

ESTHER CHITANDO
versus
PAULINE MANDIGO
(In her capacity as the Executrix Dative of Estate Late Kumbirayi Manyika Kangai)
and
MIRRIAM REHWAI KANGAI
and
FUNGAI KANGAI
and
MUCHATENDA KANGAI
and
THE MASTER OF THE HIGH COURT
and
TIRIWAMAMBO KANGAI
and
MANYIKA KANGAI
and
NGWARIRAI KANGAI
and
MUSADARO KANGAI
and
FREEDOM KANGAI

HIGH COURT OF ZIMBABWE

MUCHAWA J

HARARE; 20 May, 3 June, 4 June, 17 June, 18 June, 10 July, 16 July, 15 August, 16 August, 3 September, 4 September, 20 September 2024 & 31 January 2025

Civil Trial

M Sinyoro and N.S Garakara, for the plaintiff

First defendant in person

V Muza, for the second, third and fourth defendants

No appearance for fifth defendant

C Chichetu and E Chibondo, for sixth, eighth and ninth defendants

MUCHAWA J:

Introduction

Kumbirai Manyika Kangai, passed away on 24 August 2013. He died testate and his estate was registered under reference DR 1405/13. On 13 May 2014, the plaintiff lodged a claim for maintenance against the deceased estate in terms of section 3 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*]. The grounds for her claim were that though she was the first widow of the deceased, she had been omitted in the list of beneficiaries in the deceased's Last Will and Testament. As a widow, she averred that the estate has an obligation to maintain her.

The marriage between the deceased and the plaintiff was disputed through the second defendant and the Master's office concluded that there was need for plaintiff's spouseship status to be determined. It was also opined that the claim of US\$645 681.60 from the estate in which there were 11 beneficiaries was on the high side and would likely exceed awards to be made to the testate beneficiaries.

The matter first came before the High Court as an opposed court application, but due to the disputes of fact, it was referred as a trial cause for oral evidence to be led. The questions on which oral evidence was to be led were crystalized at a joint pre-trial conference on 20 March 2015 as follows.

1. Whether or not the Estate of the Late Kumbirai Manyika Kangai is liable to maintain the applicant?
2. If so, the quantum of lumpsum maintenance

The sixth to tenth defendants were joined to the proceedings on 20 May 2024 and accepted the issues above.

The Parties

The plaintiff alleges that she was the deceased's first wife and remained so at the time of his death, having been customarily married in 1957 and the marriage solemnized in 1963 in terms of the African Marriages Act.

The first defendant cited in her official capacity as the Executrix Dative in the Estate Late Kumbirai Manyika Kangai.

Miriam Rehwai Kangai was married to the deceased under the Marriage Act, then [*Chapter 37*], in 1981.

The third, fourth, sixth, seventh, eighth, ninth and tenth defendant are all children of the deceased, born to him and various women whose spousal status is at variance between the plaintiff and second defendant. There were no children born to the deceased and second plaintiff. The fifth defendant is the official administrative body responsible for administration of deceased estates in Zimbabwe.

The Plaintiff's Case

The plaintiff led evidence from herself and two other witnesses, her daughter Enea Kangai Maroveke and grandson Tashinga Maroveke.

Plaintiff's Evidence

In her testimony, the plaintiff stated that she is now 83 years old and was 75 years old in 2013 When Kumbirai Manyika Kangai died.

She stated that she was married to the deceased in 1958 and their marriage was solemnized in 1963 at Fort Victoria (now Masvingo) in terms of the African Marriages Act. She was aware that this was a potentially polygamous marriage and is aware of 4 other women who were married to her husband. These were Margaret Hamandishe who was married in 1975 in Zambia, Elizabeth Makunike who was married in Mozambique and Mirriam Rehwai Munzara who was married after the war in or about 1981. She did not name the other woman.

Her husband who had been politically active left the country first and due to the ensuing harassment by the Smith regime, she also left the country and ended up in Kenya. They both returned to the country in 1980.

Four children were born to her and the deceased. In 1958 they had twins, Martha and Mary. These were followed by Mara in 1962 and lastly Enea Nyunyuto in 1964.

Upon return to the country at independence, the plaintiff says that she was staying in her own house with her own children as the senior wife whilst Margaret Hamandishe and Elizabeth Makunike stayed with the deceased in Glen Lorne. Elizabeth Makunike did not last and was returned to her own home in Mutare whilst Margaret Hamandishe lasted until Mirriam Rehwai Kangai came.

When quizzed about the inconsistency in the date of the unregistered customary law union as her papers say 1957 yet the oral evidence says 1958, she explained that she cannot remember as it has been a long time.

The plaintiff said that her original marriage certificate was lost during the war and when she returned to the country in 1980, she attended at Masvingo to get a duplicate on 15 May 1980. The copy however, does not state that it is a duplicate. What she got was not a photocopy but a duplicate was filled in. She however lost that duplicate when she submitted it to her legal practitioners together with her title deeds sometime in 2014. What she has submitted before the court is a photocopy.

The marriage certificate was used to register the estate of the deceased upon request by his eldest son. It was also used at the Pension office for the plaintiff to get a widow's pension.

The plaintiff vehemently denied that the unregistered customary law marriage was dissolved by the payment of gupuro in the 1960s.

It was undisputed that the plaintiff was initially employed as a teacher, as was her husband before the war of liberation. Upon her return she was working in government until her retirement on medical grounds in 1998. She said that her life had changed after her husband's death as she was no longer receiving the financial support he used to extend to her.

On the status of her marriage, she said that it was still in subsistence though they were on separation. The plaintiff averred that her life changed after her husband's death. She is now just living on her own pension and her widow's pension and the total of this, in United States Dollars comes to \$300.00. The second defendant is alleged to have collected the lumpsum widow's pension in the sum of \$30 000.00 United States Dollars.

Consequently the plaintiff is claiming a total of US\$4 483.00 per month as maintenance from the deceased estate. This is broken down as follows:

- (i) US\$370.00 per month for groceries and food stuffs on the basis that food is now expensive and she requires a special diet due to her ill health. She also requires supplements for her condition of rheumatoid arthritis.
- (ii) US\$454.00 for toiletries as she requires special sanitary ware day and night.
- (iii) US\$625.00 for holidays this will help with her health as an elderly person.
- (iv) US\$462.00 for clothing to maintain her lifestyle due to her husband's status she cannot wear the same clothes in summer and winter.
- (v) US\$628.00 for 2 maids and a gardener as she needs constant care and this ensures the maids take turns in their duties and get time off.

(vi) US\$200.00 per month for transport as she goes for her medical check up visits and used ambulances and also to go to church.

(vii) US\$2 343.00 for health expenses to cover physiotherapy at St Giles where she has been attended since 1998 due to Rheumatoid arthritis. Her medication is also expensive. She developed hypertension at some point. Has a broken leg and a K – nail inserted. Another doctor has said she needs a pacemaker as she would sometimes be sick and unconscious. She however does not agree to that.

It is the plaintiff's belief that the estate has the means to maintain her as there are two very big farms. The executor said the value is about 7 million United States Dollars.

Under cross – examination, the plaintiff was quizzed on the authenticity of her marriage certificate. She was asked why the husband's name is only given as Manyika instead of Kumbirai Manyika Kangai and she retorted that his identification number is endorsed though; now there are different identification numbers. She observed too that in 1963 women did not have identification numbers. When it was pointed out that the bride and the groom's surnames were missing she stated that she had not noticed this and opined that maybe they had been erased as she thinks that they were there on the original marriage certificate. Her guardian's name and ID number were endorsed.

In explaining how the 1980 marriage certificate copy was acquired, plaintiff explained that what she got was not a photocopy but a new copy was filled in and it was an extraction of the information in the original marriage certificate whose reference was 50/63. The original marriage certificate had recorded the terms of payment of lobola with the date and amounts paid as well as outstanding amount.

When it was put to her that there was no record of her marriage certificate she insisted she was indeed married in 1963. She vehemently denied the allegation that the marriage certificate was fraudulently acquired through the facilitation of her daughter Nyunyuto who had once worked for the Central Registry as a clerk sometime in 1982.

The allegation that the plaintiff had not been a part of Kangai family gatherings except those involving her children was explained as resulting from an incident in January 1993 which caused her to stop going to the deceased and second defendant's house. So in the end she would only be present where her children were involved.

