JANE MAPENZAUSWA
versus
TAYENGWA DUGMORE MUSKWE
and
MASTER OF THE HIGH COURT
and
DIRECTOR OF HOUSING AND COMMUNITY SERVICES
and
TANITA KATSENGA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 7 March and 18 June 2008

Family Law Court
Opposed Application

J.M. Bhamu, for the applicant
T.D. Muskwe, for the 1st respondent
L. Mazonde, for the 4th respondent

KUDYA J**:** This application was filed on 19 December 2006 by the widow of the late Abisha Mapenzauswa. She is challenging the validity of the will and last testament of her late husband and its subsequent execution by the first respondent, the testamentary executor.

On 26 October 2000, the deceased executed a will and appointed first respondent testamentary executor. He married the applicant by civil rites on 21 April 2001. He died at the ripe age of 82 on 8 December 2004. His estate was registered with the Master in D/R 171/2005 by the testamentary executor on 12 May 2005.

In clause 5 of the will, the deceased disposed of his immovable property in these terms:

> "Upon my death, my immovable property commonly known as 56 Mubvamaropa Road Mufakose, Harare, shall be sold and ninety-five (95%) percent of the proceeds shall be shared equally among my surviving children namely:-
> 5.1 PAUL MAPENZAUSWA (BORN 13th May, 1956)
> 5.2 JONAH MAPENZAUSWA (born 7th January, 1958)
> 5.3 CHIPO MAPENZAUSWA (BORN 8th July, 1997)
> 5.4 AND I bequeath five percent(5%) of the said proceeds to my surviving wife namely JANE MAPENZAUSWA (nee KAMBINI)"

The Master accepted the will as valid and after due inquiry granted authority to the executor to dispose of the property by private treaty. The executor duly sold the rights of the deceased in the immovable property to fourth respondent for cash on 31 August 2005. The applicant must have submitted her marriage certificate to the Master at a subsequent date for he wrote to the executor on 12 December 2005 requesting him to withhold the sale opining that in terms of s 5 (3) (a) of the Wills Act [*Chapter 6:06*] the will was invalid as it was executed prior to the contraction of the civil marriage. On 22 March 2006 the executor wrote to the Master indicating that only 50% of the immovable property was for distribution given that the other half had been dealt with in the estate of the deceased's first wife and that the beneficiaries agreed that the property be disposed of in terms of the will. On 19 June 2006, the Master authorised the advertisement of the First and Final Administration and Distribution Account. The applicant objected to the account but her objections were dismissed by the Master on 7 November 2006.

On 14 September 2006 the third respondent advised the applicant's legal practitioners of record that the property was still registered in the name of the Estate Late Abisha Mapenzauswa but had no objection to the request from the executor testamentary to cede it to fourth respondent. On 25 September 2006, acting in terms of the agreement of sale, the fourth respondent, by an order of the magistrates' court, duly evicted the applicant from the immovable property. Her subsequent attempts to reverse the eviction in the same forum failed.

The application was opposed on 6 February 2007 by first respondent and on 11 July 2007 by fourth respondent (who was served with the application on 12 June 2007). The first respondent attached his response to the Master's letter of 16 March 2006 dated 22 March 2006. Apparently the Master granted the consent to sale after receiving a copy of the agreement of sale to fourth respondent. Correspondence was exchanged between the Master and the applicant's legal practitioners and the first respondent. On 7 November 2006 the Master overruled the applicant's objection to the sale of the immovable estate property in question. The fourth respondent averred that he purchased the property in good faith and that the applicant was lawfully evicted by a Magistrate's court order.

On 13 March 2007 the Master submitted his report on the present application. He stated that when he authorised the sale of the house he was not aware that the applicant, who was one of the beneficiaries in the will, had contracted a civil marriage with the deceased subsequent to the execution of the will.

The main issue for determination is whether the civil marriage that the deceased contracted 5 months after the execution of will invalidated that will.

