TAWANDA MUSAKANDA

Versus

LOVEMORE WADZVANYA

And

BENJAMIN CHIKOWERO
(In his capacity as executor of the Estate Late
Anna Musakanda DR 2785/16)

And

MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 22 NOVEMBER 2022 AND 5 JANUARY 2023

Civil Trial

N. Mlala, for the plaintiff
T. Zungura, for the 1st and 2nd defendants
No appearance for the 3rd defendant

KABASA J: On 12th September 2018 the plaintiff issued summons against the defendants in which he claimed the following:-

> "(a) An order that the will declared deemed (sic) to have been attested to by the late Anna Musakanda on 31 December 2013 be and is hereby declared null and void on the basis that it was not her intention that her property be distributed as they have been indicated (sic) in that will after her death.
>
> b) An order that the plaintiff be declared the rightful beneficiary of a piece of land known as Lancashire 434 in the district of Charter held under the deed of grant number 7445/90.
>
> c) An order that the 1st defendant pays costs of this suit."

The basis of the claim as elaborated in the declaration is that: - The plaintiff was very close to the late Anna Musakanda who was his father's mother. As a result, the late Anna

entrusted the plaintiff with all her possessions and indicated that she wanted him to inherit her farm and all farm implements. In 2012 the late Anna attested to a will and expressed her wishes therein which reflected what she had already expressed to her relatives. She also stated that should there be any changes to that will which was drawn up by the 2nd defendant, the plaintiff and one Raphael Musakanda would be informed. No such communication ever occurred until the late Anna's death.

The plaintiff and Raphael Musakanda took care of the late Anna's funeral expenses. The plaintiff was subsequently asked to surrender title (deed?) by the 2nd defendant and that is when he learnt of the 2013 will. The late Anna used her thumb print on that will and yet she could read and write. She therefore could not have been in her sound mind as her health had deteriorated to such an extent that she could not have attested to a will. The 1st defendant was not as close to the late Anna as plaintiff was for him to be the major beneficiary of the late Anna's property.

The 1st and 2nd defendants contested the claim and in a joint plea disputed the assertion that the plaintiff was the late Anna's grandson as she never bore any children. The plaintiff's grandmother was the late Anna's sister. However even if the plaintiff was related to the late Anna in the manner he asserted, such relationship did not automatically clothe him with inheritance rights. The 2012 will did not bequeath anything to the plaintiff and the use of a thumb print on the 2013 will is nothing unusual. It does not denote illiteracy and is an acceptable form of signing. The late Anna expressed her wishes in the 2013 will and the plaintiff seeks to defeat the late Anna's express wishes because of greed and jealousy.

With the closure of pleadings the parties attended a pre-trial conference and the matter was referred to trial on a single issue which is:-

> Whether or not the last will and testament dated December 31st 2013 was attested by the late Anna Musakanda.

The plaintiff gave evidence. The gist of it was that the late Anna was his father's mother. His challenge to the 2013 will was based on the fact that the late Anna called a family meeting in 2006 and neighbours were also invited at which meeting she announced that she had chosen the plaintiff to oversee the farm operations. The next day the whole family went to the 2nd defendant's offices where the late Anna told the 2nd defendant about her intentions

and how she wanted to distribute her property. A will was drawn up and one Peter, Kudakwashe, Raphael and Chrispen signed the will and the late Anna signed after them. The late Anna paid for the lawyer's services and he also assisted with the payments.

The late Anna later died in 2015. At no time did she express a wish to change the 2006 will. The 2008 will (exhibit 1), 2012 will (exhibit 2) and 2013 will (exhibit 3) could not have been by the late Anna.

A photograph was produced (exhibit 4) in which the plaintiff and an aunt, one Ophilia were pictured with the deceased. The plaintiff explained that the picture shows that the deceased was not well and so could not have attested to the 2013 will. All her relatives were not present on that occasion and the late Anna would not travel without one Raphael or the plaintiff's elder brother. She therefore could not have travelled to the 2nd defendant's offices where the 2013 will was drawn up. The will does not show the deceased's wishes.

