

SIPHATHISIWE MUCHIYANI MUDAWINI
(In her capacity as the Executrix Dative of the estate late
Ema Mudawini and also as beneficiary to the estate late
Wilson Muchiyani Mudawini)

And

HENRY MUCHIYANI

Versus

PATRICIA DARANGWA N.O
(In her capacity as Executrix Dative of the
Estate late Wilson Muchiyani Mudawini)

And

MASTER OF THE HIGH COURT N.O

And

REGISTRAR OF DEEDS N.O

And

BUSISO MTHUNZI

And

SIHLE MTHUNZI

And

FLASHIA NCUBE

And

CLEMENCE MUCHIYANI

And

MIRRIAM MUCHIYANI

And

BARBRA MUCHIYANI

And

NOMATHEMBA MUCHIYANI

And

GRAHAM MUCHIYANI

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 11 JANUARY, 17 MAY AND 14 JULY 2022

Civil Trial

Advocate S Siziba with A Sibanda, for the plaintiffs
1st defendant in person
No appearance for the 3rd and 4th defendants
S Chamunorwa, for the 5th and 6th defendants
No appearance for the 7th – 12th defendants

KABASA J: The plaintiffs issued summons against the defendants on 12th March 2019. The summons and declaration were later amended, which amendment removed the 1st plaintiff and 2nd defendant whose citation had been erroneously captured as Estate Late Ema Mudawini and Estate Late Wilson Muchiyani Mudawini, respectively. Paragraphs 1 and 5 of the declaration which made reference to the same erroneous citation were deleted and so were paragraphs (iii) and (v) of the prayer in both the summons and declaration by removal of the reference to the same erroneous citations. This would have meant that the second plaintiff was to become the first plaintiff and the 3rd defendant was to be the second defendant with each subsequent defendant being equally affected. The inconvenience and confusion that would have caused was averted when it was agreed that the rest of the parties would remain as per initial citation notwithstanding the removal of the 1st plaintiff and 2nd defendant.

The plaintiffs claimed the following relief:-

- “(i) That the First and Final Liquidation and Distribution Account filed by the 1st defendant with the 3rd defendant’s office under case number DR 266/18 dated be (sic) and is hereby declared to be null and void and that the Estate Late Wilson Muchiyani shall be re-administered in compliance with the provisions of section 68 F of the Administration of Estates Act (Chapter 6:01).
- (ii) That Subdivision H of Lot 11 Montgomery also known as number 11 Seymour Road, Montgomery, Bulawayo be and is hereby declared to be the property of

the Estate Late Ema Mudawini together with the household goods and effects therein and as such it shall not form part of the Estate Late Wilson Muchiyani Mudawini.

- (iii) That the two homesteads in Lahleka Village, Chief Malisa in Kwekwe be and are hereby declared to be part of the Estate Late Wilson Mudawini and that they shall accordingly be included in the inventory thereof.
- (iv) The sale and transfer of Subdivision H of Lot 11 of Montgomery also known as number 11 Seymour Road, Montgomery, Bulawayo by the 1st defendant to the 5th and 6th defendants be and is hereby nullified and set aside and the title thereof shall revert to Ema Mudawini.

Or alternatively:

- (v) The Estate Late Wilson Muchiyani Mudawini shall pay a sum of US\$28 000,00 to the Estate Late Ema Mudawini being the total value of the useful improvements effected by the late Ema Mudawini which have enhanced the value of the Montgomery plot after the death of the late Wilson Muchiyani Mudawini.
- (vi) The 1st defendant shall bear the costs of this suit together with any other defendants who will choose to defend this claim.”

The plaintiffs’ claim was elaborated in the declaration which set out the following:

The plaintiffs are beneficiaries in both Estate Late Ema Mudawini and Wilson Muchiyani Mudawini. The late Wilson owned the Montgomery plot and the two homesteads in Lahleka Village, “Lahleka homesteads.” Wilson died on 7th February 1994 and after his death the late Ema, who was his second wife effected improvements at the Montgomery plot, these were 4 cottages or staff quarters, 2 toilets, 1 borehole and pump and 1 borehole shelter. The value of the improvements was US\$28 000. Wilson had a first wife, Flashia (7th defendant) but she did not reside at the Montgomery plot.

