ROBERT THOMAS ZAWAIRA APPLICANT
versus
W NYAMUPFUKUDZA
(in his capacity as executor dative in the Estate late
Thomas Tavagwisa Zawaira)
and
THE MASTER OF THE HIGH COURT
and
FAITH POTTS (in her capacity as Guardian of minor child George Zawaira)
and
ANNA ZAWAIRA
and
JOSEPH ZAWAIRA
and
TENDAYI ZAWAIRA
and
ALEXANDER ZAWAIRA
and
JULIUS ZAWAIRA
and
KUNDAI ZAWAIRA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 February, and 3 November 2011

OPPOSED APPLICATION

H Mukonoweshuro, for applicant
A Nyamupfukudza, for 1st respondent
Munangati- Munongwa, for 3rd - 9th respondents

CHITAKUNYE J: The applicant is a son to the late Thomas Tavagwisa Zawaira who died on 5 September 2003.

The first respondent is the executor in the estate late Thomas T. Zawaira. The second respondent is cited in his official capacity. The third respondent is a mother and guardian of a minor child George Zawaira. The fourth to ninth respondents are all adults.

The late T.T. Zawaira was married to the late Felistas Jimisayi Zawaira at Chirumanzu on 21 August 1958 in terms of the Marriages Act, [*Cap 5*:*11*]. The marriage was blessed with six children including the applicant. All these children are now adults.

The late T. T. Zawaira also had a total of ten children out of wedlock. The ten include the fourth to ninth respondents, George Zawaira, Veronica Zawaira, Sekai Zawaira and Mary Zawaira. Of the ten out of wedlock children three are minors whilst one suffers from mental disability.

The late T.T. Zawaira died intestate on 5 September 2003. His estate was duly registered under DR 988/07. The first respondent was appointed executor dative thereof.

Upon being appointed the first respondent went about administering the estate. He thereafter lodged with the second respondent a second and final Administration and Distribution Account in terms of which he distributed the estate equally to the surviving spouse and all the children of the late T. T. Zawaira.

The account was duly advertised in terms of the law and lay in inspection from 27 February 2009 to 20 March 2009.

The applicant lodged an objection with the second respondent. In his objection he contended that in terms of the general law children born out of wedlock cannot succeed *ab intestate* to their father or father's relatives.

The second respondent dismissed the objection arguing that the laws of succession in this country treat all children of the deceased as being equal. In this regard the second respondent cited ss 3 and 3A of the Deceased Estates Succession Act [*Cap 6*:*02*]. In his report in terms of r 248 of the High Court Rules the second respondent also referred to s 10 of the Deceased Persons Family Maintenance Act [*Cap 6*:*03*] as further support of the contention that there is no more distinction between children born out of wedlock and those born in wedlock.

Not being satisfied with the second respondent's response the applicant approached this court seeking a declaratory order that only the children of the late T.T. Zawaira born in wedlock are the only legitimate intestate beneficiaries of the late T.T. Zawaira.

The first respondent opposed the application contending that in as far as the applicant acknowledges that the ten out of wedlock children are those of T.T. Zawaira there is no longer

the question of legitimacy and so there should be no differentiation between children born in wedlock and those born out of wedlock.

The third respondent also opposed the application contending that all children born of the late T.T. Zawaira must benefit equally from the estate. The fourth to the ninth respondents did not file any opposing affidavits.

The issues for determination were identified as:-

1. Whether or not the children born out of wedlock of the late Thomas Tavagwisa Zawaira can succeed *ab intestate* to their father or father's relatives.
2. Whether customary law or general law should apply in the resolution of the matter.
3. Whether or not the children of the deceased born out of wedlock are l*egitimate intestate* beneficiaries of the late estate Thomas Tavagwisa Zawaira.

The applicant argued that as the deceased was married in terms of the Marriages Act [*Cap 5*:*11*], general law must apply. The respondents on the other hand contended that though the applicant married in terms of the Marriages Act, customary law must apply.

On the question of succession the general law position is that:

> "…illegitimate children cannot succeed *ab intestate* to their father or their father's relatives similarly; the father and his relatives cannot succeed *ab intestate* to the illegitimate children."

