REGGIE MUTSINDIRI
versus
MOREBLESSING TAWODZERA (N.O)
and
IDAH MANDIZVIDZA
and
MASTER OF THE HIGH COURT NO
and
MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 7 February & 2 March 2023

Opposed Application

S Banda, for applicant
2nd respondent in person
B Hatinahama, for the 2nd respondent

TSANGA J: This is an application for a declaratur to the effect that the applicant's customary marriage to the Late Wilfred Mandizvidza is valid for the purposes of the Administration of Estates Act [*Chapter 6:01*].

In the alternative, the applicant Reggie Mutsindiri seeks that the proviso to s 68(3) of the Administration of Estates Act [*Chapter 6:01*] be declared unconstitutional to the extent that it violates applicant's rights to equal protection of the law from discrimination. Dissatisfaction is taken at the *proviso* which fails to recognise a customary law marriage contracted alongside an existing civil marriage. The quest is that it be struck down. Section 68(3) of the Administration of Estates Act provides as follows:

> (3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [*Chapter 5:07*], and any reference in this Part to a spouse shall be construed accordingly:
> Provided that such a marriage shall not be regarded as valid for the purposes of this Part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriage Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse.

It is juxtaposed against s 68(4) which provides as follows:

> (4) A marriage contracted according to the Marriage Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]:
> Provided that, for the purposes of this Part, the first-mentioned marriage shall be regarded as a customary-law marriage.

In essence s 68(4) recognises as a customary marriage, a civil marriage which is contracted whist a party was already married to someone else under customary law. In other words, for purposes of inheritance the civil marriage is downgraded to a customary marriage. The hue and cry from the applicant is why not the recognition of validity if it is the other way round, that is where a civil marriage is followed by a customary law marriage.

As a consequence of her quest for a declaratur, applicant therefore seeks that she be entitled to inherit the matrimonial home she acquired with the deceased in what she says is as a capacity as a surviving spouse of the deceased in circumstances that are not recognised by s 68(3).

The background facts

The applicant met the now deceased some time in 2005 at a time she says he had separated from his wife, Idah Mandizvidza, who is the second respondent in this matter. In May of that year, he is said to have instituted divorce proceedings against his wife Idah but applicant only discovered after his demise that he had never prosecuted that divorce to finality. He had then customarily married the applicant in December 2005 which marriage was not officialised beyond the lobola payments. In 2011, they had acquired property registered in both their names, known as stand 872 Ventersburg Township of Ventersburg, commonly known as Sunway City, Ruwa, measuring 2004 square metres. They built a cottage and moved there in June 2018. The deceased's two children from his first marriage were said to occasionally come and stay with them. The second respondent Idah, is also said to have been aware of the applicant's "marriage" to Wilfred.

Wilfred died intestate on 17 January 2021. The first respondent Moreblessing Tawodzera was appointed as executor dative and will hereinafter be referred to as the executor.

Applicant lodged among other claims, a full claim to the above mentioned property which she says is in terms of s 3A of the Deceased Estates Succession Act [*Chapter 6:02*].

In view of the reality of the existence of an undissolved civil marriage, the executor deemed Idah as the only valid spouse of the deceased. He took the view that the applicant should only be entitled to 50 percent as a co-owner since her customary law marriage to the deceased was invalid. The remaining 50 percent would be shared among the beneficiaries of the late Wilfred Mandizvidza.

It is in this context that applicant she seeks a pronouncement of her rights in relation to the state of the deceased. She seeks, put simply, to extend the incidences of marriage, in particular the right to inherit property in a situation where a marriage contracted against the backdrop of a civil marriage would otherwise be regarded as a legal nullity.

She admits to being a co-owner and says she lived with him for more than 15 years. She insists she has a right to inherit by virtue of s 3A of the Deceased Estates Succession Act but does not explain how she concludes that this should be the applicable piece of legislation given her actual circumstances. She says she is a spouse and in the alternative points to the unconstitutionality of s 68(3) of the Administration of Estates Act. As stated, the unconstitutionality in her view arises from the fact that the provision does not offer a widow like herself in a customary law union the same protection that is offered to a widow by s 68(4) under similar circumstances where a civil marriage occurring against the backdrop of an existing customary law marriage, is simply regarded as a customary law marriage for purposes of inheritance. The crux of her argument is that a customary law marriage occurring against the backdrop of a civil marriage should likewise receive the same honour.

