**REPORTABLE (31)**

**1) YUBIN LIN 2) REWAI GUTU**
**v**
**1) BARBARA COOK 2) MASTER OF THE HIGH COURT N.O 3) REGISTRAR OF DEEDS 4) ALTON EDWARDS 5) ALISTAIR ABRAHAMS**

**SUPREME COURT OF ZIMBABWE**
**UCHENA JA, CHIWESHE JA & MUSAKWA JA**
**HARARE: 24 MARCH 2022 & 31 MARCH 2023**

*Ms T. R. Hove*, for the appellants

*R. Sitotombe,* for the first respondent

No appearance for the second to fifth respondents

**CHIWESHE JA:** This is an appeal against part of the judgment of the High Court (the court *a quo*) sitting at Harare, dated 26 May 2021 wherein the court *a quo* granted an application made by the first respondent for the registration of a foreign judgment emanating from the Business and Property Court of the United Kingdom and Wales as a judgment of the High Court of Zimbabwe, capable of execution within Zimbabwe.

The appellants are of the view that the execution of that judgment will negatively affect their proprietary rights. It is for that reason that they noted the present appeal contending that for

that reason, the judgment should not have been registered as it is contrary to the public policy of Zimbabwe.

**THE FACTS**

The first respondent is the biological sister of the late Prudence Clementine who died in Harare on 28 March 2019. The first respondent avers that to her knowledge her sister died intestate. She alleged that the fifth respondent, working in cahoots with the fourth respondent, forged a will with intent to defraud the estate. The first respondent and her sister Sophie Wilding vehemently challenged the will in the court *a quo* and in this Court under cases HH 859/15 and SC 607/15, respectively. Both matters were dismissed on a technicality.

In the meantime, the fifth and second respondents proceeded to wind up the Estate contrary to her late sister's wishes. The first respondent was aware that her late sister wished that the assets of her estate be channeled towards charity and had, for that reason, established a private and voluntary organization called "The Lady of All Nations Charity." Simultaneously with the proceedings in Zimbabwe, the first respondent challenged the validity of the will before the Business and Property Court of the United Kingdom and Wales. That Court invalidated the will and declared that the deceased had died intestate. It is that foreign judgment that the court *a quo* registered which is the subject of this appeal.

The first respondent also sought, in the court *a quo*, consequential relief, arguing that as the will had been invalidated, all actions taken or resultant from the will are null and void and should be set aside. She noted that the second appellant had purchased from the estate Stand 4102

Salisbury Township of Salisbury Township Lands, held under deed of transfer 280/96 and that the first appellant had similarly purchased and taken transfer from the estate Stand 7706 Salisbury Township Lands held under deed of transfer 1311/87.

The first respondent contended that the sale and transfer of these properties was birthed by fraud and were therefore tainted with illegality. Accordingly, by way of consequential relief she sought cancellation of the sale and transfer of these properties and vindication of the same by the estate.

The appellants opposed the first respondent's application in the court *a quo* on the grounds that the registration of the said foreign judgment would be contrary to the public policy of Zimbabwe and that the claim for consequential relief was not properly before the court *a quo*.

The court *a quo* granted the application for the registration of the foreign judgment. It dismissed the application for consequential relief on the grounds that affected parties had not been afforded the opportunity to properly respond to it.

The appellants have noted this appeal on the following grounds.

**GROUNDS OF APPEAL**

1. The High Court erred at law by ordering that the judgment from the High Court Justices of the Business and Property Court of England and Wales be registered as a judgment of the High Court of Zimbabwe. This effectively extended the thirty (30) day

period set out in terms of s 52 (9) of the Administration of Estates Act [*Chapter 6:01*], which the High Court has no authority to do.

2. The High Court misdirected itself by not finding that the first respondent waived her rights to protection under the laws of Zimbabwe, by choosing to abandon the legal process in Zimbabwe and opting to proceed to the courts in the United Kingdom without following due process in Zimbabwe.
3. The High Court erred by not finding that the claim by first respondent had prescribed in terms of the Prescription Act, [*Chapter 8:11*], in that she failed to file her claims against the Executor timeously."

