

JONASI DONDO N.O
versus
MAGNA MUGANHIRI
and
RICKY KANDEMWA
and
MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 2 & 3 October 2014 and 29 January 2015

Family court: Trial Cause

L Matapura, for the Plaintiff
Z Chidyausiku, for the 1st Defendant
TP Mateisanwa, for the 2nd Defendant
No appearance for the 3rd & 4th Defendants

TSANGA J: This trial rests on the sale of a house that belonged to a deceased's estate. To grasp the essence of the dispute start with misfortune of "tardy" executorship in the initial instance to grasp one of its possible consequences as being the opening of doors for the stealthy. Stir in the factual reality of a deceased whose lifestyle was *de facto* far from monogamous even if his legal choice of marriage may have dictated otherwise. What emerges is a legal drama that unravels from the grievance of exclusion and the machinations to gain centre stage. Stir to this mix an innocent purchaser, to appreciate the blend of interlocking realities from which this court has to unearth legal positions and fashion its decision.

What the plaintiff, Jonasi Dondo seeks in his capacity as executor, is in essence an order setting aside the sale and transfer by the first defendant, Magana Muganhiri, to Ricky Kandemwa who is the second defendant, certain property, known as stand 4303 Highfield township. Also sought by the plaintiff is the cancellation of that transfer by the fourth defendant, the Registrar of Deeds.

More than ten years ago, on 11 February 2004, the plaintiff was issued with letters of administration to the estate of the late Isaac Chabveka, hereinafter referred to as the deceased. He died on 20 September 2003 without leaving a will. He left a widow, one Liya Chabveka Nee Apololi (Liya) with whom he had a civil marriage registered on 12 June 1995. When his estate was registered he was said to have been survived by his two children with Liya, namely Anna Chabveka and Audrey Chabveka who were minors at the time. Also included were two other children from previous unions. However, the first defendant and her son were not among the beneficiaries.

The deceased's estate was registered as DR 2768/03. However, for reasons which the plaintiff says stemmed from the widow's ill health resulting in her inability to provide him with documents that he required such as values of vehicles, bank account statements, and insurance policies, the administration of the deceased's estate remained unresolved for nearly a decade. He had therefore taken the position that he would wait out, and that the family would come when they were ready.

It was some time in 2011 when this eventuality ensued. He was approached by one of the children who also informed that the widow, Liya, had died on 9 July 2010. He was asked to finalise the winding of the estate. Following this he had drawn up the final liquidation and distribution account which he lodged with the Master in June 2012. It was whilst waiting for its auditing that he was approached by a sitting tenant at the property enquiring why they were being evicted. An examination of the documents revealed that the tenant was being evicted by a third party on account of having purchased the house.

The plaintiff's investigations with the Masters office unearthed that the property had been sold by the first defendant to the second defendant for US\$36 000-00 as captured in the agreement of sale. The second defendant transferred a sum of US\$38 200-00 to her legal practitioners for the purchase and transfer. The sale was on the strength of letters of administration granted to the first defendant on 4 December 2012 in her capacity as a widow of the deceased. She had also sworn an affidavit that she and her son were the deceased's only surviving relatives. Under these letters of administration the estate was registered as DR 560/12. Consent to the sale of the property was granted by the Master in terms of s120 of the Administration of Estates Act [*Cap 6:01*] in July 2013. The Deed of Transfer by the fourth defendant is dated 10 September 2013.

Following the plaintiff's investigation, a letter was written to the Master enquiring why he had allowed the estate to be administered for the second time without cancelling the

first letters of administration. According to the plaintiff, the Master's office did not respond directly to the letter but he did request the first defendant to render an explanation. The Master thereafter called for all interested parties to attend but the plaintiff said he did not go as his firm view was that the proper legal procedure to follow was for the second set of letters of administration to be revoked by the Master.

The Master filed a report confirming a double registration emanating from different names having been used by the registering parties for the same estate. The report is also unequivocal that the resolution of the dispute lies in resolving who the deceased's beneficiaries are. It urges that the second defendant be interdicted from selling the property pending the resolution of the dispute. While the Master was not represented at this trial his report makes it clear that he will abide by the decision of this court.