Wilson’s estate was administered and finalised. On 3rd August 2017 per judgment number HH 492-17 CHITAKUNYE J (as he then was) ordered, *inter alia*, that the administration of the estate of the Late Wilson be re-opened and 3rd defendant convene an edict meeting for the purposes of appointing an independent executor so that the estate could be administered in terms of the law. The 1st defendant was subsequently appointed as the executrix dative and purportedly administered the estate applying the provisions of section 68 F of the Administration of Estates Act. The 1st defendant proceeded to sell the Montgomery plot at US\$60 000 to the 5th and 6th defendants who have since taken transfer of the property.

The sale was however irregular as the value is US\$140 000 not US\$60 000. The 5th and 6th defendants' mortgage bond was for US\$72 000 which could only have been part payment for the plot. The defendants were aware of the plaintiffs' objections to the sale. After such sale the 1st defendant shared the proceeds among the two surviving spouses and their children.

In doing so the 1st defendant failed to take in consideration that:-

- (i) At the time of Wilson's death, Ema was entitled to ownership or at least usufruct of the Montgomery plot where she resided and the 7th defendant was equally entitled to ownership or usufruct of the house she resided at.
- (ii) There were 2 homesteads at Lahleka Village which Wilson owned.
- (iii) The late Ema had effected improvements at the Montgomery plot to the value of US\$28 000 after Wilson's death

The 1st defendant therefore administered the late Wilson's estate in a manner contrary to the law.

The 1st, 5th and 6th defendants defended this claim. The 1st, 5th and 6th defendants pleaded over to the merits after the special plea they had taken was not set down in terms of the rules.

The 1st defendant's defence to the claim was that she had administered the estate of the late Wilson in terms of section 68 F of the Administration of Estates Act, Chapter 6:01. She had advertised for debtors and creditors and the plaintiffs had not lodged any claims against the estate. The Montgomery plot was lawfully sold and the price fetched was reasonable. The proceeds were distributed amongst all the beneficiaries. The homesteads at Lahleka did not form part of the estate as they fall under the Communal Lands Act, Chapter 20:04 and the 7th defendant was not residing at this rural home.

The 5th and 6th defendants' defence was that CHITAKUNYE J's judgment was to the effect that the Montgomery plot was not part of the late Ema's estate. When they bought the plot they relied on the 1st and 3rd defendants' representations to the effect that there was no legal impediment to the sale. The amount of the mortgage bond factored in the ancillary charges associated with the bank loan and not indicative of the amount they paid for the plot. They are not aware of improvements, if any, effected by the late Ema and if the plaintiffs had

a claim against Wilson's estate, such ought to have been lodged in terms of section 43 of the Administration of Estates Act.

The 5th and 6th defendants counter-claimed against the plaintiffs. The counter-claim was premised on the fact that they are the registered owners of the Montgomery plot and the plaintiffs are in occupation of their property. They therefore prayed for the eviction of the plaintiffs and all those claiming occupation through them, payment of occupational damages in the sum of \$300 per month with effect from 1 December 2018 to the date the plaintiffs vacate the plot. The defendants also prayed for punitive costs.

With the closure of pleadings the parties attended a pre-trial conference where the following issues were referred for trial:-

1. Whether this Honourable Court in *Muchiyani and Others v Estate Late Ema Mudawini and Others* HH 492-17 disqualified the late Ema Mudawini from inheriting Subdivision H of Lot 11 of Montgomery also known as Number 11 Seymour Road, Montgomery, Bulawayo.
2. Whether or not the late Ema Mudawini, could during her lifetime, inherit the immovable property known as Subdivision H of Lot 11 of Montgomery Bulawayo from the estate of the late Wilson Muchiyani Mudawini in terms of section 68 F (2) (c) of the Administration of Estates Act (Chapter 6:01) which came into effect on 1 November 1997.
3. Whether or not the 1st defendant administered the estate late Wilson Muchiyani Mudawini in terms of section 68 F of the Administration of Estates Act or not.
4. Whether the late Ema Mudawini was resident at the Montgomery property at the time the late Wilson Muchiyani Mudawini passed on.
5. Whether the late Ema Mudawini effected improvements on the Montgomery property after the late Wilson Muchiyani Mudawini passed on and the value of such improvements.
6. Whether or not the sale of the immovable property known as Subdivision H of Lot 11 of Montgomery Bulawayo by the 1st defendant to the 5th and 6th

defendants on April 2018 (sic) was fraudulent in that it was sold at a price more than US\$60 000,00.

