CHENGETO MASHINGAIDZE

versus

PAULINE MANDIGO

In her capacity as Executrix in the Estate of the late

W G Mashingaidze DR 677/14

and

MASTER OF THE HIGH COURT N.O.

and

GIVEMORE MASHINGAIDZE

HIGH COURT OF ZIMBABWE

MANZUNZU J

HARARE, 10 November 2022 & 30 August 2023

COURT APPLICATION

T K Mudzimbasekwa, for the applicant
J M Bamu, for the 3rd respondent

MANZUNZU J

A. INTRODUCTION

This is a court application in terms of section 52 of the Administration of Estates Act, Chapter 6:01 in which the applicant puts a challenge to the decision by the Master and seeks relief in the following terms:

"1. The Master's decision in terms of a letter dated 27 February 2015 to the effect that Glassalla Farm, Centenary is not a matrimonial property in terms of section 3A of the Deceased Estates Succession Act {Chapter 6:02} be and is hereby set aside.

2. Applicant be and is hereby declared to be the sole beneficiary of a certain piece of land called Glassalla Farm, Centenary measuring 1105,9293 hectares.

3. The first and Interim Administration and Distribution Account filed by the 1st respondent dated 13 January 2015 in the estate of late Wilfanos Gabriel Mashingaidze be and is hereby amended to reflect that the applicant is the sole beneficiary of Glassalla Farm, Centenary.

4. The 3rd respondent shall pay costs of suit."

When this application was initially filed on 19 March 2015 it cited the first two respondents. The 3rd respondent was later joined to these proceedings and is the only respondent who has opposed the application.

B. THE APPLICATION

This application is in terms of section 52 (9) (i) of the Administration of Estates Act, Chapter 6:01 which states that;

" (*9) 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 direction, and after giving notice to the executor and to any 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 order as it may think fit;"

C. BACKGROUND

The facts of this application are to a very large extent common cause. These can be summarized as follows:

(1) The applicant was married to the late Wilfanos Gabriel Mashingaidze *(hereinafter referred to as the late or the deceased*) on 17 August 1967 in terms of the Marriage Act, Chapter 37 [now *Chapter 5:17*].
(2) The late Wilfanos Gabriel Mashingaidze died intestate on 25 November 2013 leaving behind, among other properties, a farm known as Glassalla Farm (*the farm*) in Centenary measuring 1105, 9293 hectares which is now at the centre of this dispute.
(3) Glassalla Farm was bought in 1986 through the joint effort of the applicant and her late husband as they engaged in business. Despite the fact that the couple had other immovable properties they moved to stay at the farm as their matrimonial home.
(4) The applicant and the late Wilfanos Gabriel Mashingaidze were blessed with 6 children, unfortunately 2 of whom were late at the time of commencement of these proceedings.
(5) Despite the monogamous nature of the couple's marriage, the late Wilfanos Gabriel Mashingaidze had two other "wives" and 6 children.
(6) Following the death of the deceased, the first respondent Pauline Mandigo was appointed the executrix dative of the estate.
(7) The first respondent, in terms of the law, compiled an interim account on 13 January 2015 which reflects that Glassalla farm be jointly awarded, in equal shares, to the applicant and the deceased's 10 surviving children. It records;

"Awarded to the following beneficiaries in equal shares, share and share alike;
Awarded to : 1) Chengeto Mashingaidze (surviving spouse); 2) Tirivatatu Stanislous Mashingaidze (son of the deceased); 3) Trymore Chifa Mashingaidze (son of the deceased); 4) Givemore Rungano Mashingaidze (son of the deceased); 5) Blessing Mashingaidze (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."

(8) The applicant objected to the 1st and 2nd respondents the proposed joint ownership on the basis that the farm constitutes matrimonial property.

(9) The Master responded to her objection by letter of 27 February 2015 which reads in part;

"I acknowledge receipt of your letter dated 9th of February 2015 contents of which have been noted.

