FAITH NDIGE
versus
MARGARET MATSVANGE
and
JABULANI MZINYATHI (in his capacity as Executor Dative of Estate late CORNELIO EVANS NDIGE)
and
THE MASTER OF THE HIGH COURT N.O MASVINGO

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 4 OCTOBER 2019, 18 May 2020

**Opposed application**

*J. Mpoperi* for the applicant
*S. Moffat* for the 1st respondent
No appearance for the 2nd and 3rd respondents

WAMAMBO J: This matter concerns an immovable property namely House No. 48, McGhie Avenue Rhodene, Masvingo (hereinafter called the house) which forms part of the estate of the, late Cornelio Evans Ndige who died on 25 March 2012 and whose estate is registered under WE34/13

In an edict meeting concerning the above mentioned estate held on 11 May 2018 the Master of the High Court made the following resolutions:

*"1.* ……

2. *Parties were advised that the Rhodene house is not a matrimonial home.*
3. *The Master made a ruling that Margret Matsvange is the deceased's second wife according to submissions made in this meeting. If there is anyone who is aggrieved*

*by this decision is free to take it for review. Therefore the deceased is survived by two wives Faith Ndige with a registered customary marriage and Margret Matsvange with an unregistered customary marriage".*

The applicant is proceeding under Section 52(a) of the Administration of Estates Act [*Chapter 6:01*]

It reads as follows:

*(a) The Master shall consider such account, together with any objections that may have been duly lodged and shall give such directions as he may deem fit*

*Provided that*

*(i) Any person aggrieved by any such direction of the Master may, within thirty days after the date of the Master's direction, and after giving notice to the executor and to any person affected by the direction apply by motion to the High Court for an order to set aside the direction and the High Court may make such order as it may think fit.*

(ii) ……

In this application at the start of the hearing, applicant's counsel quickly sprang into action and applied for amendments to the draft order and heads of argument which were unopposed by counsel for the first respondent and also made some concessions. The amendments relate to paragraphs 2.2, 2.4 and 2.6 of applicant's heads of argument. The said paragraphs relate to the inheritance of a matrimonial home for a person who dies interstate and refer to section 3A of the Deceased Estates Succession Act *[Chapter 6:02]*. The application was for the deletion of this reference to section 3A of the Deceased Estates and in its place the substitution of section 68 (F) (2) (c) of the Administration of Estates Act *[Chapter 6:01]*

Section 68 (F) 2 (c) reads as follows:

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

*(i) where they live in separate houses, each wife should get ownership of or if that is impracticable, a usufruct over the house she lived in at the time of*

*the deceased person's death, together with all the household goods in that house.*

*(ii) Where the two wives live together in one house at the time of the deceased person's death, they should get joint ownership of or, if that is impracticable a joint usufruct over the house and the household goods in that house.*

Applicant's counsel was initially challenging the two resolutions by the Master of High Court referred to earlier in this judgment. He now abandoned the resolution to the effect that deceased was customarily married to the deceased. The amendments to the draft order flow directly from this concession.

Effectively applicant's prayer is summarily that House No.48 McGhie Avenue, Rhodene, Masvingo (the house) be declared a matrimonial home to which applicant shall be vested with all rights and benefits of inheritance as the sole surviving spouse. Further that the first and final distribution account of the deceased's estate should give effect to the declaration above.

The background to the matter between the parties is to a large extent, after the concession by applicant's counsel largely common cause. The following appears to be common cause

- Deceased died intestate on 25 March 2012
- Deceased married applicant under the African Marriages Act [*Chapter 105*] on 15 November, 1977
- Applicant left Zimbabwe for the United Kingdom and at the time deceased died she was resident in the United Kingdom. The first respondent never contributed to the purchase of House No. 48 Mcghie Avenue, Rhodene, Masvingo. Deceased also left behind a farm he obtained under the Land Reform Programme which farm is situated in Mvuma.

In advancing his case *Mr Mpoperi* for the applicant submitted as follows: -

This matter can be resolved through the interpretation of section 68(f)(2)(c) of the Administration of Estates Act [*Chapter 6:01*].

Technically applicant was residing at the house when deceased died although she was based in the United Kingdom. Applicant left for the United Kingdom in 2002 to seek medical treatment after she and deceased had purchased and moved into the house in 1981. She and

deceased considered the house as their matrimonial property and permanently resided there since 1981. When applicant left for the United Kingdom in 2002 she subsequently got employed there and continued to reside there since then. Deceased and some of her children continued residing at the house with some of the children sometimes residing at Mvuma where deceased worked and where he had obtained a farm as alluded to earlier. Some of the deceased and applicants children continued to permanently reside at the house from 2002 when applicant left up to 2012 when deceased died. Thereafter part of the house was leased to relatives with the main bedroom and cottage being reserved as their furniture had been lodged there. Applicant's position is that since 2012 to date she has been responsible for the upkeep of the house including renovations and painting of the house. 1st applicant never resided at the house. 1st respondent never contributed to the acquisition of the property.

*Mr Mpoperi* was of the view that a literal interpretation of section 68(f)(2)(c) of the Administration of Estates Act [*Chapter 6:01*] will not achieve the intention of the legislature. He argued that section 68(f)(2)(c) (above) was a response and a protection mechanism to widows and minors from deceased's relatives who were intent on plundering matrimonial property. His view is that the Administration of Estates Act is spouse centred. Further that the house was acquired in 1981 before 1st respondent was married by deceased. He submitted that a robust, liberal and purposive interpretation should be given to section 68(f)(2)(c) of the Administration of Estates Act [*Chapter 6:01*].

A reference was also made to 26(d) of the Constitution which reads as follows:-

"*26. Marriage*

*The State must take appropriate measures to ensure that:-*

*(a)* ----------

*(b)* ----------

*(c)* ----------

(d) *In the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses*"

Applicant's counsel referred to a number of cases namely *Chimhowa & Ors* v *Chimhowa & Ors* 2011 (2) ZLR 471 (H), *Tendai Dzomonda & Others* v *Kirison Chipanda & Others* HH

535/14, *Margaret Chirowodza* v *Freddy Chimbari & Others* HH 725/16 and *Nathan Hosho* v *Lilian Hosho* HH 491/15.

*Mr Mpoperi* also made submissions to distinguish the case law cited by 1st respondent's counsel from the instant case. He paid particular attention to the cases of *Jessie Chinzou* versus *Oliver Masomera & Others* HH 593/15 and *Linah Ndoro v Evidence Ndoro and Another* HH 198/12.

Counsel for the first respondent was resolutely opposed to the applicant. She made the following submissions :-

Part III of the Deceased Estates Succession Act [*Chapter 6:02*] was amended to protect among others surviving spouses "married" under unregistered customary law, especially as second wives such as in the instant case. It was submitted that applicant left for the United Kingdom in 1999 and not in 2002 as submitted by the applicant.

It was submitted that since 1999 or even if placed as 2002, 10 years at least passed without applicant returning to the house which she now calls her matrimonial home. It was averred that applicant had abandoned the marriage and did not even attend the funeral of deceased and that in the intervening years since her departure to the United Kingdom she never returned to the house or to Zimbabwe for that matter. Counsel cited a number of cases *inter alia* *Jeke* v *Zembe* HH 237/18, *Hosho* v *Hasisi* HH 491/15 and the other 2 cases cited earlier which *Mr Mpoperi* sought to distinguish from this case.

In *Chimhowa & Ors* v *Chimhowa & Ors* 2011(2) ZLR 471 (H) at pages 475 – 476 CHIWESHE JP said as follows:-

> "*In reading the legislation governing deceased estates in so far as the rights of surviving spouses are concerned, it is important to bear in mind the intention of the legislature, bearing in mind that this branch of law has in the last decade been the subject of much debate and controversy. A number of amendments have been brought to bear to this branch of the law. The chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of deceased persons of plundering the matrimonial property acquired by the spouse during the subsistence of the marriage. Under this practise which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases the culprit relatives would not have contributed anything in the acquisition of such immovable and movable properties, often the result of years of toil on the part of the deceased and the surviving spouse. This is the mischief that the legislature sought to suppress in introducing provisions such as section 3A of the Deceased Estates Succession*

*Act and s 68F of the Administration of Deceased Estates Act and the Deceased Persons Family Maintenance Act [Chapter 6:03]"*

In *Margaret Chirowodza* versus *Freddy Chimbari & Others* HH 725/16 CHITAKUNYE J was dealing with a matter sought to be resolved through an interpretation of the phrase "the house she lived in at the time of the deceased's death" as contained in section 68 F(2)(c). The learned Judge at page 6 said the following:-

"*The interpretation given must be such that the surviving spouse and children are not made destitute or homeless when they had a home during the deceased's lifetime. It in this light that the law guarantees them of the shelter they lived in before deceased's demise.*

*In instances.where a couple has been living apart for sometime it is important to ascertain the nature of such separation before determining whether such separation would disentitle a spouse to the protection envisaged in the aforementioned pieces of legislation."*

At page 7 CHITAKUNYE J continues as follows:-

"*Thus the term "live in" or "lived in" in s 68 F must be interpretation in such a way as to maintain the protection of a spouse who has temporarily gone away on employment or other activities in search of the needs of the family*."

In the instant case it is clear that applicant and the deceased acquired the house in 1981. 1st respondent did not contribute to the purchase of the house. She avers in paragraph 13 of her opposing affidavit as follows:-

"*13. As already alluded to above, I never worked for applicant. Over and above that I never alleged contributing to the purchase of the house situate at No. 48 McGhie Rhodene, Masvingo as applicant seems to suggest*."

It is interesting that in her founding affidavit in paragraph 8 applicant avers as follows:-

"*In 1981 I and my late husband purchased and moved into House No*. 48 *McGhie Avenue, Rhodene, Masvingo. The property was transferred into my late husband's home in 1983. I attach a copy of the Deed of Transfer as Annexure "C"*

In 1st respondent's opposing affidavit there is no response to paragraph 8 of the founding affidavit at all. This suggests that 1st respondent deliberately avoided meeting headlong the averments by applicant in paragraph 8. It is also clear that 1st respondent in her opposing affidavit responds to every paragraph in applicants founding affidavit except the mentioned

paragraph 8. I find here that applicant has proven that she and deceased jointly acquired the house in 1981.

It is not lost to me that 1st respondent attempts, albeit late in the day to allege that first respondent played a role in the acquisition of the property. What role she played is not clear. The allegation should clearly have been ventilated in the opposing affidavit and not the heads of argument. I thus consider it as an ill-conceived red herring and find that the 1st respondent's response contained in her opposing affidavit outlining her position is indeed the truth.

1st respondent agrees that applicant resided at the house and considered it her matrimonial home since 1981. That some of deceased and applicant's children continued to reside at the house after applicant left for the United Kingdom is not objected to by the 1st respondent. The 1st respondent does not directly deal with the applicant's assertion in paragraph 17 of the founding affidavit that she has placed her furniture in the bedroom and cottage of the house. Further that she has been solely responsible for the upkeep of the house including renovations and painting of the house since deceased's death. I take it that the assertions by applicant are correct.

Although there is controversy on when applicant left for the United Kingdom and whether or not she returned.to the house, thereafter it is however clear that 1st respondent accepts that applicant initially left for medical treatment and later subsequently obtained employment. Whether she left in 1999 or 2002 does not change the circumstances as there is a difference of only 3 years.

It is by no means an abandonment of a marriage or of a matrimonial home that one seeks medical attention and later obtains employment. One only has to consider the economic circumstances that could cause applicant to seek employment in the United Kingdom.

In placing a robust and purposive interest I find that applicant was residing at the house immediately before the deceased's death for the reasons given above as summarised below.

Applicant was not on separation to deceased when he died. Applicant bought the house together with deceased as far back as 1981.

Applicant only left for the United Kingdom at most 13 years before deceased's demise. Applicant's property remained lodged in the main bedroom and cottage of the house. Applicant's children continued to reside with deceased t the house after her departure to the United Kingdom up to 2012.

1st respondent never resided nor contributed to the acquisition of the house. Applicant continued the upkeep of the house after deceased died. I agree with the decisions of the Judge President in *Chimhowa & Ors* vs *Chimhowa and Ors supra* and that of CHITAKUNYE J in *Margaret Chirowodza* v *Freddy Chimbari & Others* (*supra*).

I have found that the case of *Linah Ndoro* v *Evidence Ndoro* (*supra*) is distinguishable from this case on a number of grounds particularly that the deceased in that case had instituted divorce proceedings against the applicant and that the two were on separation. Applicant was also residing within the borders of Zimbabwe which means she could easily and more frequently access and reside at the matrimonial home more that a person based in the United Kingdom.

In the matter of *Jessie Chinzou* v *Oliver Masomera & Ors* (supra) the clear distinction between that matter and the instant case is the period of 37 years when the applicant had last resided in the matrimonial home. CHITAKUNYE J in that case said at page 6:-

> "*I thus conclude that even applying the purposive approach it cannot be said applicant lived in the house immediately before deceased's death. She had last been there 37 years ago. Her absence was not because she had gone for employment or for such other activities as would still entitle her to come back upon completion*."

I have to mention that *Mr Mpoperi* sought to distinguish the case of *Linah Ndoro* v *Evidence Ndoro (supra*) on the basis that it was decided before the 2013 Constitution. In the same breath he relied on the *Chimhowa & Ors* v *Chimhowa & Ors (supra).*

The argument was however misplaced for a number of reasons not least of all that *Linah Ndoro* v *Evidence Ndoro* was decided on 3 May 2012 while that of *Chimhowa & Ors* v *Chimhowa & Ors (supra)* was decided on 23 November 2011, both before the 2013 Constitution was operative.

In the circumstances I find that applicant has proven her case.

On costs in oral argument applicant's counsel was of the view that neither partly should be penalised by the court.

To that end I deem the following order fit in the circumstances:-

1. That the only immovable property of the estate, namely House No 48 McGhie Avenue, Rhodene, Masvingo be and is hereby declared as a matrimonial home to which the applicant shall be vested with all rights and benefits of inheritance as the sole surviving spouse.

2. That the 2nd respondent shall prepare and lodge with the 3rd respondent the First and Final Administration and Distribution Account in the estate of the Late Cornelio Evans Ndige, Case No. WE 34/13 giving effect to Clause 1 of this order and lodge the said account within thirty (30) days of the date of this order.
3. That there be no order as to costs.

*Saratoga Makausi Law Chambers*, applicant's legal practitioners
*Legal Resources Foundation*, first respondent's legal practitioners