EDITH MAYISVA
versus
MASTER OF THE HIGH COURT N.O.
and
J.B. MEYBURGH N.O. (In his capacity as the Executor to
The Estate Late Tom Peterkin Mayisva)

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 12 November 2010 and 23 November 2011

**Opposed Court Application**

*K Kadzere*, for the applicant
*L Uriri* with him *T Z Chadambuka*, as amicus curiae

GOWORA J: The applicant was married to the late Tom Peterkin Mayisva under the Marriage Act, which is now [*Cap 37*] on 1 January 1970. Tom Mayisva then passed away on 11 April 2006. The parties had five children. It is not in dispute that Tom Mayisva had a long term adulterous relationship with one Linah Pilime and that four children were born out of this relationship. Mayisva had another long term adulterous relationship with Margaret Maramba with whom he had another five children. The applicant has no knowledge of the details pertaining to these children with the exception of two born in 1982 and 1992 respectively. In addition the applicant states that Mayisva had four more children with different women whose further details were not known to her.

On 15 July 2007 the Master held a meeting at his offices where a decision was made that all the eighteen children sired by Mayisva, including those born out of wedlock, were the heirs to the estate of Mayisva in equal shares. The Master had further ruled that the law relating to intestate succession had changed and that it now recognised children born out of wedlock as beneficiaries to the estates of their biological fathers. As a result the Master directed that the thirteen children born out of wedlock by her late husband be included by the executor in the

distribution plan. The applicant had therefore approached the court to have the decision of the Master reviewed on the ground that it was unlawful and illegal as it had no basis in our law.

The applicant contends that the union she and her husband contracted was a civil union, which was monogamous in nature, and that such a marriage was subject to the general law as it related to intestate succession. She contends further that the estate of the late Peterkin Mayisva was governed by the common law as modified by the Deceased Estate Succession Act [*Cap 6:02*] which provides that a surviving spouse is entitled as of right to inherit the matrimonial home and the household goods and effects and, thereafter, the remaining free residue of the estate would be shared equally among the legitimate children of the deceased and the surviving spouse. She contended further that at common law children born out of wedlock were illegitimate and not entitled as of right to inherit from their father *ab intestato*. She stated that the common law position to her knowledge had not been altered by any statutory provision. The law as she was made to believe had only provided for children born out of wedlock the right to claim maintenance from the estate of the deceased. It had not bestowed upon them the right to inherit. The decision of the Master was therefore unlawful as having no foundation in law and she accordingly prayed for it to be set aside.

The application was served on the Master who filed a report in response thereto. It was noted in the report aforesaid that the application was filed outside the 30 days provided for the filing of a review against his decision in terms of the Administration of Estates Act. In terms of s 52 (9) (i) a person aggrieved by a decision of the master in relation to a distribution account may make application to the High Court within thirty days of the decision being made for such decision to be set aside. The right to have the decision of the Master set aside is provided for in a statutory provision which sets a time period for the filing of such application. The Master has not responded to the substantive relief being claimed as he is not an interested party in the resolution of the dispute. He has however stated in the report referred to above that the application has no merit and that it ought to be dismissed. The applicant did not cite the beneficiaries who had been accorded the status of heirs by the Master.

Mr *Kadzere* in addressing the court indicated that although not cited, they had applied to be joined as parties to the dispute and had in fact been joined. This application was however not served upon them. I felt compelled in view of the nature of the application before me to seek the

assistance of counsel in seeking clarity in the law. I am indebted to Mr *Uriri* for affording his time to file heads of argument and appear as *amicus curiae.*

It was argued by Mr *Uriri* that the applicant states in the founding affidavit that she is seeking a review of the decision of the Master of the High Court. Therefore it was critical that the factual basis for the review be found in the founding affidavit. The affidavit speaks of a meeting held on 15 July 2007 but does not disclose the circumstances leading up to the meeting itself. The only circumstances under which the Master would have given a direction is if he was dealing with an objection under s 52 of the Act. It was his contention that his court has been left in the invidious position where it has to assume that the meeting was convened because the Master was dealing with an objection. If the Master was dealing with an objection he could only have done so under s 52 (9) and in terms of that section the Master's an application to have the decision set aside has to be filed within thirty days of the date of the decision.

