BEAUTY KANYERE
versus
ANNA KANYERE (NEE MAKONO)
and
RICHARD JOHN CHIMBARI (in his capacity as executor dative of estate late T.T.Kanyere)
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 23 February 2016 & 29 December 2016

Opposed Application

T Magwaliba, for the applicant
I Goto, for the 1st respondent

CHITAKUNYE J: This is an application in terms of s 52 (9) of the Administration of Estates Act [*Chapter 6:01*].

In the founding affidavit the applicant states that:-

> "The present application is made in terms of section 52(9) of the Act in terms of which it is provided that any person aggrieved by the direction by the third Respondent may apply to the Honourable Court for an order setting aside the direction and request the Honourable Court to make any such order as it thinks fit."

The applicant seeks an order that:-

1. That the applicant be and is hereby declared to be deemed the sole surviving spouse of the late Todd Tandadzai Kanyere who died at Mutare on 14 November 2001 for the purposes of the administration of the deceased estate DR 472/02.
2. That the applicant shall be vested with all rights and benefits of inheritance as are applicable where a deceased in respect of whose estate is governed by African Customary Law is survived by a single spouse in terms of section 68 of the Administration of Estates Act [*chapter 6:01*].
3. That the marriage of the first respondent, the late Todd Tandadzai Kanyere be and is hereby deemed to have been terminated for all purposes at the time that the first

respondent left the matrimonial home and ceased to live with the deceased as her husband in or about the year 1980.

4. That consequently, the first respondent shall not be regarded as a spouse of the deceased in terms of the African Customary Law for the purposes of the administration of the estate of the late Todd Tandadzai Kanyere.
5. That the second respondent shall prepare and lodge with the third respondent the first and final administration account in the estate of the late Todd Tandadzai Kanyere DR No. 472/02 giving effect to clause 1 up to 4 of this order and lodge the said account within 30 days of the date of this order
6. That the first respondent shall pay the costs of this application.

Brief facts:

The applicant married the late Todd Tandadzai Kanyere (T. T Kanyere) in terms of the African Customary Law in 1977. Their marriage was unregistered. At the time of her marriage, the applicant found that the first respondent was already married to the late T.T Kanyere in terms of the African Marriages Act, [*Chapter 105*, now *Chapter 5:07*]. The first respondent's marriage to the late T.T Kanyere was solemnized on 6 September 1972.

The late T. T Kanyere died on 14 November 2001 at Mutare.

The applicant alleged that she is the sole surviving spouse of the late T. T. Kanyere, as the first respondent separated with the deceased in 1980. She alleged that as the first respondent and the deceased had separated for a period of over 24 years their marriage must be deemed to have been dissolved. The fact that they did not get a formal decree of divorce in the Magistrates Court did not mean that the marriage still subsisted.

The first respondent opposed the application. She contended that her marriage to the late T.T. Kanyere was solemnised in terms of the African Marriages Act and was never dissolved till his demise. She contended that at one time the deceased had nine wives under one roof and when that arrangement proved unworkable the wives were allowed to stay elsewhere. The first respondent was one such wife who was allowed to live elsewhere in rented accommodation. The deceased would pay the rentals. She further contended that it was, in fact, in 1981 and not in 1980 when she was allowed to live elsewhere. In the year 1981 she gave birth to their sixth child and deceased was there for them.

The first respondent also contended that the deceased continued to maintain her up to the time of his death. They were still husband and wife for all intents and purposes.

From the submission by both parties it is apparent that in about 1980 or 1981 the first respondent and the applicant ceased living under the same roof. The applicant remained at the property and has been so resident since.

It is also common cause that the marriage between the first respondent and the deceased was never dissolved by any court.

It was further common cause that besides the applicant and the first respondent, the deceased had married a number of other women whose fate was not clear from the submissions made. For the purposes of this application only the marriages of the applicant and the first respondent are pertinent.

Upon the death of the late Todd on 14 November 2001 his estate was duly registered under DR 472/02. Letters of administration were issued to James Prince Mutizwa on 25 June 2002 in Harare and, in a case of dual registration, to the applicant in Mutare on 19 April 2002. These letters of administration were apparently subsequently withdrawn. The deceased's son, Itai Kanyere, was then appointed executor dative but he failed to perform hence the appointment of the second respondent.

The second respondent was issued with the letters of administration on 24 November 2005. He then set upon administering the estate in terms of the law. The main contentious issues encountered pertained to the status of the applicant and the first respondent.