When clarification was sought on the role of her maids, plaintiff explained that they cook, clean the house, give her company, run errands for her, do her laundry, bath her, attend to her mobile toilet and push her in her wheelchair. They take turns.

It was the plaintiff's case that she had agreed with her husband that though she had been left out of the will, she would claim maintenance using her marriage certificate.

Enea Kangai Maroveke's evidence

This witness is the last daughter born to the deceased and plaintiff. She was born in September 1964. She testified that her father used to maintain the plaintiff. She remembered that before she moved out after her marriage in 1983 she would see her father visit her mother. Even after moving out she would still find her father at home and he continued until he was sick after 2000.

It was also her evidence that her father was polygamous and second defendant was just one of her father's five wives. However, at the time of his death, only two wives remained being the plaintiff and second defendant.

She confirmed that plaintiff was employed in government till her retirement on ill health in 1998. Plaintiff is now surviving on a small pension but the deceased would largely buy groceries. In 1998 he is said to have painted plaintiff's house for her birthday.

The deceased was alleged to have been covering the plaintiff's medical aid shortfall as she had her own medical aid cover.

She dismissed the sixth, eighth and ninth defendants' allegation that the plaintiff's unregistered customary law union was dissolved in the 1960s on account of their being too young to know anything about that. The sixth defendant was also said to have been learning in England and so did not know what was transpiring here. The sixth defendant is also said to have visited the plaintiff's house sometime in 2000 when he had problems with second defendant as he knew that plaintiff was the first wife to their father.

According to this witness the opposition to the plaintiff's claim is based on pure greed.

She explained in detail some of the plaintiff's claims. For the special dietary requirements she indicated that the plaintiff eats millet, rapoko and honey which are expensive, amongst other things.

For the toiletries she explained that the plaintiff requires diapers, mobile toilet replacement and the detergents used to clean are expensive.

The holiday allowance claim was justified on account that the plaintiff used to work at a beach Hotel in Kenya, so she needs to go for holidays for refreshment and health benefits.

The claim for clothing was said to be because she is changing sizes as her clothes are now too small.

The two maids are because the plaintiff needs caretakers constantly and the gardener is because she has always wanted a good landscape.

An ambulance for travel was said to be as per doctor's orders as lifting her was advised to be risky.

The amount US\$2 343.00 for health was alleged to cover physiotherapy costs which are said to be between \$360.00 to \$380.00 per fortnight. This is because the doctors said they can no longer do any operations due to her old age. The plaintiff is alleged to have been attended by Dr Bowers and Makarau as bone and back specialists, Bhaudhi and Malunga for physiotherapy and at Milton Park Medical Centre for her heart.

US\$626.00 for entertainment is to cater for Wi-Fi, TV, phone calls and hosting for her children and many grandchildren.

The quantum claimed are said to be an attempt to meet the deceased's standards.

This witness confirmed that the second defendant had benefitted from the lumpsum widow's pension.

According to her, the estate is well able to meet this claim as the executor indicated that the estate is worth US\$8 million.

Whilst accepting that she worked at the Marriage Registry from 17 May 1982 to end of 1985 as a clerk, she claimed to be familiar with civil marriages registry only and not the customary one. She denied boasting at her father's funeral about how she would fraudulently get a marriage certificate for her mother.

The maintenance for plaintiff was said to have been on a need basis and the deceased would come on his own or send one Cde Serious to deliver groceries or plaintiff would send the grandchildren to collect money. The deceased is said to have kept plaintiff informed of all his

involvements with other women including when he was involved with Betty and this was in recognition of her status as Senior wife.

It was stated that prior to the deceased's demise, this witness had enjoyed a cordial relationship with second defendant but the turning point came when plaintiff gave the oldest son her marriage certificate in order to get the deceased's death certificate.

She confirmed that plaintiff had stopped attending all family events in 1993 when a certain event occurred.

Tashinga Norman Maroveke's Evidence

This witness is a son to witness Enea Nyunyuto Maroveke and grandson to plaintiff.

He testified that he was staying with plaintiff since he was young together with his mother and father and when he was in forms 1 to 6 in 1993 to 1999 and when he went to college in 2000 – 2002 he was coming from his grandmother's house.

He said he would see his late grandfather visiting plaintiff and giving her money. This was not a daily occurrence but would happen here and there. Sometimes he would be sent by plaintiff to collect money from the deceased or Cde Serious would bring groceries. In some cases, the deceased would send a driver to take plaintiff to the doctor.

He never saw the deceased putting up for the night at plaintiff's house.

The only holidays he could recall plaintiff going to, were to her rural home from 1998 to 2008. With the above evidence, the plaintiff closed her case.

The evidence of the first defendant

The first defendant testified that she is being sued in her official capacity as executor dative. She was appointed in November 2013 and prepared the executor's inventory and caused the valuation of the assets of the estate by professional valuers.

The estate has 50% shareholding in a company called Luna Estates which owns land in Paarl Farm and Glen Forest. There are stands being developed at Paarl Farm which is about 200 hectares in extent. Stands of 1200m² are being developed.

In the interim account she distributed assets worth 2.2 million dollars, being 62 stands. The land development is still ongoing and it is expected that a total of 960 stands will materialize. Lunar Estate is likely to lose 250 stands through ongoing litigation. Service providers are also paid through stands and Rawson has 200 stands set aside. 43 stands have been

provided for water reticulation, 15 stands for endowment to be paid to Zvimba Rural District Council. Another 15 stands have reserved for further water reticulation.

Of the 960 stands, 20 are said to be on a wetland leaving 940. 12 stands are reserved for legal fees in relation to various litigation. 40 stands are set aside for the surveyor, engineers and other like service providers.

Luna Estates is said to be likely to lose more than 500 stands as it also took over people who had purchased from Datco, a prior developer.

As at the date of the hearing, a dividend of 42 stands was done and the executor was holding onto 24 of those stands as provision for the court decision, in *casu*.

The first defendant averred that if 600 stands are knocked off for the various provisions outlined, only 360 stands would remain and only 50% of those would belong to the estate whilst the other 50% belongs to second defendant. The 180 stands at USD 30 000.00 each would realise 5.4 million United State Dollars.

As for the Glen Forest property, the first defendant said that no position has been taken about developing this property. According to the valuation report filed of record the open market value of the Glen Forest property was placed at one million one hundred and fifty thousand dollars in December 2013

The Second Defendant's Case

The second defendant's testimony went as follows. She was married to the deceased initially in an unregistered customary law union in July 1980 and then had a white wedding in which they had a civil marriage under the Marriage Act [*Chapter 37*]. At both times, the deceased had no other wife and it is not true that he was married to the plaintiff as she alleges.

The deceased told the second defendant that he had given the plaintiff a divorce token in 1964 and she left Buhera for her rural home in Masvingo. She had been told that thereafter the deceased went to the United States of America for studies and it was at that point that they went their separate ways. Two of their children Marah and Florence were left in Buhera under the stewardship of their uncle Thomas Jamiel Kangai and their grandparents (deceased's) parents. The child Enea Nyunyuto who was young is said to have gone with her mother whilst Florence joined the liberation struggle. It was related that the deceased had stayed in the United States of America for 7 years and had never left to visit the plaintiff in Kenya as she had alleged. The

deceased left United States of America in 1972 to go to Tanzania, then Zambia and China for military training.

Shingai Hamandishe and Elizabeth Makunike were said to be women the deceased had sired children with during the war of liberation and the three children were Tinayo Nyika Kangai, Muchatenda Kangai and Ngwarirai Kangai. When she went to Glen Lorne in 1980, she said she did not see any wife but these children and Marah Hativagone.

The second defendant vehemently denied that her husband was a polygamist. He is said to have paid damages and not “lobola” for every woman he had children with. These children were then brought to the second defendant who brought them up. The other children later brought in were Manyika Kangai, Fungai Kudzai Kangai, Rwatinyanya Kangai, Musadaro Kangai, Tiriwamambo Kangai and Freedom Kangai who came into the family as an adult.

On the question of the divorce token allegedly given to the plaintiff in 1964 it was said that there were unfortunately no witnesses available to testify as most had passed on but Jamiel Thomas Kangai had left an affidavit attesting to this fact. Some witnesses were said to have been threatened. One Reward Kangai, a son to the late Thomas Jamiel Kangai would testify.

