SUSAN RUFUDZA
versus
OLIVER MASOMERA N.O
(in his capacity as the Executor Dative in the estate of the Late Sociates Zimunhu)
and
TINASHE MAGAIZA
and
ABYGAIL MAGAIZA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 18 March 2024 & 20 June 2024

**Opposed Matter**

*F Siyakurima,* for the Applicant
*B Mamva,* for the 1st Respondent
E Ngwerewe, for the 2nd Respondent
No appearance for the 4th Respondent

MAXWELL J:

At the hearing of this matter first to third Respondents raised preliminary issues. This judgment on the preliminary issues raised.

Background

On 13 July 2023 Applicant filed a Court Application for Review in terms of Rule 62 of SI 202/2021. The Grounds of Review centered on the fourth Respondent's decision to grant the consent to sell stand 14410/5 Kuwadzana Township Harare, a property belonging to the late Socrates Zimunhu's Estates. In her Founding Affidavit, Applicant stated that she was customarily married to the deceased sometime in 1994. Three children were born out of the marriage. In 2003 she divorced the deceased in the Magistrates Court under case number MC 243/03. She was awarded 40% of the value of the matrimonial home, namely, stand number 144105/5 Kuwadzana Township Harare. In 2004 they reconciled and did not sell the property. Two other children were

born after the reunion. She further stated that during the deceased's lifetime, they acquired the Kuwadzana property, a property in Epworth, and motor vehicles.

In 2016, the first Respondent, without her knowledge, sought and obtained the fourth Respondent's consent to sell the matrimonial home, the Epworth property, and 36 herd of cattle. The liquidation of these assets was said to have been meant to pay estate liabilities. Applicant was of the view that there were sufficient moveable assets to meet the estate liabilities. She therefore, submitted that fourth Respondent contravened section 120 of the Administration of Estates Act [*Chapter 6.01*] when he granted the consent to sell without conducting due inquiry. Further that he also contravened section 68 of the Constitution of Zimbabwe.

She enquired with the fourth Respondent on the propriety of the consent to sell, fourth Respondent withdrew the letter and called for a meeting on 17 August 2016. At the meeting, she learnt that the matrimonial home had already been sold by first Respondent to the second and third Respondents in June 2016. Her Legal Practitioner was of the view that the matter had been overtaken by events so he asked to be excused from the meeting. For some time first and fourth Respondents could not furnish her with a copy of the Agreement of Sale. She intended to challenge the sale in question. She eventually received it on 8 September 2016. She issued summons under reference 10446/16 against the first Respondent for the cancellation of the sale.

The first Respondent opposed the application. He raised two preliminary issues. The first was that Applicant had no *locus standi* as she is neither a beneficiary nor a surviving spouse in the estate he administered. The second issue was that the order Applicant seeks to use has superannuated and, in any event, once a divorce order was issued Applicant lost all entitlements of a surviving spouse and the property sold was not matrimonial property. He prayed that the application fails with an order for punitive costs.

On the merits, he submitted that the superannuated order was not availed to him before the consent to sale the immovable property was executed. He pointed out that the Applicant had personal rights as the property did not belong to her union with the deceased and that motor vehicles belonged to Chifamba Driving School and were not owned by the deceased. The first Respondent submitted that the Applicant was aware of the processes leading to the sale of the immovable property but was not cooperative. Further, the Applicant failed to provide a payment

plan for the estate liabilities to be liquidated and the property was sold after all the legal prerequisites were followed.

The first Respondent disputed that section 3 of the Administrative Justice Act [*Chapter 10:28*] was breached. He denied that the consent was obtained behind the Applicant's back. He indicated that the Applicant was not cooperative and that the house could not have devolved to her as she was not a surviving spouse. He denied filing a final distribution account and indicated that he has protected the interests of the estate by conducting himself as required by the law.