By the time the appeal was heard the appellants had filed two further grounds of appeal, namely, that the foreign judgment did not comply with the tenets of natural justice and that the foreign court had no jurisdiction to deliberate on issues involving property in Zimbabwe.

**RELIEF SOUGHT**

The appellants seek an order in the following terms:

"(a) That the appeal be and is hereby allowed with costs.
(b) That paragraph (a) of the judgment of the High Court under case number 5608/19 be and is hereby set aside and substituted with the following:
"(a) The application for the registration of the judgment from the Business and Property Courts of England and Wales in Zimbabwe be and is hereby dismissed with costs."

**ISSUES FOR DETERMINATION**

The grounds of appeal raise the following issues:

(1) Whether or not the said foreign judgment was contrary to the public policy of Zimbabwe and should not therefore have been registered.

(2) Whether or not the first respondent waived her rights to protection under the laws of Zimbabwe by abandoning the legal process in Zimbabwe and opting to proceed in a foreign court.

(3) Whether or not the court *a quo* erred by not finding that the first respondent's claims had prescribed in that she failed to file the same against the Executor timeously.

(4) Whether or not proceedings in the foreign court complied with natural justice.

(5) Whether or not the foreign court had jurisdiction to deal with property situated in Zimbabwe.

**ANALYSIS**

The requirements for registration of a foreign judgment are as follows:

1. That the foreign court had the international jurisdiction or competency according to our law.
2. That the judgment concerned was final and has the effect or "*res judicata*" according to the law of the jurisdiction in which it was pronounced.
3. That the judgment has not been obtained by fraudulent means.
4. That the judgment does not entail the enforcement of a penal law or revenue law of the foreign state, and
5. That the foreign judgment must not be contrary to the public policy of Zimbabwe.

(See *Tiiso Holding (Pvt) Ltd v Zimbabwe Iron and Steel Company* HH 95/2020)

Regarding the first issue, the appellants contend that the foreign judgment should not have been registered because it offends the public policy of Zimbabwe. They agree that all other requirements for registration have been met. The appellants contend that the registration of the foreign judgment has the effect of derailing and setting aside all that the Master and the Executor would have done pursuant to the terms of the forged will! They are not challenging the finding of the foreign court to the effect that no valid will was lodged in that jurisdiction in the first place! The obvious implication is that the will availed to the Master of the High Court purporting to be a certified copy of a forged will was an outright fraud. If it had been brought to the Master's attention that the will had been forged, he would not have acted upon it.

Clearly what would have been against the public policy of Zimbabwe would have been the refusal to register the foreign judgment thereby perpetuating an illegality. A forged will is a nullity and so is everything done in its name. It cannot be executed. That is the public policy of Zimbabwe! We agree with the first respondent when she submits that a nullity begets a nullity. Her counsel correctly referred us to the case of *Tamanikwa and Another vs Zimdef and Another* SC 73/17 wherein at p 6 this Court had this to say:

> "The authorities are clear and it is now a matter of settled elementary law that when a proceeding is a nullity every proceeding based on it is also a nullity as observed by Korsah J in *Ngani v Mbanje & Anor* 1987 (2) ZLR 111 at p 115, where the learned Judge, relying on the dicta in McFoy v United Africa Company Ltd ALL ER 1169 remarked that:
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> "If an act is in law a nullity, it is not only bad, but incurably bad. There is no need for the order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes more convenient to do so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse!"

Once it is accepted that the will upon which the Master and the Executor acted was forged, all their actions, including the distribution account and the subsequent alienation of estate property are by operation of law null and void. That position is in accordance with the laws of Zimbabwe. It cannot be said to be contrary to the public policy of Zimbabwe. The contention to the contrary by the appellants is misplaced.