Regarding the marriage certificate of the plaintiff, the second defendant questioned its authenticity by pointing out that there are no surnames for the parties. The groom is recorded as Manyika yet this claim is against the Estate Late Kumbirai Manyika Kangai.

The reference of 50/63 and yet there are two stamps, one of 15 May 1980 was questioned. It was pointed out that the certificate presented is a certificate of African Marriage yet in the 1960s there were Certificates of Native Marriage.

The first defendant believes that the marriage certificate which was commissioned on 2 September 2013, immediately after the deceased’s death on 24 August 2013 was a well orchestrated fraud.

Another alleged anomaly is that the lobola paid is said to have been £79 and this amount is said to be exorbitant for a bride as the deceased was a teacher earning £4 per month. The change in currency to \$140.00 as consideration to be paid, is said to be dubious pointing to a fake marriage certificate.

The second defendant’s theory is that Enea Nyunyuto Maroveke who used to work at the Marriage Registry office fraudulently secured a marriage certificate for her mother. The second

defendant says that she heard Enea Nyunyuto boasting at the deceased's funeral that she knows all the systems and would secure a marriage certificate for her mother. Thereafter the plaintiff and her daughters are said to have proceeded speedily to secure a death certificate which thereafter was torn as it was unprocedurally acquired without the involvement of protocol officers from the Ministry of Home Affairs and herself as the widow. The second defendant claims that she then discovered that her own marriage certificate was no longer in the system. What was found was plaintiff's marriage certificate.

The second defendant said that efforts to confirm with the Registrar General on plaintiff's marriage certificate had been futile, pointing to fraud as she suspected.

The second defendant said that her husband had denied ever entering into an unregistered customary law union with the plaintiff. His alleged version was that the plaintiff had fallen pregnant whilst they were at school and she moved to stay with Kangai's. There were 2 children and traditional rites were performed but it was never a formal customary marriage.

Evidence was also given on how Luna Estates was acquired as a company and how second defendant and the deceased each had 50% shareholding and its first property. She related how she resigned from her job to run various farming projects at Glen Forest. When the plot became too small for all the projects, they then purchased the Nyabira farm – Paarl in 1994. This too fell under Luna Estates. The plaintiff was never involved in these projects which she ran with her husband as she had retired, and her husband was a Cabinet Minister. She concentrated on market gardening, piggery, dairy cows, sheep, goats, fruit, ostriches and a bakery.

The plaintiff was said to have never been involved in family events except those to do with her children, Marah and Enea Nyunyuto being their traditional marriages, an anniversary and funerals.

The widow's pension the plaintiff is receiving, was allegedly acquired using the "fake" marriage certificate at the behest of Marah and Enea Nyunyuto as the plaintiff is too old to have come up with that. An order from the High Court was allegedly secured stealthily for her. Contrary to the plaintiff's case that the second defendant got the bulk of the pension money, the second defendant said that the plaintiff is the one who got up to US\$90 000.00 and they used it to go to China for a holiday whilst she got only US\$7 000.00. She is no longer receiving a widow's pension.

The second defendant said she did not contest the 2015 High Court order as she had up to 8 litigation cases mostly by Marah and Enea Nyunyuto and also Datco and she was overwhelmed.

It was alleged that Enea Nyunyuto had also gotten a marriage certificate for Elizabeth Makunike who is Ngwarirai's mother. She later however confessed to her children what she had tried to do and did not pursue this.

To show that the plaintiff was not being maintained by the deceased, the second defendant stated that from as early as 1980, the deceased had put 13 people on medical aid being himself, second defendant, children – Tinayo, Ngwarirai, Muchatenda, Manyika, Fungai, Rwatinyanya, Musadaro, Tiriwamambo and his parents and second defendant's mother.

In evidence, the second defendant vehemently denied that the plaintiff was being maintained by the deceased as she handled finances and she budgeted together with the deceased and had bank statements. Because they were heavily borrowed on the projects, had many children and the extended family to support, she says there was no excess money to maintain the plaintiff.

According to the second defendant there were no secrets between her and her husband. He could not have been secretly maintaining the plaintiff. He was open enough to disclose everytime he had a child out of wedlock and she would forgive him and take the children to raise them herself. Some she raised from the age of three. In these cases, the deceased would pay damages, not lobola.

The fact that the plaintiff and the other alleged wives did not appear in the deceased's Last Will and Testament was said to be a clear indication that they were not his wives.

The testimony of Tashinga Norman Maroveke that he would collect money from the deceased at Ngungunyana Building when he was a minister was said to be a lie as in or about May 2000 the deceased had been dismissed from his ministerial role and had no job or salary to the extent that they could not meet the financial obligations they had including catering for 4 children who were studying in the USA. He could not even afford to pay his bail money. The children in the USA who were studying had to send them money and second defendant had to sell at the market for their upkeep. Their breakthrough came when she was chosen to introduce Chinese medicine to Zimbabwe through network marketing.

Though her husband went through 57 criminal court cases until his acquittal in the High Court, the plaintiff, Marah and Enea Nyunyuto are said to have never shown up.

The claim by Tashinga Norman Maroveke that he would collect money and groceries from CFI was said to be a blatant lie as it was the second defendant who had an office there and the money made was for their own large family upkeep as well as for the extended family.

The only times the deceased was said to have visited the plaintiff's house were said to be when there were funerals and at Marah's renewal of vows. The only groceries delivered by Cde Serious were those pertaining to lobola things as these would be held at the deceased's brother's house. Cde Sevius is said to have last worked with the deceased in 1995.

Attempts to establish the authenticity of the plaintiff's marriage certificate were done through 2 letters to the Registrar of Marriages. The response of 5 June 2016 says there is no record of marriage. The one dated 21 June, the Registrar General says he is custodian of marriage records but in the case of plaintiff's marriage, there is no such record. Her mind is boggled by the fact that the plaintiff's marriage certificate the record surfaced only after the deceased's demise and was therefore smuggled into the system.

This application is said to be a demonstration of extreme greed and gold digging.

On the quantum of maintenance claimed, the second defendant said everything is extravagant and unrealistic especially for someone who parted ways with the deceased in 1964 and was nowhere near him when he was ill and she singlehandedly nursed him.

Under cross examination, the second defendant conceded that Margaret Hamandishe was relocated to 265 Enterprise Road Grange and stayed with the deceased after the war. She was not sure whether Margaret Hamandishe had then relocated to Glen Lorne but agreed that the child Rwatinyanya was born in 1982 between them which was after her marriage to the deceased. She could not explain how this was as she said she was not Kumbirai Kangai and would know such details. Second defendant could not explain too what relationship continued between the deceased and Elizabeth Makunike as the child Musadaro was born in 1981. She still insisted that there was no marriage relationship and only damages were paid.

The second defendant denied too that Betty Makonese who bore Tendai Kangai was married to the deceased. Fungai Kangai who was born in 1983 and Tiriwamambo Kangai born in 1985 were alleged to be children born out of wedlock to Elizabeth Makunike's sister. In her

evidence under cross examination, the second defendant stated that she had learnt of the dissolution of the unregistered customary law union between plaintiff and the deceased not only from the deceased but also from his relatives and village elders.

When it was pointed out to second defendant that she had not followed up her letter after the letter of 5 June 2016 on the marriage certificate by going to Masvingo where she had been referred, she confirmed this. Similarly there was no proof she had followed up to the Ministry of Local Government for the letter of 21 June 2016 as they said in the 1960s the function of keeping marriage registries fell there.

When pressed for comment on fact that the deceased who was an adult, an MP, a cabinet minister had a right to move and conduct his affairs and second defendant could not account 100% for his movements and financial decisions, she said she could not necessarily have known everything.

It was confirmed that the youngest beneficiary in the will is 40 years old and they are all gainfully employed.

The second defendant's case is that it would be morally wrong for the plaintiff who was never there for 33 years, was not married to the deceased at the time of death and never worked in building up the estate, to reap where she did not sow.

