EDLEEN MATONHODZE
versus
MINISTER OF JUSTICE N.O
and
FLORENCE MAPUVIRE N.O
and
FLORENCE MAPUVIRE
and
MASTER OF THE HIGH COURT

HICH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 10 October & 19 December 2022

Opposed Matter

Mr *M Chipetiwa,* for applicant
Mr *M Mavhiringidze*, for second and third respondents
No appearance for first and fourth respondents

MUCHAWA J: This is a court application for a *declaratur* in which the following order is sought;

"IT IS ORDERED THAT:

1. The application for a declaratory be and is hereby granted.
2. The certificate of heir issued in favour of Frank Mapuvire on the first day of October 1990 by the Chibi Community Court be and is hereby declare null and void. (*sic*)
3. The transfer of property from the Estate of Frank Mapuvire to Florence Mapuvire be and is hereby declared null and void,
4. The shop commonly known as Chamahota Store, the house commonly known as stand No. 110 Chivi Township and the rural homestead situate at Chivi be declared the matrimonial property of the late Edward Gwainda Mapuvire and Nellie Mapuvire.
5. The applicant be declared the heir to the estate of Edward Mapuvire and Nellie Mapuvire.
6. The second and third respondents be and are hereby ordered to pay costs of suit."

The brief background facts of this matter are that the late Edward Gwainda Mapuvire customarily married Nellie Mapuvire in 1960. On 21 December 1963, they registered their

marriage under general law as per marriage certificate on p 7 of the record. There were three children born to this marriage, as follows;

i. Frank Mapuvire was born on 31 December 1960 and he died on 25 March 1997;
ii. Florence Mapuvire was born on 17 March 1963 and died on the 11 of March 1996; and
iii. Edleen Matonhodze who was born on first of July 1965 and is the only surviving child and applicant in this matter.

Edward Gwainda Mapuvire died on 28 September 1989 whilst Nellie Mapuvire died sometime in 2012. The late Frank Mapuvire was appointed heir to his father's estate on 1 October 1990. The late Frank Mapuvire is survived by a daughter, the third respondent. She was appointed executrix dative to the estate of the late Edward Gwainda Mapuvire which was registered with the fourth respondent under DR 2667/15 after having been issued with letters of administration on 10 May 2016. Nothing further was done in the winding up of the estate until the applicant made an application for the removal of the third respondent from being executor dative and the cancellation of the letters of administration issued by the fourth respondent in favour of the third respondent and that an independent executor be appointed. This application was granted under case HC 8083/19 on 11 May 2021. This matter therefore pits the applicant who is the aunt against her niece, the third respondent.

The second respondent is cited in her official capacity as executor of the estate of the late Frank Mapuvire. Florence Mapuvire is also cited as third respondent, in her personal capacity. The fourth respondent is cited in his official capacity as the one charged with the administration of all deceased estates, including the ones *in casu*. The first respondent is also cited in his official capacity.

The application is opposed and the second and third respondents raised points *in limine* which I heard the parties on and dismissed all three points in a judgment handed down on 29 July 2022 under case number HH 517/22. I then proceeded to hear the parties on the merits of the matter and reserved my judgment. This is it.

Mr *Chipetiwa* submitted that the court should declare the certificate of heir issued in favour of the late Frank Mapuvire which was issued by the Chibi Community Court null and void for lack of jurisdiction to determine the estate of a deceased person who was married in terms of the Marriage Act, [*Chapter 37*]. Reference is made to several case law authorities, including that of

Mujawo v *Chogugudza* 1992 (2) ZLR 321 (SC) and *Magaya* v *Magaya* 1999 (1) ZLR (SC) 100. Furthermore, Mr *Chipetiwa* submitted that in this case it was not necessary for the court to make a choice of law inquiry.

A request was made for the draft order to be amended in para 4 so as to exclude any reference to stand No 110 Chivi Township following a concession made at the earlier hearing that such property in fact, belonged to the late Frank Mapuvire and not Edward Gwainda Mapuvire.

Mr *Chipetiwa* submitted that this is a proper case for the court to exercise its discretion as provided for in section 14 of the High Court Act which provides as follows;

> **"High Court may determine future or contingent rights**
> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

It was argued that the above section confers on this court, a discretion to make a declaratory order in an appropriate case, which discretion has to be exercised judicially. The requirements to be satisfied were said to include establishing that the applicant is an interested person in an existing, future or contingent right or obligation. The second inquiry is whether the case is a proper one for the exercise of the discretion. See *Johnsen* v *Agricultural Finance Corporation* 1994 (1) ZLR 95 (HC).

Mr *Chipetiwa* contended that the applicant's interest flows from the fact that she is the daughter of the late Edward Mapuvire and Nellie Mapuvire and ought to have inherited from the estate of the late Edward Mapuvire. Furthermore, the matter before the court was alleged to be a live controversy capable of being resolved by this court as the court is being called upon to declare that the certificate of heir which was issued by the community court is a nullity, for lack of jurisdiction.

