

SAMSON ELLIOT
(In his capacity as the Executor Dative of the estate late GLAMOUS ELLIOT)
versus
MAX CHIKOVA
and
MUNICIPALITY OF BEITBRIDGE
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 18 March 2021 and 27 August 2021

Opposed application

J. Chipangura & M. Mureri for the appellant
F. Chirairo for 1st respondent
No appearance for 2nd and 3rd respondents

WAMAMBO J : In this opposed application the applicant seeks the following relief.

- “1. *The cession of the late Glamous Elliot rights and interest in stand number 3710 Dulibadzumu Township, Beitbridge by the first respondent and approved by the 2nd respondent be and is hereby cancelled.*
2. *The 2nd respondents to include 3710 Dulibadzumu to the estate of the late Glamous Elliot*
3. *The respondents to pay costs on attorney client sale.”*

The brief background to the matter is as follows: Glamous Elliot (*hereafter called deceased*) died on 22 March 2009. He was formerly known as Glamous Mathuthu. He left behind

Sophia Nyenyesai his unregistered customary law wife and two children one of whom is the applicant. In 2019 applicant registered his father's estate with the Master of the High Court and included stand 3710 Dulibadzimu Township Beitbridge (*hereafter called the stand*) Applicant is executor to deceased' estate. The third respondent could not confirm that the stand belongs to the deceased estate without proof to that effect. It came to the fore that the stand was sold to 1st respondent through an affidavit dated 20 March 2009. Annexure "E". A court judgement Annexure "F" reflects that the stand is currently registered in first respondent's name. Applicant in his capacity as executor of deceased's estate and deceased's son seeks an order as referred to earlier.

First respondent opposed the application while second and third respondents did not file any opposing papers. Clearly second respondent being at the centre of the wrangle should have filed documents to assist the court in reaching a decision. Second respondent is the custodian of the chain of documents which clarify who is registered as the owner of the stand and from whom the stand was ceded by whom and in what circumstances. Second respondent's participation was clearly central in the determination of this matter. It is of some assistance that the participating parties filed Annexures "D", "H" and "J" which Annexures are letters written on behalf of second respondent.

Applicant raised a point *in limine*. He avers that the opposing affidavit is a nullity as it was signed by the deponent on 12 October 2020 while the Commissioner of Oaths signed the same on 15 October 2020. First respondent avers that there is thus no notice of opposition to talk about

Mr Chirairo for the first respondent was of the view that factually it was correct that the opposing affidavit reflects two different dates. He was of the view that the legal Practitioner who commissioned the affidavit being a busy person may have mistakenly used a stamp with the wrong date but that the opposing affidavit in reality was signed by the deponent and the legal practitioner on the same day i.e. 12 October 2021. He averred further that the supporting affidavit was drawn after sight of the opposing affidavit.

I note that the opposing affidavit was properly commissioned before a legal practitioner and I condone the error of the different dates. In order to effect justice between the parties I invoke rule 4C of the High Court Rules, 1971.

I will now move to deal with the merits

The applicant's application is predicated upon the following;

He was appointed an executor dative to his father's estate on 11 September, 2019. His father the deceased was once known as Glamous Mathuthu and a water bill for the Stand Annexure "C" reflects these names. Annexure "C" is dated 11 June, 2020. Applicant sought clarity from 2nd respondent on the status of the Stand only to discover that the Stand is now registered under 1st respondent's names.

The 2nd respondent in Annexures "D", "H" and "J" gives information that the Stand is owned by 1st respondent after it was sold to him by deceased. The sale is said to have been facilitated by an affidavit Annexure "E" and a Court Order Annexure "F".

It is of importance to interrogate these two documents in some detail. It should be noted that most of the Annexures produced by applicant are referred to and produced by 1st respondent as well.

Annexure "E" is an affidavit form which reads as follows;

I, Eliot Glamous residing at stand no 3719 Dulibadzimu Township do you hear by solemnly and sincerely swear I declare the following ...

That I have sold my business Stand to Mr Max Chikova reg no which is stand no 3710 Dulibadzimu T/Ship. I have agreed to sell the Stand as it is at an amount of R20,000.

The said document reflects deceased's signature and is date stamped 20 March 2019. The date stamp though a bit unclear appears to be from the Prosecutor's office at Beitbridge Court.

The applicant attacks Annexure "E". He avers that three people's handwritings appear on the document and that the document is a fraud. Further that the name of the Commissioner of Oaths is not given and the affidavit was signed only two days before the deceased died.

He further avers that the name Glamous Mathuthu Is the one that is on the second respondents files. That how then could Glamous Elliott sell a stand in the name of Glamous Mathuthu. He also makes the allegation that first respondent used the fact that he was deceased's friend and was the one who ferried him to hospital on 20 March 2019 when he was unwell and used this to change ownership of the stand. Further that the fact that first respondent was also deceased's neighbour and a councilor must have been used his influence on second respondent to effect the change of ownership without following the correct procedures.

First respondent however is of the contrary view. His view on Annexure "E" is as follows. Annexure "E" was executed by deceased in the presence of deceased's wife, Ephias Hove,

deceased's brother and his two children. In support of this position first respondent appended a supporting affidavit by Ephias Hove who declared that first respondent paid the full purchase price of the stand in his presence and the wife and two children of deceased.