The Third Defendant's Case

The third defendant gave evidence on his own behalf. He is a son born to the deceased and second defendant's sister. He stated that the first time he ever saw the plaintiff was at a meeting held by the executrix for the will reading. He had never heard his father referring to her at all. He denied that his father was ever in a polygamous set up and that he ever went for any secret visits to the plaintiff as he did not drive and needed a driver and in later times an aide and nurse aide. As there were no secrets when children were brought into the house, he does not see why there would be secrets about groceries. His father was open and he was closest to him as he was involved in the family business. He had never seen plaintiff at family gatherings.

His evidence on the authenticity of the plaintiff's marriage certificate mirrors that of the second defendant. He pointed out that the marriage certificate produced is a copy of a copy and is therefore dubious.

Evidence was given about how a chat group was formed in which all his siblings were, including plaintiff's daughters, Marah and Enea Nyunyuto. Marah was alleged to have expressed herself in bitterness that it was wrong that their mother had left the Kangai homestead with nothing. They then discussed how to take 50% of the company from the second defendant. He believes this was how the "fake" marriage certificate was acquired and subsequently used in securing a widow's pension and registering the estate.

It was stated that he would be prejudiced as a beneficiary if this claim is to be awarded as it is tantamount to fraud.

His opinion is that it is common knowledge that his father had children with different women and the children grew up in the same house and it does not make sense that the plaintiff was a wife who was kept a secret for all that while.

Fourth Defendant's Evidence

It was explained that the fourth defendant who is based out of the country was unable to travel to attend trial. Her defence was therefore withdrawn.

Sixth Defendant's Case

The sixth defendant gave evidence and also called Reward Kangai as a witness.

He is the deceased's son and knows plaintiff as the mother of his sisters Marah Hativagone and Enea Nyunyuto Maroveke. He knows the second defendant as the mother who raised him from a toddler at 3 years and she was married to his late father. As he was growing up he had heard that the plaintiff was customarily married to the deceased but had been given a token of divorce before the deceased left for America.

He once visited the plaintiff in Mabelreign out of courtesy when he was visiting an uncle in Mabelreign and had learnt that his sisters' mother stayed nearby.

They initially stayed in Glen Lorne and that house was sold and second defendant and the deceased took out a mortgage bond to acquire the Glen Forest property into which they moved in. That property was owned by Luna Estates, a company. There were initially 2 directors, his eldest daughters Marah Hativagone and Florence Gavapo as the deceased as a Minister, in terms of the Code of Conduct was not allowed to be actively involved in running of the company. At the time of his death, the directorship was then between the second defendant and the deceased

with second defendant responsible for the day to day running of the company. In 1994 the company took out a mortgage bond and acquired the Nyabira property.

The plaintiff had not contributed anything to the acquisition of the assets in the estate.

It is disputed that the deceased was maintaining the plaintiff as there is no single documentary evidence. The sixth defendant also questions how the deceased would have been able to maintain the plaintiff from the year 2000 as he could not even pay his children's fees as they were studying abroad.

His evidence on the authenticity of the marriage certificate of the plaintiff is similar to that of the second defendant.

The deceased had always been saying to him and his siblings that he could not take care of all the woman he had sired children with but he would educate all his children so that they could take care of their mothers.

The quantum of maintenance is viewed as exorbitant in nature as a claim for maintenance should be based on what you were receiving before. It would be unreasonable to create new figures and also to receive a larger share than the beneficiaries.

Elizabeth Makunike who is the witness' aunt as she is elder sister to his mother is said to have been married to the deceased and severed ties sometime in 1981, it being a customary union.

The deceased was said to have severed ties with Margaret Hamandishe in or around 1980 when the deceased was still staying in Glen Lorne.

His recollection of events as told to him were that the deceased was a teacher in Buhera when he was customarily married to the plaintiff. He then transferred to Murehwa after dissolving that union. Thereafter he got a job at Harare City Council before going to America. Meanwhile the plaintiff had left for Masvingo with Enia, leaving the rest of her children in Buhera.

The witness could not dispute the plaintiff's version that she had remained in Buhera and only left for her Masvingo home after the deceased was overseas and there were no prospects of his coming back. He could not contradict too that plaintiff then left for Kenya and would communicate with the deceased.

The Sixth defendant denied that upon return from the war, the deceased had stayed with the plaintiff. He could not rule out that in the same way the deceased visited his other exes, he may have visited the plaintiff.

The deceased was categorized as a very open person who would bring any children born out of wedlock to the second defendant. An example was given of his customary law union with Betty Makonese in the late 1990s whom the deceased was alleged to have customarily married and had a child with. The witness said that he went to see the child and he was open and upfront with what was happening.

The plaintiff's allegation of maintenance by the deceased was said to be inconsistent as there is no pattern of maintenance shown.

The Evidence of Reward Kangai

This witness was a nephew to the deceased, his late father having been deceased's brother. He was born in 1956. His late father is Thomas Jamiel Kangai. He knows the plaintiff as someone who was once married to his uncle, the deceased and mother to his cousins and the second defendant as the deceased's surviving widow.

He is aware that the plaintiff and deceased dissolved their customary union in the 1960s. His late father had been approached on this issue and he wrote an affidavit which was signed in his presence confirming the divorce. His father passed away on 10 August 2024.

The production of the affidavit of Thomas Jamiel Kangai was declined as this witness was neither the author nor commissioner of same.

The witness stated that upon the divorce of plaintiff and the deceased, they stayed with his cousins, Florence Garapo and Marah Hativagone whilst Enia left with the mother. One of the children, a twin is said to have died in 1967. The plaintiff is said to have left for Malawi in the late 1960s to early 1970s and to have even visited to see her children, from there.

This witness went to study in the United Kingdom in 1976 and came back 1981 and stayed with the second defendant and the deceased in Glen Lorne for 6 months. He was not aware of any other wives to the deceased, then.

Under cross examination it was put to the witness that there was bad blood between his father and the plaintiff based on several incidents. One is that in 1966 the deceased had sent money, \$ 5000.00 Canadian dollars for the upkeep of his children and wife, the plaintiff, but the

money was never remitted. Another was in 1980 when Thomas Jamiel Kangai was given \$ 1000.00 to go and pay “Chiredzwa” for Enea Nyunyuto’s upbringing at plaintiff’s home in Masvingo and this was not remitted. The last was after the will reading when plaintiff communicated with the Buhera ward 19 councilors to claim their benefit and not have it go through Thomas Jamiel Kangai. The witness lamented that his father was not there to defend himself against these allegations, that he had no knowledge of the transactions and his father was reliable and honest.

When asked on details about the deceased’s other wives, he said no one can know intricate details but his uncle sired children with several women.

Seventh and Tenth Defendant’s Case

Ms *Chichetu* indicated on 3 June 2024 that she was no longer representing the seventh and tenth defendants. They therefore stand unopposed to the claim as their pleas were withdrawn.

The Eighth and Ninth Defendants’ Case

Eighth defendant gave evidence on commission, the essence of which is that she is a daughter to the deceased and a beneficiary in his last will and testament. She says she only met the plaintiff at her father’s funeral and knows her as mother to her siblings, Marah and Enea Nyunyuto. She had not seen the marriage certificate produced by the plaintiff before this matter. She too questions its authenticity along the evidence of the sixth defendant. She also considers the claim by the plaintiff to be extravagant.

The evidence of the ninth defendant is also similar. She too is a daughter to the deceased and a beneficiary in his last will and testament.

The Parties’ Submissions in Papers and in Argument

Just as a reminder, the issues to be determined are the following:

1. Whether or not the estate of the Late Kumbirai Manyika Kangai is liable to maintain the applicant.
2. If so, the quantum of lumpsum maintenance.

The Plaintiff’s Arguments

The plaintiff’s legal argument is based on Section 2 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*]

It is argued that the plaintiff is a dependant of the deceased in that she is a surviving spouse. Plaintiff's evidence was to the effect that she was customarily married to the deceased in 1957 at Buhera and their marriage was solemnized in 1963 in terms of the African Marriages Act [*Chapter 105*]. The parties lived apart because of the war of liberation until 1980 when they returned to Zimbabwe. Thereafter because of the deceased's polygamous set up, the plaintiff lived in Mabelreign whilst the deceased lived in Glen Lorne then Glen Forest. This marriage is said to have subsisted until the deceased's demise on 24 August 2023.

