

WINFILDA ZVAVAMWE

APPELLANT

VERSUS

ALICE MPOFU

1ST RESPONDENT

ANNA SIBANDA

2ND RESPONDENT

THE ADDITIONAL ASSISTANT MASTER N.O

3RD RESPONDENT

BULAWAYO CITY COUNCIL

4TH RESPONDENT

HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 21 AND 24 FEBRUARY 2011

Miss M. Bhunu, for the appellant
Ms C. Nunu, for the respondent

CIVIL APPEAL

MATHONSI J: The late Elina Nyoni died on 14 July 1986 at Bulawayo. She was a widow whose husband died in 1967 and their marriage had been blessed with 5 children namely Abias Zvavamwe, born on 21 November 1957, Anna Mpofu, born on 7 April 1959, Never Mpofu, born on 10 May 1961, Albert Mpofu, born on 5 November 1963 and Alice Mpofu, born on 3 June 1967.

All the male children of the late Elina Nyoni are now deceased but are survived by their own children who are the grand children of the late Elina Nyoni.

At the time of the death of her husband, the late Elina Nyoni had inherited stand No. 63816 Tshabalala Township, Bulawayo which is also known as house No. 7547/8 Tshabalala Bulawayo. Clearly, that inheritance was not in accordance with customary law as an African woman was then regarded as a perpetual minor incapable of owning or inheriting her husband's immovable property. Therefore the late Elina Nyoni inherited the house from her husband by virtue of general law which means that the family elected to be governed by general law in so far as inheritance was concerned.

When Elina Nyoni died, her estate was not registered and nothing was done to wind up her estate until the year 2001. The first born son Abias Zvavamwe remained in occupation of house No. 7547/8 Tshabalala Bulawayo along with his family which included his wife Winfilda Zvavamwe, the Appellant in this matter. Trouble started when the late Elina's children 1st and

2nd Respondents wanted to perform the traditional ceremony known as “umbuyiso ” in Sindebele in 2007 which had not been performed from the time their mother died.

The Appellant, whose husband Abias Zvavamwe had died leaving her in occupation of the house, refused to let them perform the ceremony at the house arguing that she had since inherited the house from her husband. Prior to that the estate of the late Elina Nyoni had been registered with the additional master as DRB No. 1135/2001 with Annah Sibanda, the daughter who is 2nd Respondent in this matter being appointed executrix.

A distribution plan in terms of which the only asset of the estate, house No. 7547/8 Tshabalala Bulawayo, was to devolve to the surviving children and grand children of the late Elina Nyoni, was drawn up and submitted to the additional master. It is that distribution plan which the Appellant contested and when the matter was heard by the court *a quo* it found in favour of the Respondents and directed that the winding up of the estate must proceed in terms of that plan.

Aggrieved by that decision the Appellant noted an appeal to this court on the following grounds

- “ 1. The learned magistrate erred in law in making an order that all children of the deceased were entitled to inherit in equal shares in terms of Amendment 6 of 1997 of the Deceased Estates Act (sic) when in fact the deceased died in 1986 and the Amendment does not have retrospective effect.
2. The learned magistrate erred in evicting the Appellant upon 4 days notice of the order. Even if the order was correct the Appellant was still entitled to a reasonable notice period.
3. Appellant therefore seeks an order declaring that 2nd and 3rd Respondent (s) are not entitled to inherit from the deceased estate and the deceased son Abias Zvavamwe was the heir of the deceased estate in terms of the law at the time of her death and that as such the Appellant as the surviving spouse of Abias Zvavamwe is his heir and as such should inherit his estate.”

At the commencement of hearing of this appeal, Ms Nunu for the 1st and 2nd Respondents took a point *in limine* that the notice of appeal was fatally defective in that it did not identify the part of the judgment being attacked and did not contain a prayer. The parties however agreed that the merits of the matter be determined once and for all in order to give the parties direction as to how to proceed here after.