Annexure "F"; is a Beitbridge Magistrate Court Order dated 17 August 2009 which reads as follows:-

"It is hereby ordered that :-

1. *Max Chikova is the owner of stand number 3719 Dulibadzimu Beitbridge*
2. *The defendant be and is hereby evicted from stand number 3710 Dulibadzimu Beitbridge*
3. *Each party to bear its own costs"*

Appellant attacks Annexure "F". He avers that it contains a declaratory order which is an order a magistrate cannot order at law.

Incidentally the appellant's mother was unable to locate the file relating to Annexure "F".

Indeed Annexure "K" a letter from the Judicial Service Commission Office, Beitbridge reflects that after diligent search the record could not be located. The letter is dated 24 April 2018 First respondent strongly opposes the application and raises other issues. He avers that he has been trading at the stand since 2016 and that since he bought it the stand is now worth about USD25 000. He perused the Master of High Court records under deceased estate DRMS 203/19 and noted the contents thereof which form part of the record. Some of the points raised did not seem to have been persisted upon with in oral argument. I note however that applicant established locus standi stands in this case. He is the executor of his father's estate. His father was the owner of the stand in question. The issue at hand involves the registration of the deceased's estate. Documents filed with the Master of the High Court included the stand as deceased's property.

In *Christwish Ganizani v Cynthia Takaindisa Kwiyo and Others* HH 121-21 MANGOTA J at page 3 defined a sale as follows:

"It is trite that a contract of sale has four essential elements. All the four elements must be present in order for a sale to be regarded as valid. The elements comprise:

- a) *The seller*
- b) *The purchaser*
- c) *The merx and the price (ox pretium)*

Writing on the requirements of a valid sale contract C Bradfield K Lehman state in their Sale & Lease 3 ed on p24 that is the identifying features or essential elements of a contract of sale must be present, the seller must intend to sell and the buyer to buy, and there must be agreement on the subject matter of the sale and on a price to be paid for it. In the absence of agreement on these aspects contract is not one of sale''

The applicant attacks Annexure "E" for various reasons.

Annexure "E" however identifies the seller and the buyer, the stand to be sold and the purchase price for the stand. That these may appear to be three handwritings on the document is of no moment. This is because the word "stand" that is added on does not change the complexion of the document as the stand number is already clearly identified in the document. The deceased's signature is appended. Applicant has not sought to distinguish this signature and that of deceased. It has not been alleged that deceased was of unsound mind either. Annexure "E" also bears both the buyer and sellers identification particulars. On the face of it the said Annexure "E" was signed before a Commissioner of Oaths. The said Annexure "E" standing on its own suggests that deceased agreed to sell the stand to first respondent. It however does not stand on its own. It is supported by the affidavit of Ephias Hove. Ephias Hove avers that he is deceased's older half-brother. He sketches the background of deceased having spent a lot of money towards his medication wherein he sold properties in an attempt to get money for medical attention. First respondent is said to have been deceased's friend who assisted him with money for treatments.

Deceased in his illness was disposing of his property to pay for his medication. The stand was sold to first respondent and the purchase price was paid to deceased in the presence of Ephias Hove, the deceased's wife and his two children.

Against all these important and damning revelations applicant does not address these concerns in his answering affidavit. Notably applicants mother who was involved in the wrangle concerning the stand is not invited as a supporting witness in the applicants case. I find in the light of the above that applicants attack on Annexure "E" failed to advance his case any further.

The attack on Annexure "F" is justifiable. Annexure "F" comes in the form of a declaratur which the magistrate is not allowed at law to make. It was argued that the water bill Annexure "C" reflects the names of Mathuthu C and the 2nd respondent could not accede to the change of ownership of C Mathuthu's property by Glamorous Elliot. All this is speculative. It is applicant who is alleging that the procedures were not adhered to who should prove it. It does not follow that

because the water bill reflects the names C Mathuthu then the file reflects the registered owner also as C. Mathuthu. In fact Annexure “J” by the second respondent reflects that the stand was sold to second respondent by Elliott Glamous. The water bill can even reflect the name of the tenant and not necessarily an owner..

I find the other considerations as appear hereunder to suggest that applicant did not prove his case on a balance of probabilities Deceased died on 22 March 2009 yet his estate was only registered in 2019. To alert the applicant and the rest of the family that the stand was being claimed by first respondent, respondent made an application for the eviction of deceased wife and an order was granted on 17 August 2009. Clearly the portion of the order containing a declaratur was inappropriate and a nullity. However the fact that there were such proceedings leading to such order was enough to spur applicant to seek to dislodge this order or otherwise seek to clarify the issue of who owned the stand. According to first respondent he has been an occupant of the stand since 2010 and has built a five roomed structure from which he is earning ZW50 000 .00 a month. The question is why would applicant watch 1st respondent build and operate on their deceased’s father’s stand without any intervention. Why would it surprise appellant in 2019 that first respondent is registered as the owner of the stand when he built a structure on the stand and was operating from the stand since 2010.

I find that the applicant has not succeeded to prove that he deserves the relief he seeks. I find that the application fails and that the application be dismissed with costs as prayed for.

To that end I order as follows;

The application be and is hereby dismissed with costs

Matutu and Mureri, applicant’s legal practitioners
Garikai & Company, 1st respondent’s legal practitioners