JOYCE CHARLIE
versus
MATIVENGA LLOYD MHISHI (In his capacity as the Executor Dative for the Estate of late Martin Charlie) DRH 932/15
and
THE MASTER OF THE HIGH COURT
and
WELLINGTON CHARLIE
and
HILARY CHARLIE
and
ITAI CHARLIE
and
ELECTOR CHARLIE
and
DIANA CHARLIE
and
ELINAH NYAMAYARO (for and on behalf of the minor child EDGAR CHARLIE)

HIGH COURT OF ZIMBABWE
MHURI J
HARARE 2 October and 13 November 2024

Mr S Machiridza for the applicant
Mr V Mavhondo for the first Respondent
No appearance for 2nd 3rd 4th 5th 6th 7th and 8th respondents

Opposed Application

MHURI J: This is an application for a declaratur wherein applicant is seeking that -:

1. The sole asset of the Estate of late Martin Charlie commonly known as Number 7 Meister Road, Ardbernie, Harare be and is hereby declared matrimonial property as envisaged in terms of section 3 A(a) of the Deceased Estate Succession Act [*Chapter* 6:02];

Consequently it be ordered that-:

1. First Respondent shall submit to second Respondent the Distribution account for Estate Late Martin Charlie reflecting the applicant as the sole beneficiary of the property known as Number 7 Meister Road, Ardbernie, Harare and,

2. Applicants' Legal practitioner be granted leave to serve this Order.
3. First and or second Respondent bear costs of this application on the attorney and client scale.

First Respondent opposed the application and in its opposition had raised three preliminary points, to wit, improper citation of first Respondent, the application being fatally defective for in its title it says it is for a declaratur and interdict, and fatal non joinder of other beneficiaries. The first and the third preliminary issues were attended to and two orders were issued addressing them. The second one about the title it was conceded that it was an error to include the word interdict and was not then persisted with.

The factual background that gives rise to this application as per the applicants' founding affidavit is that:-

Applicant was married to the late Martin Charlie in 1978 in terms of the then Marriages Act [*Chapte*r 5:11]. The marriage subsisted until 13 August 2015 when her husband Martin passed on. She is the surviving spouse of Martin Charlie.

During the subsistence of their marriage, they acquired immovable property known as Number 7 Meister Road Ardbernie, Harare was aquired. This immovable property is the only property that forms the estate of the late Martin Charlie.

During the process of winding up the estate, an issue arose as regards the distribution of the residue of the estate. The first and second Respondents are of the view that the property in question does not constitute matrimonial property hence it should be shared among all the beneficiaries.

Applicant avers in her founding affidavit, that in 1999 she relocated to the United Kingdom to seek greener pastures. She has been working there but Zimbabwe is her home and the property in question remains the only home she knows. Her husband sired four children with other women who have shown an interest in the winding up of the estate and have it shared to them as well. She averred that since the property is the matrimonial home and only asset of the estate, there is no asset for the children to inherit as it is the preserve of the surviving spouse. When she left for the United Kingdom, she has been sending money to ensure that the property is maintained, this is demonstration of her connection to the place, as such she cannot now be disenfranchised of the property because her husband is now deceased or that he had extra marital affairs. She submitted

that her initial offer to buy out other beneficiaries should not be held against her. This shows the magnitude of her attachment to the property and willingness to protect the property she bought with her husband. This speaks to her connection to the place.

In opposition, it was first respondent's case that the only issue is whether or not applicant was living on the property immediately before deceased's death, for her to fall under the ambit of s 3A (a) of the deceased Estates Succession Act [*Chapter* 6:02] (The Act).

It was first Respondents submissions that by going to the United Kingdom applicant had abandoned the matrimonial home, in other words she was not living in the house in question immediately before the death of the deceased. She was away from the matrimonial home for over 16 years or more and she never returned to the house not even for his burial. She did not even assist during his illness nor assist during the funeral. Deceased was living with another woman whom he had a child with (8th respondent) until his demise. This was a *defacto* divorce, so argued first Respondent, and that a party who lived in a *defacto* divorce cannot be entitled to come back at the demise of the other spouse and claim the matrimonial house as his or her exclusive property to the exclusion of children of the marriage and subsequent unions born and lived at the house.
It was further submitted that after deceased's death applicant sent her relatives to go and collect her belongings from the house. She also initially agreed that the house was to be shared equally among the beneficiaries and later indicated her readiness to buy out the other beneficiaries. First respondent prayed for dismissal of the application.