This witness was at pains to show how close he was to the late Anna and what assistance he rendered to her during her lifetime, including paying the lawyer's fees. His eagerness to demonstrate his relationship with the late Anna pre-occupied his mind to such an extent that he would fail to apply his mind to questions posed under cross-examination and consequently answered questions of his own. He was one difficult witness and the court felt constrained to ask him whether he was experiencing any problems, probably hearing and comprehending questions.

He did not impress as a credible witness. He appeared to think that the late Anna had to inform relatives as to what she intended to put in her will. The 2006 will he said was attested to was not produced and he was not aware of its whereabouts. He acknowledged paying the lawyer's fees in 2013 which is the year the will he challenges was drawn up but sought to suggest that the receipts reflecting payment of legal fees were tampered with.

I got the impression that he was so determined to run with the narrative that the 1st defendant was not supposed to inherit the farm to such an extent that he failed to make sense.

The photograph he presented shows that the late Anna was being propped up for the picture to be taken. Asked why the date thereon was "cut out" he said he did not intend to use it as an exhibit. This begs the question as to why he was even having the picture taken with a

woman who appeared to be better off left to rest than being propped up for purposes of having a photograph taken. Photographs capture memories and people would want to capture happy memories. It is baffling as to why the plaintiff found it necessary to prop up a frail old woman for purposes of having a photograph taken. The date thereon was clearly "cut out" leaving one wondering why it was necessary to produce the photograph. The taking of this photograph led to the inescapable conclusion that it was all contrived.

Evidence was also led from Raphael, the uncle who was said to be the one the late Anna would insist be present whenever she needed to travel. Raphael is the late Anna's brother's son and the 1st defendant is his nephew, a grandchild to his aunt's daughter.

Raphael's evidence was to the effect that nothing was done in the family in his absence. The 2013 will is therefore fake as that was not the one the late Anna attested to in his presence. He too referred to a 2006 will which was non-existent and which he said he signed together with 3 other witnesses.

These 3 other witnesses were not called as witnesses and that 2006 will was not tendered in evidence because no one seemed to know where it was if indeed it was ever attested to.

He confirmed that the plaintiff used to pay lawyers' fees, an indication that the payment of legal fees by the 1st defendant was nothing out of the ordinary.

Raphael also gave a narrative which sought to suggest that the 1st defendant was trying to get the late Anna to change the 2006 will but she would have none of it and went on to advise the witnesses that nothing she stated in that 2006 will should change. The 1st defendant's mother who was looking after the late Anna was said to have demanded some form of compensation for her role as care-giver to the late Anna and the late Anna emphasized that Prisca (1st defendant's mother) should be compensated.

Raphael appeared to insinuate that the 1st defendant cornered the late Anna when he saw her at Chivhu where she was receiving medical treatment. He however did not hear their conversation. He therefore could not say what they were talking about.

Raphael appeared to find nothing wrong with the fact that the whole family was interested in what the late Anna was going to do as regards disposal of her property to the

extent that they all accompanied her to the 2nd defendant's offices including the plaintiff who is said to have been the main beneficiary.

It was clear Raphael was not happy that the 1st defendant had the farm and the farm implements bequeathed to him. There was an insinuation that an employee from the 2nd defendant's law firm clandestinely visited the late Anna and put up at her home for the night.

This narrative was picked up by the last witness whose testimony was to the effect that the late Anna appeared distraught after a visit by a certain man on 31st December 2013.

It is interesting to note that this witness was a young boy of 12 at the time. Why he would recall dates with such precision was rather baffling. He appeared to also recall that on 31st December 2013 the late Anna and Privilege never left the farm. This date is significant in that it was the date when the late Anna attested to the will in which the bulk of her possessions were bequeathed to the 1st defendant.

This witness's evidence appeared to suggest that the late Anna could not have attested to that Will at the 2nd defendant's offices as she never left the farm and this strange man who visited her could have been the one whose shenanigans birthed this 2013 will.

