

ALEX CHIMHOWA  
and  
CLEOPAS CHIMHOWA  
and  
VIOLA CHIMHOWA  
and  
PAULINE CHIMHOWA  
and  
EDMORE CHIMHOWA  
and  
NYASHA MASIYIWA CHIMHOWA  
versus  
JOYCE CHIMHOWA (nee MASUKWEDZA)  
and  
FREMUS EXECUTOR SERVICES (PVT) LTD (N.O.)  
and  
MASTER OF HIGH COURT OF ZIMBABWE (N.O.)  
and  
CITY OF HARARE (N.O.)

HIGH COURT OF ZIMBABWE  
CHIWESHE JP  
HARARE, 8 March, 17 November and 23 November 2011

Mr *T. Moyo*, for the applicants  
Mr *T.I. Gumbo*, for the first respondent

CHIWESHE JP: This is an application to review the actions of the second and third respondents with regards the distribution of the estate of the late Lloyd Chimhowa, who died intestate on 3 December 2007.

At the time of his death the deceased was married to the first respondent, Joyce Chimhowa, in terms of the then Marriages Act [*Cap 37*]. The parties initially contracted a customary law union. This union was subsequently solemnised on 14 June 1991. Up till then the deceased was a widower, having been customarily married to Mary – Maria Mabwe in 1971. She died intestate in October 1987. During the subsistence of this first marriage the spouses acquired an immovable property known as house number 7447, 6<sup>th</sup> Way, Glen View 7, Harare. The house was registered in the name of the deceased, Lloyd Chimhowa. The house was acquired in 1979. The spouses jointly contributed to the development of the stand including the construction of a dwelling house. Mary Maria died after completion of the house. For one reason or another her estate was neither registered nor administered as

required by law. She was survived by her husband Lloyd Chimhowa and six children, the applicants in this matter.

The late Lloyd Chimhowa's second marriage to the first respondent was blessed with four children. The new family continued to reside at the house left behind by Mary Maria Mabwe. Also residing at the same address were the six children borne out of the deceased's marriage to Mary Maria Mabwe.

When the late Lloyd Chimhowa died the first respondent was appointed executor of the deceased estate. She did not last long in that appointment after the Master wrote to her accusing her of falsifying information in order to get authority to transfer estate assets into her name. For this, the Master threatened her with criminal prosecution. Her appointment as executor was then revoked in favour of the second respondent. The first respondent and the applicants were in bitter dispute as to the distribution of the matrimonial home. The parties eventually buried the hatchet and came to a mutually agreed distribution plan. It was agreed that the matrimonial home be jointly owned by the applicants, the first respondent and her four children, in equal share. This agreement was referred to as 'the family tree'.

This agreement did not last long. The first respondent opted out of it and, in a letter addressed to the executor (the second respondent), dated 30 September 2008, she advised that she was resiling out of the agreement and demanded to be allocated what belonged to her and her biological children. She followed this with another letter dated 21 October 2009 in which she demanded to be allocated fifty per cent of the matrimonial home, with the other fifty per cent being allocated to the 6<sup>th</sup> respondent and her minor biological children.

On 4 August 2009 the executor (2<sup>nd</sup> respondent) submitted to the third respondent the first and final distribution account in terms of which it was proposed *inter alia* to award the immovable property (matrimonial home) No. 7447 – 6<sup>th</sup> Way, Glen view 7, Harare, to the second respondent. Despite applicants' written objection to the distribution of the matrimonial home, the third respondent, the Master, confirmed the distribution, advising the applicants to seek review by this honourable court should they persist with their objections.

The applicants have proceeded accordingly by launching the present application. They contend as follows: The third respondent did not take their objections into account and for that reason he failed to apply his mind to the issues before him. Chief among the applicant's reasons for objection was that the distribution did not take into account the fact that the matrimonial home also constituted part of their late mother's estate (Mary-Maria

Mabwe's estate). This should have been taken into account in finalising the estate, they argue.