7. Whether or not the plaintiffs are entitled to an order setting aside the sale of the immovable property to the 5th and 6th defendants and cancelling the registration of title in their favour on the basis of the alleged fraud.
8. Whether or not the 1st defendant's distribution of the proceeds of the sale of the immovable property, as per the First and Final Liquidation and Distribution Account dated 4 June 2019 and confirmed on 31 July 2019, in terms of section 68 F (2) (b) of the Administration of Estates Act affects the validity of the sale of the immovable property to the 5th and 6th defendants.
9. If so, whether or not such distribution renders the sale of the property to the 5th and 6th defendants irregular and thus null and void.
10. Whether or not the 5th and 6th defendants are entitled to an order for the eviction of the 2nd and 3rd plaintiffs and the payment of occupational damages in the sum of US\$300 per month or its equivalent in the local currency.
11. Whether or not the relief sought by the plaintiffs is competent.

At the commencement of the trial an amendment was sought and granted by consent and such amendment related to the 5th and 6th defendants plea so that the parties would be cited in tandem with the citation which followed the granting of the amendment to the summons and declaration.

The second plaintiff then testified. The gist of her evidence was largely not in dispute. She is a daughter to the late Ema and the late Wilson. Her mother was Wilson's second wife and she was residing at the Montgomery plot with her parents. After her father's death her late mother registered his estate. The witness's half-brother, son to Flashia, the 7th defendant, later challenged the manner in which the estate was administered resulting in the judgment by CHITAKUNYE J (exhibit 8). Her mother later died on 3rd September 2015 (exhibit 5) and she left a Will appointing the witness as the executor. She has registered the estate but is yet to obtain the Letters of Administration.

After the appointment of the 1st defendant as executrix dative for her late father's estate (exhibit 7) the late Wilson's estate was wound up and the Montgomery plot was sold.

She was unhappy with that sale as she believed it ought not to have been sold as her mother was residing there. She wrote to the 3rd defendant complaining that she had not consented to the sale of the plot and that no consultations had been made to establish that both her parents had bought the Montgomery plot. The 3rd defendant however granted the section 120 consent for the sale of the plot (exhibit 12). The 1st defendant wound up the estate and advertised in the Herald of 30 November 2012 the lying for inspection of the First and Final Distribution Account (exhibit 16). She however did not see the advertisement nor did she become aware of the confirmation of the First and Final Distribution Account.

The witness was adamant that she decided not to leave the Montgomery plot as she was left there by her parents who bought the property. She however acknowledged that her erstwhile legal practitioners, V.J Mpofo and Associates had written to the 3rd defendant objecting to the 1st defendant's distribution account (exhibit 13) on the grounds that:

- a) The utility bills whose amounts were deducted from the witness, 3rd plaintiff and the late Ema's share of the proceeds of the sale of the plot was not equitable and they ought not to have been burdened by the debts owed by the estate of their late father.
- b) The deduction of US\$3 187 legal costs incurred in defending applications filed by the 2nd plaintiff were not justified as they were not articulated in terms of how they were arrived at and to whom they were payable.
- c) The 1st defendant had not considered the US\$30 468, 60 value addition the late Ema had added in improvements effected at the plot after Wilson's death.
- d) The 1st defendant was biased against the late Ema's children as she had been advising the 7th defendant and her children before her appointment as executrix dative of late Wilson's estate.

There was however no mention of the fact that the plot belonged to the late Ema.

As regards the price paid for the plot by the 5th and 6th defendants, the witness conceded that she had no valuation report but was relying on a valuation by Gwande Estate Agents (exhibit 17) which valuation report was done on 28th February 2019, 10 months after the property was sold to the 5th and 6th defendants.

