GERALD MUJAJI
versus
FRANSCISCA MUSHORIWA
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 09 July 2007, 28, 29 July 2008 & 5 March 2009

**Family Law Court**
**Trial Cause**

Mr *Nhemwa*, for the plaintiff
Mr *Mudambanuki*, for the first defendant

GUVAVA J: This is an application in terms of s 52 (9) (i) of the Administration of Estates Act [*Cap 6:01*]. The trial of this matter has taken a long time to finalize for various reasons. The matter was initially filed in this court as a court application in July 2003. When the matter was set down on the opposed roll the parties realized that there were disputes of fact which could not be resolved on the papers. By consent it was referred to trial. The trial commenced in July 2007 with Mr Dembure representing the plaintiff. The matter was postponed *sine die* before the plaintiff had finished testifying. The matter could not proceed as the parties required a transcript because the plaintiff was now being represented by Mr Nhemwa as Mr Dembure was said to have left the country.

The facts giving rise to this matter which are not in dispute are as follows. The late Victor Doit Mujaji died on 10 June 1998. (The deceased) He is survived by the first defendant, whom he had married in terms of customary law in 1996, and eight children. At the time of his death he owned three motor vehicles, an immovable property where he resided and household goods. Prior to his death the deceased instructed a legal practitioner to draw up a will. He however died before he had signed it. For convenience I will refer to it as a draft will in this judgment. At his funeral the deceased's legal practitioner Mr *Warara* read the draft will to the gathering. Family members agreed to adopt the draft will for the purpose of distributing the estate. At an edict meeting attended by members of the family and first defendant the plaintiff

was appointed as executor of the deceased's estate. A first and final distribution account was lodged with the second defendant awarding the deceased's immovable property to his four children in equal and undivided shares. The first defendant lodged an objection to the account as she was of the view that she was entitled to a share in the immovable property.

The second defendant, acting in terms of s 52 of the Administration of Estates Act directed that the estate should be distributed by giving the first defendant 50% and the four minor children 12,5% share in the immovable property as the deceased had died interstate. The second defendant proceeded to issue new letters of administration in favour of the first defendant in the same estate and authorizing her to transfer the property into her name and the names of the minor children in the shares already stated. It is against the directions of the second respondent that the plaintiff complains and has lodged this claim in order to have them set aside.

The plaintiff in his claim seeks the following order:

a) The appointment of the first respondent as executor dative on 5 of April 2002 be and is hereby declared null and void.

b) The plaintiff is hereby declared executor dative of the estate Late Doit Victor Mujaji

c) The deceased estate be administered in terms of the family agreement and the will

d) That first defendant pays the costs of suit.

The basis of plaintiffs claim is that members of the deceased's family and first defendant's family had entered into an agreement in terms of which the deceased's draft will would be used for the purpose of the administration of the estate. The plaintiff stated that the agreement was legally binding and the deceased's estate should be administered in terms of this agreement. The plaintiff also alleged that the appointment of first defendant as executor after he had been so appointed was unlawful.

The dispute between the parties relates to what transpired at the meeting following the burial of the deceased when the beneficiaries are alleged to have agreed to adopt the draft will. The issues that were referred to trial were as follows:

1. Whether there was an agreement by the beneficiaries to adopt the contents of the deceased's invalid will

2. Whether such agreement, if any, is legal

3. Whether such agreement, if any supersedes the provisions of s 68 of the Administration of Estates Act [*Cap 6:01*]

The plaintiff gave evidence and testified that at the time of deceased's death he owned an immovable property known as 3 Vickers Road, Ridgeview Harare. (The property) The deceased had three wives during his lifetime. The first was Benedict Kambasha. She did not have any children with the deceased and he then married his second wife Susan Zulu. The three lived together in a flat in town until they built the house at 3 Vickers Road. Susan Zulu had three children with the deceased. Benedict died and deceased entered into an arrangement with his in laws that the property they had accumulated during the marriage would be left intact for the benefit of the children. In 1994 Susan Zulu also died. The deceased then married the first respondent in June 1996 in terms of customary law.

