

TARISAI CHIKUWE
and
PATRICK CHIKUWE
and
MISS CHIKUWE
and
SAMUEL CHIKUWE
and
AGNESS CHIKUWE
versus
ABIGAIL MAGUNA
and
GENERATIONS EXECUTOR SERVICES (NO)
and
THE MASTER OF THE HIGH COURT
and
THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 13 March 2014

Opposed Matter

P. Muchemwa, for the applicants
Advoc. F. Mahere, for the first respondent

CHITAKUNYE J: On 13 March 2014, I dismissed the above application and indicated that full reasons will follow. These are the reasons for the dismissal.

The applicants are children of the late Taruvinga Misheck Chikuwe, who died on 7 April 2006.

The first respondent is the applicants' step mother as she is the surviving spouse of their late father. The second respondent was appointed executor dative of the estate late Taruvinga Misheck Chikuwe.

The third and fourth respondents were cited in their official capacity for purposes of enforcing the court order sought.

The late Taruvinga in his lifetime and whilst still married to applicants' mother acquired an immovable property namely Stand Number 1970/12 Dendera Road, Dzivarasekwa 2, Harare.

The applicants' mother died on 9 October 1990.

In 2005 the applicants' late father married the first respondent in terms of the Marriages Act, [*Cap 5:11*]. Within three months of that marriage the late Taruvinga Misheck Chikuwe ceded 50% of the immovable property to the first respondent. Thus the first respondent became a joint owner or holder of rights and interests in the said property and this was on 30 September 2005.

Within six months of his marriage to the first respondent, the late Taruvinga Misheck Chikuwe died.

The second respondent was duly appointed executor dative. In the course of distribution of the estate, the second respondent awarded the first respondent the late Taruvinga Misheck Chikuwe's 50% share in the property. That meant the first defendant was now owner or holder of 100% of the rights and interests in the immovable property.

On 25 March 2013, applicants filed this application seeking an order that:

1(a) That 50% share of the immovable property commonly referred to as House No. 1970/12 Dendera Road, Dzivarasekwa 2, Harare be awarded to the first to fifth applicants in equal shares.

Or alternatively:

(b) That the first to fifth applicants be granted a life usufruct over the said immovable property.

2. That the final order of the third respondent given under DR. 457/09 of the Estate Late Taruvinga Misheck Chikuwe be and is hereby amended to the extent of paragraphs 1(a) or 1(b) above.

3. That there be no order as to costs.

In seeking the above order the applicants argued that the first respondent had no right to be awarded their late mother's 50% share in the property, which property had been acquired some 26 years before the first respondent married their father.

The first respondent opposed the application contending that as the surviving spouse she is entitled to the matrimonial home she lived with her late husband immediately before his death.

On the date of hearing the respondent's counsel raised a *point in limine* to the effect that this court had no jurisdiction to entertain the application. She argued that the nature of the relief sought shows that the applicants are asking court to redraw the distribution plan. It is clear the applicants are not happy with the distribution plan but it is not this court's function to redraw that plan. The applicants had an avenue to take if they were not happy with the distribution plan.

In this regard s 68D provides that it is the duty of the executor to draw up the distribution plan taking into account certain principles stated therein. In this case the second respondent drew up the distribution plan as required.

To the extent that the applicants are not happy with the plan the Act provides in s 68F the process the Master of the High Court must take for the resolution of disputes over the inheritance plan. That process is an administrative process. The decision by the Master on the dispute can then be taken on review by an aggrieved party.

In *casu*, the applicants did not take their dispute to the Master hence the Master confirmed the plan without any objections. It was the respondent's contention that what the applicants' are in fact seeking is a review of the distribution plan and the Master's confirmation thereof without following the statutory provisions.

The review sought cannot stand as not only are there no reasons for review as required, but this application was brought well out of the 8 weeks period for bringing applications for review from the time of the decision being challenged.

Accordingly, the respondent argued that the application must be dismissed.

The applicants' response was rather feeble in nature. Applicants' counsel contended that this court has inherent jurisdiction and so can safely entertain the application irrespective of the fact that the matter could be entertained by another tribunal provided for by statute. She also contended that court is not being asked to redraw the distribution plan but court is being persuaded to redo the plan approved by the Master. In the same breath counsel

conceded that the procedure for review would have been appropriate but upon noting the long delay and realising they were well out of time they opted for an ordinary court application. In her submissions counsel conceded that the applicants were aware of the distribution plan as they had been part to the edict meetings. Even at the time the 50% in contention was awarded to the first respondent, the applicants were alive to it but took no action to object to it because they thought they would stay as mother and children. It was only when steps for their eviction were taken that they decided to approach court.

If the applicants were aware of the distribution plan, done some 5 to 6 years ago, surely they cannot be heard to approach court as if they were not aware of the distribution plan now.

The application is surely not proper. If the applicants were aggrieved by the distribution plan they ought to have taken steps in terms of the Administration of Estates Act to object to the plan. No cogent argument was placed before me justifying this courts interference with a distribution plan the applicants have been aware of and had not challenged for the last 6 years.

I am of the view that the application is not properly before this court and so it should be dismissed with costs.

Legal Resources Foundation-Harare, applicants' legal practitioners
First respondent, in person c/o WLSA