This witness's brother, the 3rd plaintiff by and large associated himself with what the 2nd plaintiff said. He confirmed that Clemence was the late Wilson's first born son and son to the 7th defendant whilst Keith who had been declared as the eldest son was the late Ema's son but younger to Clemence. The witness's mother Ema had misrepresented to the 3rd defendant that her son Keith was the eldest son, consequently Keith was declared the heir and he subsequently gave up his entitlement to the plot which had been registered as the late Wilson's property to his mother, Ema. He confirmed the plot belonged to his late father and that after it was sold their erstwhile lawyer raised issues on matters that did not include the price at which the plot was sold.

The 3rd and 4th witnesses were a maternal and paternal uncle to 2nd and 3rd plaintiff. The gist of their evidence confirmed the fact that the 7th defendant was married to the late Wilson and was the first wife whilst the late Ema was the second wife and Clemence was the late Wilson's eldest son whose mother is Flashia, the 7th defendant.

The last witness for the plaintiffs was the Senior Assistant Master who confirmed that the Master's office issued a consent for the sale of the Montgomery plot and such consent was never revoked.

With this witness's evidence, the plaintiffs' case was closed. The 1st defendant testified. Her evidence was to the effect that after her appointment as executrix dative (exhibit 7) she obtained a section 120 consent (of the Administrative of Estates Act) to sell the Montgomery plot (exhibit 12). Such sale was as per the heir's instruction who at a meeting of the late Wilson's beneficiaries (exhibit 19) the eldest son, Clemence stated that all the deceased's children were to benefit from the proceeds of the sale. At that meeting the 2nd plaintiff agreed with Clemence's submissions.

Three different estate agents were instructed to advertise and sell the plot and the plot was valued which valuation was accepted by the 3rd defendant. The 5th and 6th defendant's offer of USD\$60 000 was the highest offer and the plot was sold to them. She prepared the first and final liquidation and distribution account (exhibit 9) which lay for inspection and she did not receive any objections. The account was subsequently confirmed by the 3rd defendant (exhibit 9 and 28). There was no challenge from the plaintiffs after the 3rd defendant confirmed the account. She also did not receive any claims after she advertised for debtors

and creditors, no receipts, invoices or site surveys were ever submitted to her relating to improvements allegedly effected by the late Ema.

There was a suggestion that the 1st defendant was biased as she had assisted the children of the 1st wife in registering the late Wilson's estate. The 1st defendant however explained that these beneficiaries had visited her offices intending to register their father's estate and they were advised to do so. That is when it was discovered that the estate had already been wound up in 2005.

The 5th and 6th defendants' involvement in the winding up of the late Wilson's estate was only in so far as they purchased the plot and nothing else.

With this evidence the 1st defendant's case was closed.

The 5th and 6th defendants' case opened and the 5th defendant was the only witness who testified. This being so because the 6th defendant is his wife and counsel submitted that due to the similarities in their testimony, only the husband would testify.

The 5th defendant's testimony touched on how he purchased the Montgomery plot which he and his wife wanted as a retirement home. As a lecturer and dean of the Faculty of Engineering at the National University of Science and Technology he qualified for a facility which assists employees to purchase property. NUST, Old Mutual and CABS were responsible for the setting up of this facility where CABS would pay 75% and NUST 25% (exhibit 23).

They successfully negotiated for the purchase of the plot after seeing it being advertised on the classified pages of a local newspaper. Their offer of US\$60 000 was accepted and an Agreement of Sale (exhibit 22) was eventually executed and signed. CABS paid USD60 000 whilst NUST put in USD 15 500, in all USD\$72 000 was paid and USD\$12 000 was for ancillary costs to do with stamp duty, transfer fees and legal fees. They obtained title of the property (exhibit 26) but were not able to take occupation of the entire plot and buildings as the second plaintiff refused to leave. They are however utilising everything else, including the land except the main house which has 8 rooms, which rooms they would have let out to tenants at USD50- USD60 had the 2nd plaintiff agreed to move out. The amount claimed as rentals was obtained from an estate agent (exhibit 27).

