LENA TAVENGWA

Versus

CUTHBERT TAVENGWA

And

NESTAI TAVENGWA

And

JANET TAVENGWA

And

JOHN TAVENGWA

And

KUDZANAYI TAVENGWA

And

PATSON TAVENGWA

And

THE ASSISTANT MASTER

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 10 FEBRUARY 2004 AND 20 JANUARY 2005

C Dube for plaintiff
Ms C Nleya for defendants

Civil Trial

NDOU J: On 12 April 2002, the plaintiff issued summons against the defendants in which she sought an order in the following terms:

> "(i) The plaintiff's claim is for an order declaring the will executed by Jephias Tavengwa in July 2001 null and void *ab initio*.
> (ii) That Jephias Tavengwa be declared to have died intestate; and

(iii) First and second defendants pay the costs of the suit on an attorney-client scale, jointly and severally, each paying the other to be absolved."

The first six(6) defendants filed a plea in which they contended that the will sought to be challenged by the plaintiff was valid. They alleged that at the time that the late Jephias Tavengwa is alleged to have signed the will he was in his sound and sober senses and had the necessary testamentary capacity.

The plaintiff led evidence from a consultant physician, Dr D K Njau. Dr Njau is a specialist in internal medicine with twenty-five years experience. He testified that the late Tavengwa was discharged from hospital i.e. before he signed the will, after he was diagnosed to have been a victim of immuno suppression for home based care, as he was considered terminally ill. He made such a decision because the hospital had nothing to offer the patient. He was re-admitted on 27 July 2001 and the doctors diagnosed that he was in a semi-comatose state. He died on 27 July 2001. The doctor pointed out that, it is highly unlikely that on 22 July 2001 he could have been able to execute a will. The plaintiff also gave evidence. Her version was corroborated in material respects by tat of Irene Temberere. The total effect of their evidence was that on 22 July 2001, the late Jephias Tavengwa was terribly ill, he could not have been able to execute a will. I find that the above evidence led in support of the plaintiff's case as credible and probable. The testimony clearly established that the late Jephias Tavengwa was so ill on 22 July 2001 that he was incapable of executing the disputed will. In addition Dr Njau indicated that the CPZ drug that the late Tavengwa was taking at the time could also lead to confusion.

Some of the defendants testified in support of their case. They also led evidence from their aunt Jane Chivasa. Their testimony was to the effect that on 22 July 2001 Jephias Tavengwa was in a sound and disposing mind to execute a will. According to Janet Tavengwa the will was executed on 22 July 2001. According to Jane Chivasa the will was drafted in 1999. She kept the draft and it was only signed by the late on 22 July 2001. On being questioned by the court, Chivasa conceded that although she appears as one of the witnesses to the will, she was not present when the late signed it on 22 July 2001. The defendants concede that this evidence of Chivasa render the will invalid on account of non compliance with the provisions of section 8(1) of the Wills Act [Chapter 6:06] which provides-

> "8(1) subject to subsection (3), a will shall not be valid unless-
> (a) it is in writing; and
> (b) the testator or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing on the page concerned; and
> (c) each signature referred to in paragraph (b) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the time; and
> (d) each competent witness either-
> (i) signs each page of the will; or
> (ii) acknowledges his signature on each page of the will."

The evidence of the defendants clearly shows that the will in *casu* falls foul of the provisions of this section. One of the witnesses signed some time well before the late Tavengwa did so. The deceased did not sign in the presence of witness Chivasa. The evidence generally shows that the will does not comply with the formalities provided for in section 8(1), it is therefore not a valid will.

Further from the credible evidence adduced by the plaintiff, supra, the late Tavengwa clearly lacked the requisite capacity to make a will. From the defendants' version they became desperate when they realised the fate of the deceased prior his

execution of the will. They picked him from the plaintiff's custody and attention and drove him to sign and lodge the disputed will with the Master's office. This is an act of desperation as they feared that the late might die before he executed a will. They were doing the right thing very late as the late Tavengwa no longer enjoyed the capacity to execute a will in terms of the law. In particular section 4 provides-

> "4. Capacity to make a will
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> (i) Subject to this Act, every person who is of or over the age of sixteen years may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act."

Section 4 is a declaratory of the common law – *Kunz* v *Swart* 1924 AD 618 and *Kirsten* v *Bailey* 1976(4) SA 108(C). The evidence, medical and otherwise shows that the extent of his terminal illness coupled with the taking of CPZ drugs affected the late Tavengwa's power of exercising judgment and discretion and discrimination – *Lewin* v *Lewin* 1949(4) SA 241 TPD at page 279-280 ROPER J observed-

> "The analyses of the testimentary power which I have extracted from *Banks* v *Goodfellow* [L.R.5,Q.B. 349] and *Harwood* v *Baker* [3 Moo.PC 282] have been elaborated in such cases as *Smee* v *Smee* (5.P.D. 84); *Burdett* v *Thompson* (L.R. 3P & D, 72(n)), and *Birkin* v *Wing* (91 L.T. 80) but without adding materially to their effect. It is abundantly clear from the authorities that it is not sufficient that the testator understood and intended the disposition which he was making in his will (see on this point in our own Courts Estate *Rehne and Others* v *Rehne* (1930, OPD 80 at page 91); *Lange* v *Lange* (1945, AD 332 at page 342); it is necessary further that he shall have been able to comprehend and appreciate the claim of his various relations upon his bounty, without any poisoning of his affections, or pervesion of his sense of right, due to mental disorder; and generally, to use the language of the American case referred to by COCKBURN CJ, that he shall have had the ability –
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> > "clearly to discern and discretely to judge of all these things and all those circumstances, which enter into the nature of a rational, fair and just testament" …"

In other words, infirmity, or weakness caused by illness may be such as to affect a person's testamentary capacity. In these days of AIDS and HIV, where a

legal practitioner is instructed to prepare a will, the validity of which may be impeached on the grounds of the testator's infirmity or weakness, the legal practitioner would be well advised to call a disinterested medical practitioner to examine the testator and attest the will - *Thomas* v *Jones* [1928] P 162, 166 and *The Law of Succession* by Sir David H Parry (6th Ed) at 10.

It is clear that on 22 July 2001 the late Tavengwa was so disoriented by disease and the intake of CPZ drugs to the extent that he lacked testamentary capacity. This is a case of enfeeblement due to terminal illness – *Battan Singh* v *Amirdard* (1948)(1) AER 152).

Whichever way one looks at the evidence, the will has to be impeached either failing to comply with the provisions of section 4(1) or section 8(1) of the Act. The plaintiff has made a good case for the order sought.

Accordingly, the order is granted in terms of the aforesaid draft.

Dube and Associates, plaintiff's legal practitioners
Mabhikwa, Hikwa and Nyathi, defendants' legal practitioners