Mr *Mavhiringidze* conceded that the applicant is indeed an interested party but this is not a proper case for the exercise of discretion due to the need for finality to litigation as the decision sought to be impugned was entered in 1990 and applicant who was 25 years then, chose to sit on her laurels.

Furthermore it was submitted that a person seeking a *declaratur* under s 14 of the High Court Act cannot seek consequential relief but that is what the applicant seeks in para5 of the draft order. The case of *Markham* v *Minister of Energy and Power Development* & 3 Ors HH 275/21 was cited in support of the argument that for one to also claim consequential relief over and above a *declaratur*, then one has to combine the two applications. *In casu*, it was averred that the application for consequential relief is standing on nothing.

Mr *Mavhiringidze* questioned how the applicant on one hand seeks to have the appointment of an heir nullified but at the same time she seeks to be declared heir to the same estate. He questioned too whether there is heirship under general law. The relief sought in para 5 of the draft order was said to be incompetent due to the per steppes principle as the late Edward and Nellie Mapuvire had three children, two of whom are deceased. These are Frank and Florence who died after their father. It was argued that all three children had an equal right to benefit from their father's estate. Frank is said to have been survived by a daughter, the third respondent whilst the late Florence Mapuvire is survived by two children. In such a scenario, it was argued that the applicant cannot pray to be declared heir. Furthermore, it was argued that the estate of the late Edward Mapuvire is open and it is the prerogative of the executor to attend to its administration instead of the Court interfering with same.

Mr *Mavhiringidge* prayed for the dismissal of the application with costs on a higher scale.

Mr *Chipetiwa* conceded that para 5 of the draft order was not sustainable and agreed that it be struck out.

Mr *Mavhiringidze* advised that there has been no transfer yet nor any cession of the store from Frank Mapuvire to Florence Mapuvire, in respect to para 3 of the draft order.

The question before this court is one which has been previously considered by the Supreme Court. In *Mujawo* v *Chogugudza supra*, the Honorable MANYARARA JA held as follows;

> "I would therefore respectfully suggest that for the present purpose one may borrow from the principles enunciated in *R* v *Moyo, supra*, without doing violence to their true legal effect, the following propositions -
> 1. That customary law shall be applicable to the estate of a person who had contracted a customary union or marriage;
> 2. That the estate of a person who had contracted a civil marriage in terms of the Marriage Act [*Chapter 37*] shall be dealt with under the general law of Zimbabwe because, by waiving the

> privileges of a customary marriage, he must be deemed in law to have avoided the consequences of such a marriage."

In *Magaya* v *Magaya supra* the Honourable MUCHECHETERE JA restated the same position, thus;

> "Thirdly, the application of customary law, especially in inheritance and succession, is in a way voluntary, that is, to Africans married under customary law or those who choose to be bound by it. It could therefore be argued that there should be no or little interference with a person's choice. This aspect of choice was stated in *Mujawo* v *Chogugudza* 1992 (2) ZLR 321 (S), where it was held that when an African contracts a marriage according to African law and custom s 69(1) (now s 68(1)) of the Act lays down that customary law will apply to the administration of the estate of the African. And that, on the other hand, the general law will apply to marriages under the Marriages Act [*Chapter 5:11*]."

In this case it is common cause that the late Edward and Nellie Mapuvire were married in terms of general law. They should therefore be deemed in law to have avoided the consequences of a customary law marriage. In the circumstances, the Chibi Community Court had no jurisdiction to deal with the deceased estate of the late Edward Gwainda Mapuvire, under customary law.

This is a fitting case for me to exercise my discretion as even *Mr Mavhiringidze* conceded that the estate of the late Edward Mapuvire is still open. The store and rural home are still in existence and it will be up to the executor to properly administer the estate in terms of general law.

In both the *Mujawo v Chogugudza* and *Magaya* v *Magaya supra* cases, the court considered it unnecessary to saddle either party with costs due to the importance of the matter to the parties and the sensitive nature of succession disputes as between the parties who are related. I take the same view and would order that each party bears its own costs.

I note too that there is to be an amendment to para 4 of the draft order, as conceded and that para 5 has been struck out.

I accordingly order as follows;

1. The application for a declaratory order be and is hereby granted.
2. The certificate of heir issued in favour of Frank Mapuvire on the first day of October 1990 by the Chibi Community Court be and is hereby declared null and void.
3. The transfer of property, if any, from the Estate of Frank Mapuvire to Florence Mapuvire be and is hereby declared null and void,

4. The shop commonly known as Chamahota Store, and the rural homestead situate at Chivi be declared the matrimonial property of the late Edward Gwainda Mapuvire and Nellie Mapuvire.

5. Each party to bear its own cost.

Maringe & Kwaramba, applicant's legal practitioners
Mavhiringidze & Mashanyare, second and third respondents' legal practitioners