**WHETHER FIRST RESPONDENT LOST HER RIGHT TO THE PROTECTION OF ZIMBABWEAN LAW BY ABANDONING LOCAL PROCESSES AND OPTING TO APPROACH A FOREIGN COURT.**

There is no merit in this ground of appeal. Firstly, as pointed out by the first respondent, there is no law that prohibits Zimbabwean nationals from accessing foreign courts. Secondly the first respondent did not indicate to anyone that she was abandoning her cause of action which she had pursued in the ill-fated matters in the court *a quo* under HH 859/15 and in this Court under SC 607/15. Her actions were justified in the circumstances of this case. The first respondent was challenging the validity of the will deposited with the Master. What the Master held was a certified copy of a will that had been filed in the United Kingdom. The original will was outside Zimbabwe. What the first respondent decided to do was to challenge the validity of the will at source, that is, in the courts of the jurisdiction in which the original will had been deposited. She would return to Zimbabwe with the results and present such to the local courts. That cannot be construed as abandonment of the Zimbabwean legal process. On the contrary her efforts in the United Kingdom have resolved the dispute before the courts in Zimbabwe through the registration of the foreign judgment. That is not to say that the dispute could not have been resolved by the Zimbabwean courts. The point is that in that scenario a determination by courts

in Zimbabwe on the validity of the will would have been made on the evidence that the first respondent would have sought from the authorities in the United Kingdom. There would have been no prejudice to any party either way. This ground of appeal must be dismissed.

**WHETHER THE FIRST RESPONDENT'S CLAIMS HAD PRESCRIBED IN THAT SHE FAILED TO LODGE SAME AGAINST THE EXECUTOR TIMEOUSLY.**

As already noted, the forged will was a nullity. All actions taken by the executor or any other party pursuant to it are equally null and void. The processes described in the Administration of Estates Act [*Chapter 6:01*] referred to by the appellants can only be triggered by the execution of a valid will. *In casu* the will was forged rendering it a nullity. No valid claims could have been lodged under those circumstances by any party, including the first respondent, within or outside the prescribed period. This ground of appeal must also be dismissed for lack of merit.

**WHETHER OR NOT PROCEEDINGS IN THE FOREIGN COURT COMPLIED WITH NATURAL JUSTICE**

Our understanding is that the appellants are innocent third parties caught up in a dispute on the validity of a will between the first respondent and the fourth and fifth respondents. They are not privy to the circumstances under which the will was made or forged. Their citation in the case before the foreign court would not have changed anything. It is doubtful whether they would have been granted audience at all. Sight must not be lost that the question before the foreign court was whether the will was valid or not. It did not therefore determine the proprietary rights

of parties whose properties are in Zimbabwe. The citation or non-citation of the appellants in the foreign court was of no consequence.

**WHETHER THE FOREIGN COURT HAD JURISDICTION TO DELIBERATE ON ISSUES INVOLVING PROPERTY IN ZIMBABWE.**

This ground of appeal is misleading. The foreign court deliberated on the validity of the will. It derived its jurisdiction from the fact that the original will had been lodged in the United Kingdom and that, we are told, some of the assets of the deceased estate are in that country. As already stated, the foreign court did not determine the fate of properties in Zimbabwe. Its judgment setting aside the validity of the will no doubt, having been registered with the High Court, will have a bearing on the fate of the properties purchased by the appellants from the deceased estate. That fact is purely consequential.

**DISPOSITION**

We are satisfied that the decision of the court *a quo* to register the foreign judgment was arrived at properly and in accordance with the law. That decision cannot be faulted. The appeal has no merit. It ought to be dismissed.

Costs shall follow the cause.

In the result it is ordered as follows:

1. The appeal be and is hereby dismissed.
2. The appellants shall pay the costs jointly and severally.

**UCHENA JA:** I agree

**MUSAKWA JA:** I agree

*Hove & Associates*, appellants' legal practitioners

*Mtetwa & Nyambirai*, 1st respondent's legal practitioners