It is common cause that applicant was married to the late Martin Charlie. She is the surviving spouse and that during the subsistence of their marriage the property which in the subject of these proceedings was bought. In 1999 applicant left the matrimonial home for the United Kingdom leaving the late Martin Charlie at the property. Applicant never returned to the house since 1999 even at the demise of her husband. It was not stated when, if ever she did, after the demise of her husband, that she came back to the house.
What this Court is to determine is whether applicant lived at this property immediately before the demise of Martin Charlie- her husband, for the property to devolve to her solely as matrimonial property or to be estate property to be shared among all beneficiaries.

Section 3A of the Act provides as follows:-

"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;
> (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."

It is subsection (a) above, which is the bone of contention in this matter. First respondent's position is that applicant was not living at the property immediately before the demise of the deceased.

It is not in dispute that applicant is the surviving spouse of the late Martin Charlie. Neither is it in dispute that applicant and the late Martin lived in this house before she left for the United Kingdom. It is also not in dispute that applicant left for the United Kingdom (whether it was in 1994 or 1999 it is of no consequence). She never came back to the matrimonial home at all, even during the time the late Martin was ill and even for his funeral. Before the demise of Martin, applicant sent her relative to collect her belongings from the house and by then the late Martin was living with eighth respondent as husband and wife as from 2008 until his death in 2015.

It being common cause that applicant is the surviving spouse of the late Martin, the requirement that a person who seeks to inherit the house must be the spouse, is met. That notwithstanding, does applicant meet the next requirement that she lived in the house in question immediately before the deceased's death?

CHITAKUNYE J (as he then was) put it succinctly in the case of *Margaret Chirowodza* v *Freddy Chimbari and Others* HH 725/16 that:-

> "In the circumstances, of importance is the interpretation to be accorded to the phrase "lived in" in section 68 F(2)(c)(i) of the Act. In Black's Law Dictionary, 4th ed live in is defined as: to live in a place, is to reside there, to abide there, to have one's home.
> To reside may be taken to mean to live in a place permanently. (Webster's Universal Dictionary & Thesaurus). In deciding whether in the circumstances obtaining applicant is covered by the provisions of s 68F(2) (i) of the Act, it is pertinent to bear in mind the intention of the Legislature. The interpretation given must be such that the surviving spouse and children are not made destitute or homeless when they had a home during the deceased's lifetime. It is in this light that the law guarantees them of the shelter they lived in before deceased's demise. In instances where a couple has been living apart for some time it is important to ascertain the nature of such separation before determining whether such separation would disentitle a spouse to the protection envisaged in the aforementioned piece of legislation."

As stated earlier, applicant left the matrimonial home in 1999. She alleged it was for greener pastures. She alleged she sent money for the upkeep of the children and maintenance of the home. No proof however was availed to show that she sent money for the maintenance of the home. Sending money to the children is not maintaining links with the home, in my view as some of the children were not resident at this house. She never returned to this house since her departure in 1999, not even to come and see her ailing husband, not even to come and attend his funeral and burial. She was absent for 15 years, and never returned. She sent her relative to come and collect her belongings. Borrowing CHITAKUNYE J's remarks, I thus conclude that even applying the purposive approach it cannot be said applicant lived in the house immediately before deceased's death.

Jessie Chinzou v *Oliver Masomera and Others* HH 593/15.

It would not have been the intention of the Legislature that a spouse who leaves his/her matrimonial home for years, maintains no links with the home for years on end, can be allowed to come back at the demise of his/her spouse and claim as her or his sole inheritance the matrimonial home to the exclusion of the children of the marriage and those born outside the marriage and who had been living on the property, as the situation *in casu.*

It is noted that initially applicant had agreed that the house be shared equally among all the beneficiaries, herself included. She had also indicated her willingness to buy out the other beneficiaries and they had agreed to this. As submitted by first respondent, she cannot be allowed to blow both hot and cold.

All having been said, it is my conclusion that applicant has failed to pass the hurdle that she lived in the matrimonial home immediately before her husband's demise. Section 3A (a) of the Act therefore does not cover her.

In the premis, it is ordered that

1. The application for a declaratur be and is hereby dismissed with costs.

MHURI J:…….

Tafadzwa Ralp Mugabe Legal Counsel, applicant's legal practitioners
Mhishi Nkomo Legal Practice, first respondent's legal practitioners