

JANET RUSERE

Versus

MARITA CHANETSA

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 23 MAY & 2 JUNE 2011

Ms Chivasa for appellant

No appearance for respondent

Civil Appeal

KAMOCHA J: This is an appeal wherein the appellant prays for her appeal to be upheld with costs and the order of the court *a quo* set aside and replaced by the following:

Applicant's application to be declared the sole surviving spouse of the late Gibson Rice is granted with costs."

The court *a quo* had confirmed the respondent as the first wife of the deceased.

In her grounds of appeal the appellant complained that:-

- "1. The court *a quo* erred in law in finding that respondent is a surviving spouse in the estate of the late Gibson Rice when in fact the customary law union was dissolved in 1978 respondent remarried in another customary law union;
2. the court *a quo* erred in fact and in law in finding that there was undisputed evidence that respondent and the late Gibson Rice had reconciled and formalized a new customary law union;
3. The court *a quo* erred in law and in fact by making a finding that the respondent is the first wife when she was divorced in 1978 and appellant was married in 1992;
4. the court *a quo* erred in fact by failing to appreciate the argument presented by the appellant as to why she should be declared the sole surviving spouse; and
5. The court *a quo* erred in law and in fact in making a finding that the Legal Age of Majority Act 1982, did away with necessity of lobola and traditional rites in customary law marriages thus in his view there was no need for the parties who had reconciled to formalize their new union."

The facts which are largely common cause are that the late Gibson Rice had been married to the respondent in an unregistered customary law union which was blessed with 7 children. The late Gibson Rice and the respondent dissolved their union in 1978. At the dissolution of the union the respondent got the matrimonial home being house number 1780 Mkoba 14, Gweru as part of the divorce settlement.

Thereafter the parties went their separate ways. The respondent got remarried to one Chakanetsa and thereby assumed her marital name Maritha Chakanetsa. The respondent had two children namely Shadreck and Stella by Chakanetsa who unfortunately died in 1996. When the respondent sought to reconcile with Gibson Rice in 1997 he had already remarried the appellant in 1992. This was another customary law union.

What was not clear from the record of proceedings is whether or not the respondent's endeavours to reconcile with Gibson Rice came to fruition. The witness called by respondent one Respine Kariri was so biased and untruthful that her own legal practitioner ended up cross examining her and telling her not to tell lies. She was not worth to be believed and was of no assistance to the court. There was therefore no reliable and acceptable evidence to confirm that the reconciliation was formalized. There was no basis upon which the trial court concluded that the reconciliation was formalized. Similarly, there was no basis for the finding that the respondent was the first wife of the deceased. Assuming it had been proved that the reconciliation had been formalized she still would not have been the first wife. She had lost that status at the dissolution of her union with the deceased. Had the reconciliation been formalized she would have been the second wife to the appellant who was married in 1992 when she was still married to Chakanetsa.

As already stated elsewhere in this judgment there is no acceptable evidence to hold that the respondent was re-married by the late Gibson Rice. The fact that he used to visit her at the house she was awarded at the divorce in Mkoba 14 does not mean that he had remarried her. He had 7 children with her. There was no reason to avoid her.

The respondent was staying with the deceased at number 3102 Mkoba 16 until his death while respondent stayed at her home. The appellant was the only surviving spouse at the time the deceased died. Her appeal succeeds.

In the result, it is ordered that the appellant be and is hereby declared the sole surviving spouse of the late Gibson Rice.

Cheda J I agree

Gweru Legal Project Centre appellant's legal practitioners