The gist of plaintiff's argument was that the transfer of the house from the deceased estate to the second defendant was irregular and unlawful and that it ought to be set aside as the plaintiff's letters of administration are still extant. He further stated that the first defendant obtained her letters through misrepresentation as she could not have been the deceased's wife since he had a monogamous marriage. He also argued that the first defendant had conveniently waited for Liya's death to assert her claim as a surviving spouse. Regarding the sale of the house, his position was that this was a matter between the first and the second defendant since if she was not supposed to be appointed, she had no right to sell nor transfer the property.

The plaintiff also called a second witness Sekai Mukahana, a sister to Liya's mother. Her evidence, though factual about Liya's marriage to the deceased, was of no value in clarifying to this court whether the deceased had another wife.

The first defendant denied that she misrepresented herself as a wife and argued that the obtainment of the letters and the sale of the house were all above board in accordance with the law. Her evidence was that she met the deceased in 1989 and had a child with him in 1991. She said their relationship had continued until 1993 when the deceased expressed his intention to marry and that he had done so at her parents' house in Highfields. She said the deceased was accompanied by his brother one Raphael Nyaunga, since deceased. However, he did not finish paying for everything charged.

Asked if there was any documentation regarding the payment of *lobola* she stated that her brother who took notes had since died and therefore she could not confirm proof of the ceremony. She admitted knowing that Isaac had a wife but insisted he had denied that they

had a registered marriage. She also confirmed in cross examination that besides herself she knew of a total of three other women who had been in the deceased's life and mentioned them by the names of their children. Her evidence was that Isaac resided with her in her flat in Mufakose initially spending one night there but that he had gradually moved in with her. Regarding the registration of the estate she said she had waited to be approached but no one had approached her. She also claimed that she was unaware that the plaintiff had been made an executor of the estate. When no one approached her that is when she decided to register the estate in 2012. She did admit though that soon after the deceased's death a car belonging to the deceased had been taken away from her. She had tried to assert her claim to the car on the basis that she had paid for it. Of relevance is that the judge in that case, namely HH 82-2004 had alluded to the deceased's monogamous marriage, a fact that the first defendant admitted had not been challenged by appealing the decision as having been founded on an incorrect set of facts. The judge had described the facts relating to the deceased's marital as follows:

“The background to the main application is that the Respondent was married to the late Isaac Chabveka on the 12th June 1995 in terms of the then Chapter 37 which is now Chapter 5:11. This type of marriage is a civil marriage which does not co-exist with any other marriage, it is monogamous.

During the subsistence of the civil marriage the late Isaac Chabveka entered into a sexual relationship with the applicant Magna Mureche Muganhiri. The two cohabited as man and woman resulting in the birth of a child”.

The first defendant admitted that when she came to register the estate, she was only accompanied by her brother's child and her own son. She stated that she only became aware of the double registration when the buyer of the property was trying to evict the tenants.

The second defendant's main assertion was that she purchased the property as innocent person and followed all the necessary procedures as required by the relevant authorities and as facilitated by her lawyer. Any wrongful acts she maintained, were outside her purview as a *bona fide* purchaser. She argued that there was no basis for reversing the sale to her prejudice since the other beneficiaries to the estate could address their prejudice by claiming their share from the first defendant.

In laying out the first defendant's position, Mr *Chidyausiku* painted a picture in cross examination supported by documented letters of complaint, of gross incompetence in the

winding up of the estate stemming not only from the inordinate delay it was taking to wind up the estate but also from the fact that the plaintiff was unaware as executor that there were other beneficiaries. The fact that the plaintiff is a lawyer of 23 years standing was also used to highlight that despite this reality the winding was anything but that of a professional and experienced executor. In particular correspondence from Dururu & Associates, lawyers acting on behalf of one Kednus Chinanzvavana and Tendai Chabveka who had registered claims against the estate was used in support of the contention of grave incompetence and lethargy on the part of the plaintiff in winding up the estate. Also put in the open was that on 10 January 2011, upon enquiry, this firm of attorneys had been advised by the plaintiff in a response dated 8 March 2011 that his firm were not the executors and that they in fact were no longer administering the estate as the widow had failed to put them in a position to conclude the matter. The Master had, however, clarified by attaching Mr Dondo's letters of administration, that he was in fact still the appointed executor.

