MARGARET SUMBURERU
v
(1) PRISCA CHINAMORA (2) THE MASTER OF THE HIGH COURT (3) WILBERT NYAMUPFUKUDZA N.O.

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA & PATEL JA
HARARE, 24 OCTOBER 2013 & 13 JULY 2018

D. Ochieng, for the appellant

S. Hwacha, for the first respondent

HLATSHWAYO JA: The appeal is from the High Court where the applicant had made an application for the determination of whether or not the will executed by one late Amos Chirunda on 9 December 1997 was valid. The application was dismissed with costs, hence this present appeal. The question before this Court therefore is whether or not the court *a quo* erred in finding that the will in contention was invalid.

Appellant's grounds of appeal before the court are as follows:

GROUNDS OF APPEAL

1. The court *a quo* erred in finding that the deceased's will was invalidated by him contracting a civil marriage with the appellant, who was already his spouse at customary law as at the date of the will.

2. The court *a quo* erred in finding that the deceased intended to appoint as executor 'his wife' in her capacity as such and not the Appellant in her individual stead.
3. The court *a quo* erred in finding that the first respondent lawfully married the deceased and is properly regarded as the surviving spouse of the deceased.

The facts are as follows. On 11 September 1977, the appellant was married to one Amos Chirunda according to customary rites. On 9 December 1977, Amos Chirunda executed a will which read as follows:

> "I, AMOS JOHN CHIRUNDA, do hereby revoke all past Wills and testamentary acts and declare this to be my last will.
>
> I appoint my wife MARGARET CHIRUNDA (nee SUMBURERU) to be my Executor and Heiress to my estate.
>
> In the event of my wife Margaret dying at the same time with me, I appoint my nephew HASTINGS CHIRUNDA and my sister ALICE CHIRUNDA to be joint Heir and Heiress to my estate in equal shares.
>
> I reserve to myself the power from time to time and at all times hereafter to make all such alterations in or additions to this my Will as I may think fit, either by separate act or at the foot hereof, desiring that all such alterations so made under my own signature and duly witnessed according to law, may be held to be as valid and effectual as if the same had been inserted herein.
>
> Given under my hand at Salisbury on this 9th day of December, 1977."

The appellant and Amos Chirunda who had registered their customary union under the **African Marriages Act [*Chapter 238*]** subsequently entered into a civil union on 29 October 1978 under the **Marriage Act [*Chapter 37*].** However, eight years later, the two ended their civil union by decree of divorce of the High Court on 23 July 1986. The appellant and Amos Chirunda were blessed with three children during the subsistence of their marriage. Sometime after the divorce, Amos Chirunda customarily married the first respondent and they lived together as husband and wife. Their customary union was not registered and neither did the two contract a civil marriage. Amos Chirunda died on

8 December 1997. Until the time of his death, Amos Chirunda lived with the first respondent as his wife.

Sometime in February 1998, the appellant was invited to the second respondent's office where she was asked to register the estate of the late Amos Chirunda in terms of his will. However, on 4 March 1998, the second respondent wrote letters to the appellant where he was seeking to have the appellant return the letters of administration that he had issued her with. The reason that prompted the second respondent to so write was that the appellant and the late Amos Chirunda had since divorced by the time of his death and, therefore, the appellant was disqualified by **s 17 of the Wills Act [*Chapter 6:06*]** from administering or inheriting from the estate of the late Amos Chirunda. The appellant did not yield to the second respondent's request which prompted the first respondent to make an application before the High Court seeking an order revoking the appointment of appellant as executor of the deceased's estate. The court dismissed the application on the basis that the will did not show any intention on the part of the deceased that his divorce from the appellant would invalidate the will, thereby prompting the first respondent to go on appeal against the dismissal of the application. The court's decision was based on **s 17(1) of the Wills Act [*Chapter 6:06*]**. The first respondent proceeded to note an appeal against that dismissal and the Supreme Court held that the High court had made a finding on the basis of the wrong law, the **Wills Act [*Chapter 6:06*],** whereas the appropriate law to be used instead was the **African Wills Act [*Chapter 240*]** because the **Wills Act** applied to wills made after 1 January 1988 while the will in contention had been executed on 9 December 1977.

Since the Supreme Court had not made a finding on whether or not the appellant had been removed as executor, the second respondent went on to appoint an independent

person as executor who is the third respondent who was issued with letters of administration as executor dative on 19 April 2005. The second respondent also appointed the first respondent as the surviving spouse of the late Amos Chirunda. That appointment was challenged before a magistrate's court. The magistrate found that the first respondent had been properly appointed as surviving spouse. That decision was appealed against by the appellant before the High Court which court found that the magistrate had made its finding on the basis of the wrong law but declined to state in definitive terms whether or not the first respondent was the surviving spouse although it expressed its reservations on the power of the second respondent to make a ruling on whether or not one is a surviving spouse.