Mr *Bhamu*, for the applicant, submitted that the subsequent civil marriage between the testator and the applicant invalidated the will. He relied on the provisions of subsection (1) of s 16 of the Wills *Act [Chapter 6:06]* and *In Re Savanhu* 1990 (2) ZLR 177 (HC).

Section 16(1) of the Wills Act states as follows:

16 Effect of testator's subsequent marriage on will
(1) Subject to this section, a will shall become void upon the subsequent marriage of the testator.

The facts in the *Savanhu* case, *supra*, were that the testator solemnized his customary law union on 17 May 1949. He executed a will on 7 October 1988 and contracted a civil marriage in church with the same wife of almost 40 years on 26 February 1989. He died on 6 September 1989. The widow applied to the High Court to have the will declared null and void on the ground that he had entered into a subsequent marriage with her as contemplated by s 16 (1) of the Wills Act.

CHINENGUDU J dismissed the application on the basis that the civil marriage to the same woman with whom he had a registered customary union was not a subsequent marriage as contemplated by s 16(1) of the Wills Act. At page 179B-C he stated thus:

> "In my view a subsequent marriage contemplated by s 16(1) of the Wills Act 1987, is a marriage by one party to another person after the dissolution of an existing union either by divorce in Court or by death. Such a marriage can properly be regarded as a subsequent marriage for the purposes of the above-mentioned Act. What the parties did was to convert their potentially polygamous marriage into a monogamous one, but their proprietary rights are still governed by African law and custom."

His reasoning found approval with GUBBAY CJ on appeal in *Savanhu v Heirs Estate Savanhu* 1991 (2) ZLR 19 (SC) who at 23F held that:

> "But the right given to Africans who have already contracted a registered customary union to contract a second marriage under the Marriages Act, without having the first dissolved, does not mean that their second marriage has the effect of rendering void any pre-existing will. For there has been no change in status of the testator from an unmarried to a married person, and it is the existence of that very change that the legislative intendment is aimed at."

The learned Chief Justice set out the legislative basis for promulgating s 16(1) of the Wills Act at 23B-E in these terms:

> "It is plain to me that by enacting the provision in question the lawmaker was minded to alter the common law in accordance with which a will is not revoked by the

> subsequent marriage of the testator. See *Ludwig v Ludwig's Executors* (1848) 2 Menz 452; *Shearer v Shearer's Executors* 1911 CPD 813; *Braude NO v Perlmutter & Ors* 1969 (2) RLR 103 (AD) at 109C; 1969 (4) SA 101 (RA) at 106. It was appreciated that the operation of such a principle would cause injustice and untold hardship. So in 1929 a change in the law was effected by the introduction of s 2 of the former Deceased Estates Act, presently superseded by s 16(1) of the Wills Act. Its object is to afford some measure of protection to the new spouse of the testator who had been previously married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous or potentially polygamous matrimonial union to one of monogamy. It envisages a necessary change, brought about by the subsequent marriage, to the status of both the spouse and the testator to that of a married person - from a bachelor, divorcée or widower in the case of the man, and from a spinster, divorcée or widow in the case of the woman. It is designed to avoid a situation in which the will of one or each of them, which pre-dates the subsequent marriage, makes no provision for the other's new spouse." (The underlining is mine for emphasis)

In the present case neither the applicant nor the respondents have averred that the testator had solemnized a customary law union with her which they converted into a civil marriage. Their marriage certificate showed that their status changed from widower and spinster, respectively, to married. Section 3 of the Customary Marriages Act *[Chapter 5:07]* makes it clear that an unregistered customary marriage is not a marriage in this country. It reads:

> **"3 Marriages not to be valid unless solemnized**
> (1) Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless—
> (*a*) such marriage is solemnized in terms of this Act"

The present case is not on all fours with the *Savanhu* case, *supra*. To the extent that the testator was a widower, he entered into a subsequent marriage with the applicant. He executed his will prior to the civil marriage. The validity of the will falls for determination under s 16 of the Wills Act.