The plaintiff stated that when his brother fell ill he then came to him for advice on how to deal with his property taking into account that he had accumulated this property with his wives whom were now late. The plaintiff then referred him to Mr *Warara* so that he could assist him in drafting a will. However, the deceased died before signing the will. Following the burial of the deceased a family meeting was convened. Present at the meeting were members of the Kambasha family, members of the Zulu family, members of the Mataruse family (deceased had children with them), members of the Mushoriwa family, the first defendant and all members of the Mujaji family. The meeting was chaired by a nephew named Zex Moritari. He advised the gathering that the deceased had left a will. He then invited Mr *Warara* to read the contents of the draft will by the deceased. He stated that Mr *Warara* advised the gathering that what he was reading was an unsigned will.

The deceased's draft will in essence acknowledged four of his children as his heirs and bequeathed the house to his four children in equal shares. To the first defendant he gives a life usufruct over the property which would terminate in the event that she remarries. The plaintiff stated that after the draft will was read out by Mr *Warara*, various persons stood up and stated the will should be adopted for the purpose of distributing the estate. The first defendant's brother also stood up and stated that the provisions of the will should be followed. He stated that the first defendant also addressed the gathering. She said she was happy to stay and look after the children as that is what she had discussed and agreed to with the deceased before he died. He testified that she had also stated that she agreed with the adoption of the draft will for the purpose of administering the estate.

The plaintiff stated that following this event he was appointed as executor of the deceaseds estate in terms of the provisions of the draft will. He stated that the first defendant was awarded a motor vehicle in terms of the draft will. Another motor vehicle was given to the Kambasha family in terms of an agreement they had had with the deceased and the third car was given to Tafadzwa the deceased's eldest son. The first defendant was also given half of the pension with the other half being given to the four children. They also distributed the insurance money in the same way with half going to the first defendant and the other half to the children. He stated that in this respect he departed from the provisions of the draft will as it bequeathed the full insurance to his children in equal shares leaving out the first defendant. The plaintiff stated that he decided to give the first defendant this money so that she could purchase her own house since the draft will did not give her a share in the immovable property.

On 13 June 2000 the plaintiff in his capacity as executor and acting through Mr Warara, filed a first and final distribution account with the second defendant in which he awarded the immovable property to the four children in equal shares in terms of the draft will and the agreement. On 4 September 2000 the first defendant formally lodged an objection with the second defendant on the basis that the executor had not consulted her when he filed the account and that she was entitled to the immovable property in terms of the Administration of Estates Act. The plaintiff stated that he was surprised by the objection as they had been working well together with the first defendant all along.

Mr *Charles Warara* also gave evidence for the plaintiff. He stated that he is a legal practitioner and at the relevant time was practicing in the law firm of V. Nyangulu & Associates. He testified that he received instructions from the deceased during his lifetime dealing with the distribution of his estate in the event of his death. He confirmed that the deceased did not sign the final draft as he died before it was ready. He said that following the burial of the deceased he was invited to a family gathering and asked to read out the draft will. After he read the draft will a number of persons stood up and spoke in support of following the wishes of the deceased. It was his evidence that the 1$^{st}$ defendant was present at the gathering and she stated that she was happy to follow the terms of the draft will.

He said that following the registration of the estate she was in constant contact with him until he filed the distribution account. He said he was surprised by her objection as she had hitherto proceeded as if she was in agreement with what they were doing.

Mutsa Mujaji, a brother of the deceased, also gave evidence. He said the deceased was his elder brother. When the deceased died he was buried two days later at Warren Hills Cemetery. The day following the burial a family gathering took place in the morning at about 10: 00 a m. Mr *Warara* attended the meeting and read the draft will which was made by the deceased. He stated that Mr *Warara* advised the meeting that the document he had was not signed by the deceased. After he read the draft will the chairman then invited comments from the people gathered. He said that his elder brothers Gerald and Witmore spoke in support of adoption of the will and thereafter the first defendant and her brother also spoke. He stated that the first defendant stated that she was happy with the will and that she would stay and look after the children. With this evidence the plaintiff closed his case.

