

FREDDY CHIMBARI
(In his capacity as the Executor to the Estate of the late Kudakwashe Mutongi)
versus
MAKEPEACE MUZENDA
and
CHIEF EXECUTIVE OFFICER- GUTU RURAL DISTRICT COUNCIL N.O
and
MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 23 June and 15 September 2021

Civil- application for absolution

C. Tafireyi, for plaintiff
A.A. Debwe, for 1st defendant
S. Charowa, for 2nd defendant

TAGU J: In this case, the 1st Defendant applied for absolution from the instance and dismissal of the plaintiff's case with costs.

The Plaintiff issued summons claims against the 1st, 2nd and 3rd Defendants claiming a declarator that stand number 414 Gutu is considered to be the property of the late Kudakwashe Mutongi and is liable for distribution to his beneficiaries. That transfer of the property from the estate of the late Kudakwashe Mutongi to the 1st Defendant is null and void and costs of suit.

The Plaintiff's declaration is to the effect that the late Kudakwashe Mutongi was a holder of certain lease rights with the option to buy of stand number 414 Gutu. The property is a commercial property which is a partly developed commercial stand. The property was registered in the name of Kudakwashe Mutongi during his life time. The property is listed in the inventory filed with the Master of the High Court as property which belongs to the late Kudakwashe Mutongi. The inventory was signed by the 1st Defendant. Sometime in 2009 the 1st Defendant in connivance with the officials at Gutu Rural District Council caused the property to be transferred from the Estate of the late Kudakwashe Mutongi to the 1st Defendant without following due

process of the law. The distribution account has not been drawn and neither was the estate wound up. Further, the 1st and 2nd Defendants had not sought the consent of the 3rd Defendant to transfer the property. The 1st Defendant acquired the said property for no consideration. It has since been transferred into the 1st Defendant's names and she is currently the registered owner of the estate property.

Two witnesses testified in this case and were cross examined by the counsels for the 1st and 2nd Defendants. The Plaintiff closed his case.

At the close of the Plaintiff's case the 1st Defendant filed the present application for absolution from the instance which is supported by the 2nd Defendant on the basis that there is no sufficient evidence at this stage on which a court could or might make a reasonable mistake and give judgment for the Plaintiff.

PLAINTIFF'S CASE.

The first to give evidence was Mr. Freddy Chimbari. He told the court that he is the Executor to the Estate of the late Kudakwashe Mutongi. He was appointed by the Master of the High Court in July 2007. He called a meeting of the relatives. The deceased's children, two wives, a lawyer from *Muzenda & Partners* representing the 1st Defendant attended the meeting. They discussed an inventory of assets compiled by the 1st Defendant and other documents. He produced the inventory as exhibit 2. Stand 414 was listed as one of the deceased's assets. After the meeting some assets were confirmed including the stand in question. He visited the stand and saw some trenches with bricks built from a foundation. There was no compaction and there was some tall grasses, a heap of quarry stones and river sand at the stand. He was not aware how the stand had been transferred to the 1st Defendant because they were to agree as to who was to inherit what assets. He said at the meeting the 1st Defendant had confirmed that the stand belonged to the Estate. He denied the suggestion that the stand was never leased to the late Kudakwashe Mutongi and averred that the 1st Defendant never suggested that the stand belonged to her. He therefore wanted the stand to be transferred back to the estate since it was fraudulently transferred to the 1st Defendant.

During cross examination by the counsel for the 1st Defendant he denied the suggestion that the 1st Defendant never compiled exhibits 1 and 2. His response was that the 1st Defendant was denying what she did. These were signed by herself after she produced an affidavit to the Master of the High Court because there were complications in the estate. Secondly, in the meeting that they held 1st Defendant never disputed her efforts to register the estate at the Master's Office. He further disputed the suggestion that the 1st Defendant was allocated that stand in her capacity as the District Coordinator for the 2nd Defendant. Had that been the case then she should have stated the same during the meeting, but she did not. Neither did she raise any objections when the estate was advertised. Lastly, he said it is awkward that she could have paid for the stand without council resolution in 2004, and then goes back to sign 2 or 3 years back. The second Defendant signed in 2009 hence she connived with the 2nd Defendant.

The second to testify on behalf of the Plaintiff was Kuda Magondo. He is a son to the late Kudakwashe Mutongi. His father changed his surname after he had already obtained his birth certificate hence the differences in surnames. His evidence was that he came to know of stand 414 Gutu in 2005 when he was shown the said stand by his father. According to him there a slab had been constructed, there was a heap of quarry stones and sand at the site. At the time of his father's death on the 20th of January 2007 there was a perimeter fence at the stand. It was his further evidence that the 1st Defendant registered the estate of his father at Gutu and they were called to attend a meeting. They were then called to the Master of the High Court in Harare after the 1st Defendant had sued them. He produced a lease agreement in the name of the deceased in respect of the said stand. He further produced two receipts from Gutu council and the other receipt related to the inspection of stand 414. These were noted as exhibits 5 and 6 respectively. Later he discovered that there was some developments taking place on the stand. He went to 2nd Defendant council offices and he was told that the records in respect of the stand were missing. Having gone there on several occasions he was then shown a file for the 1st Defendant in respect of the said stand. He disputed the suggestion that the stand was allocated to the 1st Defendant and said the 1st Defendant was allocated the same stand after his father passed on. He therefore does not know how and why the 2nd Defendant allocated the said stand to 1st Defendant.