Exhibits 29, 30, 31, 32 and 33 were produced through this witness and their relevance related to the fact that the 2nd plaintiff was asked to vacate the main house so the buyers could take vacant possession (exhibit 29), the letter from one of the beneficiaries expressing dissatisfaction with the sale of the plot (exhibit 31), a letter from the Zimbabwe Anti-Corruption Commission to the 3rd defendant seeking information on how the 1st defendant had administered the estate, (exhibit 32) and the 3rd defendant's response to ZACC giving details of how the estate had been administered (exhibit 33).

With the evidence of this witness the 5th and 6th defendants' case was closed.

Each witness who testified in this matter had their evidence juxtaposed to the documentary evidence availed to the court. This matter therefore did not revolve around issues of credibility, as the evidence upon which this matter turns is largely common cause or not seriously disputed.

My brief summation of what each witness said was therefore informed by the need for completeness.

I turn now to the issues that this evidence must address.

1. Did HH 492-17 disqualify the late Ema Mudawini from inheriting the Montgomery Plot?

I can do no more than refer to CHITAKUNYE J's judgment. The application the court was dealing with was for the re-opening of the estate late Wilson Muchiyani Mudawini. The court asked this pertinent question:-

"The question is: who was the rightful heir as at the time of the demise of the late Wilson?" This was to be determined as at the date of death of the late Wilson (*Nyathi and Another v Ncube & Others* 2011 (2) ZLR 156 (H)).

Clemence, being the eldest son was the rightful heir and not Keith who Ema had misrepresented as the heir. After a careful articulation of the law as regards intestate succession before 1st November 1997, the learned Judge stated, *inter alia*,

"For the avoidance of doubt, the immovable property cited above shall not be considered as part of the estate late Ema Mudawini till such time the estate of the late Wilson Mudawini is properly wound up."

What this meant was the law had to follow its course, the late Wilson's estate had to be wound up in terms of the applicable law. The immovable property was not to be included as the late Ema's property until the proper winding up of Wilson's estate. If, upon such proper winding up it was the legal position that the property was to form part of the late Ema's estate then that would be so decided. If on the other hand, the proper winding up of Wilson's estate meant this property was not to be part of the late Ema's estate, it would mean it would not be so included.

The proper administration of the late Wilson's estate was done after the appointment of the 1st defendant and Clemence, being the eldest son, was appointed heir to his late father's estate. In that capacity he inherited the Montgomery plot. There never was a dispute as to ownership of this plot. Ema, in her declaration to the 3rd defendant acknowledged that the property belonged to the late Wilson and that is why the restricted Letters of Administration which the 3rd defendant issued allowed for the transfer of the Montgomery plot into the late Ema's name. But for the misrepresentation perpetuated by the late Ema, the Montgomery plot would not have been awarded to Keith and in turn to Ema after Keith decided to renounce his entitlement to it in favour of his mother.

So whilst the court did not disqualify Ema in so many words, it however ordered that the law be applied and the application of the appropriate law would determine whether Ema could inherit the plot.

The first issue leads on to the second issue which is:-

2. Whether the late Ema Mudawini could, during her lifetime inherit the immovable property, the Montgomery Plot

The starting point here is the applicable law as at the death of the late Wilson. Wilson died on 7th February 1994. He therefore died before the coming into effect of the Administration of Estates Amendment Act, No. 6 of 1997 which came into effect on 1 November 1997.

CHITAKUNYE J succinctly put it thus:-

“We now have section 3A of the Deceased Estates Succession Act (Chapter 6:02) which provides for the surviving spouse to inherit from his or her deceased spouse. It is important to note that before 1 November 1997 when section 3 of Act 6 of 1997

came into effect the then section 68 (F) of the Administration of Estates Act provided that:-

“If any African who had contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or customs, *dies intestate*, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which they belonged.”

Ema was married under the African Marriages Act, Chapter 105 and was the second wife (exhibit 6). She therefore could not inherit the immovable property in question. The eldest surviving son of the late Wilson was the rightful heir (*Magaya v Magaya* 1999 (1) ZLR 100 (S) *Chaumba v Chaumba* 2002 (2) ZLR 51 (S)).

Advocate Siziba's reference to section 68 (F) (2) of the Administration of Estates Act, Chapter 6:01 is misplaced as such applies to estates of those who died after 1 November 1997. If the late Wilson had died after 1 November 1997, Ema would inherit in terms of section 68 F (2) (c) but this is not the case *in casu*.

