

DEBORAH NGWENYA

And

NDABEZINHLE NGWENYA

And

NQOBIZITHA NGWENYA

And

NOMATHAMSANQA NGWENYA

Versus

GLORY MPOFU N.O.

And

SIPHATHISIWE NCUBE

And

ASSISTANT MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 8 AND 23 JUNE 2011

Ms S Ncube for applicants

G Nyoni for 1st and 2nd respondents

No appearance from 3rd respondent

Opposed Court Application

KAMOCHA J: The first applicant Deborah Ngwenya is the biological mother of the second, third and fourth applicants. She and her three children seek an order of this court in these terms:-

“It is ordered:

- 1) That the purported winding up of the estate late Ronnie Ngwenya under DRB number 325/08 be and is hereby nullified;
- 2) That the appointment of the first respondent and the approval of the first and final distribution account be and are hereby nullified;
- 3) That the third respondent be and is hereby directed to convene another edict meeting of interested parties for the appointment of an executor to wind up the estate.
- 4) That the costs of this application shall be borne by the respondents.”

The facts giving rise to this matter which are common cause may be summarized thus. On 23 July 1982 the first applicant got married to one Ronnie Ngwenya in terms of the African Marriages Act [Chapter 238]. Her name appears in the marriage certificate as Debra Sibanda. Their marriage was blessed with the three children who are the co-applicants in this matter. The first applicant then separated with Ronnie Ngwenya in 1992 – after a period of 10 years. She left the matrimonial home. Thereafter the parties went their separate ways for 16 years although they were not formally divorced. It is not known what the applicant did during the 16 year period of separation. She only returned for the burial of Ronnie Ngwenya and claims to have met all the funeral expenses.

In the meantime, Ronnie Ngwenya contracted a marriage with Siphathisiwe Ncube the second respondent in terms of customary law but the marriage was not solemnized in terms of the Customary Marriages Act [Chapter 5:07]. All the formalities of such a marriage were done and observed. The second respondent accordingly qualifies as a spouse of the late Ronnie Ngwenya in terms of section 68(3) of the Administration of Estates Act [Chapter 6:01] “the Act”.

The second respondent lived with the deceased at house number 6613 Nkulumane, Bulawayo from the time she got married to him in 1992 until he died on 24 April 2008. She looked after the deceased during the time he was sick until he passed on. She brought up the second, third and fourth applicants who had been left behind with their father by their biological mother.

House number 6613 Nkulumane was acquired in August 1989 while the first applicant still lived with the deceased. When she departed for some unknown destination in 1992 the second defendant commenced to live with the deceased later that same year in October 1992 at the house. The house was renovated. The second defendant contributed towards the renovations to the house by paying back the money which had been borrowed to effect the renovations. The payments were made monthly until the debt was liquidated. The payments were jointly made with the deceased. She used to run a poultry project.

It is common cause that the second defendant had lived with the deceased in the said house for nearly 16 years. It is not known where the first applicant lived when she was not in Zimbabwe. She also appears to have been living in South Africa even at the time the deceased died. She has not claimed, in her papers filed of record that she used to return home during the 15 years she was away. Neither has she claimed to have provided her conjugal obligations to the deceased during that period.

On the contrary, she regarded the marriage as having come to an end from the time she left the deceased at the matrimonial home. In order to legally terminate the marriage she instituted divorce proceedings in the magistrates' court shortly after her departure under case number CC 934/92. Unfortunately the matter dragged on and on from 1992 to the time the deceased passed on in April 2008.

Similarly the deceased regarded the marriage as having been terminated immediately after the departure of the first applicant from the matrimonial home. He then on regarded the second respondent as his wife for 15 years. She was the one who was looking after his three children the first applicant had left behind and had a child with her. Deceased was anxious to have the marriage dissolved without any delay. By 24 November 1992 he had this to say to the first applicant's lawyers through his legal practitioners.

"Dear Sirs

Re: Debra Ngwenya vs Ronnie Ngwenya

Please be advised that our client wishes that this matter be finalized by January, 1993.

We would be grateful if you were to contact your client with a view to arrange a trial date for that month.

Yours faithfully

Brassel Sigidi and Partners"

Unfortunately for both parties the marriage could not be dissolved before the death of the husband. The actions of the parties were those of the people who had divorced as can be seen from the foregoing.

The first applicant was not living at the house when the deceased died. She had last lived there some 15 years ago and only returned to attend the deceased's funeral. Whereas the second respondent lived in the house with the deceased for nearly 16 years until he passed on. She is entitled to received ownership of the house and all household goods and effects thereat in terms of section 68F(2)(c)(i) of the Act.

The first applicant alleged that she had contributed towards the acquisition of the house but provided no proof to that effect. She was not a joint owner of the house. It is registered in the name of the deceased. She has no entitlement to the house as she cannot be regarded as a surviving spouse in the circumstances in terms of the Act.

In the result, I would hold that she was not a surviving spouse while holding that Siphathisiwe Ncube is the sole surviving spouse.

I now turn to the claims of her children, the second, third and fourth respondents who are now adults. They had filed their claims which were considered before the estate was wound up. If they had been aggrieved by the decision of the Assistant master they should have appealed to this court in terms of section 68J of the Administration of Estates Act [Chapter 6:01]. They did not do so but chose to file this application which is devoid of any merit.

Consequently in the light of the foregoing the application is dismissed with costs.

Messrs Coghlan & Welsh, applicants' legal practitioners

Messrs Moyo & Nyoni, 1st and 2nd respondents' legal practitioners