

NOMAH MAJASI

Versus

BEAUTY MAWUSHA

And

VICTORIA FALLS MUNICIPALITY

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 8 APRIL 2004

M Dube for applicant
Z Moyo for 1st respondent

Judgment

CHIWESHE J: The applicant seeks the following order:

1. Applicant be and is hereby declared the sole surviving spouse of the late Tonderai Wellington Majasi.
2. Second respondent through its Housing Department be and is hereby authorised to effect transfer of title in house number 4514 Chinotimba, Victoria Falls into applicant's name.
3. The first respondent pays costs of this application."

The background facts of this matter are as follows. The applicant resides in the Murewa Communal Lands. The first respondent resides at number 4514 Chinotimba Township, Victoria Falls. The applicant was married to Tonderai Wellington Majasi under the civil laws of the then Rhodesia in 1974. Six children were born to this marriage. Tonderai Wellington Majasi died on 26 July 2000. At the time of his death he was employed as a professional cook at the Elephant Hills Hotel, Victoria Falls. The applicant states that her late husband had been in continuous employ at various places since the 1970s. She and the children would move around with him wherever he went. As the applicant advanced in age she went to live at the

couple's rural homestead in Murewa whilst her husband continued with his employment. At the rural home she stayed with the children and took care of her ageing parents in law.

In 1983 the applicant's husband "deserted" the family prompting an application for maintenance by the applicant. It was during those proceedings that it came to light that her husband had contracted a second marriage with the first respondent in Victoria Falls. Needless to say this second marriage was void on account of the subsistence of the first marriage to the applicant.

In 2000 the applicant's husband was discharged from employment on medical grounds. He returned to the communal lands in Murewa where the applicant nursed him till his death. The applicant subsequently registered the estate with the Master of the High Court in Harare. She was issued a certificate of authority in terms of which she was *inter alia* authorised to transfer house number 4514 Chinotimba Township, Victoria Falls, into her name. The second respondent however refused to transfer the property into the applicant's name on the grounds that the records showed the first respondent as the widow and not the applicant. It is that refusal that prompted the present application.

The first respondent states that she met the applicant's husband in 1979 – it was then that they fell in love. She "married" him in 1983 in terms of the African Marriages Act [Chapter 7:11]. She says she only became aware of his prior marriage to the applicant when he was charged with and convicted of bigamy. He was fined and they continued living together. She had three children with him, one of whom is still a minor.

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In 1996 the first respondent acquired jointly with the deceased house number 4514, Chinotimba, Victoria Falls. The memorandum of agreement of lease kept by the second respondent records the deceased and his “spouse” (the first respondent) as the tenants. It also records the names of their three children who at the time were all under the age of 18. The first respondent says she and the deceased developed the house from a two-roomed structure to a six-roomed house. She sourced \$80 000,00 from her employer to finance the extension of the house. She is still repaying the loan at the rate of \$800,00 per month. She has attached to her opposing affidavit a letter from one A Palmer confirming the loan agreement.

The first respondent avers that the applicant did not contribute to the purchase and development of this property. She says the applicant never visited this property and that this is her only home. She has lived there since 1996.

In her answering affidavit the applicant avers that the first respondent was at all material times aware that the deceased was married to her. She also disputes the validity of the second respondent’s loan agreement with Palmer and her contribution to the development of the stand.

It is accepted by both parties that the first respondent’s marriage was void *ab initio* and that no consequence arising out of the marriage relationship can flow from it. That position is at law correct.

However, the first respondent’s claim is not based purely on the basis that she was a spouse. Her argument is that she acquired the house together with the deceased. Together they developed it. She acquired a loan for that purpose. The applicant does not dispute that the house was extended and maintained as alleged by the first respondent. Her argument is to the effect that the first respondent is not

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entitled to inherit from the deceased because she is not a spouse. She also disputes that first respondent contributed in any measure towards the purchase and development of the property. The first respondent's claim however is based on unjust enrichment and not on the legal status of her "marriage". I do not think the applicant can challenge the first respondent's claim that she contributed towards the development of the property. The first respondent has lived in that house since 1996 and to all intents and purposes acted as though she was the deceased's spouse. This is confirmed by her registration with the third respondent as such. The applicant never visited this property and this fact is not in dispute. She is not in a position to challenge the first respondent's contribution in the acquisition and development of the property. She has no first hand knowledge of what actually transpired. The facts show that the property was acquired behind her back so to speak. At all relevant times she lived at the deceased's matrimonial communal home in Murewa. The applicant's contribution if any was indirect in the sense that while the deceased was based at his work place, she looked after the rural home and the children.

On the whole the balance of convenience is heavily tilted in favour of the first defendant. She has a right to this property on account of her contribution. The applicant in my view can only claim that portion of the property as would represent her husband's contribution in the acquisition and development of the property. She cannot simply kick the defendant out. The deceased's contribution has not been evaluated. It is therefore difficult to say how much of this property should be regarded as his share which the applicant may inherit.

Moreover the first respondent has children. One of these is a minor. The other two are certainly young adults. It has not been shown whether they are self

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supporting or in need of maintenance. In all probability they may still be dependants in which case they too would be entitled to maintenance from the deceased's estate. These children have lived at the house in question all their life. Is there any wisdom in having them removed from this house which both their parents built?

It appears to me that even if it were shown what proportion by way of contribution is attributable to the deceased and therefore to be inherited by the applicant, the balance of convenience would favour an arrangement under which the first respondent retains the property with the applicant or the estate being paid off the equivalent in monetary terms of its share in the house. It is not possible to do so on the basis of the papers presently before the court because the deceased's contribution has not been ascertained.

For these reasons the application is dismissed with costs.

Sibusiso Ndlovu Legal Practitioners, applicant's legal practitioners
Bulawayo Legal Projects Centre, respondent's legal practitioners