

TAZVITYA ARTHAR MUTANDWA  
versus  
SILVER ZHUWAKE  
and  
BRENDA CAROL LEEPER  
and  
THE DEPUTY SHERIFF  
and  
THE REGISTRAR OF DEEDS  
and  
ISRAEL GUMUNYU

HIGH COURT OF ZIMBABWE  
BUNHU J  
HARARE, 30 September 2009 and 10 October 2009 and 17 March 2010

*O. Hute*, for the plaintiff  
*C. Kwaramba*, for the first defendant  
*L. Uriri*, for the fifth defendant

BHUNU J: The plaintiff sued the first to fifth defendants seeking vacant possession of certain piece of immovable property known as stand number 381 Goodhope Township.

The first defendant claims occupation of the disputed property on the basis that he inherited it from his late father Lovemore Zhuwake.

The fifth defendant is the executor in the estate of the late Lovemore Zhuwake whereas the second defendant is the executrix in the estate of the late Johana Fransisca Logan, the previous owner of the disputed property.

When sued the second defendant did not enter an appearance to defend and was accordingly barred in terms of r 50 of the High Court Rules.

The effects of a bar flow from r 83 which provide that:

- “(a) the Registrar shall not accept for filing any pleading or other document from the party barred and
- (b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit; except for the purpose of applying for the removal of the bar”.

During the course of the trial the plaintiff sought to call the second defendant as a witness. Both counsel for the first and fifth defendants have vigorously objected to the calling of this witness on the grounds that she is already barred and as such she cannot be heard in terms of r 83.

Counsel for the plaintiff however countered that he is calling the second defendant as a witness and not as a party to the proceedings.

Counsel for the first and fifth defendants retorted that the second defendant is no ordinary party to the proceedings. She is cited as a statutory functionary. Despite being barred she remains a party to the proceedings by virtue of her statutory obligation to represent the estate.

That may very well be so but I take the robust view that the executor is in fact wearing two hats one as the executrix in the estate of the late Johana Francisca Logan and the other as a competent and compelable witness in this trial. The two positions are separate and distinct.

Whereas r 83 expressly bars a barred party from being heard other than for the upliftment of the bar it does not preclude a barred party from giving evidence as a witness at the instance of an interested party.

Had the law maker intended to bar a party who has been barred from giving evidence it would have undoubtedly expressly said so.

As the law does not expressly bar a barred party from giving evidence as a witness it means that the law does not prohibit him from being called as a witness by another party in the same proceedings.

It is trite that what is not prohibited by law is permissible at law. For that reason I hold that it is competent for the plaintiff to call the second defendant notwithstanding that she has been barred from being heard as a party. Being heard as party is different from being heard as a witness for the other party.

It is accordingly ordered that the plaintiff be and is hereby allowed to call the second defendant as a witness in these proceedings.

*Hute & Partners*, the plaintiff's legal practitioners  
*Mbidzo, Muchadehama & Makoni*, the first defendant's legal practitioners  
*Chadyiwa & Associates*, fifth respondent's legal practitioners