

JOYCE CHAGADURA
versus
SHELLY ANTONIO
and
REGIS MUVEREGI
and
DIRECTOR OF HOUSING CITY OF HARARE
and
THE SHERIFF OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 14, 15 & 16 July 2009 & 29 July 2010

FAMILY LAW COURT

Trial Cause

Mr *Tsaurai* for the plaintiff

Mr *Ruzengwe* for 1st & 2nd defendants

GUVAVA J: The plaintiff issued summons out of this court seeking the setting aside of an agreement of sale relating to stand number 32 Manga Street New Mabvuku entered into between the first and second defendants, nullification of the cession of the property from the estate of the Late Vito Bhero to the first defendant and costs. When this matter commenced before this court it was by way of court application. This court in its judgment of 26 April 2006 ordered that the matter be referred to trial so that the parties could fully ventilate the issues between them. The matter was thus delayed by the issuance of new process and subsequent referral to trial. After hearing the evidence in this matter the notebook was inadvertently lost in the registrars' office. The securing of a transcript has taken some time to obtain and this has accounted for the long delay in finalizing this matter.

Several facts in this matter are common cause and I will set them out hereunder. The plaintiff was married at customary law by the late Vito Bhero (the deceased) who died intestate on 15 January 2004. She had five children with the deceased who are now all majors. Prior to the deceased's marriage to the plaintiff he was married to the first defendant in terms of the African Marriages Act. After the death of the deceased the first defendant registered the estate and was appointed executor of the estate. She proceeded to transfer the only immovable

property, which was stand 32 Manga Street New Mabvuku into her name and subsequently sold it to the second defendant. The second defendant, after acquiring title to the property sought to evict the plaintiff and her children from the property. The plaintiff sought and obtained interim protection from this court stopping her eviction. She then instituted a court application seeking an order setting aside the first defendant as executor of the estate and the relief already alluded to above. At the hearing before MAKARAU J the court found that the issue of the first defendant's removal as executor was *res judicata* and referred the other issues to trial. The issues which were thus referred to trial are as follows:

- a) Whether or not the marriage between the first defendant and the late Vito Bhero was dissolved and the two separated in 1976?
- b) Whether or not the second defendant was an innocent and bona fide purchaser for value of the property called stand 32 Manga Street New Mabvuku, Harare?
- c) Whether or not the sale of the property to the second defendant should be set aside?

The plaintiff gave evidence. She told the court that she married the deceased in 1983. She stated that at the time that she married the deceased he had divorced the first defendant. She stated that although she saw the order for divorce it was burnt when their house was burnt down in 2001. When the deceased passed away she met the first defendant for the first time at the funeral. After the funeral the first defendant took the burial order and made all the necessary arrangements for the registration of the estate. She continued to reside on the property with her children and was unaware of the sale of the property until the first defendant's children came and attacked her. They demanded that she vacate the property. She stated that at the time that the deceased died she was staying in the property with him and the first defendant was staying at her communal home.

In cross examination the witness reiterated that the first defendant was divorced in 1976 and first defendant was now living with another man. She denied that the first defendant would ever visit the deceased during his lifetime nor that they had stayed together in the same house. The plaintiff admitted that the first defendant's name was on the Municipal cards belonging to the City of Harare. When it was put to her that if it is found that they were both the wives of the deceased would she not be entitled to a share of the house she conceded that the first defendant would be so entitled. The plaintiff denied that the first defendant had to

process the estate on her own because the plaintiff was being hostile. She also denied that the first defendant had to sell the property because of the hostility between them which made it impossible for them to stay together and stated that she was never consulted. She denied that they had ever stayed together at the house though the first defendant's children would come to visit. She further denied that she was offered \$10 million out of the sale price of \$40 million. She also stated that she had tried to obtain the divorce order but had failed as she did not have the case reference number. In my view the plaintiff gave her evidence well. She was not shaken in cross examination. Her story was both credible and believable and I had no difficulty in believing her evidence. I however did not accept her evidence as it related to the divorce between the first defendant and the deceased. It seems to me that her evidence may have been influenced by the fact that the deceased had married her and in her eyes had divorced his 1st wife. She was no longer living with them but she may not have appreciated that the marriage was not dissolved by a court order and thus remained in existence. Had the divorce order been granted the plaintiffs legal practitioners would have been able to obtain it from the court records.

The second witness was Raiva Bhero. The plaintiff is his mother and the deceased was his father. He told the court that he came to know the first defendant at his father's funeral. He testified that he never lived with the first defendant during his father's lifetime. After his father died, his half- brother by the name of Chaparira Mutasa, who is the first defendants son, came and asked for a room to stay at the house. When he got the room the first defendant came and stayed in that room for about a week. He came to know that the property had been sold when they were served with an eviction order by the second defendant. He denied that he or his mother had been consulted at any stage about the appointment of an executor or the sale of the house.

During cross examination he claimed that he had seen the divorce order between his father and the first defendant when he was 8 years old. He was adamant that he had never met the first defendant before his father died but had been advised by his half brother and sister that she lived in Mazoe. He further stated that the divorce order had been burnt during a fire which took place at their home in 2001. He insisted that after the fire the plaintiff rebuilt the house with the assistance of her employer and at the time they were evicted only the windowpanes were yet to be replaced. He also denied that they had received a letter from

Messers Marimba and Partners asking his mother to come and collect \$10 million as her share from the proceeds of the sale of the property.

The witness gave his evidence well. He was clear in his answers and was not evasive in cross examination. He accepted that relations between the two families were not good. He also conceded that in the event that the court was to find that the first defendant was still married to the deceased she would be entitled to a share in the estate. I however did not believe him when he stated that he had seen the divorce order between his father and the first defendant when he was still a child.

The third witness for the plaintiff was Agushita Sinati. She told the court that she resides at 30 Tende Street in Mabvuku. She knows plaintiff as a sister in law as the late Vito Bhero was her brother. She testified that she did not know the first defendant and further stated that the deceased was not married prior to his marriage to the plaintiff. She stated that at the time that the deceased lived at number 32 Manga Road they did not live with any one else other than their children. In cross examination she stated that she had come to tell the court that the junior wife was suffering with the children as they were staying in the open as they had been evicted from their home.

This witness did not give her evidence well. The evidence was very disjointed and unclear. In one breath she would say the deceased was not married to the first defendant and in the next breath she would refer to the plaintiff as the junior wife. In my view she was not a credible witness and did not advance the plaintiffs case in any way.

With this evidence the plaintiff closed her case.

The defendant testified that she was married to the deceased in terms of the Customary Marriages Act on 4 December 1972. She knows the plaintiff as her husband's junior wife. She stated that her original marriage certificate was burnt when their house in Mabvuku burnt down in 2001. She thus produced a duplicate original marriage certificate before the court which she obtained after the death of the deceased. She stated that she had three children with the deceased who are now all majors. She indicated that when number 32 Manga Street Mabvuku was purchased from the municipality her name was endorsed on the municipal cards as the wife of the deceased. She stated that from the time she married the deceased up until he died she was living with him at that address. The deceased married the plaintiff in 1983 and they all lived at the same house. She denied that she divorced the deceased in 1976 and left the

home. She also disputed that she married another man by the name Kareto and had five children with him.

She testified that after the deceased died she was appointed as executor of his estate. She produced the letters of administration granted to her by the Master. She however stated that the plaintiff and her children from a previous marriage would continuously harass her and at some stage she had to seek a peace order from the magistrates Court. Following the registration of the deceased's estate the first defendant had the property transferred into her name. She subsequently sold it to the second defendant. The property is now registered in the name of the second defendant. She produced the agreement of sale dated 18 February 2005 and the memorandum of assignment from the City Council. She stated that she sold the property for \$40 million and instructed her legal practitioner to give \$10 million to the plaintiff as her share of the proceeds. She further testified that if the plaintiff and her children had not been harassing her she would not have sold the house. The witness stated that she came to know the second defendant after she told members of her church that she was looking for a buyer for her house. The second defendant then came and viewed the house and they agreed on the purchase price. When he came to view the house the plaintiff and her children were not present.

In cross examination she insisted that she had lived with the plaintiff and the deceased at the house in Mabvuku until she sold it. It was however apparent that the witness did not know the names of the plaintiff's children though she stated that they had lived together for more than 20 years. She failed to explain the reason why she would not know their names if they had all lived together. It was also apparent that she did not know the second defendant until the sale of the house although he lived just down the road and had lived there all his life. However she conceded that at the time she sold the property the second defendant knew that the plaintiff was objecting to the sale. She stated that she knew nothing about the administration of estates. She sold the house after an application by the plaintiff for her removal as executor had been dismissed. I was not impressed with the witness's evidence. I did not believe her when she stated that she had been living at number 32 Manga Street until the death of the deceased. She did not know things which one would expect a person living in the area to know. For instance she did not know the names of plaintiff's children nor did she know the second defendant who lived just a few houses from them on the same street. I

however accepted her testimony that at the time of the deceased's death she was still married to him.

The next witness for the defence was Chaparira Bhero. He stated that the first defendant is his mother and the deceased was his father. He has an elder brother and a sister. He knows the plaintiff as his step mother. He came to know her in 1983 when she married his father and moved in at 32 Manga Street in Mabvuku. At the time he was living elsewhere as a tenant and his brother was staying at their rural home. His sister was married and living with her husband. When their father died the estate was registered at the assistant Masters office. The plaintiff was invited to attend the edict meeting but she declined to do so. The first defendant was appointed executor of the estate and transferred the property into her name. She subsequently sold the property to the second defendant. He stated that he did not know the second defendant until he came and saw the house. After the second defendant purchased the house his brother Itayi was asked to deliver a letter to the plaintiff advising her to collect her share of the money. He was attacked by the plaintiff's children and made a report to the police. He confirmed the first defendant's testimony that she remained married to the deceased until his death.

In cross examination he confirmed that his mother remained married to his father until he died. He denied that his mother ever left the matrimonial home and stated that she lived there with the plaintiff. He confirmed that the relationship between his mother and the plaintiff was acrimonious. He confirmed that his mother was living with his elder brother at their rural home in Madziva. This witnesses evidence in my view reinforced the fact that they did not know the second defendant prior to the sale of the property because they were no longer living in Mabvuku.

The next witness was Regis Muverengi the second defendant. He testified that he has lived at 17 Manga Street since 1973 when he was 10 years old. The property belongs to his parents. He knows the plaintiff as a neighbour as she started living there in 1984. He knew the first defendant facially and had known her since 1974. He confirmed that the late Vito Bhero had two wives who both resided with him at number 32 Manga Street Mabvuku. In 2005 he was advised by his uncle that the house was being sold. He went and viewed the house and agreed to buy it for \$40 million. In his opinion it was a fair price as it had been burnt at some stage and needed considerable rebuilding. He conducted negotiations with the first defendant because when he went to the council offices he found that the property was registered in her

name. He paid the purchase price to Marimba and Partners a firm of legal practitioners who were involved in drafting the sale agreement. After he obtained cession to the property he then instituted proceedings to evict the plaintiff from the house. She was evicted in March 2008 and he then moved into the property. He further stated that when he signed the agreement of sale his attention was drawn to clause 6.1 which stated that the sale was subject to a resolution of a dispute on the property. It was explained to him that the clause meant that there were people staying in the property and he could not get immediate occupation.

In cross examination the witness conceded that he was aware that the plaintiff and her children lived on the property but he was of the opinion that her problem with the first defendant was a family dispute which did not involve him. He stood firm on his evidence that he knew the first defendant from 1974. When questioned about the provisions in the agreement of sale that he signed he explained that clause 6.1 was explained to him and he understood it to mean that although there was a pending dispute on the property the persons living thereon would be evicted.

In assessing the evidence that was led before me it is clear that the late Vito Bareto was married to the plaintiff and the first defendant during his lifetime. The first defendant was his first wife and he registered their marriage in terms of the then African Marriages Act. This was quite apparent from the evidence of all the witnesses. The deceased married the plaintiff in terms of customary law in 1983. The plaintiff testified that the deceased had divorced the first defendant in 1976 before he married her. In support of this assertion the plaintiff called her son Raiva who told the court that he saw the divorce papers when she was 8 years old. How an 8 year old would be able to identify and remember a divorce order she had seen many years ago was in my view totally incredible. The evidence by Agushita Sinati was not reliable as she denied that the deceased had been married to the first defendant; a point which was common cause. No other evidence was called to show that the first defendant had been divorced at customary law nor did she produce the divorce order or a copy of the document. The explanation was that it had been destroyed in a fire in 2001. The first defendant on the other hand produced to the court a duplicate original marriage certificate issued by the Registrar of Marriages and she denied that their marriage was ever dissolved. In my view that piece of evidence was conclusive in determining the first defendant's status at the time of the deceased's death.

The first defendant and the deceased may very well have been living separately especially after the marriage of plaintiff to the deceased. The evidence led showed that the relationship between the plaintiff and the first defendant was acrimonious. I believed the plaintiff's testimony that she was living with the deceased whilst the first defendant lived elsewhere. This evidence was in my view corroborated by the fact that the second defendant knew the plaintiff as a neighbor and only knew the first defendant when they entered into the agreement of sale. This was further confirmed by Chaparira Bhero who told the court that they only got to know the second defendant because of the sale of the property, yet he lived just a few houses down the road. This in my view confirms the evidence that the person who was resident at 32 Manga Street was the plaintiff. This position was further supported by the fact that, when questioned in cross examination, the first defendant did not know the names of the plaintiff's children and yet she claimed that they had lived together under the same roof for close to 20 years. However what is quite clear is that the marriage which was registered between the deceased and the first defendant on 4 December 1972 had not been terminated. In my view therefore the late Vito Bhero was survived by two wives who were both married in terms of customary law.

The law relating to the distribution of deceased's estates is regulated by the Administration of Estates Act [*Cap 6:01*], ("the Act"). The first defendant was properly appointed as executor of the deceased's estate on 4 August 2004. Following her appointment as executor she was obliged in terms of the law to draw up an inheritance plan after due consultation with the beneficiaries for consideration and approval by the Master in terms of s 68 D and 68 E of the Act. The specific provisions provide as follows:

68D Inheritance plan

(1) As soon as possible after the death of a person referred to in subsection (1) of section *sixty-eight A* and the discharge or settlement of any legitimate claims against his estate, his executor shall draw up a plan providing for such of the following matters as may be appropriate—

- (a) the conservation and application of the net estate for the benefit of the beneficiaries;
- (b) the distribution of all or any part of the net estate to the beneficiaries;
- (c) the sale or disposal of any property of the net estate for the benefit of the beneficiaries;
- (d) the maintenance of any beneficiary.

(2) When drawing up a plan in terms of subsection (1), an executor shall—

- (a) pay due regard to the principles set out in subsection (2) of section *sixty-eight F*, to the extent that they are applicable; and

- (b) so far as is practicable, consult the deceased person's family and the beneficiaries and endeavour to obtain the beneficiaries' agreement to it.

68E Consideration and approval of inheritance plan

(1) As soon as possible after drawing up a plan in terms of section *sixty-eight*, an executor shall submit it to the Master for approval.

(2) On receipt of a plan drawn up in terms of *sixty-eight D*, the Master shall take such steps as he considers necessary or appropriate to satisfy himself that—

- (a) the executor has consulted all the members of the deceased's family and beneficiaries whom he could with reasonable diligence have consulted, and has obtained the beneficiaries' agreement to the plan; and
- (b) the beneficiaries who have agreed to the plan have done so with full knowledge and understanding of their rights.

