

BEAU

TY KANYERE
versus
RICHARD JOHN CHIMBARI
(In his capacity as Executor Dative of Estate T.T Kanyere)
and
THE MASTER OF THE HIGH COURT OF ZIMBABWE
and
VENGAI KANYERE
and
VENGAI KANYERE N.O
(In his capacity as Executor Testamentary of Estate Late Anna Kanyere)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE; 18 October 2022 & 12 July 2023

Opposed Application

F Chinwawadzimba & T G Mukwindidza, for the applicant
M Chinyangarara-Kaseke, for the 1st respondent
M C Mukome, for the 3rd and 4th respondents
No appearance for the 2nd respondent

MAXWELL J: This matter was remitted from the Supreme Court for determination of the issues in para(s) 3, 4 and 5 of the draft order. The paragraphs are couched in the following terms; -

- “3. The applicant be and is hereby awarded as sole beneficiary the matrimonial property being a certain piece of land situate in the district of Umtali called Lot BB Kelly’s Park, measuring 86, 8420 hectares held under Deed of Transfer 4768/89.
4. First Respondent be and is hereby ordered to award the said matrimonial property to the Applicant in her First and Final distribution account to be submitted to the Second Respondent for further auctioning (sic) in terms of the law.
5. Respondents be and are hereby ordered to pay Applicant’s costs.”

At the hearing of the remitted matter I dismissed a point raised *in limine* on behalf of third and fourth respondents and indicated that reasons would follow. Mr *Mukome* submitted that

the matter was *res judicata* as a pronouncement on the same issues was given in HH 826/16. In heads of argument filed for 3rd and 4th Respondents, reference is made to *Rinos Terera v Zimbabwe Housing Company & Another* HC 5912/12 and several cases on the requirements of *res judicata*. It is trite that for *res judicata* to succeed, the following requirements have to be met;

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1. The matter must be between the same parties or their privies;
2. The case must concern the same subject matter; and
3. The case must be founded on the same cause of action.

Mr *Mukome* submitted that the dispute involves the same parties, applicant and the late Anna Kanyere now represented by her estate's executor. He also submitted that the subject matter is the same, the farm, and that the relief sought is the same as applicant is insisting on being declared the sole surviving spouse. He further submitted that the cause of action is still the same, the death of Todd Tandadzai Kanyere and that applicant just played around with words to give a semblance of difference. Advocate *Chinwawadzimba* pointed out in response that in HH826/16 the merits of the matter were not considered as the court dealt with the preliminary issue only. She pointed out that *in casu* the issue is not whether or not Anna is a surviving spouse as was the case in HH826/16.

In *Chawasarira Transport (Pvt) Ltd v Reserve Bank of Zimbabwe* 2009 (2) ZLR 112, it was held that

“when *res judicata* is pleaded by way of estoppel it amounts to an allegation that the whole of the legal rights and obligations of the parties are concluded by the earlier judgment and that the plaintiff is estopped by the findings of fact involved in that earlier judgment.”

I was not persuaded that all the legal rights and obligations of the parties were dealt with in the earlier judgment. Indeed the parties were the same and the death of Todd Tandadzai Kanyere was the root of the litigation.

However, in the earlier case, applicant sought to be declared the sole surviving spouse. The issue of what she would be awarded as a surviving spouse was not covered. There is no judgment dealing with the challenge to the award of the farm. The preliminary point was therefore dismissed on that basis.

The late Todd Tandadzai Kanyere (the deceased) purchased two farms during the subsistence of the marriage with the first wife, the late Annah Kanyere. According to the third respondent, the late Annah Kanyere and her children used to stay on one farm while the applicant was on the other. Third respondent further submitted that the late Annah Kanyere left the farm as a number of the late Todd Tandadzai Kanyere's wives were on one farm. Applicant remained on the farm. She submitted that the deceased freely and voluntarily caused the consolidation of the farm in 1989 and thereafter continued to use the farm as the matrimonial home and for domestic purposes. She further submitted that the farm house and the land adjacent to it as per title deed was her matrimonial home with the deceased and she cannot be asked to share her matrimonial home with the deceased's children who are all majors.

The question is whether or not applicant should be the sole beneficiary of Lot BB Kellys Park measuring 86, 8420 hectares held under Deed of Transfer 4768/89. To answer that issue, recourse must be had to s 68F (2)(c)(i) of the Administration of Deceased Estates Act which provide that; -

“(c) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (b)-

- (i) Where they live in separate houses, each wife should get ownership of or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person's death, together with all the household goods in that house.”(underlining for emphasis)

This section would be applicable where two living spouses are claiming a share in the deceased's estate. Applicant sought to be declared the sole surviving spouse in HH 826/16, a matter decided during the lifetime of the first wife, and she was not successful. The court held that she is not the sole surviving spouse for purposes of distribution of the deceased's estate. According to the law, where there are two surviving spouses, each one would be entitled to the

house she lived in at the time of the deceased's death. In *casu*, the other surviving spouse has since passed on. At the time of the demise of the first wife, no decision had been made on what each of the surviving spouse was entitled to. In my view, that on its own creates a set of facts which are not addressed in section 68F (2)(c)(i) of the Administration of Deceased Estates Act [*Chapter 6:01*]. This is more so in view of the fact that in HH 826/16, the following observations were made by CHITAKUNYE J (as he then was); -

“It appeared accepted that when the applicant married the deceased she found that the first respondent (i.e. first wife) and the deceased already had their matrimonial estate. When the first respondent and the deceased separated I did not hear the applicant to allege that first respondent was awarded any of the estate that was part of her sweat as wife to the deceased.”

At the time of the demise of the first wife, she still had a claim on the assets of the deceased arising from being married to him as there had not been any sharing of the matrimonial assets between the deceased and the first wife. In my view, Applicant was misguided to base her claim on section 68F (2)(c)(i) of the Administration of Deceased Estates Act [*Chapter 6:01*]. That section, in my view, is not applicable to the facts of this case.

Advocate *Chinwadzimba* referred to the cases of *Ndoro v Ndoro* HH 198/12 and *Munangatire v Chikaka* HH 11/18 in support of the position that a surviving spouse is entitled to the house they lived in immediately before the death of the deceased. None of those cases involves the facts as *in casu*, where there were two surviving spouses and one passed on before there was a determination of the proprietary rights between the deceased and the late first wife. On that basis, the cases referred to by counsel for the applicant are distinguishable. The proprietary rights between the deceased and the late first wife not having been determined, I find it improper to award applicant a certain piece of land situate in the district of Umtali called Lot BB Kelly's Park, measuring 86, 8420 hectares held under Deed of Transfer 4768/89 as sole beneficiary.

Accordingly, I decline to grant the order sought in para(s) 3 and 4 of the draft order.

Messrs Bere Brothers, applicant's legal practitioners.

Messrs Hove Legal Practice, first respondent's legal practitioners.
Charamba & Partners, third & fourth respondents' legal practitioners.