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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 256 OF 2020

BETWEEN:

TEBOGO MAMASHILA

CLAIMANT

AND

CHRISTOPHER CHAFUNYA (JUNIOR)

1st DEFENDANT

JANE CHAFUNYA

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

L. Ulaya, Counsel for the Claimant
M. Lunguzi, Counsel for the Defendants
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court on the claimant's claim for a declaration that she is entitled to a fair share of property, being a house located here in Malawi, that she acquired and developed with Thomas Chafunya, now deceased, with whom she had a domestic partnership in the Republic of South Africa.
2. The claimant is a South African national and so too is the 1st defendant. They both reside in the Republic of South Africa. The 2nd defendant is a Malawian and is resident here.
3. The 1st defendant is the deceased's son with another woman other than the claimant and the 2nd defendant is the deceased's sister. The defendants have

been sued on account of their efforts to obtain letters of administration over the property in issue herein without disclosing or taking into account the claimant's fair share in the said property.

4. The case of the claimant is as follows. That she is the domestic surviving partner of late Christopher Chafunya (Senior), the deceased. She indicated that she was in a domestic partnership with the deceased since 2007, but started staying together with the deceased from 2008 up until March, 2019 in South Africa when the deceased passed away.
5. It is her case that during the whole of that period she stayed together with the deceased, they always considered each other as husband and wife.
6. She stated that in 2014, she together with the deceased jointly bought a property situated at Mpingwe in the City of Blantyre, the property, and started building on it. She further asserted that notwithstanding her huge monetary contribution towards the acquisition and subsequent development of the property, it was agreed with the deceased that the property would be registered in the deceased's name because it was acquired in Malawi, the deceased's country of birth.
7. The claimant avers that having substantially contributed to the purchase and development of the property, she was a joint owner and holder of the property together with the deceased.
8. She states that being beneficiaries of the deceased estate, the defendants are in the process of applying for and obtaining letters of administration for the estate of the deceased herein. She further stated that the defendants have hence submitted or are in the process of submitting an estate duty affidavit to the Registrar General for purposes of assessment of estate duty and for obtaining the said letters of administration.
9. She claims that notwithstanding the fact that the property in question was jointly acquired and held by her together with the deceased, the defendants have unlawfully considered the whole of the property as part of the deceased estate and have thus wholly included it in the estate duty affidavit submitted or to be submitted to the Registrar General.
10. It is the claimant's case that being joint property, the property in question does not wholly belong to the deceased estate. She further stated that being joint owners and holders of the property herein, both the claimant and the deceased

are entitled to their respective shares in the property and that only part of the deceased's share belongs to the deceased estate.

11. The claimant states that the defendant's actions in proceeding to include the whole property as part of the deceased estate in the estate duty affidavit for purposes of obtaining letters of administration is not only unjustified and illegal but also a blatant violation of her right to own property and hold property independently and in association with others. She added that it also tantamount to an arbitrary deprivation of her property.

12. She therefore claims against the defendants:

- a. A declaration that the claimant and the deceased were joint owners and holders of the property.
- b. A declaration that being joint property, the property does not wholly belong to the deceased estate herein.
- c. A declaration that by unlawfully including the whole property in the deceased estate herein, the defendants have violated the claimant's right to own and hold property independently or jointly with others and is also tantamount to arbitrary deprivation of property.
- d. An order that the claimant is entitled to a fair share of the jointly held property to be determined by this Court.
- e. An order of injunction restraining the defendants from interfering with her property rights in the property herein.
- f. Costs.

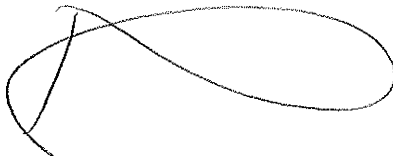
13. The defendants deny that the claimant was in a domestic partnership with the deceased and that she jointly acquired and developed the property with the deceased. They sought a dismissal of this matter.

14. The defendants counterclaimed for the expenses incurred as a result of delays caused in the finalization of the application for letters of administration as a result of the injunction that the claimant obtained in this matter pending the trial being property valuation fees and transportation costs to conduct valuation. They also sought an order allowing them to carry on with processing the application for letters of administration on the basis of no joint ownership of the property. The claimant denied the counterclaim asserting that no expenses have been incurred by the defendants because of her actions.

15. This Court heard evidence from both parties. Both parties correctly pointed out that the standard of proof in these civil matters is on a balance of probabilities. And, that the burden of proof to that standard lies on he who asserts the affirmative, in this case the claimant on her claim and on the defendants on their counterclaim. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
16. This Court assumed jurisdiction in this matter because the property in issue is under this Court's jurisdiction. However, this Court observes that the claimant's claim raises a fundamental question in terms of what law must be applied in assessing the legal nature of the domestic partnership the claimant allegedly had with the deceased and its implications. This is considering the undisputed fact that the claimant is South African and is not domiciled here in Malawi as correctly submitted by the defendants. There is no indication that the deceased's and claimant's domicile was Malawian given that their alleged entire relationship occurred in the Republic of South Africa. Had it been that the claimant and the deceased were domiciled in Malawi this Court would have considered her marital status in terms of the relevant Malawian law, that includes the Marriage, Divorce and Family Relations Act. However, on the facts of this case, Malawian law on types of marriage is not applicable to the claimant.
17. This Court's view is that it would have to look to the personal law of the claimant and the deceased on the aspect of the foreign domestic relationship that the two allegedly had, to find out the legal nature of such a relationship. That personal law or law of domicile is South African law. The claimant had a duty to prove the nature of the foreign domestic relationship she alleges herein. See *Bhangwanji v Bhangwanji* [1995] 1 MLR 31.
18. The claimant was under a duty to bring evidence on the law of the Republic of South Africa to show the nature of her domestic relationship with the deceased. This Court cannot assess that relationship using Malawian law that is inapplicable. The claimant did not produce evidence on the relevant South African law to show that the type of domestic relationship is indeed one that is recognized under South African law as a domestic relationship entitling her to a fair share of property acquired during the subsistence of such a relationship.

19. In the circumstances, this Court has no legal basis for considering the evidence adduced by the claimant on how she lived with the deceased in a domestic relationship, evidence that has been heavily contested by the defendants.
20. The claimant's case accordingly fails for lack of proof of the applicable foreign law.
21. As regards the counterclaim, indeed the defendants took steps to process letters of administration of their own volition. As correctly submitted by the claimant, the expenses they incurred are natural to the process and cannot be attributed to the claimant. The counterclaim fails in that regard but the defendants are at liberty to finalize the processing of the letters of administration the claimant's case having failed.
22. The defendants shall get the costs of these proceedings.

Made at Blantyre this 23rd December, 2021.



M.A. Tembo
JUDGE