Mr *Muskwe* contended on his own behalf that the will was executed at a time when the applicant was in a customary law union with the testator. He drafted the will for the deceased. He was not aware that at that time the deceased was not married to the applicant. He was aware that the deceased was once a widower as he had dealt with his deceased wife's estate. He averred that the testator disposed of his half share in the immovable property under his will. The other half belonged to his late wife and this went to her children.

I agree with Mr *Bhamu* that the introduction of the testator's deceased wife into the controversy is a red herring. The will sought to dispose of the whole house and not just a half share. The letter from the third respondent of 14 September 2006 indicated that the property was registered in the deceased's name. The question of the deceased wife holding a half share in the property does not arise. Mr. *Muskwe* failed to appreciate that after her death, as the property was registered in his name, the rights in the property remained vested in the testator. I agree with Mr *Bhamu* that the immovable property belonged to the testator.

Mr *Muskwe* contended that in terms of African custom, even though the applicant and the testator had not solemnized their customary law union under the Customary Marriages Act or the Marriages Act [*Chapter 5:11*], they were regarded as husband and wife. In fact they also regarded each other as husband and wife. He therefore submitted that their union in the eyes of African custom created the same legal obligations as a registered one.

The pleaded facts did not disclose that by the time the testator executed the will, he had contracted a customary law union with the applicant. Had the facts established the existence of such a union, I would have been prepared to consider Mr *Muskwe*'s submission. I, however, leave the question open and decline to venture an opinion whether in those circumstances I would have reached the same conclusion as did CHINENGUNDU J in the *Savanhu* case.

Mr *Muskwe* further submitted that the will was validated by the provisions subsection (4) of s 16 of the Wills Act. It reads:

> "(4) Where it appears from a will that when it was made the testator was expecting to be married and that he intended that—
>
> (*a*) the will should not become void upon the expected marriage, the will shall not become void upon that marriage;
>
> (*b*) a particular disposition or provision in the will should not become void upon the marriage—
>
> (i) that disposition or provision shall take effect notwithstanding the marriage; and
>
> (ii) any other disposition or provision in the will shall take effect also, unless it appears that the testator intended the disposition or provision to become void upon the marriage."

It seems to me that the intention of the testator can be discerned from the wording of the will. He referred to the applicant three times by name and called her "my surviving wife". The civil marriage was contracted just less than 6 months after the will was executed. He made three bequests to her in the will. He therefore provided for her. He called her his surviving wife even though she was not yet, legally, his wife. At that time, in law, she was his girl friend. He obviously desired that she become his future wife. He was then 79 years old. He had

children, grandchildren and great grand children from his previous marriage that he felt he owed a filial duty to provide for. He also wished his future wife to benefit from his only major asset together with his descendants in the proportion which he believed did justice and fairness to them all. In my view, this demonstrates that he made the will in contemplation of his pending civil marriage to the applicant. He therefore did not intend that his will be invalidated by that marriage.

The civil marriage did not, in my view, invalidate his will. The will and the subsequent acts of the testamentary executor cannot, therefore, be impugned.

The resolution of this main issue makes it unnecessary for me to deal with the other issues that were raised by the parties and Mr *Mazonde,* for the fourth respondent, save for the one which touches on the conduct of the Master's office. There is need for that office to be consistent in its operations. It does not assist litigants for officials in the Master's office to issue contradictory opinions in the same matter. In any event in *Logan v Morris NO & Others* 1990(2) ZLR 65 (SC) at 71E, MCNALLY JA stated:

> "The Master is not empowered to conduct judicial enquiries. Where matters of law arise he is enjoined to refer the matter to a Judge or to the Court. (see e.g. s 113)"

In terms of proviso (i) of s 16 of the Administration of Estates Act [*Chapter 6:01*] the determination of the validity of a will is the domain of the High Court. The Master should have referred this issue to the High Court for determination when it arose rather than issue contradictory opinions.

I, however, hold that the will was valid. The application is therefore dismissed with costs.

Musarira Law Chambers, applicant's legal practitioners
Muskwe & Associates, 1st respondent's legal practitioners
Chihambakwe, Mutizwa & Partners, 4th respondent's legal practitioners