What interest a 12 year old would have in all this is a question I failed to get an answer to. It was as if this young boy was roped in so as to strengthen the narrative seeking to show that the 2013 Will is a forgery and does not express the late Anna's wishes.

These witnesses' eagerness to cast aspersions on the 1st defendant and to seek to speak on behalf of the late Anna detracted from the little credibility they had as witnesses.

I got the distinct impression that this was a family divided and those who sought to benefit from ownership of the farm bonded together in a desperate bid to wrestle it from the one to whom it was bequeathed. The plaintiff's case was closed after the evidence of the 3rd witness.

The onus to discharge the single issue referred to trial lay with the plaintiff. The standard of proof is obviously on a balance of probabilities.

> "If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged" (*City of Gweru* v *Mbalabala* 2014 (1) ZLR 248 (H)).

Has the plaintiff discharged the onus? Can it be said it is more probable than not that the late Anna's 2013 will does not reflect her wishes and she was not of sound mind to have been able to attest to it?

The 1st defendant was the only witness who testified and the testimony was to the effect that the plaintiff's narrative as regards how he (the plaintiff) is related to the late Anna is not correct. The plaintiff is actually the late Anna's sister's grandson, born of that sister's son who she bore out of wedlock and so gave him her surname, otherwise the plaintiff's father was not a Musakanda for the plaintiff to argue that the late Anna wanted the farm to remain in the Musakanda family.

The 1st defendant's mother was the one who was staying with the late Anna and the same one who the plaintiff and Raphael suggested prevailed upon the late Anna to bequeath the farm to her son, the 1st defendant. This witness appears to be a son to the daughter of the late Anna's sister. I must say the manner in which the relationship was explained was somewhat difficult to follow. The 1st defendant however was born and bred at the farm and his family lived at the farm at the late Anna's invitation.

Counsel for the plaintiff appeared to suggest that the fact that the 1st defendant paid the legal fees in 2013 proves that he had influenced the late Anna into bequeathing the farm to him. I find this interesting given that the plaintiff also paid significant sums of money to the same lawyers even in 2013 when this contested Will was attested to.

Is it being suggested therefore that the plaintiff's payments were innocent but the 1st defendant's were not? Why would that be so? Is the court to accept that because the plaintiff believes he should be the one to inherit the late Anna's farm it follows that the 1st defendant's payment of legal fees in 2013 speaks to interference with the testatrix? Such a deduction defies logic and sits on nothing. I say so because the plaintiff testified to the fact that at the time he thought the late Anna attested to a will wherein she left the bulk of her property to him, he is the one who paid the legal fees. Receipts to that effect verified such payments. How is it different then to the payments made to the same lawyers by the 1st defendant? I would say there is no difference.

It was also suggested that the presence of 3 wills, the 2008, 2012 and 2013 speaks to some underhand shenanigans. The law however allows a testator to change their will depending

on the circumstances. It does happen that with time a testator decides to bequeath property to some other person for whatever reason necessitating a change of the earlier bequeathing.

The 2008 will (exhibit 1) was signed by a single witness, Raphael who is the plaintiff's second witness. The late Anna affixed her thumb print thereon. The will is not dated. It is also not signed by the 2nd defendant. The 2nd Will attested to in 2012 is also not dated but was witnessed by Virimayi Mushaike and Martin Chinyowa. The farm was bequeathed to the 1st defendant and the plaintiff did not get anything.

The last will of 2013 was signed by the late Anna who made her mark using her right thumb print. It was witnessed by Priviledge and Nolascho. In this will the plaintiff was to get one bovine.

All 3 wills show the late Anna's thumb print and not her name. The plaintiff and his witnesses' narrative that the late Anna could read and write and so could not have put a thumb print in place of her signature is a mere bald unsubstantiated assertion as none of them produced any document where the late Anna supposedly signed. The so called 2006 will was their mere say so as no such document was tendered in evidence. In any event the plaintiff mentioned that such will was attested to in 2012 and appeared to be confused as to the year this will which he says made him a beneficiary of the bulk of the late Anna's property was drawn up.