Kindly be advised that the distribution plan appears to be in order. In terms of Deceased Estates Act, section 3A (Chapter 6:02) the property in question is not a matrimonial property hence should be shared equally among the surviving spouse and all the deceased children."

(10) This response by the Master triggered the current application in which the applicant seeks redress as she argued that the farm was their matrimonial home and that in terms of the law, in particular s 3A of the Deceased Estate Succession Act [*Chapter 6:02*] (the Act), 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.

(11) The 3rd respondent's defence is short and to the point. He alleges the farm in question does not constitute matrimonial property. He says;*"Section 3A of the Deceased Estate Succession Act Chapter 6:02 entitles the applicant to inherit the matrimonial house she lived in immediately before the death of her husband which is within the farm and not the whole Glassalla farm as the said farm is a commercial stand and not a domestic premise. Hence the applicant should inherit the matrimonial house and the rest of the farm is free residue and the surviving spouse is only entitled to a child's share."*

D. ISSUES

. What falls for determination can be summarised as follows: -

1. Whether or not the property in question, Glassalla Farm situate in the district of Centenary, is matrimonial property falling for distribution in terms of s 3A of the Deceased Estates Succession Act [*Chapter 6:02*].
2. Whether or not Glassalla Farm can be subdivided 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 Centenary held under Deed of Transfer 2595/87 should be shared equally between the applicant and deceased's surviving children.

E. THE LAW

The dispute between the parties revolves around the interpretation of section 3A of the Deceased Estates Succession Act, Chapter 6:02 whose wording is as follows;

> ***"3A Inheritance of matrimonial home and household effects***
> *The surviving spouse of every person who, on or after the 1st 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 effects which, immediately before the person's death, were used in relation to the house or domestic premises referred to in paragraph*
> *(a);where such house, premises, goods and effects form part of the deceased person's estate"*
> *(underlining is mine)*

The applicant's position is 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 is of the view that she is entitled to the whole farm and not to a child's share.

The 3rd respondent's view is that the farm; it being a commercial enterprise, cannot be classified as a matrimonial home, though the applicant can inherit the house she lived in and benefit a child's share from the rest of the farm.

The Master's report opined the farm in question, being of commercial value, could not rightly be treated as a matrimonial home. On that basis, his view was that 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."*

These are the different views expressed based on the interpretation of section 3A supra.

F. ANALYSIS OF EVIDENCE AND SUBMISSIONS BY THE PARTIES

It is not disputed that the applicant and the late Wilfanos Gabriel Mashingaidze were staying at the farm house as their matrimonial home. Parties also agree that section 3A of the Deceased Estates Succession Act [*Chapter 6:02*] (*hereinafter referred to as section 3A*) governs the distribution of property in this intestate estate. 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. It is also not in dispute that the farm house occupied by the applicant is her matrimonial home. This is why the Master and the 3rd respondent are not opposed to the applicant inheriting the farm house; but then the golden question which follows is, can the farm house be separated from the rest of the farm for the purposes of inheritance? This takes us to the issue:

a) *Is Glassalla Farm a matrimonial property falling for distribution in terms of s 3A of the Deceased Estates Succession Act [Chapter 6:02]?*

Mr Mudzimbasekwa for the applicant argued that, once it is accepted that the house is matrimonial property, it cannot be separated from the rest of the farm. This is simply because matrimonial property cannot exist in the air. The farm therefore is said to constitute the house or domestic premises. He further argued that there is no basis to separate the house from the farm because everything which is built on or attached to the soil forms part of the soil. For this proposition he referred the case of *Willoughby's Investments (Private) Limited v Peruke Investments (Private) Limited, HH 178/14* which cites the authors C. G. van der Merwe & de Waal, *The Law of Things & Servitudes*, p. 126.