But despite resuming his administration the dissatisfaction with his pace of operation was so deep that in one of the letters to the Master in October of that year, Dururu & Associates had sought from the Master his removal as executor.

The issues placed before this court in the joint PTC minute as calling for decision are:

1. Whether the defendant was lawfully married to the late Isaac Chabveka taking into account that the late Isaac Chabveka was married to Liya Apololi in terms of the marriage Act [*Cap 5: 11*]?
2. Whether the disposal and transfer of stand 4303 Highfield Township Harare by the first defendant to second defendants was valid at law under the circumstances?
3. Whether the second defendant purchased the stand in dispute and acquired transfer thereof in good faith?
4. Whether the plaintiff is entitled to the relief sought?

Whether the defendant was lawfully married to Isaac Chabveka

No convincing evidence was in my view put forward to support the claim by the first defendant that she was indeed a wife at customary law and not just a mistress at the time when the defendant married Liya in 1995 under a civil union. Notably no relatives of the deceased or even herself or other persons who knew the deceased and who could confirm to the marriage, were brought to support the claim of a customary law union with the deceased which preceded the civil marriage to Liya. This was somewhat surprising given that *lobola*

ceremonies in practice bring together a sizeable number of relatives, especially on the woman's side to bear witness.

Also as stated in relation to the observation on the nature of the deceased's marriage in an earlier case, when the first defendant became aware of the fact that the deceased had been civilly married, there is no evidence that shows that she tried to assert her status as a wife. Everything indeed points to her having advantage of the fact that the deceased's wife, Liya, had died, thereby bringing herself forward as a legal claimant to his estate and even so, relying on devious means. Even if she were given the benefit of the doubt of having been a customary law wife, thereby impacting on the deceased's civil marriage by virtue of s 68F (2)(c)(i) of the Administration of Estates Act [*Cap 6:01*], the house in question did not fall to be inherited by the first defendant. The law is clear that in terms of that section that each spouse in a polygamous setting is entitled to the house they were living in at the time of the deceased death. The evidence suggests that it is Liya who resided there and the house would have accordingly gone to her and should legally form part of her estate. (See *W Pamacheche v E Pamacheche & Ors* HB 69/2011; *Nyathi & Anor v Ncube & Ors* 2011 (2) ZLR 156) However, as stated above, my finding based on the facts placed before me, is that the first defendant was not the deceased's wife at customary law. Her son with the deceased on the other hand, in the absence of any concrete evidence that he was not his son, is entitled to be a beneficiary as the constitution does not permit for discrimination on the basis of being born out of wedlock. [See s 56 (3) of the new Constitution]. In any event even under customary a child born out of wedlock who has been acknowledged by the father is regarded rightfully as his child.

Her disposal of the house was not only irregular for the above reasons but more significantly because she did not have the right to sell the house since the letters of administration though regular at face value, had been improperly obtained. There was in essence already an executor in place whose letters had not been revoked. I discuss this more fully below.

Whether disposal of stand 4303 was lawful under the circumstances

Disposal of assets of the estate falls in the hands of the executor upon due authority from the master. Furthermore an executor remains in office unless and until they have been lawfully relieved of their duties whether statutorily at the instance of the Master or at the instigation of a beneficiary under common law. (See *F Katirawu v D Katirawu* 2007 (2) ZLR 64.

Counsel for the first defendant Mr *Chidyausiku*, argued that s 26 permits the appointment of two executors and therefore the fact that there are two executors cannot be the basis for failure to recognise the second appointment. Factually this case is not one where two executors were appointed with the full knowledge of each other or with the knowledge of the Master. It is clear that the second appointment was made oblivious of the fact that the estate had been registered already and that an executor had been appointed by the Master. The argument by Mr *Chidyausiku* cannot salvage the first defendant's appointment on this basis.