The second and third Respondents also opposed the application. The third Respondent deposed to the opposing affidavit also challenging Applicant's *locus standi*. She indicated that the Applicant is not a surviving spouse as the union with the deceased was dissolved and property shared. Furthermore, as the Magistrates Court awarded her, a 40% share of the value of the property, she is a potential creditor of the estate and cannot seek to assert the rights of a surviving spouse or beneficiary.

On the merits, she stated that the application is *mala fide* and motivated by the Applicant's desire to continue occupying the house illegally. Further, the second Respondent and she are innocent *bona fide* purchasers who purchased the property after seeing an advertisement in the newspaper. She also stated that seven years have since elapsed since they purchased the property. In her view, the proceedings are meant to continuously deprive her and the second Respondent of enjoying vacant possession of the property they lawfully acquired. She prayed for costs on a punitive scale.

In her answering affidavit Applicant insisted that she was the surviving spouse of the deceased. She disputed that the order of the Magistrates' Court had superannuated. She insisted that the deceased owned all the vehicles used by Chifamba Diving School. She submitted that the first Respondent lacked transparency in his handling of the estate including the disposal of the estate assets. She insisted that if due inquiry had been done it would have been apparent that there were sufficient movable assets to sell to meet estate liabilities. She denied being uncooperative and indicated that the first Respondent had commended her for being cooperative. She stated that the first Respondent had not given an account of the estate to the beneficiaries. She further stated

that following her divorce in 2003, she had reconciled with the deceased in 2004 and two children were born after their reunion.

She admitted that her sister, Nellia Rufudza, had a child with the deceased but disputed that Nellia was the surviving spouse. She accused the second and third Respondents of being complicit in the devious manner in which the first Respondent sold the house as they did not view the house before or after the sale. She stated that the second and third Respondents never communicated with her at all. She submitted that the Master contravened the law and accordingly all the resultant processes including the alleged sale and cession of the matrimonial house are null and void, and of no legal consequence, and must be set aside.

At the hearing of the matter, the first to third Respondents persisted with the preliminary points, Mr Maruva raised the first point that Applicant has no *locus standi* a she is not a surviving spouse. He argued that her marriage to the deceased was terminated in 2003 and no evidence was tendered to show that they re-married or lived as husband and wife. He submitted that the Applicant did not ask relatives of the deceased to confirm the re-marriage. Instead, she attached an affidavit from her brother. The same point was raised by Mr Ngwerewe for the second and third Respondents. He submitted that where circumstances of a marriage were questioned, the evidence of the relatives of the deceased is material.

In response, Mr Siyakurima submitted that Applicant has *locus standi* as a surviving spouse. He referred to the fact that two children were born after reconciliation and that no law says under customary law a ceremony is held for reunion. He referred to the case of *Muringaniza* v *Munyikwa* HB 102/2003 in which it was held that it is not essential to strictly adhere to certain rituals to confirm a customary law marriage.

Honourable TSANGA J in *Hosho v Hasisi* HH 491/15 stated:-

> "…….where a party relies on an unregistered customary union, central to asserting widowhood and claiming the protection accorded widows under relevant legislation, is proof that such customary union indeed existed……
> ….certain cultural practices which involve the payment of roora/lobola are attendant upon its formation……
> It is not just proof of payment but also the process which has to be considered;
> The process of paying roora/lobola and the ceremony itself involves key representatives from both families, as well as other people who can attest to the process having taken place."

The Applicant has not proved any re-marriage or reunion process. The affidavit from her brother is not sufficient as it only speaks to marriage "ever since 1997." He did not mention that

they divorced and remarried. It is the Applicant who placed the order of sharing of property between her and the deceased before the court. The case cited by Mr Siyakurima, *Muringaniza* v *Munyikwa* (*supra*), does not help the Applicant. In that case, there was evidence of the process of a customary marriage having taken place. A go-between (munyai) testified of the process.

