

JULIET NHLIZIYO (N.O)
and
ESTATE LATE HAROLD NHLIZIYO
versus
NOKUTHULA MOYO
and
ESTER KELLI (N.O)
and
ESTATE LATE PREECE NHLIZIYO
and
THE ASSISTANT MASTER (N.O)
and
CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22-23 JANUARY AND 5 FEBRUARY 2015

Civil Trial

Mr Mehluli Dube for the plaintiff
Mrs Tachiona for the 1st defendant

MAKONESE J: This is an application for absolution from the instance. The first defendant contends that at the close of the plaintiff's case the court should find that the first plaintiff has hopelessly failed to place any evidence before the court upon which a reasonable court may find for the first plaintiff.

A joint pre-trial conference memorandum signed and filed by the parties sets out the issues for determination as follows:

1. whether or not house number 8566 Pumula East Township, Bulawayo, registered in the names of the late Preece Nhliziyo should be declared as being owned by the estate of the late Harold Nhliziyo.
2. whether or not Thembelani Adrian Nhliziyo should be declared the only beneficiary in the Estate of the Late Preece Nhliziyo and house number 8566 Pumula East Township, Bulawayo, must be transferred into his names.

3. whether or not first plaintiff and all those claiming occupation through her should vacate house number 8566 Pumula East Township, Bulawayo, fourteen days after the order is served on her.
4. whether or not the first plaintiff should pay holdover damages (rentals) in the sum of US\$250 .00 calculated from the date she issued summons to date of her eviction.

The first plaintiff avers in her declaration that she is the Executrix Dative in the estate of the late Harold Nhliziyo in terms of Letters of Administration dated 22 March 2011. The second plaintiff is the estate of the late Harold Nhliziyo who died at Bulawayo on 17 December 2010. The first defendant is cited in her capacity as the guardian of Thembelani Adrian Nhliziyo, a minor child and beneficiary in the Estate of the third defendant. The first plaintiff further avers that the late Harold Nhliziyo was married to three different women before his demise. His first marriage ended in divorce and his second wife predeceased him. At the time of his death he was married to first plaintiff. It is not in dispute that on 14 February 1986 the late Harold Nhliziyo purchased from the City of Bulawayo stand 8566 Pumula East, Bulawayo. First plaintiff alleges in her declaration that after his divorce with his first wife the late Harold Nhliziyo transferred stand 8566 Pumula East, Bulawayo into the names of his late son Preece Nhliziyo. She avers further that it was the intention of the former that upon his death the property be inherited by Preece and his siblings. Preece Nhliziyo died in 2004 before his father died and his estate was registered in 2007.

It is the first plaintiff's case that the late Harold Nhliziyo failed to effect a change of ownership of the property back into his names before he died. First plaintiff also contends that first defendant was once married to the late Preece Nhliziyo before she abandoned him when he became critically ill. It is the plaintiff's case that Preece was never ordinarily resident at the property in dispute and that first defendant has no right to the property. At the heart of the plaintiff's case was the assertion that the house belongs to the estate of the late Harold Nhliziyo and not the estate of the late Preece Nhliziyo. The property was "provisionally" registered in the name of Preece Nhliziyo to prevent Harold Nhliziyo's first wife from laying a claim in the property in divorce proceedings. This was the first plaintiff's position. She said her version was largely based on what she was told by Harold Nhliziyo before he died.

The first plaintiff gave evidence. She largely abandoned her case as set out in the declaration. It emerged from her evidence that it was not true that Harold Nhliziyo had transferred stand 8566 Pumula East, Bulawayo into the names of Preece Nhliziyo after his divorce with his first wife. The first plaintiff admitted that that the property was transferred into Preece's names before the divorce. It was also established that first plaintiff was only married to Harold Nhliziyo in 2005. She had two children with the late Harold Nhliziyo, namely Ashley Nhliziyo (born in 1998) and Andila Nhliziyo (born in 2002). The house in dispute was registered into the names of Preece Nhliziyo in 1993. It is therefore not possible for Harold Nhliziyo to have intended the unborn children to benefit from the said property. In any event, when the house was transferred into the names of Preece Nhliziyo, the late Harold Nhliziyo had not even met the first plaintiff. Her claim that her late husband had told her that he was making provision for children who were not born does not make sense and the plaintiff failed to explain that discrepancy. Under re-examination by her legal practitioner she was asked to explain why her husband transferred the house into the names of Preece. She said her husband had told her that he had a problem pertaining to divorce.