The appellant then made an application in the court *a quo* where she sought that the court make a determination of whether or not the will of the late Amos Chirunda was valid. That question arose because the appellant was of the view that her appointment in the first place as executor had been done properly as per the will of the late Amos Chirunda and someone else being put in her place was contrary to the will of the late Amos Chirunda. Appellant's view therefore was that a determination on the validity of the will would clarify matters and confirm whether or not the appellant was the rightful executor of the estate of the late Moses Chirunda. Her draft order read as follows:

> "IT IS ORDERED (THAT) :
>
> 1. That the last will and testament executed by the late Amos John Chirunda on 9th December, 1977 be and is hereby declare to be a valid testamentary instrument.
> 2. That the Master of the High Court be and is hereby directed to admit that the said last will and testament to probate.
> 3. That the appointment of Wilbert Nyamupfukudza as Executor Dative by Letters of Administration issued to him by the Master of the High Court on 19th April, 2005 be and is hereby set aside.
> 4. That the Master of the High Court be and is hereby directed to re-issue fresh Letters of Administration to Margaret Sumbureru to enable her to administer the estate of the late Amos Chirunda.
> 5. That First Defendant, being Prisca Chinamora, pay the costs of this application."

In dismissing the application, the court *a quo* assessed the validity of the will in two ways. Firstly, since the Supreme Court had previously made a finding that the law to be used to assess the validity of the will was the **African Wills Act**, the court *a quo* looked at the relevant sections of that Act which are ss 6 and 7. They read as follows:

> "6. Subject to only the limitations imposed by this Act, an African may, by will freely dispose of the ownership of immovable property or any right attaching thereto.
>
> 7 The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will."

The court *a quo*, however, found that the Act did not have an express provision as to what would happen to that will or the benefits flowing to the African's husband or wife in the event of the death of that African who had executed a will divorcing the spouse whom they had made a beneficiary in that will. The **African Wills Act** had no provision similar to **s 17(1) of the Wills Act** which clearly ousted the rights of a person flowing from the will of a deceased person in the event that the person who had executed that will had divorced the person whom they had made a beneficiary in their will. In the absence of that express provision, the court a quo then looked at what could have been the intention of the deceased when he made the will in order to ascertain the validity of the will.

The court found that since at the time of the making of will, the appellant and the late Amos Chirunda had only been customarily married and that union would not allow the appellant to inherit from her husband, the deceased's intention was to avoid a situation where if he were to die he would die intestate thereby leaving his wife at the mercy of his relatives who would most probably enjoy the benefits of his estate to the exclusion of his wife. The court found that since the appellant and the late Amos Chirandu had since divorced, the intended purpose of expressly appointing the appellant as executor and heiress to avoid the

likelihood of her losing the inheritance battle against her husband's relatives should he die had since fallen away. Also, the court considered that the appellant had been awarded a significant settlement upon divorce. Hence, it could not have been the intention of the deceased to again have her benefit from the estate, reasoning thus:

> "The mischief that he had sought to circumvent in his will no longer applied with regard to the applicant as she was no longer his wife. It seems to me therefore that once the applicant ceased to be his wife, the will became invalid as it was no longer capable of enforcement."

The court *a quo* also dismissed the application on the basis of general law, holding that the will became void upon the termination of appellant and Amos Chirandu's marriage in terms of the **Marriage Act [*Chapter 37*]** in 1978. It is common cause that the deceased executed his will prior to his civil marriage with the appellant. The relevant law at that time was s **13 of the African Marriages Act [*Chapter 238*]** which provided as follows:

> "The solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of spouses which shall be held and may be disposed of unless disposed of by will shall devolve according to African law and custom."

Since the appellant and the deceased were married in terms of civil law, general law applied and the law applicable to the will at the relevant time was **s 2 of the Deceased Estate Succession Act [*Chapter 302*]** which provided as follows:

> "Except in the case of a party to a joint will who has adiated, a will, other than a joint will of an intended husband and wife who thereafter married each other, executed by any person prior to marriage shall become null and void on marriage *unless such person endorses on such a will that it is desired that the same shall remain in full force and effect.* Such endorsement shall be duly signed and witnessed in the manner required in the case of a will."

The court *a quo* concluded that since the will in contention had no provision that preserved its validity, the will became null and void upon the contracting of the civil marriage

between the appellant and the deceased. It was on the two approaches above that the court *a quo* dismissed the application before it.

Therefore, in considering whether or not this appeal should succeed, the question is whether or not it can be said that the court *a quo* erred in dismissing the application. The learned judge *a quo* was so logical and clear in determining the validity of a will in the absence of an express statute that governed what divorce would do to a will executed by an African in the event of his death. Moreover, it appears clearly from the will that the deceased did not endorse a statement to the effect that his will would remain in full force and effect notwithstanding his subsequent contracting of a civil marriage. The court *a quo* cannot be said to have erred in any way by coming to the conclusion that it made. It could not be said that the deceased intended the appellant to benefit from his estate when he had given her a settlement upon divorce in 1986. The intention to guard against any relatives preventing her from benefiting from the deceased's estate as his widower had been overtaken by the divorce. The court *a quo* was therefore correct in finding that the will was no longer valid.

DISPOSITION

The appeal be and is hereby dismissed with costs of suit following the event.

ZIYAMBI JA: I agree

PATEL JA: I agree

Atherstone & Cook, appellant's legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners