

THERESA CHIGIJI
versus
MANASE AND MANASE LEGAL PRACTITIONERS
and
CLINTON MUDZIMU
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 5 and 12 September 2005

Opposed Court Application

Mr *Muringi*, for the applicant
Mr *P Matizanadzo*, for the 1st respondent
C Andersen, for the 2nd respondent
No appearance from 3rd respondent

KAMOCHA J: The applicant sought for an order in the following terms:

"It is ordered that:-

1. The power of attorney in favour of 1st respondent be and is hereby declared invalid and of no force or effect;
2. The agreement of sale entered on the 25th of June 2004 between Winston Hazvineyi Chigiji represented by 1st respondent and Clinton Mudzimu be and is hereby cancelled and declared null and void;
3. The transfer of title in respect of stand 1119, Seke Township effected on the 28th of October 2004 to 2nd respondent be and is hereby reversed, and Deed of Transfer D.T 8572/72/04 is revoked and 3rd respondent be and is hereby ordered to put the above into effect; and
4. That 1st and 2nd respondents shall pay costs of suit jointly and severally."

Manase and Manase legal practitioners were engaged by Winston Hazvineyi Chigiji "Winston" who instructed them, by power of Attorney, to sell his property known as Stand 1119 Seke Township. On 25 June 2004 the legal practitioners entered into an agreement of sale of the said property with the 2nd respondent. The purchase price was an amount of \$65 million which the 2nd respondent paid in full as stipulated in the agreement.

On 28 October 2004 the property was transferred from the name of Winston Hazvineyi Chigiji into the name of Clinton Mudzimu.

The basis upon which the applicant sought to have the sale declared null and void and transfer reversed is two pronged. Firstly she claimed to have been properly married to Winston and that having contributed to the construction of the house she had a vested interest in the property and by virtue thereof she had *locus standi* to prosecute this application.

Secondly, she asserted that the power of attorney granting agency to the 1st respondent was a legal nullity as she alleged that Winston had no capacity to contract at the time of its execution. Consequently, any act performed by the 1st respondent pursuant to the power of attorney was *ipso facto* invalid and that invalidity affected the resultant transfer of the property which ought to be reversed.

I shall now deal with the alleged invalidity of the power of attorney. Applicant's claim that Winston had no capacity to grant a power of attorney to the 1st respondent is not supported by any cogent evidence. The documents, from medical practitioners, she filed of record do not say Winston had no capacity to enter into an agreement at the time he signed the power of attorney granting authority to his legal practitioners.

It is trite that every party entering into a contract is presumed to have the legal capacity to do so, unless the contrary is proved. The party making such an assertion bears the onus of proving the lack of capacity.

It is clear that the power of attorney was granted on 13 February 2004 well before Winston suffered a stroke. As already stated above the documents, from medical practitioners, filed of record do not show Winston's mental state at the time he executed the power of attorney in favour of his legal practitioners. The applicant should have proved that Winston was mentally incapable to conduct his affairs at the time he signed the power of attorney. She however failed to discharge that burdened.

Applicant's next point of contention was that she had *locus standi* to prosecute this application since she was "properly and legally married to Winston Hazvineyi Chigiji." It is, however, common cause that Winston had contracted a customary union with one Phallice Gondo in 1968. That union was registered in terms of the then African Marriages Act (now the Customary Marriages Act, [Chapter 5:07] on 25 October 1976. That marriage still subsists.

The applicant was quite aware that Winston and Phallice were still married to each other and had not divorced in accordance with the law. She conceded in paragraph 10 of her answering affidavit that at law Phallice could be deemed to be properly married to Winston. Yet with the full appreciation of those facts, she purported to contract a marriage with Winston in terms of the Marriages Act [*Chapter 5:11*] on 3 December 1999.

The purported marriage was, however, not valid at law. The legal position is set out in **Family Law in Zimbabwe** by **W Ncube** at 139 thus:-

"A person of either sex who is already married under African Marriages Act cannot validly contract another marriage under the Marriage Act with another person other than his or her spouse."

In *casu* Winston could not have validly married the applicant in terms of the Marriage Act [*Chapter 5:11*] since he was already married to Phallice in terms of the Customary marriages Act [*Chapter 5:07*] while that marriage still subsisted. He, however, could have validly have "upgraded" his marriage to a civil one with Phallice if he so wished.

It therefore admits of no doubt that the applicant's "Marriage" to Winston was bigamous. In *Mudzingwa v Mudzingwa* 1989(2) ZLR 182 (SC) at 187C-E GUBBAY JA (as he then was) had this to say about bigamous unions such as the one *in casu*.

"It produces none of the incidents of the valid marriage. No lapse of time operates as a ratification. The "husband" is no husband at all and the "wife" is no wife at all In short, in the eyes of the law the parties to a bigamous marriage are no more than man and mistress."

Since the applicant's "marriage" to Winston was bigamous she accordingly does not have *locus standi* to claim "matrimonial" property from a non-existent marriage. Put in another way the property she sought to claim was clearly not matrimonial property or the matrimonial home since there was no matrimony.

Applicant did not found *locus standi* arising out of a tacit universal partnership nor did she seek a proprietary order arising out the dissolution of an unregistered union. That therefore distinguishes this case from cases such as *Mashingaidze v Mashingaidze* 1995(1) ZLR 219(H) and *Chapendama v Chapendama* 1998(2) ZLR 18(H).

When launching this application, the applicant did not cite Winston as a party to these proceedings. He was the owner of the property and has therefore direct

interest in the property. This application sought to interfere with his enjoyment of his property without joining him to these proceedings. In my view, the application is fatally flawed for lack of joinder of Winston.

In the light of all the above findings I would dismiss the application with costs.

Messrs Kantor Immerman, applicant's legal practitioners.

Gill, Godlonton & Gerrans, 2nd respondent's legal practitioners.