

JENNIFER NDLOVU [nee NYONI]

Plaintiff

And

CHRISTINA NDLOVU [nee SITHOLE]

1st Defendant

And

ASSISTANT MASTER OF THE HIGH COURT

2nd Defendant

And

ADDITIONAL ASSISTANT MASTER, TREGOLD

3rd Defendant

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 18 & 20 JANUARY 2011

J. Tshuma for plaintiff
C.P Moyo for defendant

JUDGMENT

MATHONSI J: This is a dispute involving the estate of the late Charles Mbunji Ndlovu, who died intestate on the 26th May 2002. The matter was commenced by court application which was opposed only by the 1st Respondent. By consent order granted by CHEDA J on 14th February 2007, the matter was referred to trial with the affidavits filed of record to stand as pleadings. This was presumably because the parties realised the disputes of fact which could not be resolved on the papers.

Charles Mbunji Ndlovu ("the deceased") met the applicant ("the plaintiff") in 1980. At some point they commenced living together and had 2 children namely Lebani Ndlovu, born in August 1984 and Wisdom Ndlovu, born in September 1986. The 2 did not solemnise their relationship in accordance with the marriage laws of this country.

On the 10th April 1987 the deceased married the 1st Respondent ("the 1st Defendant") in terms of the Marriage Act, Chapter 5:11. It would appear that this marriage is still in subsistence although the plaintiff alleges that divorce proceedings had commenced at the time of the deceased's death. There are no children born of the marriage between the deceased and the 1st Defendant. At the time of the deceased's death on 26 May 2002, he was living with the plaintiff at No. 22 David Carnegie Road, Northend Bulawayo as the 1st Defendant had left him much earlier and was now residing elsewhere.

The dispute arose after the plaintiff registered the deceased's estate in terms of customary law at the Magistrates Court (DRB 814/02) where the deceased's children from an earlier relationship Prince Ndlovu, born on 16 September 1968 and Golden Ndlovu, born on 4 April 1970 were some of the people who deposed to affidavits confirming the plaintiff as the widow and heiress to the deceased's estate.

Judgment No. HB 10/11

Case No. 2401/05

X Ref 890/03

The 1st Defendant registered the estate with the 3rd Defendant (DRB 1168/02) also claiming to be the widow and heiress to the deceased's estate.

In Case No. HC 890/03, the plaintiff unsuccessfully instituted summons action seeking an order nullifying the marriage between the deceased and the 1st Defendant and barring the 1st Defendant from laying a claim to the estate. By order of 21 March 2005 NDOU J upheld an exception by 1st Defendant that no lawful grounds had been disclosed in that action for the relief sought which was dismissed with costs.

The plaintiff then instituted this action seeking a declarator that she is a spouse of the deceased in terms of the Administration of Estates Act, Chapter 6:01; that she is entitled to inherit house No. 22 David Carnegie Road Northend Bulawayo together with household effects therein and that the said house be transferred to her name.

The 1st Defendant filed opposition alleging that the plaintiff was not customarily married to the deceased and is therefore not entitled to inherit from the estate and that she as the lawful wife of the deceased should instead inherit from the estate.

It is common cause that at the time of the deceased's death, the 1st Defendant and the deceased had long ceased to cohabit as husband and wife and were not in communication whatsoever after the 1st Defendant deserted and pursued a separate life. It is also common cause that at the time of death, the deceased and the plaintiff were living together as husband and wife at No. 22 David Carnegie Road, North End Bulawayo which was their matrimonial home.

It is pertinent to point out that at the trial the 1st Defendant defaulted. The matter was stood down for a day to enable *Mr Moyo*, representing the 1st Defendant to locate her and bring her to court. On the following day, the 19th January 2011, *Mr Moyo* again appeared without the 1st Defendant and told the court that she had elected and not to come to court. Therefore, I have not had the benefit of the *viva voce* evidence of the 1st Defendant, who elected not to appear and not to lead any such evidence.

The evidence of the plaintiff is to the effect that she met the deceased in 1980 and in 1982, the deceased approached her parents in Filabusi requesting a customary marriage through his go between, one Sikhova Nkomo, who was the deceased's uncle. When the plaintiff's parents agreed to meet the deceased and his go between, a meeting was arranged at their rural home in Filabusi which was attended *inter alia* by the deceased and Sikhova Nkomo from the Ndlovu family and the plaintiff (who was in an adjoining room during deliberations), the plaintiff's parents and her brothers Josiah and Joel Nyoni.

