

CHENGETO MASHINGAIDZE
versus
PAULINE MANDIGO
(in her capacity as executrix dative in the estate of the late W.G. Mashingaidze DR 677/14)
and
THE MASTER OF THE HIGH COURT
and
GIVEMORE MASHINGAIDZE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 9 June 2016 & 1 December 2016

Opposed matter

Ms F Chinwavadzimba, for the applicant
1st and 2nd respondents in person
3rd respondent in default

MWAYERA J: On 9 June 2016 after hearing parties and having considered documents filed of record. I ordered that

1. The first and interim administration and distribution account filed by the first respondent dated 13 January 2015 in the Estate of the late Wilfanos Gabriel Mashingaidze DR 677/14 be and is hereby set aside.
2. The applicant be and is hereby declared the sole beneficiary of a certain piece of land called Glassala Farm, Centenary measuring 1105, 9293 hectares.
3. There be no order as to costs.

This judgment captions the reasons for the disposition. It is important to highlight that on the date of hearing, the third respondent's legal practitioners, Legal Aid Directorate, were not in attendance. No satisfactory explanation was given for none appearance and infact there were no heads of arguments filed by the third respondent. There was no renunciation of agency. The third respondent was thus barred. The second respondent filed a Master's Report dated 21 May 2015. The first respondent, the Estate, as represented by the Excatrix Pauline Mandigo, did not file opposing papers. The first respondent indicated at the hearing that it would abide by the court's decision.

The brief history of the matter has to be put into perspective. The applicant was married to the late Wilfanos Gabriel Mashingaidze in terms of the Marriage Act Chapter 37 now [*Chapter 5:11*]. The late Wilfanos Gabriel Mashingaidze passed on 25 November 2013 leaving the deceased as a surviving spouse. During the life time of Wilfanos Gabriel Mashingaidze, the couple through joint effort acquired immovable properties, sold and bought some as they engaged in business. In 1986, the couple bought a farm in Centenary namely Gassalla Farm measuring 1105, 9293 hectares and they moved to stay at the farm as their matrimonial home until the death of the deceased. Following the death of the deceased, the first respondent Pauline Mandigo was appointed the executrix dative of the estate. The first respondent, in terms of the law, compiled an interim account which reflected that the Glassalla farm be jointly awarded to the deceased's surviving children (including children of the applicant and deceased) and the applicant. The applicant then approached this court seeking redress as she argued that the farm was the parties matrimonial home and that in terms of law in particular s 3A of the Deceased Estate Succession Act [*Chapter 6:02*], she as a surviving spouse was entitled to inherit the property and not a child's share as propagated by the first respondent on the advice of the second respondent the Master. The applicant argued that the farm was the matrimonial home and in any event the domestic premises in which the surviving spouse was living in immediately before the deceased's death. As such she was of the view that she is entitled to the whole farm and not to a child's share. The applicant approached the court objecting to the confirmation of the first and Interim Administration and Distribution Account and also sought to be declared the sole beneficiary of the farm.

Worth noting from the Distribution Account is Annexure B p 10-27, particularly p 20 with the narration below:

“Awarded to the following beneficiaries in equal shares 1) Chengeto Mashingaidze (surviving spouse); 2) Tirivatatu Stanislaus Mashingaidze (son of the deceased); 3) Trymore Chifa Mashingaidze (son of the deceased); 4) Givemore Rungano Mashingaidze (son of the deceased); 5) Blessing Mashingidze (daughter of the deceased); 6) Blessmore Wadzanai Mashingaidze (daughter of the deceased); 7) Ruramisai Mashingaidze (daughter of the deceased); 8) Lovemore Mashingaidze (son of the deceased); 9) Loveness Rutendo Mashingaidze (daughter of the deceased); 10) Edmore Ignatious Mashingaidze (son of the deceased) and 11) Farirayi Grace Mashingaidze (daughter of the deceased).

- 1) Certain piece of land being Glassalla Farm situate in the District of Darwin, Centenary, measuring 1 105, 9293 hectares.”

