

RANGARIRAI MUTAPURI N.O.
versus
MPAKEYI MUTUNGWAZI N.O.

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 28 May, 16 June, 17 July 2008; 16 March, 27 July, 12 & 13 October 2009
& 12 October 2011

Civil Trial

A.Debwe, for the plaintiff

L.Uriri, for the defendant

MAVANGIRA J: The plaintiff seeks in this matter an order declaring as null and void an agreement of sale entered into by and between Kingdom Mutungwazi and Ezekiel Mtapuri in respect of an immovable property called Lot 3 of Zuvanyika measuring 5.3523 Morgen including what is described as a 16 rooms compound.

After the closure of the plaintiff's case an application for absolution from the instance was made on behalf of the defendant. The application was dismissed with costs on 20 June 2009.

The trial resumed and after the closure of the defendant's case the parties were directed to file written closing submission on dates that were discussed and agreed in court. The plaintiff filed his closing submission. The defendant's were to be filed by 4 November 2009. To date they have not been filed despite reminders written by the Registrar including one dated 25 August 2010 which was responded to on 6 September 2010 by the instructing legal practitioners to the effect that they also do not have an explanation for the failure to file the submissions and a promise to remind counsel to do so.

For the sake of convenience, I reiterate herein the portion of my ruling in the application for absolution from the instance in which the pertinent aspects and evidence of the plaintiff's evidence were dealt with. I thus reproduce herein below the portion included from para 4 on page 1 to the first paragraph on p 4 of the said ruling.

“The plaintiff in this matter was appointed curator *ad litem* for Ezekiel Mutapuri by this court on 30 June 2004. ‘His (the plaintiff’s) contention is that at the time

that Ezekiel Mutapuri concluded the agreement in issue with the now deceased Kingdom Mutungwazi, he was mentally handicapped and incapable of appreciating the nature and import of the agreement. Three witnesses gave evidence being the plaintiff, one Esau Window Mtapuri and Doctor Dickson Chibanda.

Rangarirai Mtapuri's evidence was to the effect that Ezekiel Mtapuri has exhibited signs of being mentally unstable from a very early age and that this fact was known to all who lived with him and all who knew him including the family of the defendant who were neighbours of the plaintiff's family at all relevant times. He also said that at the time that Ezekiel entered into the agreement of sale the subject matter of this case, he was not mentally stable and that he was in fact coerced by Kingdom Mutungwazi to enter into the agreement. He said that when he eventually became aware of the agreement in early May 2004 he sought audience with Kingdom Mutungwazi and requested him to cancel the agreement but Mutungwazi refused to do so. He then consulted psychiatrists, namely Doctor Chibanda, Doctor Shamu and Doctor Nhiwatiwa whose reports are before the court.

Esau Window, a brother to Ezekiel Mtapuri also testified to the effect that Ezekiel Mtapuri exhibited signs of mental instability from the time when he was three years old. Ezekiel used to do horrific things such as playing with his own stool. Their mother (had) passed away when Ezekiel was two years old. The headmaster of the primary school which Ezekiel attended and Ezekiel's teacher also encountered problems until it was indicated that it was no longer possible for Ezekiel to continue attending school. A relative of their mother who was a teacher at Moffat School took Ezekiel in and cared for him while he attended Moffat School. With the passage of time, she also gave up and eventually Ezekiel ended up living in the streets where he also took to smoking marijuana, sniffing glue and taking alcohol although he had started abusing drugs when he was in Grade 5. He would sometimes come home and he would attack his sisters and the witness and their mother's sister who was taking care of them all. One Pastor Joseph Guti of the ZAOGA church also assisted. He would take Ezekiel to church and would counsel him. Sometimes he would stay with Ezekiel at his college called AMFIC College. The officer in charge at Glen Norah Police Station, then one Mr. Nzira also tried to assist. He said that everybody from their neighbourhood knows that Ezekiel is of unsound mind. He said that at the time that Ezekiel entered into the agreement of sale, he was of unsound mind, as he still is now. Ezekiel started loitering the streets after his sixth or seventh grade. He never attempted secondary school. When asked whether Ezekiel is married he opined that he does not think that there can be any woman who would ever want to stay with him because of his condition.

Doctor Chibanda's evidence was to the effect that he examined Ezekiel at Harare Central Hospital. He carried out a mental state examination which consisted of determining Ezekiel's thought process, his behaviour, his cognitive functioning and abstract thinking. He found that at the time of the examination, Ezekiel was suffering from some form of paranoid psychosis. While Ezekiel met the criteria for schizophrenia, because he was seeing him for the first time, he could not make a conclusive diagnosis hence the indication at the end of his report that there is need for collateral history.