The plaintiff acknowledged the existence of four other wives of the deceased during his lifetime and confirmed that their set up and separate living arrangement was reflective of her being on separation with the deceased, though there was no divorce. As the senior wife, she did not want to stay with the other wives in one place. It was her evidence that the deceased in fact set her up in the Mabelreign property which he bought for her.

Evidence of the defendants' witnesses of her unregistered customary law union having been dissolved in the 1960s was vehemently denied. It is argued that all the witnesses were either not there or too young to have witnessed the alleged 1964 or 1960s dissolution of the customary union. Most of the witnesses are said to have come into the life of the deceased post 1980. It is contended that there is no evidence at all about the alleged dissolution of the union. The evidence of Reward Kangai was discounted as he was barely 8 years old at the date of the alleged dissolution. That he overly relied on what his father, Thomas Jamiel Kangai told him was said to show that his, was hearsay evidence. This version is said to be shaky as Thomas Jamiel Kangai, who is now deceased, was not there to corroborate this.

An attempt by the second and sixth defendant to produce an affidavit allegedly deposed to by Thomas Jamiel Kangai during his lifetime was said to be improper as the affidavit was inadmissible as evidence as it could not be tested in cross examination. Additionally, the plaintiff's evidence painted a sour relationship between her and the late Thomas Jamiel Kangai. It was argued that this makes whatever evidence attributed to Thomas Jamiel Kangai unreliable and untruthful.

It was further argued that though the second defendant was the holder of a civil marriage contracted in 1981 under the then Marriage Act, this marriage, coming after validly solemnized customary law marriage of the plaintiff and the customary unions of the other wives, it could not

invalidate the prior marriages it was argued that the second defendant had been untruthful in denying the existence of other marriages as confirmed by the sixth defendant in respect to Betty Makonese, Elizabeth Makunike and Margaret Hamandishe through this witness later tried to doctor his evidence and said he was not sure if these women were customarily married.

The court is urged to disregard the second defendant's hearsay evidence regarding the dissolution of the customary law union wherein she says she heard from her husband, the deceased. It is contended that in terms of S 27(1) of the Civil Evidence Act [*Chapter 8:01*], that through first hand hearsay evidence is admissible, s 27(4) provides for grounds or otherwise of giving weight to such evidence. The court is to have regard to all the circumstances affecting the accuracy or otherwise of the evidence. One such factor is whether or not the person who made the statement had any incentive, or might have been affected by the circumstances to conceal or misrepresent any fact. The totality of the evidence is said to show that the second defendant has an incentive to misrepresent the actual marital status of the deceased in relation to all the other women. This is said to be evident in how she quickly solemnized a civil marriage in the face of all the other women.

The same is said to go for Reward Kangai's first hand hearsay evidence in light of the bad blood between the plaintiff and Thomas Jamiel Kangai.

On the defendants' case that the plaintiff is not a surviving spouse because her alleged marriage certificate is fake, it is argued that this is a baseless assertion. The first argument is that Since 2014 and in second defendant's plea, she did not contest the authenticity of the marriage certificate but said it "only existed on paper" and that plea stands unamended to date.

This challenge which only came up during the hearing is said to be an afterthought and that the defendants should in the ten-year period have invoked rule 47(5) of the High Court Rules on inspection of documents as a way to clear the issue whether the copy has an original or not. The plaintiff says she was therefore ambushed at trial.

The plaintiff's explanation on how she lost the original marriage certificate in or about 2014 is said to be credible. Section 11 (b)(i) of the Civil Evidence Act is said to give the court a discretion to accept a copy of any original document upon satisfaction that the original was indeed lost. The court was urged to accept the tendered marriage certificate as admissible

On the attacks regarding the contents of the marriage certificate, it is contended that the plaintiff gave satisfactory explanations and, in any event, none of the defendants is an expert or an employee from the Central Registry so as to lay out and argue on the official position on the proper layout of a marriage certificate in 1963. It is further argued that as the ones making the allegation of invalidity of the marriage certificate on account of it being inauthentic, the defendants had the onus to prove this and they failed to do so. The two letters produced by the defendants dated 6 and 21 June 2016, are alleged to be inconclusive.

The letter of 6 June 2016 is said to have referred the defendants to the originating office of the marriage certificate, being the District Commissioner for Fort Victoria (now Masvingo), The 21 June 2016 letter made it clear that the 1963 marriage was solemnized when it was the Ministry of Local Government and Housing responsible. They were directed there. As there were no follow ups, it was argued that the letters do not assist the defendants' case.

It is argued that the defendants should have subpoenaed an official from the relevant office to come and give evidence, and their failure to do so leaves their case shaky.

Plaintiff argues that she was being maintained by the deceased at the time of his death who would give her money or groceries as per her evidence and that of her witnesses. The denial by second, third and sixth defendant is said to be a bare denial as they could not account for the deceased's time and resources all round. In particular, the deceased who was a government minister, a member of parliament and a businessman is said to have had multiple streams of income. To illustrate this it was pointed out how the deceased sired several children with other women after his marriage to the second defendant. He therefore had a private life which second defendant could not account for.

The plaintiff who retired on medical grounds in the late 90s is said to have relied on the deceased for maintenance.

It is contended that the plaintiff was entitled to payment of maintenance by the deceased at the time of his death on account of s 6(3)(a) of the Maintenance Act which provides that husbands and wives at customary law are primarily responsible for each other's maintenance and it is argued that this is dependent on the means and needs of the parties.

Regarding the quantum of maintenance reference is made to s 7(2) of the Deceased Persons Family Maintenance Act which provides for the factors to be considered in assessing

this. These include whether the dependant is in need of maintenance, where there is a will, whether the dependant has benefits accruing to her. The period for which maintenance is required, the ability of the dependant to maintain self and whether it is desirable that he should work. A look at the number of persons to be maintained by the estate the general standard of living of the dependant and that of the deceased during his lifetime. These and other factors and the size and nature of the net estate are to be considered.

In casu, it is argued that the plaintiff who is 83 years old, wheelchair bound and dependant on care givers due to her medical condition is said to be in need of maintenance. The deceased's will omits her. When the claim was first made in 2013, plaintiff was 73 years old and had claimed maintenance for 12 years. Now she is 83 and maintenance will be claimed for a further 12 years.

It is pointed out that the estate is not maintaining anyone as the youngest child is 40 years old and is a beneficiary as are the other defendants. All the other wives are said to be late, the last being Elizabeth Makunike who died in 2022 before her maintenance claim against the estate was finalized.

The plaintiff's claim is alleged not to have an adverse effect on all the beneficiaries given the size of the estate. The net value of the estate is said to be five million and four thousand dollars from the Nyabira project alone and the Glen Forest property is still to be developed and measures approximately 27 hectares. It is argued that the estate is well able to cater for the plaintiff's claim.

It was pointed out that to date each beneficiary has received five stands each valued at USD \$30 000.00 per stand. This comes to USD 150 000.00 and they expect more.

The claim of USD 4 483.90 per month and a lumpsum of USD 645 681.50 (being maintenance for 12 years is prayed for.

Section 7 (3) of the Deceased Persons Family Maintenance Act is relied on to argue that as a spouse of the deceased and having regard to the age of the applicant, the duration of the marriage, and the contribution made by the applicant to the welfare of the family of the deceased, including looking after the home or caring the family, she is entitled to her claim. She was married for 56 years reckoning from the unregistered customary law union or 50 years from registration of the marriage. They were both teachers before the war. She bore four children and

looked after the three children of their late daughter. Even if the parties' marriage had ended in divorce, she would not have walked out empty handed.

The Second and Third Defendants' Arguments

The case advanced is that the plaintiff is not a surviving spouse of the deceased. It is a falsehood that the deceased was in polygamous set up. He is survived by only one widow, the second defendant whom he married customarily in 1980 and they subsequently formalized their union under the then Marriage Act [*Chapter 37*] in 1981. They first lived in Glen Lorne and purchased and moved to the Glen Forest property.

All the other women were indeed in relationship with the deceased but were never married. He was a womanizer, would sire children, abandon the woman but take custody of the children and bring them to the second defendant who then raised them.

The second defendant relies on what she was told by the Kangai elders on the dissolution of the plaintiff's customary law marriage. Second defendant says she looked after the plaintiff's two daughters after independence and that such a set up is not consistent with the alleged polygamous set up. The dissolution of the marriage through payment of a divorce token is allegedly corroborated by Fungai Kangai, Tiriwamambo Kangai and Reward Kangai. It is argued that the plaintiff should have furnished evidence to show that she was not given a divorce token in the 1960s.