The 1st defendant's evidence was that he had not been aware of this will and his payments to the lawyers was at the late Anna's request. He did not find it prudent to ask why she wanted him to pay these monies.

I have already said the 1st defendant's payments are no different from the plaintiff's and it can therefore not be said the 1st defendant's payments prove undue influence.

The 1st defendant's testimony was brief and his failure to explain why one Susan was made a beneficiary when she pre-deceased the late Anna is no reason to hold that he was not being honest. In any event there was nothing tendered in the form of proof to show when Susan died and in all 3 wills Susan was a beneficiary.

The 2013 will revoked whatever wills that preceded it and the late Anna's 2013 will was her last will and testament. The plaintiff appeared to read more into the fact that there were 3 wills, 2008, 2012 and 2013 but failed to appreciate that the last will of 2013 is the one which

complied with the requirements in terms of the Wills Act. Secondly the 2013 will revoked the other 2 which also show a change in what the late Anna was bequeathing to the several beneficiaries.

It therefore did not require any one to have died as the plaintiff contended but all it needed was the testatrix's change of heart as to what she wanted to bequeath and to whom.

The ultimate question to ask is whether a case has been made for this court to declare this will null and void and to declare the plaintiff the rightful beneficiary of the farm?

There is no dispute that the 2013 will complied with the requirements as set out in section 8 of the Wills Act Chapter 6:06.

In *Chigwada* v *Chigwada and 2 Ors* SC 188-20 MALABA CJ underscored the principle of freedom of testation. The deceased's estate's distribution is determined by the testator's will.

> "Wills silence family disputes relating to the inheritance of the deceased "spouse's" estate. They embody the actual wishes of the deceased concerning the disposition of his or her property. They should not be lightly interfered with." (*Chigwada* v *Chigwada and 2 Ors* (supra)).

In casu the plaintiff seeks to have this court declare the late Anna's will null and void and to declare him the rightful person to inherit her farm.

No evidence was led to prove that the late Anna was not of sound mind when she attested to her Will. The photograph which was tendered in evidence (exhibit 4) is hardly evidence to prove such. It has no probative value for the reasons I already stated elsewhere in this judgment.

There was no medical evidence to prove that as at the time the late Anna attested to the will on 31st December 2013 she was so ill that she was rendered mentally incapable of attesting to a will.

In *Tavengwa* v *Tavengwa and 6 Ors* HB 173-04 evidence was led from a physician of twenty-five years' experience to the effect that the testator was so ill that he was incapable of executing the disputed will. The learned Judge in that case was consequently satisfied from the evidence adduced that the testator lacked the requisite capacity to make a will.

The learned Judge cited *Lewin* v *Lewin* 1949 (4) SA 241 TPD and quoted ROPER J at pages 279-280 where he said: _

> "The analyses of the testamentary power which I have extracted from *Banks* v *Goodfellow* (L.R.S, Q.B 349) and *Harwood* v *Baker* (3 Moo.PC 282) have been elaborated in such cases as *Smee* v *Smee* (S.P.D. 84); *Burdett* v *Thompson* L.L.R. 3P & D, 72 (n)) … It is abundantly clear from the authorities that it is not sufficient that the testator understood and intended the disposition which he was making in his Will (see on this point in our own courts *Estate Rehne and Others* v *Rehne* (1930, POD, 80 at page 91); …. It is necessary further that he shall have been able to comprehend and appreciate the claim of his various relations upon his bounty, without any poisoning of his affections, or pervesion of his sense of right, due to mental disorder, and generally, to use the language of the American case referred to by COCKBURN CJ, that he shall have had the ability –
>
> "clearly to discern and discreetly to judge of all these things and all those circumstances, which enter into the nature of a rational, fair and just testament."

No evidence was led to show that the late Anna was unable to clearly discern and discreetly to judge and decide on what it is she wanted to happen with her property upon her death.