Doctor Chibanda also found that at the time of the examination Ezekiel was not in a position to give informed consent. The basis for that finding was that at that time, Ezekiel had what is called in psychiatry, loosening of association. His speech was incoherent and when guided to follow a certain line of thinking or speech he would go off at a tangent. He also had auditory hallucinations and all this was masked by a general sense of suspiciousness.

Doctor Chibanda opined that if his findings on Ezekiel at the time of the examination pertained at the time of the sale in December 2003, then he would conclude that Ezekiel did not have the mental capacity to understand what he was doing. He said that at the time of the examination, Ezekiel's condition appeared to be one of a chronic nature but he was not in a position to indicate the time frame of this condition without the benefit of collateral history. He referred to Dr. Nhiwatiwa's report which he had had sight of and stated that if that report is taken into consideration it would be possible to determine whether or not Ezekiel could appreciate a legal document at the time that he entered into the agreement of sale in issue. Doctor Chibanda examined Ezekiel on 24 May 2004.

Dr. Nhiwatiwa, a psychiatrist, did not give *viva voce* evidence before this court. However, her report dated 11 June 2004 is before the court, having been part of the documents attached in support of the court application as then filed by the plaintiff. She states, *inter alia*, in her report, that Ezekiel needs supervision with activities of daily living and that he is not mentally capable of entering into a meaningful contract and cannot follow court proceedings or be examined as a witness.

Also before the court as part of the court application papers is a report by Doctor Shamhu, a clinical psychologist who also assessed Ezekiel on 7 June 2004. Amongst other things, he formed the opinion that due to Ezekiel's problem of psychotic behaviour and deficiency in reasoning ability he is incapable of giving informed consent. Furthermore, that he should be supervised by mature family members in his day to day activities.

It is the defence's contention that the medical evidence and reports before the court are inconclusive as they all relate to dates after the agreement was

concluded and none purport to give a diagnosis of Ezekiel's state of mind on the date of the contract. The defence denies that Ezekiel was mentally handicapped and contends that he could not have at the time of contracting, failed to appreciate the nature and import of the contract. It was submitted that the evidence led by the plaintiff before this court is no different from that which was, before the matter was, as an opposed court application, referred to trial. An application has thus been made for absolution from the instance at the close of the plaintiff's case on the basis that on the evidence placed by the plaintiff before the court, it is still not possible to determine that at the time that the agreement was concluded Ezekiel was mentally incapacitated and accordingly could not have concluded a contract".

At the resumption of the trial after the dismissal of the application for absolution from the instance, the defendant, who is the executor of the estate of Kingdom Mutungwazi, stated in her evidence that she did not know Ezekiel Mutapuri until the institution of these proceedings. To put this aspect of her evidence into context, the court application which forms the basis of this matter (the matter having been referred to trial at the hearing of the opposed application) was filed on 9 July 2004. She was not involved in and was not a party to the agreement of sale between her husband, Kingdom Mutungwazi and Ezekiel Mutapuri. It was also her evidence that Ezekiel had been in the habit of borrowing money from her. Significantly, she only stated this whilst under cross-examination. What clearly emerged from this witness' evidence is that she did not know Ezekiel at the material time. She has no personal knowledge of the circumstances in which the agreement was executed. She could not be in a position therefore to counter the evidence adduced on behalf of the plaintiff.

When the matter was referred to trial the sole issue referred for the determination of the trial court (this court) was "whether at the time of the agreement in issue, Ezekiel Mutapuri was of such mental health as to appreciate the nature of the transaction."

Having thus heard evidence from both the plaintiff and the defendant it appears to me that the plaintiff has proved on a balance of probabilities, that Ezekiel Mutapuri was not of such mental health as to appreciate the nature of the transaction that he entered into with Kingdom Mutungwazi. The evidence of members of Ezekiel's family taken in conjunction with the medical evidence tends to indicate a very high probability that Ezekiel was not of such mental health at the time of the transaction as to appreciate the nature thereof. In the circumstances the plaintiff's claim must succeed and costs must follow the cause.

In the result it is ordered:

1. That the purported agreement of sale concluded between Kingdom Mutungwazi and Ezekiel Mutapuri be and is hereby declared null and void
2. That the plaintiff be and is hereby directed to refund to the defendant the total amount paid by Kingdom Mutungwazi.
3. That the defendant shall bear the costs of this suit.

Debwe and Partners, plaintiff's legal practitioners
Uriri Attorneys-At-Law, defendant's legal practitioners