The applicant alleged that she was the sole surviving spouse and that the first respondent should not be considered as a surviving spouse as she had separated with the deceased in 1980.

The first respondent, on the other hand, contended that she is a surviving spouse as her marriage to the deceased had not been dissolved. Instead, it is the applicant who should not be considered as the surviving spouse as she had been compensated in a lump sum payment by the deceased so that she would not bother beneficiaries to his estate. This was apparently so because applicant's marriage to the deceased was not blessed with any child.

Upon realising the impasse between the two women the second respondent advised them to approach the appropriate court for a declaratory order on the issue. Neither of the women paid heed to his advice and instead continued squabbling. After a long wait, the second respondent prepared the first and final distribution account and lodged it with the third respondent. The account is dated 21 April 2011 (see annexure F1). On learning that the second respondent had prepared and the lodged the account with the third respondent, the

applicant, through her erstwhile legal practitioners, lodged her objection to the account through a letter dated 18 May 2011 (annexure G1), addressed to the second respondent.

On the 3 June 2011 the first respondent's legal practitioners advised the second respondent that the first respondent was not objecting to the account (annexure H1 and H2).

On 23 June 2011 the second respondent referred the objections to the third respondent and called upon the third respondent to decide on the objections to the distribution account.

The third respondent called for a meeting of the interested parties for 16 August 2011. However, the applicant, despite full knowledge of the meeting, did not attend that meeting. Her legal practitioners did not attend either. The first and second respondents duly attended the meeting. Others who attended the meeting included- the legal practitioner for the first respondent; the deceased's two daughters, Manyara Kanyere and Tambudzai Kanyere, and Netsai Mhute, a sister of the first respondent.

The issues before the third respondent pertained, *inter alia*, to the status of the applicant and the first respondent. After hearing from those present and considering the applicant's objection, the third respondent ruled that both women should be recognised as surviving spouses and so s 68 F of the Administration of Estates Act should apply.

On 6 September 2011, the second respondent wrote a letter to the applicant's erstwhile legal practitioners advising them of the outcome of the meeting of 16 August 2011. In that letter the second respondent concluded by stating that:-

> "As neither you on behalf of your client, nor any other beneficiary has appealed against the Master's decision in terms of Section 68J of Act No. 6/97 aforesaid to show disagreement with the Master's ruling, we now intend to implement the Master's ruling as detailed above unless we receive anything to the contrary within the next 7 days from the date of this letter."

Upon noticing that there was no appeal or review lodged against the Master's ruling, the second respondent subsequently amended the first and final distribution account to take into account the aspects that had been ruled upon in that meeting and resubmitted the First and Final Administration and Distribution Account on the 16 March 2012.

On 7 May 2012, the applicant's then new legal practitioners, Farai Nyamayaro Law Chambers, wrote a letter to the second respondent advising that their client objected to the distribution account which includes Anna Makono as a beneficiary. They indicated that they were under instructions to lodge an application with the High Court should the second respondent proceed with the distribution in terms of such an account.

On 10 May 2012 the second respondent duly responded to the letter by the applicant's legal practitioners and copied that response to the third respondent. The second respondent

also requested the third respondent to urgently convene a meeting to discuss issues in that estate.

As if that was not enough a circus, on 20 June 2012, the applicant's now new legal practitioners, Bere Brothers, wrote a letter to the third respondent requesting a postponement of an estate meeting that had been scheduled for 22 June 2012 to enable them to peruse the file as they had just been instructed. The meeting was duly postponed to 3 July 2012. On the 3 July 2012 applicant and her legal practitioner did not attend. The meeting was again postponed to 9 July 2012 at the request of the applicant's legal practitioners. The events of 9 July are not documented.

The reasons for subsequent meetings and letters from the applicant's legal practitioners expressing objections is not clear as a ruling on the status of the two women had already been made and the second respondent had merely complied with the directions given in the ruling by the Master.

It is evident from the above that the applicant was aggrieved by the Master's decision of 16 August 2011. She confirms this in paragraph 24 of her founding affidavit wherein she states that:-

> "It is at the meeting of 16th August 2011 that the third respondent made a ruling that both spouses should be recognized in terms of section 68F (1) of the Administration of Estates Act as spouses of the deceased."

In paragraph 29 of the said affidavit, the applicant reaffirms knowledge of the fact that the third respondent had already made a decision on this issue when she states that:-

> "On the 10th of May 2012 my legal practitioners were advised by the second Respondent that the Master of the High Court had already made a ruling in respect of the objections on the 16th August 2011."