It was further argued for the applicant that in coming up with section 3A, the legislature intended the surviving spouse to inherit, undisturbed, the matrimonial home. In fact, this piece of legislation was introduced in order to address certain mischief in society where most widows fell victim of the greedy relatives of their late husbands who would strip them of every asset

under the guise of adherence to tradition and culture. In a worse scenario, some male child having been appointed heir to the estate, would evict the widow from the matrimonial home. The intention of the legislature was expressed in *Chimhowa & Ors v Chimhowa & Ors 2011 (2) ZLR (2) 471 H @475G – 476C* where Chiweshe JP (as he then was) said, *"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 to plunder the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases the culprit relatives would not have contributed anything in the acquisition of such immovable and movable properties, often the result of years of toil on the part of the deceased and the surviving spouse. This is the mischief that the legislature sought to supress in introducing provisions such as s 3A of the Deceased Estates Succession Act and s 68 F of the Administration of Deceased Estates Act and the Deceased Persons Family Maintenance Act [Cap 6:03].*

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."

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.

The court was urged not to concern itself with the size of the land upon which the house is built

Mr Bamu for the 3rd respondent, adopted his written heads of argument in which he questioned whether a farm run as a commercial enterprise by successful tobacco farmers is a matrimonial home in the form of a house or domestic premises.

It must also be noted that the Deceased Estates Succession Act [Chapter 6:02] does not define "matrimonial home," "the house" or "domestic premises" for the purposes of this Act.

However, what is obvious is that these are structures which are improvements on the land. They are part of immovable property.

One may want to consider the options raised by the 3rd respondent in his submissions. The first one is that the applicant is not a looser if no benefit is derived from section 3A because she can still benefit from section 3 of the Act. There is no merit in this argument because it was never part of the 3rd respondent's opposing affidavit. It is only being raised in argument. Secondly the parties are in agreement that section 3A is the one applicable in this case. Thirdly, section 3 of the Act covers situations of those who died intestate before 1 April 1977. In *casu*, the deceased died on 25 November 2013.

After analysing the literal rule of statutory interpretation and acknowledging the intention of the legislature as one to protect surviving spouses and minor children against deprivation of their domestic premises or homes, the 3rd respondent further submitted that it was not the intention of the legislature to deprive the rest of the beneficiaries of their inheritance. In other words, the court is asked to look at the rights of the widow under section 3A as against the rights of the beneficiaries to inherit. Section 3A is worded in peremptory terms. Assuming the only asset left behind by the deceased is a house or domestic premises in which the couple lived; what it means is that the surviving spouse inherits that and the matter ends there. No beneficiary will have a greater right than the one created in the Act for the surviving spouse. Where no assets are left after the surviving spouse has exercised his/her statutory right, it means there is nothing to be inherited by the beneficiaries. A beneficiary cannot inherit from nothing. For the purposes of further clarity, I recite the remarks in *Dzomba & Ors v Chifamba & Ors 2014 (2) ZLR 473 (H)* that; *"… the primary thrust of the Act is to start off by being spouse centred is clear from the above provisions. A spouse inherits household goods and effects. He or she also inherits the domestic premises. If the estate still has residue after this has been done, the spouse together with the children inherit specified statutory legacies. Inheritance by children therefore clearly depends on the size of the estate. Where the marital home is the only asset as in the present case, then the law is clear that it should go to the surviving spouse." (underlining is mine).*
The second leg of argument by the 3rd respondent must also fail.

The court has been urged to consider the *ejusdem generis* rule of statutory interpretation. This is because section 3A has used the words "house" "domestic premises". A

commercial farm is said not to be in the same class as house or domestic premises. By excluding commercial farm, it was argued, the legislature only intended to protect a spouse from being deprived of matrimonial home. I do not think this is the proper application of this rule. I have said earlier in this judgment that a house cannot exist independent of the land on which it is built. In fact, a house is an immovable property attached to the land. I find it absurd the suggestion that when the legislature said a house it ought also to describe the nature of the land upon which it sits. I am not persuaded that the *ejusdem generis* rule assist the court in these circumstances.

