KETTY KAWONDERA
versus
LINDA NYAWASHA
and
VIMBAI NYAWASHA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 22 March 2018, 11 April 2018, 16 April 2018 and 29 January 2020

Opposed Matter

N.Magumise, for the applicant
C. Chengeta, for the respondents

NDEWERE J: On 19 September, 2016 the applicant filed a court application for a declaratory order declaring the Family Deed of Settlement of 21 August, 2008 null and void and confirming her as the rightful owner of stand 5819 Glen Norah B, Harare. She relied on s14 of the High Court Act, [*Chapter 7:06*].

In her founding affidavit, the applicant stated that she was married to the late Gideon Nyawasha as his first wife. She said the late Gideon died at Musanhu village in Uzumba Maramba Pfungwe under the care of his second wife. After the deceased death, she said she jointly, with the deceased's second wife, embarked on a process of estate registration. They found it difficult so in the end they appointed a neutral executor. On 21 August, 2008, the executor presided over the conclusion of an agreement with the first and second respondents concerning house number 5819, Glen Norah B, Harare. She said she protested against this since the second wife had the communal home which was not shared out to the applicant but the executor did not take heed of her protestations

She said she was later advised that the agreement of 21 August, 2008 was illegal. She said the Master should have followed section 68 of the Administration of Deceased Estates Act [*Chapter 6:01*] as amended by the Administration of Estates Amendment Act No. 6 of 1997 which provides as follows:

> "68F(*c*) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (*b*)—
> (i) where they live in separate houses, each wife should get ownership of or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person's death, together with all the household goods in that house."

She said she was therefore approaching the court so that the 21 August, 2008 agreement is declared null and void as enforcing that agreement would leave her homeless at the hands of the first and the second respondents who want to enrich themselves by selling house number 5819, Glen Norah although they are now majors with their own properties. She said she had occupied the house since the eighties and it was not just her home but also her source of income as she collects rentals from part of it.

The second respondent filed an opposing affidavit on 26 January, 2017. The first respondent filed a supporting affidavit on 26 January, 2017 confirming the position taken by the first respondent. The respondents raised points *in limine*. They said the executor should have been cited as a party. They also said the matter had prescribed since the Estate Distribution was finalised on 17 February, 2011.

On the merits, the respondents submitted that the redistribution of the estate was done in accordance with an agreement which the applicant voluntarily signed. They denied that she was entitled to a lion's share. They prayed for dismissal of her claims. The Master filed his report on 10 November, 2016. He said the Estate was properly administered as provided for under s 5 of the Deceased Estates Succession Act, [*Chapter 6:02*]. He further referred to s 68 F (2) (b) and (2) (c) of the Administration of Estates Act, [*Chapter 6:01*].

The case was argued on 22 March, 2018. The respondents started by abandoning all the points *in limine* they had raised; about non citation of the executor and prescription. So the matter proceeded straight to the merits.

In her arguments, the applicant attacked the Executor's decision in presiding over the family agreement. She said he applied the law wrongly. She said the Deceased Estates Succession Act [*Chapter 6:02*] whose s 5 the Master said he relied on is applicable to Civil Marriage estates and not to customary marriage estates. She said the present estate arose from a deceased who had a customary polygamous marriage therefore general law provisions did not apply to it. She said s 68A of the Administration of Estates Act, [*Chapter 6:01*] as amended by Act No. 6 of 1997 is the part that applied to the estate of persons to whom customary law

applied at the date of the deceased's death. She said further, the implications of the 21 August, 2008 agreement were not fully explained to her before she signed the agreement.

The court also noted that in his report which is in the record, the Master did not indicate that he had fully explained the implications of the agreement of 21 August, 2008 to all the parties' before it was finalised as required in terms of s 68 E (2)(b) of the Administration of Estates Act, [*Chapter 6:01*].

The respondents contended that s 68 F (2)(b) of the Administration of Deceased Estates [*Chapter 6:01*] as amended is the applicable law and it provided that one third of the net estate should be divided between the surviving wives with two shares to the first wife and one share to the other wife …." and the remainder of the state should devolve upon his child or his children in equal shares.

It is crucial to note that although the respondents were relying on section 68F (2)(b) above, the applicant was in fact not given the two shares, but was made an equal shareholder with the children. The Family agreement reduced the applicant to a child just like the respondents, and gave her a child's share, equal with what each of the two respondents got. Therefore even the section which the respondents purport to be relying on was not properly followed. Furthermore, s 68 F (2)(c) specifically provides that the wives should receive the houses they lived in plus what they will get from s 68 F (2)(b).

The applicant contended that she should have been awarded the house which she lived in at the time of the deceased death, which is 5819 Glen Norah, while the second wife retained the rural home where she lived at the time of the deceased's death.

The court is persuaded by the applicant's assertions. In terms of the current legislation, the matrimonial home of a couple; even a communal home is not availed to other beneficiaries where there is a surviving spouse. In terms of s 68F (2)(c), the matrimonial home is reserved for the surviving spouse or spouses, for her or them to continue living in it so that they do not become homeless because of the other spouse's death.

The Master said in his dealings with the Estate, he relied on s 5 of the Deceased Estates Succession Act, [*Chapter 6:02*], yet that statute applied to estates involving civil law marriages. The marriage he was dealing with was a customary marriage and a polygamous one for that matter.

Reliance on a wrong provision of the law makes the decision arrived at null and void from the outset. So the court can set aside the distribution which was based on the null and void agreement.

Secondly, the executor in the agreement he presided over, improperly applied s 68F in that he equated the applicant with a child resulting in the applicant getting one third of the house, just like the two respondents who were children and had never contributed to the acquisition of the house yet the applicant was supposed to get the house first, and in addition, two shares of the one third of the other property left in the net estate. A closer look at the family agreement clearly shows that it was skewed in favour of the respondents and their mother all the way, while it prejudiced the applicant greatly.

The applicant was awarded a third of the Glen Norah house while the respondents' mother retained the rural home and obtained a life usufruct on the Glen Norah house; thus giving the respondents' mother two homes This means the two respondents could join forces and use their two thirds share to force a sale of the house and the applicant would be left homeless. Indeed there is a letter to the Master in the record which states that the respondents would like the house to be sold so that they derive a benefit pursuant to their one third share each.

Alternatively the respondents could bring their mother to live with them, using the agreement, and occupy most of the house using the 2nd wife's life usufruct; to the prejudice of the applicant whose source of income are rentals from part of the house.

It is clear from the papers in the record that the deceased was a polygamist with one house in Glen Norah where the applicant was based and a communal home in Mutunhu, Chief Nyajina; Uzumba Muramba Pfungwe where the respondent's mother was based and where the deceased died. At that communal home, he kept 2 herd of cattle, cultivator, plough, wheel barrow, two bicycles and a scotch cart.

So clearly, in terms of s 68 F (2)(c)(i) of the Administration of Estates Act, [*Chapter 6:01*] as amended, an appropriate distribution of the estate was that Shelter, the second wife would retain her communal home, as she did, while the applicant retained 5819 Glen Norah B, her home at the time of the deceased's death.

In view of the reasons outlined above it is ordered that:

(1) the agreement between the applicant and the respondents dated 21 August, 2008 be and is hereby declared null and void.

(2) the applicant be and is hereby declared as the rightful heir to stand 5819 Glen Norah 13, Harare,

(3) Each party shall pay its own costs.

Legal Aid Directorate, applicant's legal practitioners
Chengeta Law Chambers, 1st and 2nd respondent's legal practitioners