This confirms that both the applicant and her legal practitioners were aware of the date of the decision they were challenging in terms of s 52 (9) of the Act.

Section 52 (9) of the Administration of Estates Act states that:-

> "The Master shall consider such account, together with any objections that may have been duly lodged, and shall give such directions thereon 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 decision, and after giving notice to the executor and to any other 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 an order as it deem fit."

It terms of this section, the applicant was required to apply within thirty days from the date of the direction by the Master, but, alas, this application was filed about a year after the direction by the Master.

The question that immediately comes to mind is whether or not this application is properly before this court?

In *Mayiswa* v *Master & Another* 2011(2) ZLR 441(H) the applicant had approached the court to have a decision of the Master reviewed in terms of s 52 (9) of the Administration of Estates Act. The Master had then pointed out that the application had been filed outside the 30 days provided by s 52 (9) of the Act. In reference to the provision in s 52 (9) court held that:-

> "..the provision which affords the right to an aggrieved party to seek a review does not allow for an extension of the time within which such review may be launched. The court could not accord to itself the power to condone the failure on the part of the applicant to file the application within the period provided for by the statute. To do so would be to usurp Parliament's power to legislate. In the absence of compliance on the part of the applicant to observe statutory time limits, the court would have to find that the application is not properly before it."

In *casu*, the applicant did not address the requirements of the section under which she purported to act. Had she done so she would have noted that there was a hurdle in the form of the time limit of 30 days within which to file the application. The applicant proceeded as if such an application can be filed at any time a party feels like, which is fatal to the application. There is thus no proper application before me.

I am of the view that such time limit is necessary for the proper and timely administration of estates. Any laxity in adherence to such time limits would lead to uncertainty in the administration of estates as anyone would disrupt the proper administration of the estates at any time.

It may be opportune to comment on the relief that the applicant seeks. The applicant essentially seeks to be declared the sole surviving spouse of the late T.T Kanyere and that the marriage between the late T.T. Kanyere and the first respondent be deemed to have been dissolved in 1980 when the first respondent left the matrimonial home. The net effect of such relief would be that the applicant will then expect to get the share of a sole surviving spouse in the distribution of the deceased's estate.

It was in this bid that the applicant alleged that as the first respondent and the deceased had been separated for 24 years prior to the administration of the estate, their marriage, though registered, must be deemed to have been dissolved. The fact that the parties

to the marriage did not get a formal decree of divorce from a court of law should not mean that the marriage is still valid. To hold that the marriage is still valid would be inequitable as the applicant would be treated as the second wife. In terms of s 68 F (2) (b) the first respondent, as first wife, would be entitled to two shares whilst the applicant would get one share of the one third share of the net estate. She would thus get half of the first respondent's share which is a scenario she cannot accept as she had remained with the deceased until his demise.

The first respondent, on the other hand, contended that her marriage to the deceased was never dissolved and is thus still valid. She contended that though she was living elsewhere the deceased maintained her as his wife and never sought to have the marriage dissolved.

In his submissions, Mr. *Magwaliba*, for the applicant, argued on two fronts. Firstly, that on the facts it was established that the first respondent and the deceased had separated permanently and had no intention of living together as husband and wife; and secondly, that the court can at law declare a marriage dead if, in fact, for all intents and purposes the said marriage was dead except for the existence of a marriage certificate. I however, did not hear him to say that a 'dead marriage' is a dissolved marriage even without a court order confirming the dissolution.

On the question of separation, it is common cause that the first respondent and the deceased separated. The applicant said it was in 1980 whilst the first respondent said it was in 1981. That in my view is of little consequence, if any. Whilst the applicant argued that it was a permanent separation with no intention of living together again, the first respondent contended that the deceased and herself continued seeing each other and the deceased continued with his marital responsibility of maintaining her from where she was now residing. She had moved away from the farm because the situation had become untenable for a number of wives to live under one roof.

The first respondent's stance, unlikely as it may seem, cannot easily be rebutted by a third party, more so, a co-wife in a dispute essentially over rights to inheritance. Whatever may have remained in the relationship between the deceased and the first respondent is something that only the two of them knew hence neither filed for dissolution of the marriage.

Counsel for the first respondent submitted that the separation did not amount to dissolution of the marriage and for as long as the marriage had not been dissolved in terms of the law, it subsisted.

It is my view that the fact of separation is a fact which a party may seek to use as evidence in an effort to satisfy court that a marriage has irretrievably broken down and so a decree of divorce should be granted. The separation on its own is not dissolution of the marriage. Spouses may separate for any length of time but still maintain their relationship as husband and wife.