Another argument advanced is that the plaintiff's marriage certificate is "fake, fraudulent and bogus." The reasons advanced for this assertion are that plaintiff caused the second defendant's marriage certificate to be removed from the Registrar of Marriages records (both hard copy and electronic) and had her bogus marriage certificate entered as a replacement just after the deceased's demise.

Secondly, the plaintiff is alleged to rushed to the Master of the High Court and caused the Estate of the deceased to be registered using the "bogus" marriage certificate.

The plaintiff allegedly rushed to the Pension Master claiming to be the sole surviving spouse and starting receiving a pension from 2013 and in 2015 got a court order to cement her position.

This claim for maintenance is said to be an extension of the plaintiff's scheme to steal from the estate.

The third defendant supports the second defendant's arguments. He emphasized that the plaintiff did not participate in any family events.

It is questioned why the plaintiff went alone to Masvingo to get a duplicate of her marriage certificate without the deceased. Furthermore, it was contended that the plaintiff should have led evidence from her lawyers in order to prove the alleged loss of the original marriage certificate whilst in their custody.

In any event it was argued that in terms of s 12 of the Civil Evidence Act [*Chapter 8:01*] which governs production of public documents, a marriage certificate is a public document and it shall only be admissible if, it is proved to be a true copy or extract and must be signed by the public official who has custody of the original.

It is contended that the copy produced by the plaintiff at trial was not proved to be a true copy of the 1963 marriage certificate but a copy of a photocopy. It is said not to have been signed by the District Administrator of Masvingo nor the Registrar of Marriages but by a bogus Commissioner of Oaths known as "S Bungu" who is not a public official in whose custody the original marriage certificate is kept. It is argued that the marriage certificate is an inadmissible document.

The crux of the argument is that the plaintiff is not a surviving spouse of the deceased and is not entitled to receive maintenance from the deceased's estate. It is prayed that the claim be dismissed.

The arguments of the sixth, eighth and ninth defendants

Their arguments are similar to those of the second and third defendants. It is argued that the plaintiff has failed to discharge the onus of proving that she is a widow or surviving spouse of the deceased. They too pray for dismissal of the claim.

The Law: Its application and Analysis

The legal issues falling for determination are as follows:

1. Whether there was a customary law union between plaintiff and the deceased.
2. Whether the unregistered customary law union was dissolved.
3. Status of the plaintiff's marriage certificate.
4. Whether the estate of the late Kumbirayi Manyika Kangai is liable to maintain the plaintiff.

5. The legal framework for dealing with claims under the Deceased Persons Family Maintenance Act.
6. The form, substance and quantum of maintenance due

Whether there was a customary law union between plaintiff and the deceased

From the evidence given from all the parties, it is common cause that the plaintiff was customarily married to the deceased in 1957 and they bore four children. However, at some point despite relating to the existence of the customary law union, the second defendant surprisingly said that the husband had denied ever entering into an unregistered customary law union with the plaintiff and that she had just fallen pregnant whilst they were at school and have moved in to stay with the Kangai's. That there were two children born and traditional rites were performed but there was never a formal customary marriage. The sixth defendant said that as he was growing up, he heard that plaintiff was customarily married to the deceased but had been given a divorce token. Reward Kangai also echoed the same position.

The second defendant also related to the plaintiff having been given a divorce token or "gupuro." If there had been no customary law union as alleged by second defendant, why would "gupuro" be given? This means either the deceased lied to the second defendant and told her what she wanted to hear, or the second defendant is being untruthful. Either way, her evidence on this issue cannot be relied on. And how did the plaintiff end up bearing four children with the deceased in the Kangai family? I rely on the case of *Peter Nyandoro v Christopher Mukowamombe & 2 Ors* HH 209/10 to explain about "gupuro." This is what was stated in that case;

"Two traditional chiefs testified in this case. They were Joseph Magayo who is known as Chief Hata and Mark Nyaada who is known as Chief Makoni. The two Chiefs were from the district where the applicant and first respondent live. They were called to clarify the position relating to the dissolution of customary marriages. Although they were from different parts of the country, they were both agreed that a marriage at customary law can only be dissolved by the tendering of "gupuro." They were both adamant that "gupuro" is not paid in private but is paid through a go-between (Munyai) or "tete" If no "gupuro" has been paid the parties are merely separated and not divorced. They were also of the opinion that in practice the period of separation was not of any significance."

In light of the above customary law position, the second defendant's position that there had been no customary law union is manifestly untrue. Based on the evidence placed before me,

it is my finding that there was an unregistered customary law union between the plaintiff and the deceased.

Whether the customary union was dissolved

The defendants' position is that the customary law union was dissolved by the giving of gupuro in the 1960s.

The second defendant was nowhere near the Kangai family in the 1960s. She relies on what her husband allegedly told her. I have already discounted her version above especially as heard from the deceased. The third, sixth, eighth and ninth defendants were not yet born when the alleged events occurred.

The second defendant did say that all the elders who had witnessed the giving of "gupuro" had passed on, and were not available to testify. The last man standing was said to be Thomas Jamiel Kangai who passed on after deposing to an affidavit in December 2022. Second defendant and sixth defendant sought to produce this affidavit in support of their case. The plaintiff's counsel objected to its production in both instances. This was on the basis that this matter had been referred to trial for the giving of oral evidence and as the defendants were not the authors or commissioners of oath, they could not produce the affidavit as its authenticity could not be tested in cross examination. As this was not an official document whose authenticity could be confirmed by someone else, I upheld the objection.

Reward Kangai who was born in 1956 was only about 9 years old at the time of the alleged giving of "gupuro."

None of the defence witnesses could speak to the details of who was present when "gupuro" was given or who the go-between or aunt was. Theirs was a generalized version. They also had a skewed idea on who bears the burden of proving that the union was dissolved. It was argued for the second defendant that the plaintiff had not proven that there was no dissolution of the union. This is contrary to the trite position. In *Astra Industries Limited v Peter Chamburuka* SC 27/12 it was held as follows;

"The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation."

It is the defendants alleging that the plaintiff and the deceased's customary law union was dissolved by the giving of "gupuro." They bear the burden to prove this. As shown above, they have dismally failed to prove this.

Even though the plaintiff says that she was on separation with the deceased, the case of *Peter Nyandoro v Christopher Mukowamombe supra*, makes clear that as long as 'gupuro' is not paid, the separation of parties does not dissolve the customary law union.

It is my finding that the customary law union of the plaintiff and the deceased was still subsisting at the time of his death.

What is the status of the registered marriage of the plaintiff?

The defendants mounted a spirited defence that the marriage certificate produced by the plaintiff is inadmissible and based this on s 12 of the Civil Evidence Act.

This section provides as follows:

"Public and official documents

In this section -

"public document" means a document -

- (a) which was made by a public officer pursuant to duty to ascertain the truth of the matters stated in the document and to make an accurate record thereof for public use; and
- (b) to which the public have a right of access;

"public officer" means a person holding or acting in a paid office in the service of the state or a local authority.

- (2) A copy of or extract from a public document which is proved to be a true copy or extract or which purports to be signed and certified as a true copy or extract by the official who has custody of the original shall be admissible in evidence on its production by any person and shall be *prima facie* proof of the facts therein."

A marriage certificate clearly falls within the definition of a public document as set out in s 12. It is made for public use and is issued by a public officer who in 1963 was known as a District Commissioner. A marriage certificate serves to confirm that the parties whose names appear on the face of it, are lawfully married.

Section 12(2) makes clear that a public document shall only be admissible if;

- (i) The document is proved to be a true copy or extract.
- (ii) It is signed by the public official who has custody of the original.

In *casu*, the copy of the marriage certificate produced by the plaintiff is a certified copy of a copy. The commissioner of oaths is one “S Bungu” S Bungu is not alleged to be a public official in whose custody the original marriage certificate is.

It was argued for the plaintiff that, in terms of s 11(b)(i) of the Civil Evidence Act, the Court has a discretion to permit the production of a copy where it is satisfied that the original document has been destroyed or irretrievably lost. In this case though the plaintiff averred that the marriage certificate was lost in the custody of her legal practitioners in or about 2014 when she instructed them in this matter, none of the legal practitioners corroborated this in evidence. In any event, as the marriage certificate is a public document, I am inclined to use the provisions in s 12 of the Civil Evidence Act.