When first plaintiff led evidence she gave the impression that at the time the property was transferred into Preece Nhliziyo's names, he was a school going child who had no means of income. This was refuted by first plaintiff's own witness, Mandleni Nhliziyo who testified that at the maternal time Preece was already in his late twenties.

First plaintiff's witnesses, Jack Nhliziyo and Mandleni Nhliziyo were extremely unhelpful to the court. Their evidence was vague and of little assistance to the plaintiff's case. Jack Nhliziyo stated that he was a brother to the late Harold Nhliziyo. He informed the court that he was staying in Gwanda at the relevant time. He would visit his brother in Bulawayo from time to time. He said his brother told him certain things, but that sometimes he would not. He testified that sometime in 1993 he approached the late Harold Nhliziyo at Edgars, Bulawayo where he was employed. His late brother confided that he had a problem with his wife. He indicated that he would use his child Preece to protect his property from distribution in a pending divorce. Jack Nhliziyo said he did not have any further information on the house in dispute save for that discussion he had with his late brother.

The second witness for the first plaintiff, was Mandleni Nhliziyo. The witness told the court that he knew the property being 8566 Pumula East, Bulawayo to belong to the late Harold Nhliziyo. He stated that on a certain day he saw papers at the late Harold Nhliziyo's house bearing the names Preece Nhliziyo. He said upon enquiry with the late Harold Nhliziyo he was advised that the property had been transferred into Preece Nhliziyo's names for the sole purpose of preventing the first wife from claiming a share in the property. The witness could not explain why the late Harold Nhliziyo had not re-transferred the property into his names after the divorce with his first wife.

In summary the first plaintiff's evidence was centred on what she said she was told by the late Harold Nhliziyo. Her oral testimony is not consistent with the averments in her declaration. An assessment of her evidence clearly shows that she hinged her claims on what she says she was advised by Harold Nhliziyo. There is a reasonable possibility that she was misled by the late Harold Nhliziyo. There would be no reason why Harold would have failed to regularise the ownership of the house from 1993 up to 2011 when he met his death. He had two children with the first plaintiff in 1998 and 2002 and he would have had ample time to ensure that his two children with the first plaintiff were adequately catered for upon his death.

I must observe that first plaintiff did concede that she inherited a rural home with a seven roomed house at Filabusi. Her late husband also left behind eighteen head of cattle, a motor vehicle and some household goods and effects at the said rural homestead.

It is my view therefore, that on the evidence led and placed before the court, at the close of the plaintiff's case, there is no evidence upon which a reasonable court may find for the first plaintiff. The case of *Savana Maisiri and Shalati Maisiri vs Abisha Maisva and Norton Town Council* HH 35/07, is relevant. The test to be applied in an application for absolution from the instance was well set out in the case of *Lourenco v Raja Dry Clerners and Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 and *Munhuwa v Mhukahuru Bus Service (Pvt) Ltd* 1994 (2) ZLR 382.

In the case of *Cathrine Chiwawa vs Apostolos Mutzuris* HH 7/09, the learned MAKARAU JP, stated at page 4 of the cyclostyled judgment as follows:

“At this stage I wish to point out that I agree with the observation by Advocate Zhou that at this stage in the trial, I may not make recourse to any findings I may have made on the credibility of the plaintiff as a witness. I also cannot determine the application for

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absolution on the basis of probabilities as I cannot justly arrive at these without hearing the other side. I take the view that the exercise I have to undertake at this stage is to simply but critically analyze the evidence adduced by the plaintiff and assess whether on the basis of such, without passing a judgment on whether I believe it or not, I can make a reasonable mistake and pass judgment in her favour.”

In applying the above test there is no doubt in my mind that the first plaintiff departed from the assertions in her declaration. The totality of her evidence is that she placed reliance on what he was told by her late husband. Even assuming that what her late husband told was proved to be true there would still be a gap in the evidence in that there is no explanation given as to why the late Harold Nhliziyo did not transfer title in the property back into his names following the divorce with his first wife. Before marrying the first plaintiff, the late Harold Nhliziyo even married a second wife who predeceased him. If the late Harold Nhliziyo intended to bequeath the rights, title and interest in the property to his children with the first plaintiff he had all the time to do so. I am not satisfied that the first plaintiff has established a *prima facie* case. The application for absolution from the instance has merit.

I accordingly order as follows:

1. First defendant is absolved from the instance.
2. The first plaintiff shall bear the costs of suit.

Mcijo, Dube and partners, plaintiff's legal practitioners
Dube-Tachiona and Tsvangirai, 1st defendant's legal practitioners