

MARGARET CHIMKWEPTSY
versus
ESTATE LATE DENIZIO GEORGE
and
ESTATE LATE BIANNA HUNDI
and
SHARON DALIKEM
and
NEWS DALIKEN
and
ASSISTANT MASTER HARARE
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 11 March, 29 and 30 June, 1 July and 13 September 2021

Civil trial

V H Tongoona, for plaintiff
2nd defendant represented by 4th defendant
3rd defendant in person
4th defendant in person

TAGU J: The Plaintiff's claim is for a declaratory order-

- (i) Setting aside the certificate of heir to the Estate Late Denizio George that was granted to the late Biannah Hundi fraudulently on the 6 May 1998 in Harare by the Assistant Master without the Plaintiff's knowledge and information,
- (ii) That the late Denizio George died and was survived by his wife Plaintiff and three children;
- (iii) That certificate of heir granted to the late Biannah Hundi dated 6 May 1998 be and is hereby set aside;
- (iv) That fifth defendant call an edict meeting for the appointment of an Executor Dative to the Estate of the late Denizio George; and
- (v) That Defendants pay costs of suit on the higher scale of legal Practitioner and client.

The facts of the matter are that on the 17 January 1993 Denizio George died intestate in Harare. At the time of death the late was married to the Plaintiff in terms of the then African Marriages Act [*Chapter 238*] now Customary Marriage Act [*Chapter 5:07*]. The union was blessed

with three children. At the time of death the late Denizio George was the holder of rights and interests to title of house No. 22 Muzari Road, New Mabvuku, Harare. After the untimely demise of the late Denizio George the late Biannah Hundi, his sister, chased the plaintiff away from her home. In 1998 the late Biannah Hundi without the knowledge of the plaintiff appeared before the fifth defendant in DRH 953/98 and lied that the late Denizio George died as a divorcee without any children and that she was his sole heir in Zimbabwe and should therefore inherit the only asset of the estate which are the rights and interests to title in Stand No. 22 Muzari Road, New Mabvuku, Harare. The fifth defendant then appointed the late Biannah Hundi as heir of the Estate late Denizio George and issued a certificate of heir to that effect.

On the 12 February 2002 Biannah Hundi died intestate and was survived by the fourth defendant who was her son and her late husband who remained in occupation of the premises. In February 2014 the plaintiff approached the fifth defendant and registered the Estate of the late Denizio George and she was duly appointed the executrix. However, the plaintiff failed to finalize this estate as she met resistance from the fourth defendant who stated that the only asset of the estate late Denizio George belongs to the late Biannah Hundi his mother due to the certificate of heir issued by the fifth defendant on the 6 May 2014. The plaintiff then mounted the present proceedings.

At the pre-trial conference the following were perceived by the parties to be the issues for trial in this matter.

- i) Whether or not Plaintiff is Denizio George's surviving spouse;
- ii) Whether or not the late Biannah Hundi fraudulently acquired the Certificate of Heir DRH 953/98 and should subsequently be cancelled;
- iii) Whether or not the matter has prescribed; and
- iv) Whether or not Plaintiff is entitled to the relief sought.
- v) It was admitted by the parties that the Plaintiff was married to the late Denizio George and that their marriage was blessed with three children.

Three witnesses gave evidence in support of the plaintiff's case while four witnesses gave evidence in support of the defendants' case. I will proceed to give an analysis of each of the five witnesses' evidence in as far as it impacted on the issues to be resolved by this court.

The plaintiff was the first to testify. Her evidence was to the effect that she was married to the late Denizio George under customary law in 1966 and their marriage was solemnized in 1969. She produced a copy of the marriage certificate as exhibit 1. She told the court that three children were born out of the marriage. These are Dorcas born in 1968, Plaxcedia born in 1970 and George born in 1976. She produced the copies of the birth certificate of the first two children. She told the court that she lived with the late Denizio George until his demise in 1993 at number 22 Muzari Road, New Mabvuku, Harare. She tendered a copy of his death certificate as an exhibit. It was her evidence that the late Denizio George's sister Biannah Hundi is the one who obtained the death certificate and lied that he was divorced and had no children. Further, she testified to the effect that Biannah Hundi did this because she wanted to inherit the only asset of the late Denizio George. Biannah Hundi then chased her away from the house and she left with her children. In her absence Biannah Hundi then went to the offices of the Additional Master where she was appointed the heir. She produced the record of proceedings in DRH 953/98. She narrated that in 2014 she came to know that Biannah Hundi had been appointed heir to 22 Muzari Road, Mabvuku, Harare, when she visited the Municipal Offices at Mabvuku after she visited the Additional Master's offices at the Civil Court where she attempted to re-register the estate of the late Denizio George under proceedings DRH 195/14. She produced the record DRH 195/14 as an exhibit. During cross-examination she confirmed that she did not have any knowledge of any advertisements made by Biannah Hundi in the estate of the late Denizio George hence did not take any action timeously. She denied that at the time of Denizio George's death she had been divorced.

The second witness to testify on behalf of the plaintiff was Dorcas George. Her evidence was to the effect that she was the first born child to the plaintiff and the late Denizio George. She confirmed that at the death of her father the plaintiff was still married to the plaintiff. At the time of her father's death she was 25 years old. According to her evidence the late Biannah Hundi facilitated the issuance of her father's death certificate without involving his immediate family members. Hence Biannah Hundi misrepresented that the late Denizio George was divorced and had no children. She supported the orders sought by the plaintiff as she also wanted to have a say in the administration of the estate of her late father. She too insisted under cross examination that her parents stayed together as husband and wife and denied knowledge of any advertisements relating to the estate of her late father as this was done by Biannah Hundi without their knowledge.

