

1. EMILY CHIHOTA
versus
GUNDASI LUYA
and
CITY OF HARARE

2. EMILY CHIHOTA
versus
ESTATE LATE NORIA LUYA
and
MASTER OF THE HIGH COURT NO
and
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE

UCHENA J

HARARE 23, 26, 27, 30 March, 14, 27 May, 2, June,
17, 24, 30 July, 4 August, 14 September and 19 November, 2015

Civil Trial

D Muskwe, for the plaintiff
S Simango, for the defendants

UCHENA J: On 23 March 2015 the case of *Emily Chihota v The Estate Late Noria Luya and 2 Others* HC 10547/11, was placed on my continuous roll for hearing. Mr *Muskwe* counsel for the plaintiff applied for the consolidation of trials of that case and that of *Emilly Chihota v Gundasi Luya and Another* HC 5267/91, an old case from which the latter case originated. Mr *Simango* for the first defendant in each case consented to the consolidation of trials. I granted the consolidation of trials, with the consent of both parties. An impression was then created that the estates of the late Gundasi Luya and the late Noria Luya had been registered and were being represented by Luya Luya. Counsel for the parties did not clarify the issue of representation of the deceased estates, until Luya Luya, who was the last defence witness, was re-examined. I had to deal with that deficiency through asking Luya Luya

questions in clarification. The following exchange between me and the witness exposed the correct status of Gundasi Luya's estate:

- “Q. You are here in what capacity?
A. Representing the whole family.
Q. Cases are against deceased estates what is your capacity?
A. As the father figure.
Q. Are you the executor of Noria Luya's estate?
A. Yes.
Q. Have letters of appointment?
A. I have some at home.
Q. So you do not have the letters of appointment now?
A. Yes
N F Q S.”

Counsel for both parties were given an opportunity to ask questions arising. They both had no questions arising from the questions I asked the defence witness. I had to ask counsel for both parties to address me on whether a deceased estate can be represented by anyone as they seemed, to not have picked that Luya Luya was claiming to represent both estates as a father figure. Mr *Muskwe* for the plaintiff, then submitted that the defence, be ordered to produce Luya Luya's letters of appointment, and Mr *Simango* undertook to follow up the issue with the Master's office. The case was postponed to 14 September 2015 for Mr *Simango* to produce the letters of appointment. When the case resumed on 14 September 2015, he could only produce letters of appointment in respect of the estate of Noria Luya. It then became apparent that the estate of the late Gundasi Luya had not been registered.

Mr *Muskwe* for the plaintiff did not in his written submissions deal with the effect of the estate of Gundasi Luya not being registered. Mr *Simango* for the first defendant in each case capitalised on that omission and submitted that the case of the *Plaintiff v Gundasi Luya* was improperly before the Court. He is correct.

The brief facts of the cases against the late Gundasi Luya and the late Noria Luya are as follows. In 1991 the plaintiff sued the now late Gundasi Luya for the transfer to her of a house she claimed to have bought from him. Gundasi Luya thereafter died and his estate has not yet been registered. The case against the now late Gundasi Luya therefore improperly proceeded to trial when his estate was not represented by a duly appointed executor. Luya Luya who until the end of the trial gave the impression that he represented both estates was only able to present to the court letters of his appointment as the executor of the estate of the late Noria Luya.

The plaintiff's case against the estate of the late Noria Luya was based on the alleged novation of an agreement between Gundasi Luya and the plaintiff, to that between Noria Luya and the plaintiff. Harare City Council officials testified on how they discovered that Gundasi Luya had sold to the plaintiff a Council house he was renting. They then called the parties with a view of regularising the illegal sale. They told the court that Gundasi Luya admitted selling the house to the plaintiff and agreed that the sale be regularised. Shortly there-after Gundasi Luya died after which they sought, to regularise the sale through giving Noria Luya the tenancy of the house with the view that she would there-after exercise the right to buy it and subsequently transfer it to the plaintiff. The facts of the two cases are therefore interwoven. The evidence led in respect of Gundasi Luya's involvement was intended to prove why the estate of the late Noria Luya should transfer the property to the plaintiff. The nullity of proceedings against Gundasi Luya, invalidates evidence which leads to the alleged novation of the agreement between Gundasi Luya and the Plaintiff.

In terms of s 44 (1) of the Administration of Estates Act [*Chapter 6:01*], when a person dies his estate cannot be sued or executed against, except through a duly appointed executor. If any case was pending against a deceased person at the time of his death, it can only be continued against his executor. Section 44 (1) provides as follows;

“44 (1) No person who has obtained the judgment of any court against any deceased person in his lifetime, **or against his executor in any suit or action commenced against such executor, or which, having been pending against the deceased at the time of his death, has thereafter been continued against the executor of such person**, may sue out or obtain any process in execution of any such judgment before the expiration of the period notified in the *Gazette* in manner in this Act provided.” (emphasis added)

It is therefore apparent that the proceedings against the late Gundasi Luya without the involvement of an appointed executor for his estate are a nullity, and any evidence led against him is also a nullity. Nothing from such proceedings can be relied on. On the other hand, the proceedings against the estate of the late Noria Luya, were against her duly appointed executor and are therefore valid.

The trial of the plaintiff's case against the estate of the late Noria Luya though valid, suffer the fate of being an off shoot of the plaintiff's case against the now late Gundasi Luya which is a nullity and nothing said during it can be relied on to prove the plaintiff's case against the estate of the late Noria Luya.

The evidence led in the case between the Plaintiff and the now late Gundasi Luya, having been improperly placed before the court, cannot be used to support the plaintiff's case against the estate of the late Noria Luya. That takes away the evidence which would have linked the sale of the house by the now late Gundasi Luya to the alleged subsequent agreement to effect transfer of that house through the now late Noria Luya. The absence of that evidence leaves the plaintiff with insufficient evidence, from which the court can make a finding against the estate of the late Noria Luya in her favour.

In the result it is ordered that;

1. The proceedings against Gundasi Luya who died some time in 1991 before the registration of his estate and appointment of an executor to represent his estate, are a nullity.
2. The evidence led in the case between the plaintiff and Gundasi Luya which would have proved that there was an agreement between the plaintiff and Gundasi Luya which led to the alleged novation of that agreement into one between the plaintiff and Noria Luya is also a nullity and nothing can hang on to it.
3. The defendants in the case of the plaintiff versus the estate late Noria Luya are therefore absolved from the instance.
4. The plaintiff shall pay the defendants' costs of suit.

Messrs Mskwe & Associates, plaintiff's legal practitioners

Messrs Nyikadzino, Simango & Associates, 1st defendant's legal practitioners