Also put forward was the argument by same counsel that in reality what this court ought to decide is whether the estate in fact had an executor at the time that the first defendant approached the court to register the estate. This argument draws strength from the letter dated 11 February 2011 written by then the plaintiff's firm to Dururu Associates referred to earlier in which it was stated that to the best of their recollection they had not been put in a position to finalise the estate and that they were not the duly appointed executor. The plaintiff's explanation was that the letter had been written in error due to the effluxion of time that had elapsed without the parties furnishing him with the necessary information.

That the letter was written largely in error is supported by the fact that when the appointment of the new executor was sought by Dururu and Associates in light of the response they had received from Plaintiff, the Master had written them a letter attaching the plaintiff's letters of administration granted to him in 2004. This letter is dated 29 March 2011. These letters were all produced as exhibits by counsel for the first defendant. That the Master regarded the plaintiff as still being the appointed executor is further confirmed by yet another letter produced in evidence written by the Master to the plaintiff on 23 November, 2011 in his capacity as executor and calling for a special meeting with him and the beneficiaries. The meeting had been moved to January 2012.

Clearly therefore when the first defendant registered the estate in 2012 it cannot be claimed that the estate was rudderless in the legal sense as the plaintiff was most certainly still the executor.

However, it was clearly evident from the cross examination of the plaintiff that he had tried to hide from the court all evidence pertaining to his evidently less than satisfactory performance as an administrator as supported by documentation of complaints . Beneficiaries expect to inherit timeously. Indifference to duty amounts to not acting in accordance with one's fiduciary duty on the part of an executor, such as exemplified by this case where there were inordinate delays and complaints brought to the attention of the executor.

The first defendant's falsification of vital information in order to obtain letters of administration can never be sanctioned by any court of law as justifying her behaviour. Since the first defendant confirmed that she was aware that the deceased had children with three other women in total and that she knew their names, she knew fully well that she could not possibly have been the only beneficiary with her son. Furthermore her explanation that she excluded the other beneficiaries because she too had been excluded does indeed confirm that she must have known then that the estate had been registered - a fact that she should have drawn to the attention of the Master. Thus when she approached the master and indicated that she and her son were the only survivors she knew she was lying. Her attempt at explaining away the detail in her affidavit placed before the court as an exhibit in which she swore to being the deceased's only surviving relatives as having been made with reference to his having no relatives here since the deceased's father was Malawian cannot stand. It lacks veracity as clearly she knew that by saying she and her son were his only beneficiaries her statement would mislead. Her omission of the detail relating to the other children was deliberate and designed to deceive the Master into granting her the letters as a surviving spouse.

Where a person deems themselves to be a beneficiary then they must register their claim with the executor. Thereafter if they are dissatisfied with the manner of administration there are statutory provisions in place that ought to be harnessed for the removal of such an executor at any point during the course of administration. While generally courts will not remove an executor lightly, they will most certainly do so in the face of legitimate reasons, since at all times the guiding principle is always to protect the interests of the beneficiaries. In practice the factual basis upon which removals have been sought include omission of beneficiaries, the source of grievance and machination herein, mismanagement and delays in winding up the estate as also alluded here. That the plaintiff was not removed as executor was probably to give him a chance to rectify his ways.

As for the disgruntled, the answer does not lie in falsifying information to gain an upper hand. There is no evidence that the first defendant despite her disgruntlement as a purported beneficiary together with her son had ever properly placed her claim before the executor. The law does not and will not condone the assertion of claims through devious machinations. Deplorable and inexcusable as tardiness in administration always is, the reality is until such executor is legally removed whether in terms of the Administration of Estates or under common law they remain in office. A party who clandestinely re -registers such an

estate without the formal removal of the first executor cannot hope to excuse their illegal act on the basis of surrounding circumstances relating to the administration.