The last witness to testify in support of the plaintiff was Mrs Tendai Chibwana an old family friend who grew up with the plaintiff. Her evidence was that she knew the plaintiff and Denizio George as husband and wife. She testified as to the bad blood that erupted between the plaintiff and Biannah Hundi. According to her Biannah Hundi was aware of the existence of the plaintiff and the three children at the time of the death of Denizio George. She therefore confirmed that Biannah Hundi misrepresented to the Additional Master that the late Denizio George died a divorcee without children.

News Daliken, the fourth defendant was the first to give evidence on behalf of the first and second defendant and on his own behalf. His evidence was that the plaintiff was not staying with the Late Denizio George when he acquired the Stand known as number 22 Muzari Road, New Mabvuku Harare. He stated that the late was staying with a tenant called Mbira who continued to stay at the house until his mother Biannah Hundi took over the house and registered the estate. He further said the estate was advertised before Biannah Hundi was appointed the heir. He however, failed to produce evidence of the advertisement. During cross-examination he confirmed that plaintiff and Denizio George stayed as husband and wife. He further confirmed that three children were born out of the union. He confirmed that his late mother Biannah Hundi misrepresented to the Additional Master that the late Denizio George did not have any children for reasons best known to her. While he said the two had divorced he failed to produce any evidence to that effect. Under cross examination he stated that he was not opposed to the order sought by the plaintiff, namely, the setting aside of the certificate of Heir and the holding of another edict meeting as it was only fair to allow the children of the late Denizio George to have a say in the Estate of their late father.

The second witness to testify on behalf of the defendants was one Sharon Daliken, the third defendant. She is the daughter of the fourth defendant. She was only 11 years old when Biannah Hundi registered the estate in her favour. During cross-examination she too said she did not oppose the granting of the order sought by the plaintiff as it was fair that the children be given an opportunity to participate in the administration of their father's estate.

The next to testify was one Bailos Kandosiwa, the fourth defendant's brother. He gave evidence to the effect that the plaintiff had run off to another man and had ceased to be Denizio George's wife before the death of Denizio George. However, under cross-examination he

confirmed that his mother Biannah Hundi knew of the existence of Denizio George's children when she gave information in DRH 953/98 but because the children had gone with their mother their own concern was the house in question. Surprisingly, he said he did not know Dorcas George.

The last to give evidence was one who said she was always a neighbor to Denizio George since 1975 but did not know the plaintiff and the three children. What was striking about this witness is that her evidence contradicted the evidence of the rest of the witnesses.

An assessment of the evidence clearly proved that the plaintiff is Denizio George's surviving spouse. In his closing submissions the fourth defendant said that the late Denizio George was allocated house number 22 Muzari Road, New Mabvuku, Harare on the strength of his marriage to Margaret, even then the house belonged to Denizio George. He seemed to contradict himself when he said further that the late Denizio George was allocated house no. 22 Muzari Street Mabvuku a long time after his divorce to the plaintiff Margret. He reiterated that the death certificate indicates his marital status. This again contradicts his evidence-in-chief where he confirmed that his mother misrepresented to the Additional Master the deceased's status for reasons known to her. He wondered why the plaintiff did not take action earlier. I am therefore convinced that the plaintiff is the surviving spouse of Denizio George.

A further analysis proves that indeed the late Biannah Hundi fraudulently acquired the certificate of heir DRH 953/98 and the third and fourth defendants are not opposed to the fact that it the certificate be cancelled and a fresh edict meeting be held involving the participation of George's children since it was obtained through fraudulent misrepresentation. I cannot do better than to state what was said in the case of *Chirisa v Mugadzaweta* HH-323-14, where the Court stated that-

“...having pointed out that there was a fraudulent misrepresentation of death date and on position interested relatives, the appointment of executor dative is void and as such a nullity having no basis which to stand...there was material non-disclosure which led to appointment of executor dative and subsequent transfer of property without involvement of all the interested parties.

It would be an absurdity to seek to perpetuate an illegality under the umbrella of the need to finalize as quickly as possible the administration of an estate.

The circumstances of this case were an executor dative in the form of the respondent was appointed through misrepresentation and he transferred the only asset of value of the estate into his name without the involvement of the relatives of the deceased is not only un-procedural but illegal for it was based on a misrepresentation.

Given the circumstances of this case the court cannot fold its arms and perpetuate an illegality on the basis that the applicant should have approached the court earlier.

It is with this background that the applicant rightly approached this court for redress. Clearly the transfer obtained by misrepresentation cannot stand.”

In casu if the court were to nullify the certificate of heir as claimed by the plaintiff there is no prejudice to the respondents since they conceded that there be a fresh edict meeting involving the deceased’s children. I am inclined to grant the relief sought.

However, there is one other issue to resolve, that of prescription. In the case of *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) it was reiterated that a defendant bears the full evidential burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt.

In casu the Defendants did not prove that the plaintiff had the knowledge that Biannah Hundi had been appointed heir in DRH 953/98 or that an edict meeting had been conducted prior to 2014 as alleged by the plaintiff. Accordingly, the defence of prescription cannot succeed as it was not supported by evidence.

In the result I will grant the relief sought in the summons.

IT IS ORDERED THAT:

1. The late Denizio George died and was survived by his wife plaintiff and three children.
2. The certificate of heir granted to the late Biannah Hundi dated 6 May 1998 be and is hereby set aside.
3. 5th Defendant to call an edict meeting for the appointment of an Executor Dative to the Estate Late Denizio George.
4. Defendants to pay costs of suit on the higher scale of legal practitioner and client.

Mapondera & Company, plaintiff’s legal practitioners
C. Mpame and Associates, defendants’ legal practitioners.