In *Moyo* v *Estate Late Sakhile Moyo and 7 Ors* HB 100-2004 CHIWESHE J (as he then was) had this to say where a will was being challenged on more or less the same grounds as *in casu*:-

> "On the face of it the will meets the criteria outlined in the Wills Act (Chapter 6:06). The plaintiff has not seriously challenged the authenticity of the deceased's signature nor has the plaintiff sought to admit any evidence from Coghlan and Welsh shedding light on the circumstances under which the will was made. It is unlikely that a reputable firm of lawyers could take instructions to draw up a will from a person of dubious mental capacity."

I would say the same *in casu*. The late Anna's will was drawn up by a firm of lawyers. From Raphael's testimony the late Anna had occasion to talk privately with an employee from that law firm. If she was under some form of duress or was not of sound mind surely the lawyer would not have proceeded to draw up the will. It is very possible the late Anna was able to state what her true wishes were when she talked to this employee at the law firm away from prying eyes and inquisitive ears.

The plaintiff would have the court disregard a will and hold that he should be declared the beneficiary to the farm whilst accepting that every other bequethment is to be accepted as indicative of the last wishes of the deceased. I must say I find this odd and baffling.

On what basis is this court to hold that he is the beneficiary when the written document before the court does not say so? Even if the will was to be declared null and void, the plaintiff is a grandchild not the deceased's child in which case the law of intestate succession would acknowledge him as the beneficiary to his late mother's estate.

There is no credible evidence to persuade the court to find that the late Anna was prevailed upon to attest to a will which did not portray her true wishes. There is no evidence of duress or pervesion of her sense of right to justify declaring null and void a will which meets the legal requirements in terms of the Wills Act.

This court cannot, without cogent reasons, speak for the deceased by substituting a beneficiary specifically mentioned in the deceased's will for another who is also mentioned therein but to whom was bequeathed property other than the farm which he believes he ought to have been given.

The unsatisfactory *viva voce* evidence of the plaintiff and the 2 witnesses from whom he led evidence in support of his claim cannot be preferred over the documentary evidence in the form of a will which unequivocally states what the deceased wanted to happen after her death. (*Moyo* v *Ncube* HB 80-15).

The courts must be wary of interfering with a deceased's last wishes as expressed in a will unless there are valid reasons to so interfere.

A litigant who seeks to have a will declared null and void must present credible evidence justifying such a drastic action. Wills cannot be declared null and void based on a disgruntled would-be beneficiary's whim and perceptions.

Had this court been satisfied that the deceased's 2013 will was a fraud or was attested to after undue influence, the most it would have done was to declare it null and void and to allow the deceased's estate to be administered in terms of intestate succession but not to declare the plaintiff the beneficiary. What possible interest would a professional firm of lawyers have to go to the extent of coming up with a will under fraudulent circumstances?

In conclusion I must say people ought not to allow their sense of entitlement to cloud their minds and seek to change a testator's wishes. The testator speaks from beyond the grave through their last will and testament. Such should be respected unless the will falls foul of the Wills Act or there is evidence that the testator was mentally incapacitated either through illness or duress to attest to the w ill. None of these were proved *in casu.*

The plaintiff has failed to prove his claim and is therefore not entitled to the relief he seeks.

The 1st and 2nd defendants sought for costs on a punitive scale.

In *Mutunhu* v *Crest Poultry Group (Pvt) Ltd* HH 399-17 MUSHORE J had this to say:-

> "It is settled law that an award on an attorney/client scale is likely to be granted if the conduct of the litigant from which an award is sought amounted to an abuse of the court process and that his actions thereby bought (sic) additional and unwarranted expenses to the other party."

I am not persuaded to accept that the plaintiff's action was motivated by a desire to waste the court's time or by malice. This is not a case that calls for censure.

Costs however follow the cause and I do not see any reason why that should not be so *in casu*.

In the result I make the following order:-

1. The plaintiff's claim be and is hereby dismissed.

2. The plaintiff shall pay costs at the ordinary scale.

Sansole and Senda, plaintiff's legal practitioners
Gutu & Chikowero c/o Job Sibanda & Associates, 1st and 2nd defendants' legal practitioners