(3) If the Master—

- (a) is satisfied that a plan submitted to him in terms of subsection (1) has been agreed to by all the beneficiaries concerned or by such of them as the executor could with reasonable diligence have consulted, the Master shall approve the plan and authorize the executor to distribute or administer the estate in accordance with it;
- (b) has reason to believe that the executor has failed to consult a member of the deceased's family or a beneficiary whom he could with reasonable diligence have consulted, the Master shall refuse to approve the plan until that family member or beneficiary has been consulted and, in the case of a beneficiary, his agreement to the plan has been obtained;
- (c) has reason to believe that one or more of the beneficiaries concerned have not agreed to a plan submitted to him in terms of subsection (1), the Master shall proceed to determine, in accordance with section *sixty-eight F*, any issues in dispute between the executor and the beneficiary or beneficiaries, and shall direct the executor to distribute or administer the estate in accordance with his determination.

It seems to me that the wording of section s 68D is mandatory in that it requires the executor to act in a specified manner. The first defendant submitted that she had substantially complied with the requirements regard being had to the "bad blood" between the plaintiff and her. It was further submitted that for an uneducated old woman she had acted rationally and above board. In my view, the application of the provisions is not discretionary on the part of the executor. The legislature crafted the legislation in this manner in order to ensure that all the beneficiaries of the estate of the deceased would be catered for.

The first defendant's failure to comply with the Act cannot be absolved by the mere fact that she was an old and illiterate woman who thought she was acting in the best interest of the parties. Having accepted the position of executor she was obliged to act in the best interest of the estate and the beneficiaries and in accordance with the law. The legal position of an executor has been set out in various judgments of this court. D. Meyerowitz in "The Law and Practice of Administration of Estates" at p 101 describes the position of an executor succinctly as follows:

"The executor acts on his own responsibility, but he is not free to deal with assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the will and in terms of the law, which prescribes his duties and the method of administration and makes him subject to the supervision of the Master in regard to a number of matters"

The evidence led in this trial clearly shows that the executor did not act in the manner expected of an executor. She did not comply with the provisions of the Act and acted in her own interest. Had the first defendant complied with the requirements of the Act this would not have happened. The evidence led in this court disclosed that the deceased had not divorced the first defendant. Thus the estate had to be distributed between the two surviving spouses. The evidence led did not disclose how the property was transferred into the first defendant's name from the name of the deceased. The letters of administration granted to the first defendant did not give her the right to make such a transfer. As an executor she could only have sold the property after being given authority by the Master in accordance with s 120 of the Act. It seems to me that the act of transferring the property from the deceased to the first defendant could only have been accomplished through fraud as mere appointment of a person as executor does not grant them the right to transfer estate property into their name. The property, being estate property, could only have been transferred into the name of an individual once the Master had in terms of s 68E considered and approved the proposed distribution plan. The evidence led showed that to date the estate has not been finalized with the Master. No distribution plan has been lodged.

In my view therefore, the failure by the first defendant to comply with the provisions of the Act renders her actions in selling the property a nullity and as such the sale must be set aside. Having determined that her actions are a nullity it is unnecessary for this court to determine whether or not the second defendant was an innocent bona fide purchaser. The transaction being illegal makes the sale a nullity. In the case of *Katirawu v Katirawu & Anor* HH58/07 MAKARAU JP as she then was stated as follows:

In conclusion, the "rights" that the second respondent believes to have purchased and acquired from the first respondent are tainted by the same illegality and amount to naught by token of the same reasoning. It is as if there was never a sale between her and the first respondent and consequently, no rights can flow from a non-sale in her favour. The sale and the consequent cession of rights in her favour amount to nothing at law for nothing legal can flow from a fraud.

It is also on that basis that I will not award costs against the second defendant. The plaintiff has been successful in her claim and should be awarded the costs. Whilst it is the practice in cases of deceased's estates to award costs against the estate it would in my view cause an undue hardship on this estate. The first defendant abused her position as executor to unjustly enrich herself at the expense of the plaintiff and should be punished with costs.

Accordingly I make the following order:

1. The cession of number 32 Manga Street New Mabvuku from the name of the late Vito Bero to the first defendant is hereby set aside
2. It is declared that the agreement of sale entered into by the first and second defendants is null and void.
3. The first defendant shall pay the costs of suit.

Chinganga & Company, plaintiff's legal practitioners
Mapombere, Musakana & Ruzengwe, 1st and 2nd defendants' legal practitioners