The defendant testified that she had a very good relationship with the deceased. When he fell ill the first defendant promised that she would look after his children. She said that in her pleadings she had denied that a meeting had taken place as she thought the plaintiff was referring to a real meeting and not to the traditional gathering which is held after a death. She stated that on the day in question she was packing all the deceased clothes when they were asked to come and attend to a lawyer who had arrived. She said the lawyer advised the gathering that he had a will and he had come to explain the deceased's wishes. She testified that after reading the will she stood up and told the gathering that she would remain and look after the children. She stated that she was never shown the document and did not agree to its contents. She denied having adopted the draft will for the purpose of administering the estate as she had not had sight of the document before the meeting. She stated that she was only asked directly if she wished to stay and look after the children or whether she wanted to leave and return to her family since her husband had died.

The first defendant testified that following this meeting, her interaction with Mr *Warara* was not very frequent. During the first year she was busy sorting out the issue of pension. She stated that she only discovered when she went to find out why the estate was not being wound up that there were actually two wills and that she was not a beneficiary in terms of the wills. She also discovered at that stage that the wills were not executed by the deceased. She stated that she asked Mr *Warara* what she should do and he advised her to go and see the Master.

The first defendant denied that her relationship with the plaintiff was good. She said she only agreed to his appointment because she thought he would follow the law in the

administration of the estate. She said the plaintiff did not discuss the estate with her and the only time that he came to see her was to ask her to move out of the main house into the cottage so that they could rent it out in order to raise money for the children's upkeep. She stated that she has since been chased out of the house and is living with her sister.

She stated that when her husband died their child was only 11 months old. In cross examination she denied that she was ever consulted privately about the draft will before it was read out. She confirmed that she had received her share of the pension benefits and a 50% share of the insurance. She stated that she was entitled to these amounts as she was the surviving widow of the deceased. She admitted that the children's share of the insurance money was used to effect renovations to the house. She said that she and the plaintiff supervised the work. She explained that when her brother stood up to speak at the funeral it was merely to thank the Mujaji's for the manner that they had conducted the funeral. She denied that when she spoke she commented about the will. She stated that in any event the meeting took place soon after the death of her husband she could not have been in a position to make any decision at that time.

The first defendant called her brother in law, Mr Dube, as a witness. He testified that he is employed as a general manager (human resources) for UTC Zimbabwe. Mr Dube testified that on the day following the burial of the deceased there was a family gathering to distribute the deceased's property. An announcement was made that a lawyer had arrived. He stated that prior to the announcement there was no meeting between the families and they were not shown the draft will. He was seated with the first defendant's brother whilst his wife was with the first defendant. He testified that when the lawyer arrived he was holding a sealed envelope which he said was the deceased's will. He opened the envelope in the presence of everyone and read out the contents of the will. He stated that the chairman then invited comments from those present. He stated that 1st defendants brother stood up and thanked everyone for the manner they conducted the funeral. He also thanked the deceased for having left a will as it would assist in looking after the family.

In cross examination the witness confirmed that they did not see the document prior to it being read out. He stated that the gathering was not informed that the will was unsigned. He stated that as far as he was aware the first defendant only found out later that the will was unsigned. He stated that everyone at the meeting accepted that the draft will was a valid will. He said all the speeches on that day were about the will.

It was apparent from the evidence of all the witnesses that they gave their evidence as well as they could in the circumstances. The events had taken place almost ten years ago when the deceased died. In my view it is not necessary for this court to make a finding of their credibility in order to determine this matter.