Secondly, the applicants were aggrieved that in compiling the inventory the first respondent had left out the Rusape rural home, which their late father had specifically built for her. It is this rural home to which, in the opinion of the applicants, the first respondent would be entitled as she had not contributed to the acquisition and development of the Glen View matrimonial home. It is further argued that the third respondent failed to recognise that he was essentially dealing with two estates. Maria Mary Mabwe's estate, argue the applicants, would be entitled to fifty per cent of the matrimonial home. The balance of the value of the matrimonial home would have accrued to her late husband's estate. That is the value that the first respondent would have been entitled to. The applicants admit that at one stage the first respondent had offered that they buy out her fifty per cent share. They were however unable to raise the amounts involved. Further the applicants aver that on a number of occasions the first respondent had indicated that she wanted to sell the matrimonial property and that if she did so, the applicants, especially the 6<sup>th</sup> applicant, who is disabled, would be greatly prejudiced.

For these reasons the applicants seek an order setting aside the decision of the third respondent to award the matrimonial home to the first respondent. In its place they seek the substitution of an order awarding the Rusape rural home to the first respondent with the applicants and the first respondent being jointly awarded the Glen View matrimonial home in equal share. Alternatively in the event that the matrimonial home is awarded to the first respondent, that the applicants, in particular the 6<sup>th</sup> applicant, be granted the right to use the property and that the fourth respondent be directed to register a caveat against the property to prevent first respondent from disposing of the property without the consent of the applicants.

The first respondent says she was initially amenable to sharing the immovable property with the applicants but because the applicants continually undermined her authority as mother and also because there being ten people the house was always overcrowded, she had changed her mind. She expected those of the applicants who had attained adulthood to move out. They refused to so move out. She said she had left out the rural home, in compiling the inventory because although she regarded it as the family's rural home (Mary Maria Mabwe's hut is also situated there), she did not regard it as her matrimonial home as she hardly lived there, except for the odd weekend. She denied that it was her intention to sell the matrimonial home in Glen View. Above all however the first respondent argues that

at law, being the surviving spouse, she is entitled to the matrimonial home and that she is not obliged to co-own the matrimonial home with the applicants. She also avers that had the estate of Mary Maria Mabwe been registered it would have been handled under customary law and thus the house would have been excluded from her estate and awarded to her husband instead. It cannot therefore be argued that the house transcends two separate estates. To that end, contends the first respondent, the Master's decision was sound at law and meets the justice of the case.

I believe from the facts of this matter that the office of the Master followed the procedures outlined in terms of the Administration of Estates Act. An edict meeting was held attended by all stakeholders. When the first respondent failed to meet the required standards, the Master quickly intervened revoking her appointment as executor and replacing her with the second respondent. Various meetings were held among the parties with a view to getting them to agree on the way forward. They were unable to agree and naturally the Master directed that the executor proceeds in terms of s 3A of the Deceased Estates Succession Act, [Cap 6:02]. In general, therefore, the Master and the second respondent cannot be faulted in the manner in which they handled this deceased estate. They were guided ultimately by the provisions of s 3 A of the Deceased Estates Succession Act which provide that the surviving spouse of a person who dies wholly or partially intestate shall be entitled to receive from the free residue of the estate *“the house or other domestic premises on which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death and the household goods and effects which immediately before the person's death were used in relation to the house or domestic premises referred to in para (a), where such house, premises, goods and effects form, part of the deceased person's estate.”*

Section 68 F (b) (i) of the Administration of Estates Act [Cap 6:01] on the other hand provides, in relation to the estates of persons who die intestate, as follows:

“.....where the deceased person is survived by one spouse and one or more children, the surviving spouse should get –

- (i) Ownership of, or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person's death, together with all the household goods in that house.”