The deceased was asked to pay all the customary dues in the form of the introductory fee (*sivulamlomo*) of \$20-00 and the acceptance fee (*kangaziwe*) in the sum of \$200-00. The deceased requested to be charged the bride price (*lobola*) and was duly charged in the form of 4 head of cattle (converted to \$400-00) and the usual overcoat; blankets and tin. At a later date the deceased and his go-between returned to pay the lobola and deliver the other items that had been demanded thereby completing the process of a customary marriage.

The plaintiff testified further that the deceased and herself commenced staying together as husband and wife and had their 2 children afore said. Initially, as the deceased was employed by NRZ he was entitled to a company house, and they stayed at a house belonging to NRZ namely No. 4 Lovemore Crescent, Northend Bulawayo. It was not until 1985, that they purchased their own matrimonial home, namely No. 22 Dvid Carnegie Road North End, Bulawayo. They then moved to that house which they were occupying when the deceased passed away.

She had been admitted at Mpilo Hospital in 1987 as she had delivered their son Wisdom prematurely and this required that she stays in hospital for some time. When she was eventually discharged, she returned home unexpectedly only to find that the deceased had been bringing the 1st Defendant to spend nights at the matrimonial home.

As a result, they quarrelled and because she was nursing a small premature baby, she decided to move out of the matrimonial home and stay with her sister in Tshabalala while she concentrated on bringing up her child. During the time that she stayed with her sister, the deceased would come to beg her to return to the matrimonial home but she would refuse. Sometime in 1987, she heard that the deceased had wedded the 1st Defendant but when she confronted him, he initially denied it but later admitted. He however told her that they had quarrelled on the wedding day and the 1st Defendant soon left and returned to her home.

According to the plaintiff she remained at her sister's house until 1993 when the deceased eventually apologised for his aberration. He and his go-between travelled to the plaintiff's rural home to formally apologise customarily. He was penalised for that in the customary way after which he was allowed to take his family back to his home. She maintained that even as they remained apart they continued to share conjugals and therefore remained husband and wife.

When she formally returned to the deceased in 1993, he was then working in Gweru and she and the children joined him there. The matrimonial house was then being rented out. It was not until 1996 that the deceased transferred to Bulawayo and the family moved back to the matrimonial home where they remained until the deceased passed away. At his funeral, she was the only recognised wife and was made to cover herself with a blanket in the traditional way, which signified that she was the widow mourning her husband. The deceased's family, again in conformity with tradition, requested her to put on a black mourning dress for a full year. All this was to recognise her as the widow of the deceased and throughout all this the 1st Defendant was nowhere to be seen.

The evidence of the plaintiff was corroborated by 3 witnesses Josiah Nyoni the plaintiff's brother, confirmed that he was present when the customary marriage was contracted and when the deceased came to apologise for his misdeeds in 1993 and was allowed to take his family back to his home. He added that as far as his family was concerned the plaintiff has always been customarily married to the deceased until the latter died.

Joseph Mlobisi is a family friend and was a neighbour of the deceased and the plaintiff when they stayed at the NRZ house. Even after they moved to their own home their relationship continued as he would visit them. The deceased confided in him and he denied that him and the 1st Defendant stayed together for long as husband and wife.

Gladys Tshuma is a cousin of the deceased who was requested by the deceased to come and stay with him in order to assist with house hold chores after the plaintiff had moved out. She testified that the deceased and the 1st Defendant quarrelled on the day of the wedding and that the 1st Defendant soon returned to her own home. The 2 did not cohabit as husband and wife for any meaningful period.

The evidence led on behalf of the plaintiff was given very well and in a simple and straight forward manner. All the witnesses were credible and I have no reason to disbelieve them especially as the 1st Defendant chose not to testify herself. That evidence is to the effect that the deceased and the plaintiff were customarily married in 1982 and that marriage remained in subsistence until the deceased died in May 2002. Although they once had their problems and lived apart, the marriage was never dissolved. When the deceased died he was living with the plaintiff at the matrimonial home – No. 22 David Carnegie Road Northend Bulawayo – a home which they acquired together.

While, the deceased contracted a civil marriage with the 1st Defendant, they did not stay together for long and at the time of the deceased's death they had long gone their separate ways. There was no relationship whatsoever between them, except on paper. There may be other reasons why they did not have children but one cannot ignore the fact that they did not have much opportunity to do so.

