ESTATE LATE BRIDGET WAKAPILA
versus
DENNIA MATONGO
(in her capacity as the Executrix in the Estate
of the late Pension Wakapila)
and
DIRECTOR OF HOUSING AND COMMUNITY
SERVICES OF CITY OF HARARE
and
THE MASTER OF THE HIGH COURT

Family Law Court-Deceased Estate

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 4 and 31 July 2008

D Matimba, for the applicant
H Mucheche, for the first respondent

KUDYA J: The late Pension Wakapila died on 28 May 1999. He was survived *inter alia* by his wife Bridget to whom he was married in terms of the Customary Marriages Act [*Cap 5*:*07*] on 5 August 1973. Bridget died on 6 September 2002. Their union was not blessed with children. Before they contracted the union, Pension had children by another woman while Bridget also had a son by another man. This son, Remigio Tawanda Chagonda, was appointed the executor dative of Bridget's estate by the Assistant Master at Harare Magistrates Court on 6 March 2007, while the other woman in Pension's life was appointed the executrix dative by the Master on 1October 1999. She was appointed in the face of a will executed by Pension on 24 December 1998 in which he appointed Tafadzwa Wakapila as executor testamentary. The will was deposited with the Master on 11 January 1999.

Again, on 30 November 1999, the Assistant Master sitting at Harare appointed Bridget the executrix dative of the estate of the late Pension.

The untidy situation that prevailed was that two executrixes were appointed for the same estate at different foras and dates by the Master in the face of an existing will which had already been deposited with the Master. The provisions of ss 23, 24 and 25 of the

Administration of Estates Act give preference to the appointment as executor by the Master of the person nominated in the testator's will. It is only where the nominated person has predeceased the testator, declined the appointment or has the appointment challenged that the Master is precluded from issuing him with letters of administration. It is not clear from the Master's report or the pleadings why the testamentary executor was not issued with letters of administration and why the Master appointed an executrix dative on 1 October when the will had been lodged with him on 11 January 1999. The Master's appointment of 1 October 1999 was not impugned by the testamentary executor or any interested party. In my view, it remains valid until set aside by a competent court. While the appointment of Bridget was invalid, that of the first respondent was valid as it was the first in time. The first respondent was properly sued as the appointed executor.

The present application was launched by the executor in Bridget Wakapila's estate against the executrix in Pension Wakapila's estate for the control of an immovable property commonly known as stand 22 Muridzamhara Road Mufakose, Harare.

The applicant contends that though the rights in the immovable property were registered in Pension's name, they were as a matter of law jointly held in equal and undivided shares by both Pension and Bridget. He bases his contention on the fact that Pension acquired those rights through his marriage to Bridget. He further contends that the purported disposal of the jointly held rights in the property by will by Pension ran foul of the provisions of s 5 (3) (a) of the Wills Act [*Cap 6:06*]. He opines that the violation invalidates the will. He further averred that the invalidation of the will would result in the devolution of the house to Bridget and thus to her estate, and perhaps to him as her only surviving beneficiary.

The first respondent opposed the application. The first basis of opposition was that the cession in the property was held by Pension and not by both Pension and Bridget. The second was that the registration of Pension's estate by Bridget was void because it came after the registration of the same estate by the first respondent. She further averred that the will was valid and used its validity as a sword to attack the registration by Bridget of the estate in the Magistrates' Court. In her view, which was supported by the Master in his report of 30 July 2007, all testamentary estates by law are registered with the Master and not with the Assistant Master.

In her heads of argument, she raised the preliminary point that the applicant had no *locus standi* to bring the application as he was neither the wife of Pension nor a beneficiary in

his estate. Mr *Mucheche,* for first respondent, conceded that this point was misplaced as the applicant is the executor of Bridget's estate. The son is not the applicant. He is not suing in his personal capacity. The preliminary point therefore falls away.

I proceed to deal with the contentions advanced by the applicant, *seriatim.*

Whether Bridget was a joint holder of rights with Pension in the immovable property

The letter of 5 February 2007 from the second respondent, on which applicant relies for the averment that his mother was a joint holder of rights, does not disclose that she was a joint holder of rights in the property in question. It simply states that "the deceased Pension Wakapila was married to Bridget Wakapila on African Custom Certificate Number Z74/73 Zvimba on 05 August 1973." It does not establish, as was averred by the applicant in his founding affidavit, that she was a joint registered holder of rights in the property in question.

The rights, title and interest in the immovable property in question were acquired by Pension from the City of Harare. He registered six children, that is, Chanceless, Berita, Godfrey, Lazarus, Jane and Tafadzwa and his wife Bridget with the City of Harare as his dependents. The registration of the wife and children did not confer any transferable rights, interest and title in the immovable property to them. Ownership in the property remained vested in the City of Harare. Pension was a cessionary while the City of Harare was the cedant and owner of the rights, interest and title in the property. A wife who is not registered as a cessionary in her own right or jointly with her husband does not become a holder of any rights in the property such as the present merely because she is the wife.

The argument advanced by the applicant implicitly accepts that the rights were registered in Pension's name only at the time of his death. At the hearing Mr *Matimba* conceded that as the rights in the property were registered in Pension's name, he was the sole holder of those rights.

I hold that she was not in fact and in law a joint holder of rights in the immovable property. See *Muswere* v *Makanza* HH16-2005, *Cattle-Breeders Farm (Pvt) Ltd* v *Veldman* (2) 1973 (2) RLR 261 (AD), *Muzanenhamo & Anor* v *Katanga* 1991 (1) ZLR 182 (SC) and *Muganga* v *Sakupwanya* 1996 (1) ZLR 217 (S).