The first appointment remains valid. This position is amply covered in case law. In *Julius Ndemera & Anor v Siphelile Moyo & Ors* HH107/2009 CHITAKUNYE J commented as follows as regards the appointment of subsequent executor in circumstances where the first had not been removed:

“It is my view that the 1st Respondent’s purported appointment as executrix cannot automatically invalidate an earlier appointment. The appointment of an executor dative is not revoked by a mere subsequent appointment of another executor”.

Where it has been shown that an executor materially misrepresented facts that led to his appointment, he will always be removed.

Legal Standing of Purchase by the Second Defendant

It is not disputed that the second defendant bought the house from the first defendant. What falls for decision is whether she can maintain title as a *bona fide* purchaser under circumstances where the first defendant clearly got her letters of administration through misrepresentations of fact that she was a spouse and that she and her son were the only survivors.

The attempt to put the purchaser on par with those instances where a party buys property from one with title unaware of an ongoing dispute, is in my view also misplaced. *In casu* the letters of administration had been granted on the basis of false information. The first defendant’s actions were therefore a nullity and she had no title to pass. Cases where executors obtain letters under misrepresentations and proceed to sell such property have been equally dealt with by our courts. It is such cases that will guide this court in this instance as there are the ones of relevance. The Masters report is clear that when consent was granted to the sale of the property this was on the basis of the information that had been given to him by the involved parties. In this instance, the information was given by the first defendant, which information was materially false.

As for the person who however innocently purchases property from such an illegally appointed executor, our case law is clear too in this regard. In the *Ndemera* case (*supra*) where parties had acquired property through a second executor whose appointment was deemed *void ab initio*, it was held that such executrix had no title to pass. Accordingly, the

agreement of sale was said to be a nullity and that the contention by applicants that they were innocent purchasers could not give life to a nullity. (See also *M Katsingo v H Charlie & Ors* HH 6-2009).

Also in *F Katirawu v D Katirawu (supra)* an executor had obtained letters of administration on the pretext that he was a son of the deceased and that he was the only beneficiary. When his appointment was challenged, the purchaser of the property opposed the application to have the sale declared null and void on the grounds that she was an innocent purchaser. MAKARAU JP as she then was, held that the appointment having been procured by fraud nothing legal could flow from it. Furthermore the rights which the purchaser believed they had acquired were deemed to be tainted by the same illegality. As she put it:

“It is as if there was never a sale between her and 1st Respondent and consequently no rights can flow from a non sale in her favour. The sale and consequent cession in her favour amount to nothing at law for nothing legal can flow from a fraud”.

So whether the second defendant purchased in good faith is neither here nor there since the key point is that the first defendant could not legally pass title as she had been appointed as executor under a clear misrepresentation of facts. She and her son were not the only survivors and neither was she the deceased's wife. The second defendant's claim for the return of the purchase price ought accordingly to be against the first defendant.

It would open the floodgates of abuse for the administration of deceased estates in particular were the courts to allow property sold by a person who had obtained authority through misrepresentation, to be retained by the so called innocent purchaser.

The plaintiff is therefore entitled to the relief sought. The plaintiff also sought costs on a higher scale on the basis that this was a case which could easily have been settled as the law on the appointment of an executor under mistake of fact is well articulated. However, the plaintiff clearly underestimates the extent that his own tardiness contributed to the loop holes that were taken advantage of by the first defendant. His quest for costs on a higher scale are not justified and would make a mockery of the court's displeasure at practitioners who exacerbate rather than alleviate the woes of their client.

Accordingly it is hereby ordered as follows:

1. The sale and transfer to the second defendant of stand 4303 Highfield Township is set aside.

2. The fourth defendant is ordered to cancel the transfer of stand 4403 Highfield Township Harare to the second defendant under Deed of Transfer 3184/13 and to confirm that the property is still registered under the name of the deceased under Deed of Transfer 4882/86
3. Costs of suit to be paid by the first defendant on an ordinary scale.

Dondo & Partners, Plaintiff's Legal Practitioners
Messrs Dube, Manikai & Hwacha, 1st Defendant's Legal Practitioners
The Legal Aid Directorate, 2nd Defendant's Legal Practitioners