See Family Law in Zimbabwe by Welshman Ncube LRF at p 73.

That position has not been altered. The issues of succession under general law would be dealt with in terms of the Deceased Estates Succession Act, [*Cap 6*:*02*].

The customary law position on the other hand is to the effect that all children regardless of whether they were born in wedlock or out of wedlock are entitled to benefit from their late father's estate as "beneficiaries". The issue of succession under customary law is governed by the Administration of Estates Act, *Chapter 6*:*01*.

The applicant argued that the estate must be dealt with in terms of the Deceased Estates Succession Act whilst the respondent contended that the estate must be dealt with in terms of the Administration of Estates Act (*supra*). The respondents' contention was premised on the

apparent favorable provision under part 111 of that Act. However for that part to apply it must be shown first that the deceased was subject to customary law.

Section 68A of that Act states that:

"(1) Subject to subs (2), this part shall apply to the estate of any person to whom customary law applied at the time of his death."

To determine whether the deceased person was subject to customary law or not s 68G thereof provides that:-

"(1) Section 3 of the Customary Law and Local Courts Act [*Cap 7*:*05*] shall apply in determining the question whether or not customary law applied to a deceased person for the purpose of this Part:

Provided that it shall be presumed, unless the contrary is shown, that-

(a) customary law applied to a person who, at the time of his death, was married in accordance with customary law; and

(b) the general law of Zimbabwe applied to a person who, at the date of his death, was married in accordance with the Marriages Act [*Cap 5*:*11*] or the law of a foreign country, even if he was also married to the same person under customary law."

Section 3 of the Customary Law and Local Courts Act (*supra*) provides that-

"(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires-

(a) customary law shall apply in any civil case where-

(i) the parties have expressly agreed that it should apply; or

(ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or

(iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;

(b) the general law of Zimbabwe shall apply in all other cases."

Subsection (2) of section 3 states that-

> "surrounding circumstances", in relation to a case shall, without limiting the expression, include-
>
> (a) the mode of life of the parties;
>
> (b) the subject matter of the case;
>
> (c) the understanding by the parties of the provisions of customary law or general law of Zimbabwe, as the case may be, which apply to the case;
>
> (d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be."

In *casu*, it is common cause the deceased was married in terms of the Marriages Act, *Chapter 5*:*11*. No other marriage is alleged with any other woman. Thus even going by respondents' arguments the presumption is that he intended his estate to be governed in terms of the general law. For that presumption to be rebutted respondents must show that despite the deceased having married in terms of the general law the surrounding circumstances are such that he is subject to customary law.

The respondents' major point in this bid was the fact that the deceased sired ten out of wedlock children with different women. They contended that that showed that he was subject to customary law. The respondents could not allude to any other factors. One may thus ask is the factor of siring children out of wedlock with various women peculiar to people subject o customary law only? The answer, in my view, is no.

Apart from siring the children, the deceased did not marry the women in question. It was not shown that he had expressly agreed that customary law should apply despite his marriage in terms of the Marriages Act. His mode of life was not shown to have been such as to infer that he was subject to customary law.

In my view, the fact of having out of wedlock children, on its own, is inadequate to conclude that the deceased was subject to customary law at the time of his death.

The next point to consider is whether or not the differentiation between legitimate and illegitimate children on issues of intestate succession has been removed.

The first respondent referred to the case of *Chinho* v *Chinho* 2006 (2) ZLR 123 (H), as support for the contention that there is no more differentiation between children born in wedlock and those born out of wedlock even under general law. That argument was clearly misplaced.
In *Chinho* v *Chinho* (*supra*) the applicant had been married to the deceased for about twenty-seven years under an unregistered customary law marriage. Four children were born of that marriage. About three years before he died, the deceased contracted a marriage under the Marriages Act [*Cap 5*:*11*] with the first respondent. In determining the status of the two women the court said that-

> "The legislature appeared to have paid heed to the court's call to amend the law and amended the Administration of Estates Act [*Cap 6*:*01*] by the Administration of Estates Amendment Act No. 6 of 1997 which repealed s 68 of the principal Act and substituted it with a new part which caters for estates of persons subject to customary law. The new part defines a beneficiary as follows:
>
> "beneficiary" in relation to a deceased person's estate means-
>
> (a) a surviving spouse or child of the deceased person; or
>
> (b) where the deceased person left no surviving spouse or child, any person who is entitled to inherit any property in the estate in terms of this part."