As Counsel for both parties aptly noted in H R Hahlo, *The South African law of Husband and Wife*, 5th ed at pp 337 - 338, the esteemed author opined that:-

> "The mere fact that spouses live physically apart for some length of time or have separate households does not mean that they are not living together as husband and wife.
> Living together as husband and wife may cease while the spouses continue to live under one roof, and it may continue whilst they are living thousands of kilometres apart."

The author went on to state that:

> "Again, the married life does not necessarily come to an end if spouses break up their common house hold or one of them departs. The factum of physical separation does not negate continuance of the marriage consortium unless it is accompanied by the animus of at least one of the spouses to put an end to the marriage."

The intention to end the marriage, if not acted upon in terms of the law, does not on its own dissolve a marriage. A party wishing to end a marriage must thus take appropriate steps in terms of the law to bring a marriage to end. Indeed even in unregistered customary law unions, the union will not be deemed dissolved by mere separation unless appropriate customary law steps are taken to dissolve the union.

In *Pasipanodya* v *Muchoriwa* 1997(2) ZLR 182 (S) at 184 MUCHECHETERE JA had this to say:

> "This is because in my view the marriage was not dissolved- a marriage under an unregistered customary law can be dissolved under customary law either by giving the wife 'gupuro' or before a customary law court. The parties merely separated. On separation, there was no proper distribution of the matrimonial property."

In *Machafa Mukumirwa* 2001 (2) ZLR 540 (H) after a 15 year separation the wife came back. She was awarded a share of the matrimonial house as her marriage was still recognised despite the period of separation.

In *Jessie Chinzou* v *Oliver Masomera and others* HH 593/15, a wife who had lived separately from her husband for 37 years, but whose registered marriage was not dissolved, was given her due recognition as the surviving spouse in spite of the lengthy period of separation.

In *casu*, whilst the parties may have lived apart, that was not on its own dissolution of the marriage. Neither the deceased nor the first respondent took any steps to lawfully terminate the relationship of husband and wife.

As regards whether court can deem the marriage dissolved there was not much support for that argument. Counsel for the applicant submitted that the marriage had remained on paper only and so should be deemed to have been dissolved in 1980. He alluded to the need for court to adapt the law to the needs of society and to be an instrument of change. In this regard he referred to the case of *Chapeyama* v *Matende* 1999(1) ZLR 534(H) at p 536E-F where CHINHENGO J stated that:

> "The recognition and exhortation that the law must adapt and be deliberately adapted to changing social and economic conditions is indeed a fundamental premise on which our jurisprudence in the area of customary law will develop as well as being a basis on which justice will be done and be seen to be done. The correct balance must however, be struck between judicial law-making and legislation. Where the law requires to be revolutionised the function is largely that of Parliament to change it. But where within the framework and spirit of the existing law it is possible for the courts to interpret it in a purposive manner and render it more useful in the changed circumstances, the courts will by such purposive and progressive interpretation achieve the same goal. The purpose of law is to serve the people and meet their expectation."

In this argument counsel was very much concerned about the share the applicant would get if she remained as the second wife. But then one would also say from the submissions, the applicant is not contending that what the first respondent will gain is her sweat. It appeared accepted that when the applicant married the deceased she found that the first respondent and the deceased already had their matrimonial estate. When the first respondent and the deceased separated I did not hear the applicant to allege that first respondent was awarded any of the estate that was part of her sweat as wife to the deceased. If the applicant was sincere about the justice of the case she would have been arguing for the first respondent to be restricted to the estate that was there before separation and the applicant to be restricted to that which was accumulated after the separation and during the subsistence of her own marriage to the deceased.

In *Chimhowa & others* v *Chimhowa & Others* 2011(2) ZLR 471(H) at p 475G- 476E CHIWESHE JP opined that:-

> "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 the 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 spouses during the subsistence of the marriage. ……. In my view, the legislature intended to protect, in the case of widows, that property acquired during the subsistence of their marriage to the deceased persons. This protection benefitted not just the widows but their minor children as well. I do not perceive the legislature's intent to be to extend this protection and privilege to persons outside the marriage within which such property might have been acquired. To impute that kind of interpretation would lead to serious absurdities in the application of the law."

