ELAM NYAMAKURA
versus
ANNA LORI HOZHERI (Nee) NYAMAKURA
(In Her Capacity as Executrix Dative
of Estate Jairosi Nyamakura)
and
THE MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 July 2023

Stated Case (Civil)

TSANGA J:

Background:

The plaintiff instituted action proceedings against the defendants seeking *inter alia* cancellation of a title deed over certain immovable property known as Budja 52, situate in the district of Mutoko, measuring 78 030 hectares. The claim was opposed on the basis that the late Joshau Nyamakura was legally entitled to inherit the said immovable property in his own name under the laws of this country (then Rhodesia) as they were applicable then. Since the plaintiff was not in agreement with this interpretation the parties agreed to proceed by way of a stated case. I shall refer to the first defendant as simply the defendant since there were no submissions by the second and third defendants who were cited nominally.

THE AGREED FACTS

The late Muchemwa Nyamakura, the father to the plaintiff as well as the late Jairos Nyamakura, was allocated the immovable property by the then Government in 1956. Muchemwa Nyamakura passed away in 1968. At the time of Muchemwa Nyamakura's death, the late Jairos Nyamakura was Muchemwa's eldest son.

The issue for determination

The issue of determination is whether the law of inheritance applicable at the time of the late Muchemwa Nyamakura's death entitled the late Jairos Nyamakura to inherit the disputed immovable property in his own right.

The plaintiff's arguments

Plaintiff's contention is that the late Jairos did not follow the applicable law and custom when he purported to inherit the property in dispute after the passing on of his father, Muchemwa Nyamakura. His argument is that it was not automatic that the eldest son would inherit as there were customs and usages which had to be regarded. In particular, plaintiff draws on s 69 of the Administration of Estates Act which then stated as follows:

> "69 (1) If any African who has contracted a marriage according to African law or custom or who, being unmarried is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.
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> (2) If any controversies or questions arise among relatives to repute relatives regarding the distribution of the property left by him, such controversies or questions shall be determined in the speediest and least expensive manner consistent with real and substantial justice according to African usages and customs by the provincial magistrate or a senior magistrate of the province in which he deceased ordinarily resided at the time of this death, who shall call and summon the parties concerned before him and take and record evidence of such African usages and customs , which evidence he may supplement from his own knowledge."

His argument is that inheritance by the eldest son was not a foregone conclusion and that the family of that deceased person had to be involved. The essence of his objection is that the customs and usages of the people concerned would not have allowed for the heir to inherit the property in his personal capacity "in a way as to acquire personal title over the property and subsequently evict the other children of Muchemwa Nyamakura from the property".

The plaintiff, aged 79, says he has been residing at his father's property from 1956. According to the plaintiff's arguments, whilst his father died in 1968 before he finished paying for the farm, the family had contributed, through Jairos, to finalising the payment. Jairos then proceeded to have the farm registered in his name in 1973. Plaintiff maintains that Jairos became a nominal heir because there was need for a person to step into his father's shoes. In other words, he argues that it was for administrative purposes that the farm was put in the late Jairos' name. It is not his position that there was a dispute. Plaintiff submits that the farm was put in his deceased brother's name for reasons he explains himself as follows:

> "There had to be a person that would step into the father's shoes. This explains why Jairo's' name was seconded to the Ministry / Government to be the name under which rentals at the farm would continue to be paid."

The defendant's arguments

The defendant, on the other hand, has argued that the question for determination does not permit the plaintiff to supplement with factual averments in the manner in which he has sought to do in his arguments. Moreover, his challenge is being made fifty years after the death of their father when he knew all along that the farm was under the defendant. As the eldest son, it is argued that the defendant was entitled to inherit in accordance with the Shona tribe to which he belonged. He relies in particular on *Magaya* v *Magaya* 1999 (1) ZLR 100 (SC), in which it was agreed that that the eldest son succeeds to the status of the deceased inheriting his property and responsibilities. Also relied on is the earlier case of *Matambo* v *Matambo* 1969 (2) ZLR 154 which emphasised that the heir inherits in his own right. Further relied on is *Moyo* v *Moyo* 1990 (2) ZLR 81 SC, in which it was also emphasised that the heir inherits in his individual capacity.

ANALYSIS

The crisp question of law to be answered is what the law was at the time that Muchemwa Nyamakura died. At the time that Muchemwa Nyamakura died in 1968, s 6 of the then African Wills Act [*Chapter 108*] stated that where there was no will, an heir to immovable property inherited that immovable property in his individual capacity. The exact wording of that provision was as follows:

> "The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will."