Court went on to say that-

> "**the amendment Act validated marriages contracted in terms of customary law for purposes of the estates of persons subject to customary law by providing the following** in s 68 (3):
>
> (3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this part not withstanding that it has not been solemnized in terms of the Customary Marriages Act [*Cap 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 Marriages Act [***Cap 5*:*11*] or the law of a foreign country under which persons are not permitted to have more than one spouse." (emphasis is mine)

In *casu* the deceased was already married in accordance with the Marriages Act *Chapter 5*:*11* when he associated with other women and sired the out of wedlock children. Such associations were not referred to by any of the parties as customary law marriages. In any case

even if one argued that they were customary law marriages, they came after the civil rites marriage and so in terms of the above proviso they could still not be valid marriages for purposes of this part of the Act. Thus the respondent's contention in this regard was without merit.

I am of the view that the deceased cannot be said to have been subject to customary law at the time of his death. His estate must be dealt with in terms of the general law.

The amendment to the definition of beneficiary alluded to in *Chinho* case (*supra*) pertained to part 111 of the Administration of Estates Act. That part applies to persons subject to customary law and so is not applicable in this case.

The legislature has not seen it fit to alter the general law position on intestate succession under general law. The second respondent's opinion that ss 3 and 3A of the Deceased Estates Succession Act and s 10 of the Deceased Persons Family Maintenance Act removed the distinction between children born in wedlock and out of wedlock was incorrect.

Sections 3 and 3A of the Deceased Estates succession Act pertain to the entitlement of spouses of deceased persons who die intestate and the inheritance of matrimonial home and household effects by such spouses. Those sections do not in any way affect the general law position on succession *ab intestate*.

Section 10 of Deceased Persons Family Maintenance Act provides temporal protective rights to the surviving spouse and children, which rights terminate upon the completion of the administration of that portion of the deceased estate to which those rights relate. This section does not in any way amend the general law position on intestate succession.

Accordingly, the children of the deceased born out of wedlock are not legitimate intestate beneficiaries of the estate late Thomas T Zawaira. Though the illegitimate children cannot succeed *ab intestate* to their father, they may have recourse to the Deceased Persons Family Maintenance Act as dependants.

Section 3 of the Deceased Persons Family Maintenance Act (*supra*) states that:

> "(3) Any dependant of a person who dies after the 19th January, 1979 may, subject to this Act, make application for an award from the net estate of the deceased".

In section 2 of that Act a dependant is defined as-

> "Dependant", in relation to a deceased, means-

(a) a surviving spouse;
(b) a divorced spouse who at the time of the deceased's death was entitled to the payment of maintenance by the deceased in terms of an order of court;
(c) a minor child;
(d) a major child who is, by reason of some mental or physical disability, incapable of maintaining himself and who was being maintained by the deceased at the time of his death;
(e) parent who was being maintained by the deceased at the time of his death;
(f) any other person who-
    (i) was being maintained by the deceased at the time of his death; or
    (ii) was entitled to the payment of maintenance by the deceased at the time of his death;"

A "Child" is defined as, "in relation to a deceased, includes an adopted and an illegitimate child of the deceased;"

I am of the view that depending on the individual circumstances of each respondent they may proceed in terms of this Act.

Accordingly the application is granted as follows-

1. The only lawful intestate beneficiaries of the Estate of the late Thomas Tavagwisa Zawaira are the children born out of the late T.T. Zawaira's union with the late Mrs. F J Zawaira.
2. The costs of suit shall be borne by the estate late T.T. Zawaira

H Mukonoweshuro & Partners, applicant's legal practitioners
Phiri & Partners, first respondent's legal practitioners
*Munangati & Associate*s, 3rd to 9th respondents' legal practitioners