Under cross examination by the counsel for the 1st Defendant he told the court that he is the one who purchased and assisted his father in carrying some of the quarry stones, pit sand and

river sand which was at the stand since he had a truck. Further, he said he would sometimes go and pay rates to the 2nd Defendant and the receipts were in his father's names. When it was put to him the 1st Defendant applied in 2004 and 2005 was replied and given the said stand, he disputed the suggestion because she could not have been allocated a stand that was being developed. He further disputed that the late would pay on her behalf. He therefore maintained that the stand belongs to the estate. Under cross examination by the counsel for the 2nd defendant he denied the suggestion that the stand had been allocated to 1st Defendant as a senior official in the council. Finally he maintained that he went to council offices on numerous occasions but the file in respect of his late father could not be located but that of the 1st Defendant.

The Plaintiff closed its case and the Defendants filed the present application for absolution from the instance.

The parties are in agreement as to the test to be applied in an application for absolution from the instance. The applicable principle in an application for absolution from the instance, which has stood the test of time, has been enunciated in the *Gascoyne v Paul & Hunter* 1917 TPD 171 case at 173, a case that has been followed in many subsequent case, as follows:

“At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but close his case immediately, the question for the Court would be, ‘is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?’”

The same principle is stated by the Appellate Court in *Oosthuizen v Standard General Versekerringsmaatskappy Bpk* 1981 (A) at 1035H-36A as follows:

“If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution.”

In *Gordon Lloyd Page & Association v Rivera & Anr* 2001 (1) SA 88 (SCA) at p 92 para (2) where the Court said that:

“The test for absolution to be applied by a trial court at the end of the plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms;

“When absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff-*Gascoyne & Hunter* 1971 (TPD) 170 at 173, *Ruto Flour Mills (Pty) Ltd v Adelson* (2) SA 307(T)”

This implies that a plaintiff has to make a prima facie case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court find for the plaintiff (*Marine & Trade Insurance Co. Ltd v van der Schyff* 1972 (2) SA 26 (A) at 37G-38A; *Schmith Bewysreg* 4 ed at 91-2)

It is trite therefore that at this stage I need not concern myself with the credibility or otherwise of the evidence of the plaintiff, unless, of course, it is demonstrably clear that the plaintiff and or witnesses, palpably broke down under cross examination. Vide The South African Law of Evidence by *DT Zeffert* p 163 where the learned authors cited Solomon in *Siko v Zonsa* 1908 TS 1013.

In this case it is not in dispute that the deceased passed on the 20th of January 2007 as per the death certificate exhibit 1. This is confirmed by 1st Defendant’s affidavit exhibit 3. It is also not in dispute that the deceased was survived by 3 wives as shown on exhibit 4, the notes uplifted from the Master of the High Court’s file. One of the wives being the 1st Defendant who is recorded as the 3rd wife. It is also not in dispute that the 1st Defendant is a senior official in the 2nd Defendant, being the District Coordinator. Exhibit 2 which was uplifted by the Executor from the office of the Master of the High Court compiled by the 1st Defendant lists stand 414 Gutu as one of the deceased property, that is, the preliminary inventory DR 724/07. The 1st Defendant put her names on that inventory as the surviving spouse. Further, exhibit 5 the lease Statement from Gutu Rural District Council dated 28 December 2005 in respect of stand 414 is in the names of the deceased. Not only that, 2 exhibits “6” are two receipts in the names of the deceased, receipt no. 212135 being in respect of the lease processing and 18199 being in respect of plan inspection in respect of the same stand.

Having considered the evidence of the Plaintiff the defendants have a case to answer. The plaintiff managed to establish a prima facie case. For example the 1st Defendant has to explain why she inserted stand 414 Gutu on the preliminary inventory as one of the deceased’s property. If she did not do so herself she has to explain why the documents uplifted from the office of the Master

of the High Court bear her names as the informant. She has to explain why she did not indicate that she was the owner of the stand when the estate was advertised. She has to explain why she did not raise the issue at the edict meeting with the Master and or the Executor. She has to explain why being a senior officer in the 2nd Defendant the file for the deceased vanished and only her file was found. Possibility of connivance or even corruption is very high. Since the estate has not been administered to finality she has to explain how she was allocated the stand in question. The same applies to the 2nd Defendant's officials they have a lot of explanations to make, to show that what they did was above board. They have to explain whether or not it was coincidental that they allocated a stand to 1st Defendant, their official when records indicate the same stand was in the names of the deceased during his life time. The defendants therefore have to be placed in their defences.

The application for absolution from the instance lacks merit and must be dismissed.

IT IS ORDERED THAT

1. The applications for absolution from the instance are dismissed.
2. There is no order as to costs.

Tafireyi & company, plaintiff's legal practitioners

Debwe & partners, 1st defendant's legal practitioners

Mushangwe & company, 2nd defendant's legal practitioners.