The Master's position as discerned from the report was that the Interim Report as filed was proper because the property in question, being of commercial value could not rightly be treated as a matrimonial home. The master opined the farm was to be shared equally by all beneficiaries namely the surviving spouse and children. The relevant paragraph of the Master's report reads

"The estate is being administered in terms of the laws of intestate hence the award in terms of the account filed by the executrix dative. I attach same as Annexure 'A'. I submit that Annexure A in my view is proper given the provisions of section 3 and 3a of the Deceased Succession Act [Chapter 6:02]. Given the size of the farm, it cannot be treated as matrimonial house. It is my understanding and view that a farm is regarded as commercial property business venture as such fall far from matrimonial house. However the farm house can be regarded as a matrimonial house. That being the case I may not be opposed to the applicant being awarded the farm house and the portion of land surrounding farm house as opposed to the whole farm which measures 1105, 9293 hectares."

A reading of the Master's Report gives with one hand and takes away with the other. On one breath he argued the farm cannot be treated as a matrimonial house and on another breathe he suggests however, the farm house can be regarded as a matrimonial house. This stance buttresses the contentious issues that fell for determination by the court in the circumstances of this case. What falls for determination can be summarised as follows:-

1. Whether or not the property in question, Glassalla Farm situate in the district of Darwin, is matrimonial property falling for distribution in terms of s 3A of the Deceased Estates Succession Act [*Chapter 6:02*].
2. Whether or not the piece of land is indivisible so as to allow the applicant to inherit only the farm house and share the rest of the land with the children.
3. Whether or not the property Glassalla Farm situate in the District of Darwin held under Deed of Transfer 2595/87 should be shared equally between the applicant and deceased's surviving children.

The property which is central to these proceedings is Glassalla Farm under title deed 2595/87. The property is a single unit which has not been subdivided in terms of the law, that is s 39 and 40 of the Regional Town and Country Planning Act [*Chapter 29:12*]. This clearly depicts a single entity under one title. The subdivision thereof would require a permit in terms of section 40 of the Act. A reading of s 39 is clear on requirements of subdivision s 39 reads:

"Section 39 No subdivision or consolidation without permit

- (i) Subject to subsection (2) no person shall
 - (a) Subdivide any property or
 - (b) Enter into any agreement-

- (i) For the change of ownership of any portion of a property, or
 - (ii) For the lease of any portion of a property for a period of ten years or more or for lifetime of the lessee, or
 - (iii) Conferring an any person a right to occupy any portion of a property for a period of ten years or more or for lifetime of the lessee, or
 - (iv) For the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of renewal, is ten years or more, or
- (c) Consolidate two or more properties into one property, except in accordance with a permit granted in terms of s 40.”

The relevant statute in so far as subdivision is concerned does not distinguish farms. (See *Provincial Superior, Jesuit Province of Zimbabwe v Kamoto and Ors* 2007 (2) ZLR 8). Suffices to say that the property under one title is a single entity and only divisible in terms of the law.

The applicant and the late Wifanos Gabriel Mashingaidze were staying at the farm house as their matrimonial home. Given the deceased died intestate, the estate falls for distribution as such. Section 3A of the Deceased Estates succession Act [*Chapter 6:02*] governs the distribution of property. According to the relevant section, the surviving spouse of a person who dies intestate is entitled to the house or domestic premise in which the spouse lived immediately before the spouse’s death. Section 3A reads:

“The surviving spouse of every person who on or after 1st of November 1997 dies wholly or partly intestate shall be entitled to receive from the free residue of the estate

- (a) The house or other domestic premises in which the spouses or the surviving spouse as the case may be, lived immediately before the person’s death, and
- (b) The household goods and effect which, immediately before the person’s death, were used in relation to the house or domestic premises referred to in (a);”

Section 3 states

“Subject to section four, the surviving spouse of every person who, on or after 1st April, 1977 dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased’s estate according to the following rules

- (a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall-
 - (i) be entitled to receive from the free residue of the joint estate, as his or her sole property, the household goods and effects in such estate:
 - (ii) succeed in respect of the remaining free residue of the deceased spouse’s share of the joint estate to the extent of a child’s share or to so much as, together with the surviving spouse’s share in the joint estate, does not exceed the specified amount which ever is the greater:

- (b) If the spouses were married out of community of property and the deceased's spouse leaves any descendant who is entitled to succeed *abintestato*, the surviving spouse of such person shall-
 - (i) be entitled to receive from the free residue of the deceased spouse's estate, as his or her sole property the household goods and effects and such estate;
 - (ii) succeed in respect of the remaining free residue of the deceased spouse's estate to the extent of a child's share or to so much as does not exceed the specified amount whichever is greater:
- (c) If the spouses were married in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed *abintestato* but leaves a parent or brother or sister, whether of the full or half blood, who is entitled to succeed the surviving spouse shall-
 - (i) Be entitled to receive from free residue of the joint estate or the deceased spouses estate, as the case may be, as his or her sole property, the household goods and effects in such estate:
 - (ii) Succeed in respect of the remaining free residues of the deceased spouse's share of the joint estate or the deceased spouse's estate, as the case may be, to the extent of a half share or to so much as does not exceed the specified amount whichever is greater
- (d) In any case not covered by paragraph (a), (b) or (c), the surviving spouse shall be the sole intestate heir."

There is no doubt that a surviving spouse is entitled as a matter of law to inherit the house or domestic premise they were residing in immediately prior to the death of the other spouse. The applicant in this case by virtue of her civil marriage is the surviving spouse entitled to the domestic premises or house and household goods and effects as provided for by the law. In my view, s 3A was enacted to avoid undesirable situations where relatives would soon after death of their relative embark on property grabbing to the detriment of the surviving spouse. The section seeks to ensure that a surviving spouse peacefully inherits what rightly belongs to her. See also *Dzomonda and Ors v Chiponda and Ors* 2014 (2) ZLR 473 in which the court held that ,

"...further, the primary thrust of the Act is spouse centred. A spouse inherits the household goods and effects as well as domestic premises. If the estate still has residue after this has been done, then the spouse and children inherit specified statutory legacies. Inheritance by the children, therefore, clearly depends on the size of the estate. Where the marital home is the only asset, as here, then the law is clear it should go to the surviving spouses."

The protection of surviving spouses is further buttressed by the Constitution in s 26 which reads

- "The State must take appropriate measures to ensure that-
- a)
 - b)
 - c) There is equality of rights and obligations of spouses during marriage and at its dissolution.
 - d) In the event of dissolution of a marriage, whether through death or divorce provision is made for necessary protection of any children and spouses"

Worth noting is the fact that children are clearly spelt out in the Constitution as those below the age of 18. Section 81 (1) of the Constitution is opposite. It reads “Every child, that is to say every boy and girl under the age of eighteen years, has the right” In this case all the deceased’s children are majors who albeit beneficiaries by virtue of being descendants to their late father’s estate, cannot seek to erode the clearly enspounded spousal rights at dissolution of marriage by divorce or death. Given the duty of care and protection spouses owe each other during marriage and at its dissolution, one cannot seek to willy nilly in the absence of just cause, interfere with a surviving spouse’s rights. The spousal right of protection, care and proprietary rights are ably provided for by legislative enactments and the supreme law of the country, the Constitution. The Deceased Estates Succession Act [*Chapter 6:02*] is elaborate on the spouse’s rights to the matrimonial home and effects and on the descendants and parent’s rights to the free residue.

In my view, the legislature’s intention in so far as surviving spouse’s rights are concerned is clear and leaves no doubt as regards spousal rights. To seek to equate a surviving spouse’s share to a child’s share in circumstances where the farm is fundamentally the matrimonial home is not only mischievous but an open infringement of the very protection provided for by the Constitution to married couples.

Protection and equality accorded to spouses in the Constitution is what s 3 ‘A’ of the Deceased Estates Succession Act seeks to achieve by its clear wording that the matrimonial house or domestic premise in which the surviving spouse was living in immediately before the death of the other spouse should not be whisked away. The question that begs of answer is whether or not the fact that the matrimonial property is situated on a farm calls for a different legal regime in so far as the administration of the intestate estate is concerned.

It is important for one to note the definitions of land as outlined in s 72 (1) of the Constitution. Land is defined as including anything permanently attached to or growing on land. In the present case the couple prior to the demise of the late Wilfanos Gabriel Mashingaidze bought farm land Gassala under Deed of Transfer 2595/87 on which is a farm house which they used as a matrimonial home. The single unit, the farm, is what is contentious in so far as the distribution plan sought to suggest subdivision into equal portions as between the surviving spouse, the applicant and the deceased’s major children. A matrimonial home in general terms denotes the dwelling and real property occupied by a couple.