I find that Applicant did not discharge the onus of proving that she is a surviving spouse. That children were born after the separation cannot be said to be proof as there are people with children who are not husband and wife. Co-habitation is not the same as a customary marriage.

The second question is whether or not the Applicant has *locus standi* by her interest in the property derived from the order of the Magistrates' Court in 2003. Applicant stated in her founding affidavit in paragraph 8.

> "8. I must state that sometime in 2003 we divorced with the late Socrates Zimunhu in the Magistrate's Court under MC 243/03. The Magistrate awarded me 40% value of the matrimonial home namely 14410/5 Kuwadzana Township Harare. I attach hereto as Annexure 'A' a copy of the Magistrate's Court Order."

The attached order is not very legible. However, what can be gleaned from it is that the Magistrate had gone further to order the valuation of the property by a reputable and mutually agreed valuer and that the Defendant was to pay the plaintiff her share. In my view, Applicant's claim can only be for 40% of the value of the property. That the house was not sold during the lifetime of the deceased is of no consequence, as Applicant was entitled to compensation for her 40% share in its value. The Applicant's claim should be on the proceeds of the sale as she was supposed to get 40% of the value of the property. I am persuaded by the submissions in Respondents heads of argument that the order of the Magistrates' Court "relates to the monetary value of the Applicant's personal rights towards the deceased's estate which by operation of law makes the Applicant a mere creditor not a beneficiary of the deceased's estate."

On that basis, Applicant has no *locus standi* to challenge the sale of the property. As stated above, her *locus standi* relates to a claim against the deceased's estate amounting to 40% of the value of the property.

I uphold the point that Applicant has no *locus standi* in this matter.

The second point raised is that the order relied upon by the Applicant is superannuated. It was submitted for first to third Respondents that the court order relied upon by the Applicant cannot be enforced in its current state as it superannuated in terms of common law as modified by

statute and needs to be revived for it to be effective. Mr Siyakurima submitted that it is improper to raise this point as it was dealt with in HH 810/22. Indeed HH 810/22 was a matter between the same parties. The second point *in limine* in that matter was that the order relied on is superannuated. I had this to say.

> "Though the point was raised in the first respondent's opposing affidavit, it was not addressed in the heads of argument. Mr Masocha referred to it in his oral address. Mr Siyakurima submitted that the revival is wholly unnecessary as the parties were husband and wife until the death of the husband. It was not disputed for the Respondents that the revival was unnecessary. This point *in limine* therefore cannot succeed."

The question of whether or not the order was superannuated was not decided in HH 810/22. It was therefore proper for the first to third Respondents to raise the issue in this matter. Mr Siyakurima's submission stated in HH 810/22 that the revival of the order is not necessary is an admission that the order had superannuated. In his view, because a matrimonial issue was involved revival was not necessary.

In *Nzara and others* v *Kashumba and others* HH 151/16, superannuation of a judgment was discussed. It was held that there is no reason why the superannuation rule should not apply to a judgment for the transfer of an immovable property which involves the delivery up or transmission of real rights from one person to another. Further a judgment directing the transfer of an immovable property becomes superannuated after the lapse of three years under the common law. In my view, the same applies to an order for the sharing of the value of a property. In the *Nzara* case cited above, it was clarified that matrimonial issues to which superannuation does not apply include an order of annulment or decree of divorce. Applicant's issue is not in that category

I therefore find that the order of the Magistrate's court issued in 2003 has superannuated. The second point *in limine* has merit.

First to second Respondents prayed for costs on a punitive scale. I am not persuaded that they are warranted in this case. Costs on an ordinary scale will meet the justice of the case.

The following order is appropriate.

The application for review be and is hereby struck off the roll with costs.

*Sawyer and Mkushi*, Applicant's legal practitioners
*Messrs Zuze Law Chambers*, first Respondent's legal practitioners
*Messrs Chatsanga & Partners*, second and third Respondent's legal practitioners