It is my finding that the marriage certificate produced is a public document which has not been proved to be a true copy or extract and is not signed by the public official, in whose custody it is. It is therefore not admissible.

I will therefore not detain myself on the question of the authenticity of the marriage certificate which issue was argued extensively. It has fallen away.

Whether The Estate of the Late Kumbirai Manyika Kangai is Liable to Maintain The Plaintiff

The starting point in the resolution of this issue, is the Deceased Persons Family Maintenance Act. This Act is to make provision for maintenance out of the estate of a deceased person for certain members of his family. The qualifying members are set out in the definition of the word dependant. In s 2 it says, “dependant” in relation to a deceased means –

(a) A surviving spouse

(f) any other person who-

(i) was being maintained by the deceased at the time of his death, or

(ii) was entitled to the payment of maintenance by the deceased at the time of his death.

I already made the finding that the unregistered customary law union between the plaintiff and the deceased was subsisting at the time of his death.

The law recognizes parties who are married customarily as responsible for the maintenance of each other depending on means and needs. See the case of *Jeke v Zembe* HH 237/18. The position therein is founded on s 6(3) of the Maintenance Act [*Chapter 5:09*] which provides as follows:

“For the purpose of determining whether or not a person who is subject to customary law is legally liable to maintain another person, a maintenance court shall regard.

(a) Husbands and wives at customary law as primarily responsible for each other’s maintenance.”

The fact that the second defendant solemnized her marriage to the deceased in 1981, in the face of the plaintiff’s customary law union does not take away plaintiff’s entitlement to maintenance from the deceased.

In the case of *Tedreta Ndanga v Margaret Shumbare & Ors* HH 69/17 it was stated as follows:

“In circumstances where the customary marriage/union preceded or predated the civil marriage, our courts have accommodated such marriages. See *Sibanda v Sibanda* HB 86-13 and *Ndlovu v Ndlovu & Ors* HB 11-10.”

It is therefore my clear finding that the plaintiff was a surviving spouse of the deceased and therefore a qualifying dependant in terms of the Deceased Persons Family Maintenance Act.

The Legal Framework for Dealing with Claims by Dependants under the Deceased Persons Family Maintenance Act

Honourable TSANGA J, in the case of *Petronella Tendai Militala v Trustees For The Time Being of The Granta Seven Trust & 4 Ors* HH 474/24, gives a clear articulation on the legal position and the role of the court in the assessment of a claim made in terms of the Deceased Persons Family Maintenance Act. She starts off by noting how the case of *Chigwada v Chigwada* SC 188/20 upholds testamentary freedom and does not oblige a testator to bequeath his or her property to a surviving spouse. This freedom is however, curtailed by the provisions of the Deceased Persons Family Maintenance Act as it allows “dependants” as defined from the deceased estate. She opines thus;

“This Act therefore imposes a post humous duty to support where warranted. It dilutes testamentary freedom as embodied in s 5(1) of the Wills Act [*Chapter 6:06*] by balancing testamentary freedom with obligation towards a spouse, family or other dependants. As can be detected from the criteria set in s 7(2), it is the court’s duty to evaluate a claim placed before it.”

I turn to look at s 7(2) of the Act. It provides as follows:

“In the determination of an application, the court shall have regard to –

- (a) Whether or not the dependant is in need of maintenance, taking into account, where the deceased died leaving a will, the benefits, if any, to which the dependant will be entitled under the will, or where the deceased died intestate, the benefits, if any, to which the dependant will be entitled on intestacy;
- (b) The period for which maintenance of the dependant is required
- (c) The ability of the dependant to maintain himself and whether or not it is desirable that he should work,
- (d) The number of persons to be maintained by the estate;
- (e) The general standard of living of the dependant and, during his lifetime, of the deceased;
- (f) The reasons for the deceased failing to make provision for the maintenance of the dependant and in this connection, whether or not the behaviour of the dependant was responsible in any way for such failure;
- (g) Where the deceased died leaving a will, the interests of the beneficiaries in respect of whom provision has been made under the will;
- (h) Where the deceased died estate, the interests of the persons who would normally succeed on intestacy;
- (i) The size and nature of the net estate
- (j) Any other matter which in the opinion of the appropriate court, is relevant to the determination of the issue.”

In the case of an application for maintenance being by a spouse of the deceased, additional factors to those in s 7(2) are set out in s 7(3). These are they;

“7(3) Without prejudice to the generality para(j) of subsection (2), in an application by a spouse of the deceased, the appropriate court shall, in addition to the matters specifically mentioned in paragraphs (a) to (i) of that subsection, have regard to –

- (a) The age of the applicant and the nature and duration of the marriage; and
- (b) The contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; and
- (c) The provision which the applicant might reasonably have expected to receive if, on the day on which the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce.”

Section 8 of the Act provides for the form and substance of awards. It sets out that awards can be periodical payments for a set period, payment of a lump sum amount, transfer of specified property to the claimant, amongst other things.

Turning now to applying the law to the facts, regarding s 7(2)(a) it is submitted that the plaintiff is in need of maintenance because she is now 83 years old, has a medical condition of arthritis which now makes it hard for her to walk properly and she is now wheelchair bound and has to be transported by ambulance as per her doctor’s orders. Because of these factors she is said to be incapable of generating her own income.

The defendants submitted that the plaintiff is not in need of maintenance as she is in receipt of hers and deceased's pension and also gets support from her own children. This was said to adequately cater for her maintenance needs. I note that plaintiff has accounted for these in her claim.

The plaintiff estimated the total pension she receives to be about US\$300 though part comes as local currency and the amount fluctuates due to inflation. The amount was said to be inadequate for the needs she has set out in her claim.

The plaintiff is not a beneficiary in the will of the deceased.

Regarding s 7(2)(b) of the Act, when the claim was lodged initially in 2015, when the plaintiff was 73 years old, he had claimed maintenance for a 12 year period. It is now submitted that she should get maintenance for a period of 12 years from the date of the court order. This is said in light of her life expectancy and the hope that with adequate medical care, the arthritis she is suffering from can be properly managed. Given this condition, and her age, it is alleged that it is not desirable for the plaintiff to work (section 7(2)(c)).

The estate is said to have no persons liable to be maintained by it as all his children are over 40 years of age and are beneficiaries in the will together with the other surviving spouse, the second defendant. All the other wives; Margaret Hamandishe, Elizabeth Makunike and Betty Makonese are said to be deceased too with Elizabeth Makunike having died in 2022 before her maintenance claim against the deceased's estate was finalized in the High Court. This takes care of s 7(2)(d) of the Act.

Regarding s 7(2)(e) it was the plaintiff's evidence that during the deceased's lifetime, he was a cabinet minister, a member of parliament and he had a comfortable standard of living. She says was accustomed to a similar standard of living though she was living separately in a house bought by the deceased, in Mabelreign. She was working until she retired on medical grounds in 1998. The deceased was alleged to have been maintaining her through the provision of money, groceries or transport to go for medical check ups.

The defendants queried the claim that the deceased was maintaining the plaintiff at all. In particular, the second defendant averred that she is the one who was handling finances and she and the deceased budgeted together and they were heavily borrowed to the extent that there was

no excess money to maintain the plaintiff. According to her, there were no secrets between her and the deceased.

The rest of the evidence belies this version of a united and open communication relationship and joint finance management between the second defendant and the deceased. By her own admission her husband was a womanizer. She admitted that the deceased bore a child Musadaro with Elizabeth Makunike whom she claimed was not married customarily, after her own civil marriage in 1981. Another child was sired by the deceased and born to one Betty Makonese during the subsistence of second defendant's marriage, child Tendai Kangai. Another child Tiriwamambo was born in 1985, Fungai was born in 1983, Rwatinyanya was born in 1982 to Margaret Hamandishe who she disputed to have been married to the deceased. There were still other children who were said to have been coming, even at the funeral, claiming to be the deceased's children. It does not really matter whether the deceased was married to these other women. What is clear is that he was involved with all these other women and these affairs would have required some financial input by the deceased. This was unknown to the plaintiff and she did admit under cross examination that she was not 100% aware of all the deceased's affairs.