Whether the will was invalidated by s 5 (3) (a) of the Wills Act

Paragraph (a) of subs (3) of s 5 of the Wills Act on which applicant relied reads as follows:

> (3) No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of —
>
> (*a*) any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons; or
>
> (*b*) ……
>
> (*c*)……
>
> except in so far as such variation or prejudice is brought about with the consent of the person or creditor concerned or through the exercise by him of a right of election.

The applicant submitted that the intention of the legislature in enacting this provision was to prevent the erosion of the rights of the surviving spouse by the deceased through a will.

The first respondent contended that the testator exercised his testamentary freedom to dispose of his rights to whomsoever he wished without any legal or factual disabilities. She therefore submitted that the validity of the will could not be impugned. Mr *Mucheche,* further contended that the provision relied on by the applicant protects only those rights that the surviving spouse possesses at the time that the will is executed. He gave two examples of such rights. The first concerns an immovable property that is registered in the surviving spouse's name wherein the parties are married out of community of property while the second involves jointly held property for those married in community of property. In these two instances, the deceased spouse could not bequeath in a will the surviving spouse's rights. Mr *Matimba* did not make any submissions to the contrary. He in fact abandoned the initial submission in his heads that Bridget held joint rights in the immovable property with her late husband.

The provisions of s 5 (3) (a) of the Wills Act prevent the testator from eroding the property rights vested in his spouse by law in either his or their joint estate. These rights, in my view, are those that the spouse has at the time the will is executed as opposed to future or contingent rights that arise on the death of the testator. After all, the variation or prejudice does not arise on the demise of the testator but at the time the will is written notwithstanding that the will only commences to operate on his demise.

The argument advanced by Mr *Matimba* that the surviving spouse is vested with rights in a deceased estate, in which a testamentary disposition has been made, at the time of death is fallacious for three reasons. The first is that the divested property, subject to acceptance by the beneficiary, no longer belongs to the testator. The second being that giving such a meaning to

the provision in issue would result in so radical an alteration of the common law power of a spouse to dispose of his or her property to whomsoever he or she wishes. If the lawmaker intended such a radical departure from the common law it would have said so in clear language. It would be absurd to allow the spouse to dispose of his or her property during his or her lifetime but take away that power from him or her to dispose of it by will. The third being that a wife married under customary law can only inherit from her husband's estate if he dies intestate. Where he has disposed of his estate by a will, she does not inherit and thus has no rights in any property belonging to his estate.

In *casu*, at the time the testator wrote the will, Bridget did not have any legal rights in the immovable property. He did not therefore deprive her of any rights when he bequeathed them to another in a will. At his death, Pension no longer held the rights in the immovable property for they were vested in another. Disposal by will is an exercise of control over the property which is similar to disposal by sale. Both have the same effect of divesting dominion over the property from the testator. They are not prohibited by any legal regime that governs matrimonial property rights.

I am not persuaded that the divesture of the immovable property from the deceased's dominion contravened s 5 (3) (a) of the Wills Act.

At the hearing Mr *Matimba* attacked the validity of the will on the basis that it did not comply with the formalities set out in paragraph (b) of subse (1) of s 8 of the Wills Act which mandates that every page of the will be signed by the testator and his attesting witnesses. It reads as follows:

> **"8 Formalities for making wills, other than soldiers wills, wills made during epidemics and oral wills**
>
> (1) Subject to subss (3) and (5), a will shall not be valid unless—
>
> a) …….
>
> *b*) the testator, or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing on the page concerned; and"

The will under consideration has three pages. The first two pages deal with the appointment of the executor testamentary, the beneficiaries and the bequests. They are both

signed by the testator and two witnesses as closely as may be to the end of the writing on each page.

The third page is set out as follows:

> This is the Last Will and Testament
> of (signature of testator is appended)
> of (address of testator is provided)
> Dated 24/12/98
> Executor (nothing is written)

Mr *Mucheche* contended that notwithstanding the failure by the testator and his two witnesses to append their signatures close to the last writing on that page, the will was valid because the Master had accepted it as such.

I am not persuaded by Mr *Matimba's* argument that the failure to append signatures on p 3 would invalidate the will. This page does not deal with the substantive contents of the will but seems to me to identify whose will it is. In any event the information on page three is fully covered on pages one and two, both of which were correctly executed.

It is also noteworthy that the formalities that are set out in subsection (1) are made subject to subs (5) of s 8 of the Wills Act. The latter reads:

> "(5) Where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act [*Cap 6:01*] even though it does not comply with all the formalities for –
>
> (*a*) the execution of wills referred to in subs (1) or (2);"

In his report the Master indicated that he accepted the validity of the will. It seems to me that he exercised his discretion properly. The procedure for setting aside a will is provided for in s 15A of the Wills Act. In casu, it was not followed. The validity of the Will stands.

The applicant has therefore failed to impugn the validity of the will. It follows that as the deceased did not die either wholly or partially intestate, the provisions of s 3A of the Deceased Estates Succession Act [*Cap 6:02*] that were cited by the applicant do not apply in the present case.

Accordingly, the application is dismissed with costs.

Matimba & Muchengeti, applicant's legal practitioners
Donsa-Nkomo Legal Practice, first respondent's legal practitioners