In reading the legislation governing deceased estates in so far as the rights of surviving spouses are concerned, it is important to bear in mind the intention of the legislature, bearing in mind that this branch of the law has in the last decade been the subject

of much debate and controversy. A number of amendments have been brought to bear to this branch of the law. The chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of deceased persons to plunder the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases the culprit relatives would not have contributed anything in the acquisition of such immovable and movable properties, often the result of years of toil on the part of the deceased and the surviving spouse. This is the mischief that the legislature sought to suppress in introducing provisions such as s 3A of the Deceased Estates Succession Act and s 68 F of the Administration of Deceased Estates Act and the Deceased Persons Family Maintenance Act [*Cap 6:03*].

In my view the legislature intended to protect, in the case of widows, that property acquired during the subsistence of their marriage to the deceased persons. This protection benefitted not just the widows but their minor children as well. I do not perceive the legislature's intent to be to extend this protection and privilege to persons outside the marriage within which such property might have been acquired. To impute that kind of interpretation would lead to serious absurdities in the application of the law. For example A marries B. They acquire jointly what may be termed matrimonial property. They have children. A, the husband, dies and in terms of the law B, the wife and surviving spouse, is awarded the matrimonial property. Thereafter B contracts another marriage with X, the second husband. She dies and X the second husband and surviving spouse, inherits the matrimonial property that B inherited from A, at the expense of A and B's children in that marriage. Clearly the children will have been disinherited of their parents' property. They may as a result end up in the street particularly if X sells the property and converts the proceeds to his own selfish ends. In the result the noble intention of Parliament to keep the property within the family for the benefit of the surviving spouse and the children will have been subverted.

During the course of hearing this application an example was given of a surviving male spouse whose wife died leaving him to fend for their minor children. He was in terms of the law awarded the matrimonial house and movables. He retained the maid because it was in the interests of the children to keep them under the care of a person they were familiar with. In time a relationship developed between the maid and the widower, leading to

marriage. The widower dies and the maid, being the surviving spouse, is awarded the family's matrimonial home acquired during the subsistence of the first marriage, without the maid's contribution. Thereafter the maid sells the matrimonial home, takes the money, deserts the deceased husband's children and marries another man. Again in instances such as this example the intention of the legislature is subverted.

For these reasons I would conclude that the protection afforded surviving spouses is, in terms of inheritance, limited to those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose estate is under distribution. In particular, surviving spouses cannot by right claim any right to matrimonial property acquired outside their own marriage. To allow them to do so would lead to the absurdities alluded to above. It would be against public policy and conscience to deprive the children of deceased persons the common law right to inherit from their parents merely because at some stage the surviving parent had remarried. If that had been what Parliament intended to do it would have expressly so provided. I am satisfied that Parliament intended only the consequences I referred to earlier.

In my view it is of paramount importance that the legislature revisits the relevant legislation in order that its intention be expressed in clearer terms than is presently the case.

In the result, I agree with the submissions made on behalf of the applicants *vis a vis* the distribution of the immovable property in this estate. I agree that it is impracticable and indeed undesirable that the first respondent be awarded property acquired before her marriage to the deceased Lloyd Chimhowa. At the same time I recognise the first respondent's right to live at this property which to all intents and purposes is also her matrimonial home. Her four minor children being dependants of the deceased person also have the right to live with their mother at that property.

In the result I order as follows:

- (1) That the immovable property commonly referred to as house No. 7447 – 6<sup>th</sup> Way, Glen View 7, Harare be and is hereby awarded to the first to sixth applicants in equal shares.
- (2) That the first respondent be and is hereby granted a life usufruct over the said immovable property.
- (3) That the final order of the third respondent given under DR 15/08 Estate late Lloyd Chimhowa be and is hereby amended to the extent of paragraphs (1) and (2) above.

(4) That there be no order as to costs.

*Matsanura & Associates*, applicants' legal practitioners  
*Atherstone & Cook*, 1<sup>st</sup> respondent's legal practitioners