In the light of all this, nothing stands against the evidence of the plaintiff and her witnesses, that she too was in receipt of some maintenance from the deceased, as and when she required some.

The reasons why the deceased failed to make provision for the maintenance of the plaintiff were not properly established. Whereas the plaintiff said that they had agreed that she would use her marriage certificate to claim maintenance, as she has now done, the second defendant says it was because the plaintiff was not a dependant of the deceased. Whichever way one looks at it, it is not shown that the plaintiff was omitted due to her own behaviour. In any event, having found that she was customarily married to the deceased at the time of his death, her entitlement to maintenance has been established. This deals with s 7(2)(f).

Section 7(2)(g) requires the court to consider the interests of the beneficiaries in respect of whom provision has been made under the will. Though the interests of the beneficiaries cannot be ignored, they are all adults who are over 40 years of age, have their lives figured out and many of them live abroad. As argued for the plaintiff, an order in favour of the plaintiff cannot be said to adversely deprive the beneficiaries in the legal and economic sense. As

observed in the case of *Petronella Tendai Militala v Trustees for The Time Being of The Granta Seven Trust supra*, a claim under the Deceased Persons Family Maintenance Act has the expected effect of diluting testamentary freedom.

On the size and nature of the estate, the first defendant who is the executrix gave detailed evidence the estate is a 50% shareholder in the company Luna Estates and the second defendant holds the other 50%. It was the executrix testimony that there are two properties under Lunar Estates, that is the Paarl Farm Nyabira Project and Glen Forest.

The Nyabira Project alone, was said to have a net worth of ten million eight hundred thousand United States Dollars in the form of 360 (three hundred and sixty) developed stands valued at thirty thousand United States Dollars each. What would therefore fall due to the estate is 50% and that is Five Million Four Hundred Thousand United States Dollars.

The Glenforest land measures approximately 27 hectares and it was submitted that the company plans to develop the property in the future and that, it is argued, will lead to an appreciation in value of one million one hundred and fifty dollars as at December 2013.

As the plaintiff is a surviving spouse the additional factors for consideration as set out in s 7(3) of the Deceased Persons Family Maintenance Act, are the age of the applicant which has already been given as 83 years. What has been proved before me is that she was married in terms of an unregistered customary law union in 1957 and this marriage lasted till 2013 when the deceased passed on. She was therefore married for 56 years.

In terms of the contribution, she made to the welfare of the family, the plaintiff said both her and the deceased were teachers but the liberation war separated them. She says she was interrogated by the Rhodesian government when the deceased, who was active in politics, fled the country to Canada and left her with the children. In the end she also fled, first to Malawi then Kenya due to the persecution. When she was out of the country, she said she would send money to look after the children. Even Reward Kangai remembered, in his evidence, when she visited to see the children, from Malawi.

After the death of one of their daughters Florence, plaintiff said that she took in her three children and looked after them.

The evidence before the court was that plaintiff also stayed with and looked after the last daughter, Enea Nyunyuto Maroveke.

Section 7(3)(c) requires the court to look at the provision which the applicant might reasonably have expected to receive if, on the day the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce. It is clear that the plaintiff would not have walked out of the marriage, empty handed.

The Form Substance, And Quantum of The Award

The plaintiff's claim is itemized in annexure B which appears on p 10 of the consolidated record. She is claiming groceries to the amount of US\$370.50. A broken-down list of these is given and, in her evidence, and that of her witness, Enea Nyunyuto Maroveke, this amount was justified.

Toiletries are claimed in the amount of \$454.40 and a breakdown is given. Enea testified that this amount is high because the plaintiff requires many strong detergents as she now uses diapers and a mobile toilet. I note that it is in fact her facials, perfume and hairdo which constitute \$378 of the amount claimed. The plaintiff justified this claim as arising from the standard of life she was accustomed to as the wife of a cabinet minister and member of parliament.

There is a claim for holidays in the amount of \$625.00 per month and this covers both local and international holidays. There is \$125.00 for local holidays and \$500.00 for international holidays. The provision for international holidays was however not justified as plaintiff's witness Tashinga Norman Maroveke said the only holiday he recalls plaintiff going to, is her rural home and nowhere outside the country. I will only allow the claim for \$125.00 for holidays.

The claim for clothing totals \$462.00 as she is said to be changing size. Rates and water come to \$80.00. It was explained that the plaintiff who is now wheelchair bound requires two maids and the gardener takes care of the outside/garden. The total amount of \$668.00 caters for their salaries, uniforms and food.

For her transport, the plaintiff is claiming \$200.00.

The health costs claim amounts to \$2343.00. It was said to be for before various operations being dental, spinal and knee replacement. Hearing aids are also listed and there is a provision for medical aid in the amount of \$50.00 I understand that this claim may have been done some ten years ago and it was Enea's evidence that the doctors have now said they cannot proceed with the operations because of the plaintiff's age. Plaintiff is said to now go for

physiotherapy which costs about \$360 - \$380 per fortnight. The claim to cover operations which are no longer going to occur is not justified. I will only allow the amount of \$720.00 as provision for her physiotherapy sessions and \$60.00 to cover hearing aids and medical aid. So, the total for health costs comes to \$760.00.

The claim for entertainment is broken down and the total comes to \$626.00.

The defendants simply pointed out that the plaintiff's claim is exaggerated and extravagant and did not go further to point out in what respect they say so. I have therefore only adjusted where there is a clear dissonance from the evidence presented.

In her claim, the plaintiff had deducted a total of \$600.00 being the income from her pension, set at \$100.00 and \$500.00 being donations from her children. The evidence before me shows that the plaintiff is now in receipt of a widow's pension. The combined pension was said to be made up of and a USD component but would fluctuate. The May 2024 payslip tendered shows \$302.94 as the USD net pay. The net ZIG pension is \$14 435.00.

Under cross examination when it was put to the plaintiff that the ZIG component comes to approximately USD 1000.00, she insisted that it may be so for a moment as this is always fluctuating.

Given the common knowledge inflation, it is not safe to conclude as suggested by Mr Muza, that plaintiff is receiving approximately USD 1400.00 as pension. What is certain is the USD 302.94 that she receives as pension, and this is what I will consider. For the ZIG component, \$ 14 435.00 at today's ZIG official exchange rate of \$25.69 equals USD 561.89. The pension income totals USD 864.83.

In the result, the claim is allowed as follows:

Groceries	\$370.50
Toiletries	\$454.40
Holidays	\$125.00
Clothing	\$462.00
Rates and Water	\$ 80.00
Maids and Gardener	\$668.00
Transport	\$200.00
Health	\$780.00

Entertainment	\$626.00
TOTAL	\$3765.90
Less Income from Pension	\$864.83
Less Donations from Children	\$500.00
Award	<u>\$2 401.07</u>

The plaintiff is claiming lumpsum maintenance for a period of 12 years from the date of the award. At \$2 401.07 per month, the annual maintenance would be \$28 812.84. For 12 years the lumpsum maintenance comes to \$345 754.08

On the 27th of March 2024, an order was granted by consent of the parties for first defendant to pay plaintiff maintenance *pendente lite* in the amount of USD\$ 2770.00 per month with effect from the date of the court order. In lieu of this first defendant was ordered to surrender and transfer an immovable property known as number 107 Paarl of the remainder of Paarl Farm Measuring 1199 square metres to plaintiff. The order would remain extant until the main maintenance claim under HC 3863/14 –1/2 was finalized.

In finalization of the main maintenance claim, I accordingly order as follows:

1. The claim for lumpsum maintenance from the estate of the late Kumbirayi Manyika Kangai be and is hereby granted.
2. The plaintiff is awarded a lumpsum of maintenance in the sum of USD 345 754.08 (three hundred and forty -five thousand seven hundred and fifty-four dollars and eight cents.
3. First defendant is ordered to surrender and transfer immovable property from Paarl Farm, to the Plaintiff which is the equivalent in value of the lumpsum maintenance awarded, within thirty days of this order.
4. Each party bears its own costs.

MUCHAWA J:

Sinyoro and Partners, plaintiff’s legal practitioners
Muza and Nyapadi, second and third defendant’s legal practitioners
Gumbo and Associates, sixth, eighth and ninth defendants’ legal practitioners