Mr *Kadzere* submitted that what the applicant actually seeks is a declaratory order as part of the relief she has asked this court to provide, even though the actual application speaks of a review. His view was that in view of the provisions of s 14 of the High Court Act [*Cap 7:06*] this court has the power and discretion to issue a declaratory order at the instance of an applicant. That is correct. The applicant has clearly not complied with the provisions of s 52 (9). This is a hurdle that the applicant cannot surmount. The declaratory order would in my view only issue subsequent to a review of the decision of the Master.

In *Mtetwa v Mupamhadzi* 2007 (1) ZLR 253 at 255G-256A GWAUNZA JA had this to say:

> "As the judge *a quo* found, the clear meaning of this provision is that an application to set aside an award may not be made more than three months after the party seeking to have it set aside, received the award. It is not in dispute that the application in question was filed some 14 months after the appellants had received the arbitral award in question. The learned judge *a quo,* I find, correctly noted that that Article 34 does not provided for a possible extension of the period for good cause shown or any other ground. I can also find no fault with her conclusion, based on the authorities cited, that the right to have the award set aside was irrevocably lost when the applicants failed to file their application on or before 1 December 2004, the last day of the three month's period stipulated in the Arbitration Act."

I respectfully associate myself with those comments. In *casu*, the application to set aside the decision of the Master was launched more than thirty days after it was made. The section which affords the right to an aggrieved party does not allow for an extension of the time within which such review may be launched. This court cannot accord to itself the power to condone the failure on the part of the applicant to file the application within the period provided for by statute.

Mr *Uriri* in his heads of argument submitted that this court does not have the jurisdiction to entertain the application given the failure on the part of the applicant herein to comply with the time limits set by the provision. A court does not have the power to waive requirements or time limits set in a statutory provision unless the statute accords the court such power. In the instant case the applicant has filed her application outside the thirty day limit set in the section from which the right to set aside the decision by the Master is derived. I agree with the submission by Mr *Uriri* that this court does not have the jurisdiction to determine the application for review.

In *Chibvamuperu & Ors* v *Mudzengerere & Ors* HH 46/08 MAKARAU JP (as she then was) said that a court did not have the power to extend a time limit set in a statutory provision. To do so would be to usurp the power to legislate which is the purview of Parliament. In the absence of compliance on the part of the applicant to observe statutory time limits I have to find that the application is not properly before me.

This application was set down on the Unopposed Roll for an order to be granted in default of any party that may have been cited or served. The section under which the decision of the Master is reviewed requires that notice be given to any person affected by the direction given by the Master. In this case the applicant was supposed to send notice to the children who the Master had directed be regarded as heirs to the estate of the late Peterkin Mayisva. Although the order sought would have the effect of depriving them of the right to inherit from the estate of their father as directed by the Master, the applicant did not cite or serve them with documents. In my view this failure to give them notice of the application for review is fatal to the applicant's case.

Mr *Kadzere* has accepted that despite the provision of the Act, the application was not served on the beneficiaries who had in fact been joined as parties under Case No HC 459/08.

This application is described as a review by the applicant. Order 33 r 256 of the Rules of the High Court provides that any proceedings for the review of a decision of any court, tribunal or official shall be by way of court application and delivered to the official whose decision is being reviewed and to all the other parties affected. Order 32 applies to applications for review brought under Order 33. In terms of Order 32 r 231 a copy of a court application and of every affidavit by which it is supported shall be served upon every respondent.

It seems to me strange that any litigant would be presumptuous enough to enrol a matter as unopposed in circumstances where the parties directly affected by the order being sought have sought for an order for their joinder and have in fact been joined as parties to the *lis*. The fact of their joinder does not appear in the papers but was a submission by the applicant's legal practitioner from the bar. This court has the discretion under r 87 to order the joinder of a party to proceedings in order to ensure that all matters in dispute may be effectually and completely be determined and adjudicated upon. I cannot join a party who has already been joined to proceedings. I cannot however hear a matter in the absence of a party who may be prejudiced by the matter being heard in his absence. In this case the applicant has deliberately avoided serving the documents on the beneficiaries to the estate on Peterkin Mayisva even though there exists an order for their joinder to this *lis*. I have not been afforded a reason as to the failure to serve them with papers and it is not for me to speculate. However, the failure to serve them with papers is fatal to the application in that the applicant is deliberately seeking redress in the face of persons who are entitled to be heard without notice to them. The prejudice to their rights is such that I am unable to accede to the application