In my view it is now settled that, where beneficiaries to a deceased estate enter into a separate agreement that an invalid will should be adopted for the purpose of administering the estate of the deceased, such agreement is a legal and binding one. In *Mashakada v Master of the High Court & Anor* 2001 (2) ZLR 311 at 321 CHINHENGO J faced with a similar case stated as follows:

> "I think the proper construction to be placed on the beneficiaries contract in this case is that they merely adopted, for the purpose of their contract, the contents of their fathers invalid will as the terms of their own contract. They were not attempting to validate or seek validation of the will by entering into the contract. Nor could they do so. This seems to me to be a reasonable construction of the contract bearing in mind that the will constituted the beneficiaries into legatees and therefore by agreeing on the wills provisions, each of the beneficiaries was accepting what, had the will been valid, would have been his or her legacy. They contracted on that basis. There would be nothing wrong in accepting such a contract."

It is apparent from what has been stated above that the beneficiaries must adopt the terms of the invalid will as the terms of their own contract. It seems to me therefore that for the contract to be valid it must relate firstly to a document which must purport to have been crafted by the deceased which is invalid and secondly, it must be between the beneficiaries themselves.

In the *Mashakada* Case (*supra*) the issue before the court was not whether or not there was an agreement as it was admitted, the beneficiaries having written to the master confirming their decision to be bound by the will for the purpose of distributing the estate. The issue was whether or not such an agreement is legal. In both cases there is no dispute that the will was invalid. The issue to be determined in this case is whether or not there was a valid contract as amongst the beneficiaries.

R.H. Christie in "The Law of Contract in South Africa" 3$^{rd}$ edition at page 249 states that each party entering into a contract must have the capacity to do so. The parties to the contract must also reach *consensus ad idem*. In other words, for an agreement to be binding, the parties must be identified and the terms of their agreement ascertainable.

The evidence which was led by the parties in my view seems to indicate that there was no agreement. Firstly, it is not clear who the parties to this agreement were. As earlier stated the

beneficiaries would have to enter into the agreement to adopt the deceased's invalid will for the purpose of administering the estate. In this case however, there is no evidence that the beneficiaries themselves entered into an agreement. The plaintiff in his submissions was very much alive to this requirement as he submits that an agreement between the beneficiaries had been entered into. From the draft will the beneficiaries were Tafadzwa Mujaji, Fadzai Mujaji, Jewet Mujaji, Tinotenda Mujaji and Francisca Mushoriwa.

R.H. Christie also states at page 254 that a child under the age of seven has no contractual capacity at all and thus a guardian must enter a contract on his behalf. Where the children's age is above seven but under age of majority then they must be assisted by their guardian. It is not clear what the children's ages were at the time but it is apparent from the evidence that the four children were minors. There is no evidence that a guardian had been appointed to act for them at that stage and that those who spoke for them could do so legally.

It also appeared from the plaintiffs evidence that he was stating that the agreement was between members of the Mujaji family and the Mushoriwa family. Clearly such an agreement cannot be between the two families as they would not be parties to the contract. It seems to me that the import of the evidence shows that the real parties did not participate in the agreement nor were they consulted. If the plaintiff entered into the agreement on behalf of the minor children there was no evidence that he had the mandate to do so as he had not been appointed their legal guardian since both their parents were deceased.

Secondly, it is not clear from the evidence which document was read out to the gathering on the day in question and therefore which the parties agreed to adopt for the purpose of their contract. At the trial three documents exhibit 1, exhibit 2 and exhibit 3 were produced as wills of the deceased. Exhibit 1 was a rough handwritten draft which appears to be notes setting out the deceased's property, the beneficiaries and a proposed plan of distribution. It appears to have been drafted on 10 May 1998 and is initialed and signed by the deceased and witnessed by the plaintiff and the first defendant. Exhibit 2 is a typewritten, unsigned draft. It however leaves out some of the property set out in exhibit 1 such as the motor vehicles and leaves out a minor child of the deceased Tinotenda as a beneficiary. Exhibit 3 which is alleged by the plaintiff to have been read out is again an unsigned typewritten draft will which incorporates Tinotenda Mujaji as a beneficiary but still leaves out the motor vehicles. The hurdle in my view is which document did the contracting parties agree to be bound by as not all three documents were read out at the gathering?