The import of the Appellant’s argument is that her late husband Abias Zvavamwe was the first born son of the late Elina Nyoni and as such he was entitled according to customary law, to inherit her estate in his individual capacity and to the exclusion of the other children, at the time of her death in 1986. Ms Bhunu for the Appellant further argued that the estate could

not devolve according to the inheritance regime provided for in the Administration of Estates Act, Chapter 6:01, the relevant provisions of which came into effect through Act No. 16 of 1998 which did not have a retroactive effect.

Ms Nunu for the 1st and 2nd Respondents strongly argued that even if customary law was applied, the late Abias Zvavanwe was not entitled to inherit the estate on his own because according to traditional Shona customary law whatever property a woman acquired was regarded as her personal property which was distributed upon her death to all her children. It was only the property of the man which was inherited by the first born son.

I am of the view that this matter is capable of resolution by reference to section 3 of the Customary Law and Local Courts Act, Chapter 7:05 which sets out the choice of Law principles to be applied in a situation of this nature. That provision reads as follows:

"3. Application of Customary Law

(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires-

(a) customary law shall apply in any civil case where -

(i) the parties have expressly agreed that it should apply; or

(ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply; or

(iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;

(b) the General Law of Zimbabwe shall apply in all other cases.

(2) For the purposes of paragraph (a) of subsection (1)- 'surrounding circumstances' in relation to a case, shall, without limiting the expression, include -

(a) the mode of life of the parties;

(b) the subject matter of the case;

(c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case.

(d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe as the case may be."

In *Chapendama v Matende & Another* 1999(1)ZLR 534 (H) at 536 E-F, Chinengo J stated;

“ 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 jurisdiction 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 changed circumstances, the courts will by such purposive and progressive interpretation achieve the same goal. The purpose of the law is to serve the people and meet their expectations.”

I find myself totally in agreement with that pronouncement. In a case such as the present where the legislature has legislated to give the courts the latitude to apply either customary law or general law having regard to the nature of the case and the surrounding circumstances in my view the courts should purposely refrain from applying customary law, if its application would lead to an injustice. See *Jengwa v Jengwa* 1999(2) ZLR 121 (H) at 128 E; *Mtuda v Ndudzo* 2000(1) ZLR 710 (H) at 715 D-E.

In my view, it is absurd for a first born son to seek to inherit the entire estate of his parent to the complete exclusion of his siblings. Other than the historical accident of being born ahead of others there is no other justification for such a situation. The law must be used to protect the other members of that family against the acquisitive tendencies of the first born son as clearly all of them are entitled to benefit from the estate. It was probably with that mischief in mind that the legislature introduced the amendments to the Administration of Estates Act, Chapter 6:01.

Happily though in this case, the issue is resolved by the fact that the late Elina Nyoni herself inherited the house from her late husband. She could not have inherited the house and taken transfer, as the papers show, on 1 February 1969 if the parties were applying customary law. The concept of the wife inheriting from her husband then only existed in general law. It must follow therefore that the family long agreed to apply general law principles of inheritance and not customary law.

The late Abias Zvavamwe therefore was not entitled to inherit the house in his own right and did not so inherit. The house should devolve to all the children of the late Elina Nyoni including the grand children born of those children who have since passed away.

The executrix of the estate had already submitted a distribution plan approved by all concerned except the Appellant. It is in accordance with that distribution plan that the estate should be wound up.

Accordingly, I make the following order; that

1. The appeal be and is hereby dismissed.
2. All the children of the late Elina Nyoni are entitled to inherit house No. 7547/8 Tshabalala Bulawayo in equal shares with the shares of those that are now deceased going to their respective children, the grand children of the late Elina Nyoni.
3. The matter is remitted to the magistrates' court for purposes of the completion of the winding up of the estate in terms of the distribution plan already prepared.
4. The costs of the appeal shall be borne by the Estate late Elina Nyoni.

Kamocha J I agree.

Zimbabwe Women Lawyers Association, Appellant's Legal Practitioners
Calderwood Bryce Hendrie & Partners, Respondent's Legal Practitioners