This provision was analysed in *Matambo* v *Matambo* 1969 (3) SA 717 (RAD). BEADLE CJ as he then reasoned as follows:

> "It seems to me that what must be decided here is what precisely the Legislature meant by the words 'heir at African law' where they occur in sec. 6 of the African Wills Act. The word 'heir' here, since there is nothing to indicate any intention to the contrary, must be construed in the normal grammatical sense in which it is understood in our law. I look therefore to our law to see what is meant by the word 'heir'. Bell, *South African Dictionary*, 3rd ed., p. 346, quoting from Morice, *English and Roman-Dutch Law*, 2nd ed., p. 291, defines 'heir' thus:
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> > 'In regard to intestate succession the heirs are the persons who are entitled to succeed to the property of the deceased.'
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> Paraphrasing sec. 6 of the African Wills Act in the light of that definition I consider that sec. 6 must be interpreted as meaning: 'The person at African law who is entitled to succeed to the property of any deceased African shall succeed in his individual capacity to any immovable property.'

As to whether there could be more than one heir to the deceased's property among the tribe concerned in the sense that other sons and relatives could also inherit, the dispute was

remitted back to the Magistrates court for further enquiry and resolution there. How it was ultimately resolved is not known

However, it is also a fact that subsequently over the years, in various cases as set out above in the defendant's heads of argument, the Supreme Court held categorically that the heir at customary law was the deceased's eldest son, meaning it was him who got to inherit that immovable property in his individual capacity. Furthermore, once property was inherited by the deceased in his individual capacity, it was for him to do as he pleased. Dependants at customary law could have an action against such heir for support but the heir 's right to dispose of the property was not affected. See for example *Seva* v *Dzudza* S 131/92 where this legal principle was applied. Further, in *Clement Mudzinganyama* v *David Ndambakuwa* SC 50/93 the non-lateral transfer of property inherited by a single heir was dealt with. There, after the death of his brother who had inherited as single heir had died, the appellant disputed the appointment of the deceased's son as heir. Being the brother to the deceased who had inherited the property in his capacity as heir, the appellant's argument was that he was now the heir as the property ought to have passed on to him by lateral succession as opposed to going to the heir's own descendant. Looking at the wording of African Wills Act which at the time was now s 7, the Supreme Court dismissed the appeal on the basis that the heir inherits in his individual capacity. The position of the formal law as applied by the courts was therefore clear in so far as the eldest son was the heir to any immovable property on customary intestacy and also in so far as he did so in his personal capacity.

The point that the plaintiff raises is whether customary law in reality operated unwaveringly under such blanket assumptions. That question was extensively addressed by legal researchers in Zimbabwe in the mid-1990s, under the auspices of the Women and Law in Southern Africa Research Trust (WLSA). This research culminated in the book "*Inheritance in Zimbabwe: Law Customs and Practices*". [1]

Their starting point was as follows:

> "Our hypothesis is that determinations under customary law are processual and not rule oriented. They are based on consensus which is guided by the principle of the best interest of the group. Rights are often not individual but group focused. Within the traditional African society, the most clearly identifiable focal group was the family and we postulate that if they are rules of customary law they are the reflection of concerns for the group and the family."[2]

They lamented the following:

[1] Dengu –Zvobgo et al Women and Law In southern Africa Research Trust *Inheritance in Zimbabwe: Law, Custom and Practices (Sapes Trust Harare)*
[2] See Dengu Zvobgo et al at p 64.

> "Yet the customary law as recorded in articles, textbooks and as applied by lawyers, whether practising or academic has until comparatively recent years been stated as a series of specific rules, not broad guiding principles."[3]

The core finding was that:

> "More significantly what ought to have been focused was the collection of data which denied the procedures and the processes of the determination rather than the determinations themselves."[4]

They concluded that the customary law as defined in the books and applied by the courts may be a skewed version of customary law particularly as traditional society does not translate readily into a modern nuclear family especially if adaptation is restricted by rules of court.

Being that as it may, these observations and findings take the legal question posed here no further. The law of intestacy under customary law as dealt with by the Administration of Estates Act [Chapter 6:01] was extensively amended in 1997. Section 68E in particular allows families to come up with their own distribution plans failing which the stipulated formula for resolution of any disputes is outlined in s 68F of that Act. That law, however, and this is the material point, does not apply retrospectively as it only took effect from the 1st of November 1997 going forward.

To reiterate, the question of law placed before me was a straight forward one as whether the law entitled Jairos Nyamakura to inherit in his individual capacity. The answer to that question is clear. In 1968, the then s 6 of the African Wills Act definitively stated that the heir at customary law to immovable property inherited in his individual capacity. Jairos Nyamakura was the eldest son who inherited the farm in his individual capacity upon his father's intestacy. **Accordingly**:

1. The plaintiff's claim that the law at the time of Muchemwa Nyamakura's death did not entitle the late Jairos Nyamakura to inherit the disputed immovable property in his own rights is dismissed.
2. Each party shall pay their own costs.

Mutandiro Chitsanga & Chitima, plaintiff's legal practitioners
Mufadza & Associates, first defendant's legal practitioners

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[3] Above, also at p 64
[4] At p 65