The forth leg of the 3rd respondent's argument is that a farm cannot be a matrimonial home. The reason advanced is because there are commercial activities conducted at the farm. But if one were to pause and say, what if there were no commercial activities? The 3rd respondent does not say whether in the absence of commercial activities a farm will qualify as a matrimonial home. If the 3rd respondent's argument is anything to go by, it means it is the commercial activities which disqualifies the farm as a matrimonial home. By the same token, in the absence of commercial activities, the same farm will be a matrimonial home. Assuming for a moment that the matrimonial home was not on the farm but instead at a place where business or commercial activities are conducted, will 3rd respondent still raise the same argument? I don't know.

In the event the court found the farm to be matrimonial home, the 3rd respondent urged the court to consider provisions of section 68F (b) (i) of the Administration of Estates Act, Chapter 6:01. This line of argument was before it was challenged by the applicant as inapplicable as the provisions apply to customary law. Mr Bamu conceded and abandoned that line of argument.

In a further effort to throw spanners in all directions, the 3rd respondent argued that treating a farm as a house is unjust and unfair as it exclusively gives the farm to the applicant. In the premise, he proposed, based on principles of equity, I believe, that the applicant in addition to a child's share gets a usufructury right over the same farm. This is however not a relief sought by the applicant. In any case, the court is sitting to make judicial determination of the identified issues to the dispute between the parties, not as a conciliatory body. The court is here to interpret the law and apply the same to the facts of the case.

Mr Bamu took a new dimension in his oral submission to find the definition of matrimonial property. He referred to the definition of "family home" in section 2 of the Estates Duty Act, Chapter 23:03. I did not find this initiative of any assistance to the court because the definition referred to is for the purposes of the provisions of that Act.

In recognition of the applicant's rights under section 3A, the 3rd respondent argued that the applicant be allowed to inherit the matrimonial house at the exclusion of the rest of the farm where every beneficiary is entitled to a child's share including the applicant. But the 3rd respondent does not say how this is to be achieved because the farm is a single unit upon which the matrimonial house is built. There is only one title to this farm under Title Deed No. 2595/87 in the name of the deceased.

The applicant's counter argument is that the 3rd respondent intends to sub divide the farm a position supported by the Master in his report which gives with one hand and takes away with the other. This offends the law, it was argued, as section 39(1) of the Regional, Town and Country Planning Act, Chapter 29:12 prohibits the subdivision of any property without a permit issued in terms of section 40 of the said Act. In view of the above provisions, it is not competent for the court to grant an order which has the effect of subdividing any property held under a single title without the due process having been taken.

There is a judgment, HH 721/22 relating to the same farm which was my judgment. In the judgment the deceased's second "wife" got the following order which reads in part, *"the plaintiff's alternative claim for a declaratur that the estate of the deceased has been unjustly enriched hereby succeeds. The plaintiff is entitled to 15% of the farm or its value."* Mr Bamu submitted that the applicant cannot be granted sole ownership of the farm in the face of that judgment. In other words, his contention is that the relief sought by the applicant is incompetent. I disagree. The plaintiff in the other matter can enforce her judgment against the estate.

CONCLUSION

For the reasons already stated, the applicant's application must succeed. However, this is not a proper case where costs should be awarded against the 3rd respondent. Costs of suit should rather be borne by the estate.

DISPOSITION:

IT IS ORDERED THAT:

1. The Master's decision in terms of a letter dated 27 February 2015 to the effect that Glassalla Farm, Centenary is not a matrimonial property in terms of section 3A of the Deceased Estates Succession Act {Chapter 6:02} be and is hereby set aside.

2. The Applicant be and is hereby declared to be the sole beneficiary of a certain piece of land called Glassalla Farm, Centenary measuring 1105,9293 hectares.

3. The First and Interim Administration and Distribution Account filed by the 1st respondent dated 13 January 2015 in the estate of late Wilfanos Gabriel Mashingaidze be and is hereby amended to reflect that the applicant is the sole beneficiary of Glassalla Farm, Centenary.

4. Costs of suit shall be borne by the estate of the late Wilfanos Gabriel Mashingaidze

Sawyer and Mkushi, applicant's legal practitioners
Mbidzo Muchadehama and Makoni, 3rd respondent's legal practitioners