The problem presented by this matter is governed by the provisions of the Administration of Estates Act, Chapter 6:01. Section 68 of that Act provides in subsections (3) and (4) as follows:

- “(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnised in terms of the Customary Marriages Act, [Chapter5:07] and any reference in this Part to a spouse shall be construed accordingly.

Provided that such a marriage shall not be regarded as valid for the purposes of this Part if when it was contracted either of the parties was married to someone else in accordance with the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse.

- (4) A marriage contracted according to the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnised in terms of the Customary Marriages Act [Chapter 5:07].

Provided that, for the purposes of this Part, the first marriage shall be regarded as a customary law marriage.”

By clear and unambiguous language, the legislature, in the exercise of its legislative powers, has seen it fit to not only recognise a customary marriage as valid for purposes of inheritance, it has also placed

such marriage at par with one solemnised in terms of the Marriage Act. By parity of reasoning, a spouse under a customary marriage stands at the same pedestal as a spouse under the Marriage Act.

In my view the legislature has unquestionably raised the status of a customary marriage to the same level as a civil marriage. There cannot be any clearer language by which to recognise such a marriage. In my view this was borne by a realisation that no matter how you try to "civilise" an African man, he shall forever remain entangled in the web of customary law and invariably shall have a customary wife somewhere in the back ground, even as he upgrades himself by marrying someone else by civil rites. It is those customary wives which the legislature sought to protect.

Regarding the respective rights of such "spouses" Section 68 F of the Administration of Estates Act is equally clear. It provides that where there is a dispute between an executor and a beneficiary the master shall be guided by the provisions of subsection (2) which reads:

- " (2) The master shall be guided by the following principles, to the extent that they are applicable, when determining any issue between an executor and a beneficiary in terms of paragraph (c) of subsections (3) of section 68E –
- (a) --
 - (b) --
 - (c) Where the deceased person was a man and is survived by 2 or more wives, whether or not there are any children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (b) –
 - (i) Where they lived in separate houses, each wife should get the 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 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."

In my view these provisions are so clear as to admit of no ambiguity at all. Where the deceased is survived by 2 wives as in the present case, and those wives live in separate houses each wife is entitled to receive the house that she occupied at the time of the man's death together with household effects in that house. Where the 2 wives shared the same house they are entitled to joint ownership. This is so regardless of the status of the marriage as long as, in the case of a customary marriage, it was entered into before the Civil Marriage.

It is only if the wives shared the same house that they can share the house. This is regardless of the existence of children.

The mischief that the legislature intended to address is not difficult to identify. For some time women married under customary law had faced ignominy of being chased out of their homes they toiled for with, and at times without, the husband who would have married a younger wife who invariably insists on a Civil Marriage. The law as it existed before the introduction of Act No. 16 of 1998 disinherited that customary law wife in favour of the new wife.

In those circumstances a woman married under the Marriage Act would then take over the house in which the customary law wife resided and which she toiled for without any contribution from the new wife. The above provisions ensure that the customary law wife benefits from her sweat while the new wife does the same. The Act is silent as to what happens when the new wife has no house belonging to the deceased common husband.

However, in my view, considering the mischief sought to be addressed, it was never the intension of the law giver that where the 2 wives lived in different houses, the one without would be entitled to cross over and share the single house occupied by the other. That would defeat the whole purpose of the enactment.

I come to the conclusion that the plaintiff was a spouse for purposes of the Administration of Estates Act and is entitled to receive the house and the household goods in it, which she occupied to the exclusion of the 1st Defendant. The time has come to declare in no uncertain terms that parties cannot invest in a paper marriage only to surface after the death of the other person they would have long abandoned to commance a new life. Its an unacceptable and extremely indecent habit which should be discouraged. If the marriage has failed it should be terminated to release the parties to start afresh.

Accordingly I order as follows: that

1. The plaintiff, Jennifer Nyoni be and is hereby declared the spouse of the late Charles Mbunji Ndlovu for purposes of the Administration of Estates Act, Chapter 6:01.
2. The plaintiff, Jennifer Nyoni be and is hereby declared sole beneficiary of immovable property and improvements thereon known as 22 David Carnegie Road, Northend, Bulawayo together with the household effects therein.
3. The 2nd and 3rd Respondents be and are hereby directed to do everything necessary to effect transfer of the said house and the house hold effects therein to the plaintiff.
4. The costs of suit shall be borne by the estate late Charles Mbunji Ndlovu.

Webb, Low and Barry, Applicant's Legal Practitioners

Messrs Majoko and Majoko, 1st Respondent's Legal Practitioners