The argument that the 1st defendant purportedly applied the law as it is now to the estate of a person who died before such law came into effect and so Ema inherits in terms of the new law is tantamount to asking this court to disregard the law. Courts are courts of law and must be seen to apply the law. Granted the 1st defendant appears to have conflated the legal position that applied pre 1 November 1997 and post 1 November 1997 but that does not change the legal position regarding the administration of estates of those who died before 1 November 1997. The late Ema died in 2015 but it is not Ema's death that we are concerned with here but her late husband's.

Whatever confusion which is apparent in the First and Final Distribution Account is one that has no force of law. The 1st defendant, in her testimony, correctly alluded to the fact that the applicable law was that which obtained before 1 November 1997. The fact that Clemence decided that every beneficiary should get something from the sale of the Montgomery plot did not amount to a change in the applicable law.

CHITAKUNYE J cited *Murisa v Murisa* 1992 (1) ZLR 167 (S) where the court reiterated the position that, at customary law, a widow had no right to inherit from her husband's estate and could not be appointed heir to such an estate. This legal position cannot be wished away and it is the legal position prior to the amendment which came into effect on

1 November 1997. It matters not that the late Wilson's estate may have been registered after 1 November 1997, the law which applied as at the time of his death is the applicable law.

Ema could therefore not inherit the Montgomery plot during her life time. This issue is therefore resolved against the plaintiffs.

The third issue flows from the second issue.

3. Whether or not the 1st defendant administered the late Wilson's estate in terms of section 68 F of the Administration of Estates Act?

I have already alluded to the apparent confusion created by the reference to this provision in the First and Final Distribution Account. Such confusion, whatever the cause, has no effect on the legal position, which legal position the 1st defendant was aware of when she referred to the fact that Clemence as the eldest son was the heir and it was at his instruction as the rightful heir that the Montgomery plot was sold and the proceeds shared amongst all the late Wilson's children and the 2 spouses.

The third issue is resolved against the plaintiffs. It is my considered view that this ought to have been a simple matter of what the law was and whether such law was applied. The law was applied since the decision to sell the plot was from the rightful heir. The subsequent methodology used in sharing the proceeds did not change this legal position.

I move on to the fourth issue.

4. Whether the late Ema was resident at the plot at the time of Wilson's death?

This issue's determination is of no consequence given my determination of the preceding issues. Where Ema was residing would have been relevant had the late Wilson died after 1 November 1997.

I move on to the fifth issue.

5. Whether the late Ema effected improvements on the Montgomery Plot

"It is a trite rule of evidence that he who alleges must prove what he alleges" (*UZ v Mutasa and Others* SC 157-93).

It is not in dispute that when creditors and debtors were called upon to submit whatever claims they had against the late Wilson's estate no such claims were made to the 1st defendant. Reference was made to a valuation report by Gwande Properties (exhibit 17) but nothing turns on that as the valuation on its own does not change the fact that no claim was made against the late Wilson's estate. Had such been made to the 1st defendant, the claim would have been properly adjudicated on and either allowed or disallowed depending on the evidence.

The valuation report by Gwande Properties and the one by Ken Estate Agents is not on its own proof that whatever structures the two valuers saw at the property were effected by Ema after the demise of Wilson.

The 5th and 6th defendants viewed this property and subsequently bought it on the basis of a valuation report, which valuation included all the structures at the Montgomery plot as at the time of valuation.

The 2nd and 3rd plaintiffs were aware of the issues relating to their parents' estates. The 2nd plaintiff was present at the meeting held by 1st defendant where the sale of the plot was introduced by Clemence and there was no mention of improvements effected by Ema for which she was to be compensated for.

The plaintiffs did not adduce evidence upon which this court can make a finding that Ema effected the improvements and the value thereof. The mere say so by the 2nd and 3rd plaintiffs, without more, did not discharge the onus reposed on them to prove that Ema effected improvements on the plot after Wilson's death. They also appeared unsure of the value of such improvements, if any, giving the value at US\$30 500 and later US\$28500 without so much as showing how such values were arrived at. Even if I had held that such improvements were effected by the late Ema, there was no evidence to prove the value thereof.