It is not in dispute that the first defendant did not have sight of the any of the draft wills before Mr *Warara* read out one of them. No one explained to the first defendant the fact that the will was unsigned or that it was invalid. It was not in dispute that the first time that the first defendant learnt of a will was when everyone was called and advised that a lawyer was in attendance. It was also not in dispute that the first defendant only had sight of the three exhibits at a later date after the draft will had been read out. In my view all these factors lead to the inescapable conclusion that the parties themselves were unclear on the content of the agreement. Had there been one document duly signed by the deceased it could have been argued that the parties had agreed to adopt the signed will as their agreement. In this case it is not clear to me which document the parties agreed to be bound by.

Thirdly, the plaintiff in his evidence sought to show that the first defendant's conduct was such that she must have entered into the agreement. He explains how everything has been distributed in terms of the unsigned will. However this is not completely true as exhibit 3 which he says was read out by Mr *Warara* does not include the motor vehicles and one is at a loss as to the basis of bequeathing a car to the Kambasha family who are not even mentioned in any of the wills and to Tafadzwa the eldest son. His argument is further defeated by his own evidence when he says that he decided to deviate from the will by giving the first defendant a half share in the insurance money. The draft will specifically bequeath the money to the deceased's children excluding the defendant. Clearly in my view the distribution was not being done in accordance with any of the wills produced before the court and the first defendant cannot be said to have been going along with the distribution in accordance with the draft will which was read out by Mr *Warara* as it did not have some of the provisions upon which the plaintiff relied on for distributing the property.

It seems to me that where parties decide to be bound to a particular document, especially in a case such as this where parties are relying on an unsigned document which may not have been the will of the deceased, there must be no doubt that the document is indeed what the deceased intended to be his will. The parties must agree to be bound by that document. In this case there are three different documents. The evidence before me in this case does not show that the beneficiaries were party to the agreement or that there was consensus on the content of the document which they were adopting. The parties in my view did not reach consensus and thus there can be no valid agreement.

The second defendant's directions on the distribution of the immovable property were not challenged in any way during the trial. The sole argument by the plaintiff being that there was an agreement between the parties. The issue of the applicability of s 68 of the Administration of estates Act was only raised, to the extent that it would be applicable, in the event that the court found that the agreement was binding. In my view the directions given by the second defendant awarding the first defendant the immovable property together with the minor children was rationale and reasonable as it recognized the rights of the surviving spouse to inherit from her husband and also took into account the interests of the minor children some of whom are not her children. The directions in my view were also in terms of s68 of the Administration of Estates Act in so far as they made the distribution in accordance with an interstate estate under an unregistered customary union.

The second defendant however erred in giving the first defendant letters of administration in circumstances where he had already appointed the plaintiff as executor. It is apparent from a reading of the Administration of Estates Act that once an executor has been appointed another person cannot be appointed at the same time. In the event that the master was dissatisfied with the manner in which the plaintiff was administering the estate his remedy was to have plaintiff removed in terms of s 117 of the Act before appointing the first respondent. It seems to me that first defendant’s appointment cannot stand as it is unlawful. The plaintiff remains as executor until he has been lawfully removed.

In the absence of an agreement the estate must be administered in accordance with the Administration of estates Act [*Cap 6:01*] as the deceased died intestate. The directions by the second defendant are therefore upheld in relation to the distribution of the estate. I will not make an award of costs as none of the parties have been completely successful in this case.

Accordingly it is ordered as follows:

1. It is declared that there was no binding agreement between the beneficiaries of the Late Doit Victor Mujaji regulating the distribution of his estate.

2. The appointment of the first defendant as executor dative by second defendant on 5 April 2002 is declared null and void.

3. The Masters Directions for the distribution of the Estate of the Late Doit Victor Mujaji are hereby upheld.

4. The Executor shall forthwith submit an amended Inheritance Plan incorporating the Masters Directions.

5. There shall be no order as to costs.

*C Nhemwa & Associates*, plaintiff's legal practitioners
*Mudambanuki & Associates*, first defendant's legal practitioner