After giving examples of the sort of absurdities that would arise if the legislature's intent, as stated above, was not considered, the learned judge went on to say that:

> "For these reasons I would conclude that the protection afforded surviving spouses is, in terms of inheritance, limited to those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose estate is under distribution. In particular, surviving spouses cannot by right claim any right to matrimonial property acquired outside their own marriage. To allow them to do so would lead to the absurdities alluded to above. It would be against public policy and conscience to deprive the children of deceased persons the common law right to inherit from their parents merely because at some stage the surviving parent remarried."(@P477B-C).

I associate myself with the above sentiments. It would indeed be unjust for a second wife to claim as of right assets acquired before her marriage to the prejudice of the first wife whose sweat led to the acquisition of those assets especially when that first marriage still subsists. I say so because the hallmark of the applicant's application is so that she remains as the sole surviving spouse and in that way she envisages inheriting assets that may have been acquired before her marriage to the prejudice of the first respondent and other beneficiaries who in terms of common law would be entitled to benefit. The driver of this application is not a genuine desire to confirm the legal position.

Further, though the applicant's counsel persisted with the prayer for court to conclude that by virtue of the long period of separation the first respondent's marriage to the deceased must be deemed to have been dissolved, I did not hear him to point out how exactly he expected court to circumvent the express legal provisions on the dissolution of a registered marriage.

It is important to appreciate that marriage is not a mere ordinary private contract between the parties. It is a contract creating a status and gives rise to important consequences directly affecting society at large. As aptly stated in H R Hahlo, *The South African Law of Husband and Wife* (*supra*) @ p22

> "So far from being an ordinary, private contract, therefore, the act of marriage is a juristic act sui generis, and the relationship which it creates is not an ordinary contractual relationship but involves a status of a public character."

As a consequence of its nature, a marriage cannot be dissolved just by consent. Only the death of a spouse or a decree of a competent court can put an end to a marriage.

As the parties on their own cannot validly dissolve their marriage, it follows that the giving of a token of divorce is of no consequence. I am therefore of the view that the affidavits referred to in the applicant's application which she said confirmed that the first respondent was given a token of divorce cannot take the case any further. That token of divorce, if at all it was given, had no legal force or effect on the marriage.

Section 16 of the Customary Marriages Act, [*Chapter 5:07]* is very clear on this in stating that:-

> "No marriage solemnised in terms of this Act or the Marriage Act or registered under the Native Marriages Act [*Chapter 79 of 1939*] or contracted under Customary Law before the 1st April, 1918, shall be dissolved except by order of a court of competent jurisdiction in terms of the Matrimonial Causes Act [*Chapter 5:13*]."

The Matrimonial Causes Act (MCA) provides only two grounds on which a decree of divorce may be granted. These are: (a) irretrievable break down of the marriage; and (b) incurable mental illness or continuous unconsciousness of one of the spouses.

Section 5(1) of the MCA states the circumstances under which a decree of divorce may be granted in these terms:-

> "An appropriate court may grant a decree of divorce on the grounds of irretrievable break-down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them."

The personal nature of the marriage contract is such that the petition or action for divorce invariably will be at the instance of either of the parties. It is only parties to the marriage who are better placed to allege and prove to the satisfaction of court that the marriage relationship has irretrievably broken down.

In *casu*, despite the alleged separation in 1980 or 1981, neither the deceased nor the first respondent deemed it appropriate to seek a decree of divorce from a court of competent jurisdiction. Neither of them sought to bring to an end the personal relationship of husband and wife in the manner they had chosen by having their marriage solemnised in terms of the Customary Marriages Act.

The argument by the applicant's counsel that the deceased and the first respondent had forgotten about their marriage certificate is without substance. They had a copy of the marriage certificate hence it was produced when it was needed. The deceased, in my view, would not have forgotten that his marriage to the first respondent was solemnised in terms of

the law. It may as well be that he may have continued the relationship in his own way as alluded to by the first respondent, or he had not lost love and affection for the first respondent despite the problems leading to the separation. There are a host of reasons that could have made the deceased not to seek the dissolution of the marriage and it is not for this court to declare that as of 1980 his marriage to the first respondent was dissolved.

It may also be noted that the dissolution of a marriage has attendant consequences such as the proprietary rights of the spouses that have to be determined as at the time of the dissolution. It would thus not be proper to declare the marriage as having been dissolved in 1980 when the parties themselves did not do so and when upon separation the issue of their proprietary right was not dealt with.

In conclusion, this application would still not have succeeded had it been properly before this court.

Accordingly the purported application is hereby struck off with costs.

Magwaliba and Kwirirai, applicant's legal practitioners
Danziger and Partners, 1st respondent's legal practitioners