This issue is resolved against the plaintiffs.

The sixth issue relates to whether the sale of the Montgomery plot was fraudulent in that it was sold for US\$60 000?

The 2nd plaintiff could not substantiate the fraud claim. The 5th defendant's evidence showed how he came to know about the property, the offers he made and the consultations he

made with Mr Mashonganyika from the estate agent who were given the mandate to sell the plot and none of this remotely spoke to any underhand dealings.

The fraud allegations appears to be based solely on the value at which the property was sold. *Mr Chamunorwa* for the 5th and 6th defendants referred the court to *Zimunhu v Gwati* 2015 (2) ZLR 604 where SANDURA JA said the following:-

“In any event, a valuation is an opinion of the person who made the valuation and one opinion does not constitute market value.”

An estate agent valued the property and the amount offered by the 5th and 6th defendants was in tandem with such valuation.

The 2nd plaintiff appears to have done a *volte face* because in a letter written to the 3rd defendant, the plaintiffs’ erstwhile lawyer mentioned that the price fetched for the plot was because of the improvements effected thereon, as without them, the property would not have fetched such value and such purchase price (exhibit 13).The plaintiffs were therefore accepting that the value of US\$60 000 was possible because of the improvements effected at the property. It was therefore a fair and reasonable valuation as at the time it was done.

The US\$140 000 valuation the plaintiffs appear to hinge their fraud allegation on was done about 10 months after the sale was concluded. The fact that some other estate agent gave that value is not in itself proof that the US\$ 60 000 was not a fair evaluation of the property.

There really was no evidence to show that the price at which the property was sold for is indicative of fraud. There was no evidence that, apart from the 5th and 6th defendants, there were other offers which exceeded the US\$60 000 they offered.

The process conducted by the 1st defendant, from getting valuers to value the property to getting estate agents to sell it up to the conclusion of the sale do not show any fraudulent activity. The allegation of fraud is but a bare but unsubstantiated allegation.

The 6th issue is resolved against the plaintiffs.

I turn now to the 7th issue.

The seventh issue flows from the allegation of fraud, with my resolution of the 6th issue, the 7th issue is equally resolved against the plaintiffs.

No case of fraud was made and there is nothing justifying the cancellation of title now registered in the 5th and 6th defendants' names. The sale was not marred with any recognisable irregularities to justify setting it aside.

I again resolve the 7th issue against the plaintiffs.

I turn now to the 8th issue. This issue relates to the effect, if any, of the distribution of the proceeds of the sale of the Montgomery plot.

I have already stated elsewhere in this judgment that the distribution of the sale proceeds has no bearing on the fact that this was an estate administered in terms of the existing law before 1 November 1997. The heir could have taken it all but chose to share with all of the late Wilson's children and wives.

The sale itself was as per Clemence's instruction and there was no legal impediment to such sale. There being no legal impediment, one cannot arise merely from the manner in which the proceeds were distributed.

The 9th issue is a mere re-stating of the preceding issue, which is issue 8. The distribution of the proceeds of the sale of the Montgomery plot did not render the sale of same irregular. It was a valid sale, authorised by the 3rd defendant and duly executed in a manner that speaks of no irregularity.

Section 116 of the Administration of Estates Act, provides a recourse to any beneficiary dissatisfied with the conduct of an executor.

In *Salma Ebrahim v Atiya Ebrahim (in her capacity as executrix dative of Estate Late Basheer Ahmed Ebrahim) and Others* HH 448-18 (a case referred to by *Mr Chamunorwa*), CHITAKUNYE J (as he then was), had this to say:-

“It is to the Master that complaints pertaining to the conduct of the executrix should be directed at the first instance. It is the Master who is given the mandate to investigate allegations of misconduct and, as a supervisor of executors, decide to apply for their removal from the office or not It is imperative that where a Statute provided domestic remedies a litigant should resort to such unless there are good and sufficient reasons for skipping the remedy so availed as a port of first instance.”

Even if it is argued that this provision is no bar to a litigant who decides to approach the court, the fact still remains that no case has been made to impugn the conduct of the 1st

defendant and consequently persuade this court to interfere with the manner in which the estate of the late Wilson was administered.