In view of the nature of the relief that the applicant seeks and the effect that such relief would have on the lives of the children sired by the applicant's deceased husband, I have felt compelled to deal with the matter in substantive form rather than dismiss it on a technicality. Mr *Uriri* accepts that indeed the common law position is to the effect that a child born out of wedlock has no entitlement to inherit *ab intestatio* from the estate of his or her father. He submitted that the common law position flies in the face of the human rights set out in the Constitution of Zimbabwe for the following reasons:

It is a violation of the right to the protection of the law as enshrined in s 18 (1) of the Constitution of Zimbabwe;

It is a violation of the right to the protection of the law as read with the rule of law as enshrined in s 18 (1) as read with s 18 (1a) of the Constitution of Zimbabwe;

It is a violation of the right to the protection of the law as read with the freedom from discrimination as enshrined in s 18 (1) as read with s 23 (1) of the Constitution of Zimbabwe.

It is a violation of the freedom from discrimination as enshrined in s 23 (1) of the Constitution of Zimbabwe.

It is a violation of the right to privacy as read with the right to the protection of the law as enshrined in s 17 (1) as read with s 18 (1) of the Constitution of Zimbabwe.

It is a violation of the right to privacy as read with the right to the protection of the law and the rule of law as enshrined in s 17 (1) as read with ss 18 (1) and 18 (1a) of the Constitution of Zimbabwe.

He contended further that the position in classical Roman-Dutch common law flies in the face of customary international law and therefore municipal law in respect of the rights of children. It was his further argument that this court had the power to change the common law in light of contemporary concerns and considerations and that his case was an appropriate case for the court to act accordingly.

COMMON LAW POSITION

The Roman-Dutch common law holds that illegitimate children are not related to their natural fathers and are not entitled to succeed *vis-à-vis* their natural father and his relatives and vice versa. Given the obligation that a father has together with the mother to maintain a child this generalisation is misleading as a father cannot therefore be held to be a complete stranger to his own child. The father of an illegitimate child is also within the prohibited degrees as it relates to marriage and sexual intercourse. Equally legislative intervention in amending the common law has failed to address the issue of children born out of wedlock or illegitimate children. The Deceased Estates Succession Act [*Cap 6:02*] refers to descendants who are entitled to inherit *ab intestatio* without defining who those descendants are. Section 10 of the same Act provides as follows: Nothing in this part shall affect or alter the laws of Zimbabwe regarding inheritance *ab intestatio*. The intention therefore was not to amend the common law position and thus keeping children born out of wedlock from the group of persons entitled to inherit *ab intestatio* from the

estate of their natural fathers. It would seem that even under customary law itself, unless a child was born of a union wherein a marriage under customary rights was concluded a child would not be entitled to inherit from its father's estate *ab intestatio*. See *Mujawo* v *Chogugudza* 1992 (2) ZLR 321 (S) at 330D-E.

It is trite that the Constitution is the supreme law in this jurisdiction and any provisions that are inconsistent with provisions in the Constitution are as a matter of law considered unconstitutional and liable to be struck down for that reason. That a provision in the Constitution is meant to secure protection of the citizenry or rights belonging to the citizenry is beyond dispute. In order to achieve the intent of the legislature it has been held that it is necessary to adopt a broad purposive and progressive interpretation of the rights set out in the Constitutional bill of rights. In *Smyth* v *Ushewokunze & Anor* 1997 (2) ZLR 544 (S) GUBBAY CJ stated:

> "In arriving at the proper meaning and content of the right guaranteed by s 18 (2), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of a fundamental right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of the changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people."

As Mr *Uriri* is *amicus curiae* he cannot move for the dismissal of the application. The only course open to this court on the facts stated above is to withhold jurisdiction. I therefore withhold my jurisdiction in this matter.

*Gill, Godlonton & Gerrans,* applicant's legal practitioners