

CHIPO ZVAVANONDIITA
versus
RUNIYA NDLOVU
and
SIMANGELE MASEKO
and
RATCHELL MASEKO
and
BESSY MASEKO
and
THE ASSISTANT MASTER (N.O)
and
THE ADDITIONAL ASSISTANT MASTER N.O
and
THE CITY OF BULAWAYO

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 AND 17 MARCH 2016

Opposed Application

Applicant in person
1st Respondent in person

MATHONSI J: In this application, the applicant is the surviving spouse of the late Samson Maseko who died on 13 August 2013. The first to the fourth respondents are sisters of the late Samson Maseko they, together with the latter, being siblings born of the late Ellen Sikwayara who died intestate on 20 March 1996.

In essence the applicant seeks the re-opening of the estate of her late mother in law which was registered 18 years after her death as DRBY 692/14 and administered to her exclusion by the respondents. The main asset of that estate is a house being stand 44539 also known as K27 Mzilikazi Bulawayo (the house) which, in terms of the first and final distribution account drawn by the first respondent as executrix and confirmed by the sixth respondent on 25 February 2015, was parceled out to the four surviving daughters of the deceased.

The applicant has brought this application arguing that after the death of Ellen Sikwayara, herself and her late husband, had developed the house at an expense because he was also entitled

to inherit the estate of his late mother. Her late husband stood at par with the other surviving children of their mother. The first respondent has now proceeded to transfer the house into her own name after registering the estate behind her back and then excluding her and her children from benefiting from the estate. In fact as the only son, her late husband was regarded as the heir.

All this happened at a time when the applicant had approached this court in HC 2012/14 seeking an order compelling the registration of the late Ellen Sikwayara's estate. While opposing the application on flimsy grounds, the first respondent had gone behind her back to register the estate and to exclude her and her children completely. In the applicant's view the first respondent acted fraudulently. Meanwhile the fifth respondent had suggested in his report submitted in terms of rule 248 that the parties should approach his office for registration of the estate without the need of a court order. It was on that understanding that HC 2012/14 was removed from the roll on 9 June 2015 and the fifth respondent registered the estate as DRB 344/15 unaware that the respondents had done so in the customary court.

The applicant would like the winding up of the estate under DRBY 692/14 which disinherited her husband's estate to be nullified and an independent executor appointed. The application is opposed by the first respondent who denies any fraudulent conduct. She says the house did not belong to her late brother but her late mother. She confirms presenting the distribution account which excluded Samson Maseko's estate as he was dead at the time. Herself and her three sisters are the only surviving children of their mother and therefore are the only rightful heiresses to the estate. It is for that reason that the house was transferred into their four names as set out in the distribution account.

The main issue to be decided is whether the late Stanley Maseko inherited from his late mother's estate. If he did, then surely his estate or is it the beneficiaries of his estate, are entitled to inherit from the estate of his late mother. If he did not so inherit then the first respondent would be correct in distributing their mother's estate only to the four surviving siblings. It is true that in Zimbabwe statute has made a lot of inroads into the common law of intestate succession. We now talk of the provisions of s3A of the Deceased Estates Succession Act [Chapter 6:02] which allows the surviving spouse to inherit from his or her deceased spouse as well as s3 of the Administration of Estates Act [Chapter 6:01] which replaced s68(1) of that Act the terms of

which provided that if any African who had contracted a marriage according to African law or custom or, being unmarried, was the offspring of parents married according to that, died intestate his estate was to be administered and distributed according to the customs and usages of the people to which he belonged.

What it means is that prior to 1 November 1997 when s3 of the Administration of Estates Amendment Act 6 of 1997 came into effect, whether under Shona or Ndebele customary law, the heir to a deceased estate was the eldest surviving son of the deceased. See *Chaumba v Chaumba* 2002 (2) ZLR 51 (S) 52 E – G; *Magaya v Magaya* 1999 (1) ZLR 100(S).

It is a truism that in our law the intestate heirs are in all cases to be ascertained at the date when the intestacy occurs. See *Swift v Pichanick N.O* 1981ZLR 622(S); *Nyathi and another v Ncube and Others* HB 123/11. In the present matter, the intestacy of Ellen Sikwayara occurred on 20 March 1996 when she died without a will. This was before the new succession regime introduced by Act 6 of 1997 came into effect on 1 November 1997. Clearly therefore the applicant has an arguable case that the late Stanley Maseko may have inherited on his own in terms of the then prevailing law.

Thankfully that is not the subject of the present inquiry, which is simply whether the late Stanley Maseko did inherit from his late mother's estate be it on his own or along with his sisters. The first respondent has got it all wrong as her submissions are premised on who survived their mother at the time of the belated winding up of her estate in 2014. As already stated Stanley Maseko died on 13 August 2013 17 years after his mother died. The intestacy occurred when Ellen Sikwayana died in 1996 which is the time when the intestate heirs are determined.

The present case is therefore distinguishable from a situation where an estate inherits intestate from another estate which would occur when the intestate heir dies before the intestacy occurs.

In that situation the common law of intestate succession that a deceased estate cannot inherit *ab intestate* would apply. By the time Stanley Maseko died he had already inherited from his mother's estate. As such his own estate is entitled to that inheritance. Accordingly it was incompetent for the respondents to share their mother's estate to the exclusion of the estate of the late Stanley Maseko. That construction is also supported by the Assistant Master whose report

made in terms of rule 248 of the High Court of Zimbabwe Rules, 1971 was submitted belatedly on 9 March 2016.

I take judicial notice that brickbats have been flying between the applicant and her sisters-in-law who are the respondents in this matter. Clearly there is no love lost between them as they threaten to annihilate each other over the estate in question several years after Ellen Sikwayara met her maker. It is therefore prudent that an independent executor who is not one of the beneficiaries be appointed to undertake the exercise of winding up the estate.

Let me mention here for completeness that the applicant had to stand as a self-actor because Mr *Shenje* who represents her was late for court. Although not in attendance at the hearing Mr *Shenje* turned up at my chambers afterwards to explain that he had thought that the hearing of opposed matters was commencing at 10am and not 9am. So much for serving parties with notices of set down. Some of them do not bother reading the notices.

In the result, it is ordered that:

1. The winding up of the estate late Ellen Sikwayara in terms of the letters of administration issued under DRBY 692/14 is hereby declared null and void and is set aside.
2. The estate in question is re-opened for administration *de novo*.
3. The fifth respondent shall appoint an independent executor to wind up the estate in question.
4. Each party shall bear its own costs.

Shenje and Company, applicant's legal practitioners

HB 82-16
HC 1648-15