I turn now to the 10th issue. This issue relates to the 5th and 6th defendants' counter claim. They seek the plaintiffs' eviction. This is in essence a *rei vindicatio* action. As was articulated by MALABA J (as he then was in *Stanbic Finance Zimbabwe v Chivhungwa* 1999 (1) ZLR 262, the litigant must show that it is the owner of the property and that possession of it is with someone else without the litigant's consent.

GOWORA J (as she then was) echoed the same legal position in *Agro Chem Dealers P/L v Gomo and Others* 2009 (1) ZLR 255 (H) when she said:-

“The registration of title in a person's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right i.e. to enforce his right in the thing for his own benefit as against the world, that is against all persons whatsoever.”

In *Unimark Distributors (Pvt) Ltd v ERF 94, Silvertontate (Pvt) Ltd* 1999 (2) SA 986 at 996, the court had this to say:-

“But there can be little doubt that one of its incidents (*dominium*) is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found from whomsoever is holding it. It is inherent in the nature of ownership that possession of the *res* should be normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against the owner, e.g. right of retention or a contractual right.”

In casu the 5th and 6th defendants bought and paid for the Montgomery plot. They have since obtained title to the property. It is their property and the 2nd and 3rd plaintiffs have to accede to their right to possess the property in its entirety.

The 5th and 6th defendants' title is not tainted and they have successfully made a case for the plaintiffs' eviction.

It is not in dispute that the 5th and 6th defendants moved onto the property and are utilising the land and the buildings thereat save for the house in which the 2nd plaintiff is residing. They decided to move onto the property without seeking and obtaining an eviction order.

Are they entitled to occupational damages? These would, in my view, be the same as holding over damages. There never was a lease agreement between the parties. The

plaintiffs are in that house because they were challenging the sale of the property, which they believed belonged to their late mother.

I would say the same reasoning as in the *Silonda v Nkomo* HB 60-19 (SC 6-22) applies. The defendants bought the property and are now utilising it except for the 6 or 8 rooms the 2nd plaintiff is using. There was no contractual relationship with a fixed and agreed rental amount.

I am not persuaded a case for holding over damages has been made. The defendants are entitled to an order for the eviction of the plaintiffs but not to holding over damages.

The last issue is on the competency of the relief sought by the plaintiffs.

I have already dealt with this issue. The plaintiffs were not seeking to have CHITAKUNYE J's judgment set aside and I held that that judgment did not pronounce that the Montgomery plot did not belong to the late Ema.

I equally addressed the fact that the 1st defendant's First and Final Distribution Account lay for inspection and no objections were lodged within the stipulated period as provided for in section 52 (9) and (10) of the Act. Such objections would have been addressed by the 3rd defendant with any aggrieved party approaching this court to set aside the offending direction.

Whilst I am not inclined to hold that failure to do the above rendered the relief sought incompetent, I find that the plaintiffs did not make a case for the relief they are seeking. The issue of the Lahleka homestead was not pursued and for good reason. I therefore have not applied my mind to it.

The 5th and 6th defendants prayed for punitive costs. Costs are within the discretion of the court.

I find nothing in the plaintiffs' conduct warranting censure. They were trying to pursue a matter which they believed they had a right to, claiming what they believed their mother was entitled to.

I am therefore not persuaded to award punitive costs.

In the result I make the following order:-

1. The plaintiffs' claim be and is hereby dismissed.
2. The 5th and 6th defendants' counter-claim succeeds in part in that the order for holding over damages be and is hereby dismissed.
3. The 2nd and 3rd plaintiffs and all those claiming occupation through them are to vacate the property known as Subdivision H of Lot 11 of Montgomery situate in the District of Bulawayo and more commonly known as No. 11 Seymour Road, Montgomery, Bulawayo within 7 days of this order failing which the Sheriff of the High Court of Zimbabwe or his lawful deputy shall evict them.
4. The plaintiffs shall pay costs of suit at the ordinary scale, jointly and severally, the one paying the other to be absolved.

Mhaka Attorneys, c/o Majoko and Majoko, plaintiffs' legal practitioners
Calderwood, Bryce Henry and Partners, 5th and 6th defendants' legal practitioners