than 6 years after the confirmation of the distribution and liquidation account. The applicant has an arguable case on appeal especially in view of Ella's letters to the late Bookwet and the Master and her silence till Juliet's death.

The issue of waiver is also arguable entitling the applicant an opportunity to argue her case on appeal.

It is true that there is on file correspondence from Ella talking of divorce and Bookwet being granted custody. It seems to me that the applicant has an arguable case on whether on the facts of this case it was proper for the court *a quo* to take a robust approach and determine the case on papers in the face of the first respondent's letters to the late Bookwet' and the Master and her conduct on being confronted with Juliet's affidavit. It seems to me that a lot of issues in this case were not properly ventilated by the papers on record. It therefore has to be determined on appeal whether the robust approach can be taken when important facts of a case remain speculative. It had for example to be established before

determining the case, what scared the first respondent to the extent of abandoning an estate she had registered till Juliet's death. The court order which granted the late Bookwet custody should have been produced to exclude the possibility of it having included a divorce order. This in my view could only have been properly probed through the action procedure.

I am satisfied that this case should be allowed to proceed on appeal for the above stated reasons, and for its importance as it raises serious questions on whether a spouse who abandons or divorces the other for over 23 years and thereafter gets married to two other spouses can on the death of the abandoned/divorced spouse claim, to be the deceased's surviving spouse and inherit from the abandoned/divorced spouse's estate.

In the result the applicant's application is granted in terms of the draft order.

Messers Danziger & Partners, applicant's legal practitioners.

Messers Munangati & Associates, 1st respondent's legal practitioners.