Counsel for applicant, Mr Banda, argued that a declaratur should be granted because the applicant meets the requirements for such to be granted. She was an interested person with rights as a registered co-owner to the property in question and had lived together with the deceased for at least 15 years. Moreover, customary law bride price had been paid. He bemoaned the fact that the second respondent Idah would get full benefits to her house in Marondera which she acquired with the late Wilfred whilst applicant, on the other hand, would lose half of the Sunway City home also acquired with the late Wilfred. This, he argued would also violate the principle of equality before the law in terms of s 56 of the Constitution. He relied on *Greatermans Stores (1979) (Private) Limited T/A Thomas Meikles Stores & Anor* v *The Minister of Public Service, Labour and Social Welfare and Anor* CCZ 2/18 in which it was stated that:

> "The purpose of the right to equal protection of the law enshrined in s 56(1) of the Constitution is to ensure that those in similar circumstances and conditions who are the subjects of the legislation are treated equally, both in the privileges and in the liabilities imposed. There should be, as between them, equal protection of the law."

The crux of his argument was that the section makes an unjustified distinction between a surviving spouse in a customary marriage contracted subsequent to an undissolved civil marriage and a surviving spouse in a civil marriage contracted subsequent to an undissolved customary marriage. *In casu* the provision was said to discriminate against the applicant and her right to equal protection of the law resulting in manifest injustice rendering a widow destitute whilst enriching another.

On the other hand, Mr Tawodzera, the executor, emphasised the nullity and voidness of applicant's marriage for reasons already captured. In essence, he maintained that she has no legal basis for seeking to inherit the entire house as a spouse. In the face of an undissolved civil marriage he drew on *Mazarura* v *Kativhu* HH 287/2014 for the position that the spouse in the civil marriage remains the only surviving spouse. He similarly drew on *Biri* v *Tsuro* HH 18 /09 for the same principle on the non-legality of a marriage contracted against the backdrop of an existing civil marriage. He emphasised that the length of their stay together added nothing to the validity of the applicant's void union. Moreover, her rights had not been interfered with as what was being claimed was not her 50 percent share but that of the late Wilfred. In addition the Title Deed being in both their names the question of who contributed what or more was not relevant. As for the constitutional argument, he submitted that there is no basis for it since the applicant's marriage was never equal to that of the second respondent because the former's marriage was a legal nullity.

As for the second respondent, Idah, she submitted that in essence the applicant was simply in an adulterous relationship as applicant was fully aware of the monogamous marriage. She maintained that she is the legal wife. She also submitted that the claim is frivolous and vexatious and that costs should be awarded on punitive scale.

Analysis

What the deceased partook in was indeed a nullity. It was a simple nullity in that he was not in a position to take on another wife even in an unregistered customary law union which he did openly from the evidence of having paid lobola. His type of marriage did not permit him another wife in in the recognisable sense of a valid spouse. It is trite that in terms of our law, a party with a civil marriage is prohibited from contacting another marriage without

going through a divorce or dissolution of such marriage or unless dissolved by death. A marriage contracted by or with a party to a civil marriage which has not been dissolved by divorce or death is indeed a legal nullity. It cannot be declared as a valid marriage for the purposes of the Administration of Estates Act. The order sought in the main cannot be granted.

There is nothing unconstitutional in inheritance laws failing to recognise a customary marriage contracted against the backdrop of an existing civil marriage. This is because a man desirous of marrying more than one wife has from the onset, a choice of marriage in that he can contract a polygamous customary marriage from the very start. Should he realise where he has contracted a civil marriage that monogamy is not for him, he must re-sile out of such marriage legally before he can legally contract another marriage. There was no reason for the deceased not to divorce since divorce is no fault.

The application is indeed frivolous and vexatious. A civil marriage is not open to multi-partism for good reasons in the sense of validly taking on another wife whilst in it. Those who wish to avoid the drama and heartache associated with polygamy avoid it. It gives a chance of equality between the parties by excluding all others. In our context, African women in particular who opt for a civil marriage often do so specifically because they do not want the husband to have more than one wife. There is no reason to cut into the rights of those who opt for monogamy from the start by allowing other parties to come in through the back door of inheritance. Granted under the consolidated Marriages Act [*Chapter 15:15]* of 2022, civil partnerships are indeed now recognised for purposes of property distribution upon separation in that civil partnership even if a party to it had a civil marriage. In such circumstances the Matrimonial Causes Act [*Chapter 5:13*] is to be used to share the property of the civil partnership. In a similar vein, the executor is absolutely correct in his standpoint that the property acquired by the applicant and the deceased is to be shared. The applicant is not a spouse against the backdrop of a civil marriage as her marriage was simply a nullity.

The attempt to argue that s 3A of the deceased states Act applies is equally erroneous. The marriage was a nullity. The right to civil marriage must be protected for those who will have opted for that type of marriage. Holding otherwise would undermine the free choice of parties to select a monogamous marriage from the outset and all its attendant consequences on both dissolution and in death.

In the result the application in entirety is dismissed with costs.

Sinyoro & Partners, applicant's legal practitioners
Maran F and Company Legal Practitioners, first respondent's legal practitioners
Hatinahama &Associates, second respondent's legal practitioners