The definition does not concern its self with nature, extent and value. It would be illogical for example to seek to apply the law on entitlement of surviving spouses differently because of the location, nature, extent and value of the matrimonial home. A matrimonial home in the spacious leafy suburbs of Harare cannot, for purposes of inheritance, be subdivided on the basis that the house is on a large area for the obvious reason that the matrimonial home is on the land of which there is one title and the surviving spouse's entitlement is clearly spelt out in the Administration of Deceased Estate Act. On the other hand, if the matrimonial home is in the high density on a small area, one cannot seek to extend the matrimonial home by inclusion of another separate entity. The same reasoning applies for a rural home with a spacious yard or campus, it cannot be subdivided so as to define the matrimonial home as only confined to the kitchen, hut, or house on the whole extension of the rural home. The nature extent, value and type of the matrimonial home is not the determining fact of inheritance. The law is clear - a surviving spouse is entitled to inherit the matrimonial home in which he or she was living in immediately before the death of the other spouse.

In Zimbabwe, the land reform programme saw the majority black population being allocated commercial farms. The land policy is clear that one household one farm. Again in the spirit of giving care and protection to spouses as enshrined in the Constitution the policy is such that upon the death of one of the spouses the surviving spouse inherits the farm. This clear policy does not suggest subdivision of the farm into equal portions to cater for the spouse and children. This would negate the purpose of the farm from being a commercial farm to being small residential stands depending with the number of children. If the farm is for commercial use, then logically the single unit under one deed of transfer should remain intact and can only be subdivided in terms of law. Having that policy on commercial farms in place would mean that for one to seek to subdivide the applicant's property because it is a commercial farm would run parallel to such policy.

Agricultural Land Settlement (permit and conditions) Regulations 2014 (SI 53 of 2014) makes some interesting reading on dependants and spouses rights.

A dependant to a permit or land holder is defined in s 2

“ ‘dependant’ in relation to a permit holder, means any of the following as may be applicable

- (a) a minor person who is the natural child adopted child or step child of the permit holder;
- (b) any person towards whom the permit holder has a duty similar to the legal duty of care towards a child or dependant under general law,

- (c) an adult person who has been a dependant of the permit holder as defined in paragraph (a) or (b).”

The regulations make clear provision that upon death of the permit holder the surviving spouse takes over the joint and undivided share (my emphasis). Section 13 (1)

“Upon the death of a signatory permit holder, or the surrender of his or her rights under the permit in accordance with s 17, his or her rights under the permit referred to in section 6 shall

- a. in the case of a monogamous or potentially polygamous marriage where there is an existing or surviving spouse, devolve to the existing or surviving spouse, with consequence that
- (i) the existing or surviving spouse inherits the joint and undivided share in the allocated land of the deceased spouse and
 - (ii) that the spouse shall thereupon, if he or she was not a signatory of the permit, succeed to the primary responsibility of the deceased signatory permit holder for fulfilling the conditions of the permit including any obligations under the permit to the Minister or to any third party.”

In my view is apparent the spirit of the regulations is to ensure that the land will no longer be divided so as to maintain it for the purpose for which it was allocated that is agricultural and pastoral purposes. If this spirit obtains in respect of state allocated land in the absence of justification one would not seek to subdivide a commercial farm in a move that would disrupt the commercial nature of the farm. *In casu* in the absence of evidence to the contrary, the applicant through joint effort with her late husband acquired their matrimonial property Gassala Farm. The property is property acquired within their marriage thus entitling the surviving spouse the right to inherit. The facts of this case are distinguishable from the facts of *Chimhowa and Ors v Chimhowa and Ors* 2011 (2) ZLR 471 where the Judge President ably analysed the protection provided to surviving spouses to be confined to the property acquired during the course and subsistence of that marriage. In *Chimhowa* case the surviving spouse was given a usufruct right while the children got right to the property because the house was not acquired during the subsistence of her marriage to the deceased.

In the present case no evidence was placed to refute that the matrimonial home was acquired by the applicant and her husband. The applicant and her late husband through their concerted efforts bought a farm on which they lived and worked. To seek to divide the property into equal shares between the applicant and the children would be an affront of the surviving spouse’s rights. The applicant as a surviving spouse is entitled to inherit the matrimonial house and house hold goods and effects regardless of the nature extend and value of the property.

Accordingly the application was granted for the reasons I have outlined above.

Sawyer & Mkushi, applicant's legal practitioners