LOVEMORE GOREDEMA
(In his capacity as the Executor of the Estate Late Robert Tendayi Magwenzi)
versus
PATRICIA MAGWENZI
and
CHARITY MAGWENZI
and
LUCKSON MAGWENZI
and
MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 17 September and 21 October 2010

N Muhlolo, for the applicant
S A Tawona, for 1st, 2nd and 3rd respondents

GUVAVA J: The applicant filed this application seeking an order for the eviction of the first, second and third respondents and costs of suit. The facts of this case can be summarized from the founding affidavit filed by Lovemore Magwenzi. These are as follows:

The applicant is the executor of the estate of the late Robert Tendayi Magwenzi (hereinafter referred to as the deceased). The deponent of the founding affidavit is acting in terms of a special power of attorney granted to him by the applicant. The first and second respondents are his nieces whilst the third respondent is his nephew. The deceased passed away on 3 August, 2000. At that time he was resident at house number 9399 Unit "K" Seke, Chitungwiza (“the property”). The property had been sold to him by his brother, the respondents' father, in 1995 and subsequently transferred into his name. Upon his death he left a will in which he bequeathed the property in question to his second wife Patricia Chitongo. It is alleged that the respondents have forcibly taken up occupation of the property and refuse to vacate arguing that the property belongs to their father. In support of the application a copy of the agreement of sale purportedly entered into by the two brothers for the sale of the property dated 5 February 1995 has been attached together with the deed of transfer dated June 1995 and a copy of the deceased's will.

The application was opposed by the three respondents. They raised two points *in limine*. They submitted firstly that Lovemore Magwenzi had no *locus standi* to institute the proceedings as he is not the executor of the estate. They also stated in their opposing affidavit that the matter before the court was *res judicata* as it had already been determined by the Magistrates' court. On the merits they stated that their father had never sold the property to the deceased. They alleged that the agreement of sale was a forgery and was not signed by their father. They further allege that the will was a forgery as it was produced eight years after the death of the deceased. They also state that Patricia Chitongo has since passed away and the applicant is merely pursuing the matter so that he can claim the property for himself. They deny having forcibly occupied the property and say that they inherited it from their father's estate. The respondents submit in their heads of arguments that the application contains material disputes of facts which cannot be resolved on the papers without hearing oral evidence. They thus pray that the matter be dismissed with costs.

The issues that fall for determination before me are as follows:

1. Whether the applicant has *locus standi* in this matter;
2. Whether the matter is *res judicata*; and
3. Whether or not the matter contains material dispute of fact which cannot be resolved on the papers.

At the commencement of the proceedings Mr *Tawona* submitted that he was abandoning the second issue that he had raised as a point *in limine*. He stated that after having gone through the record of proceedings in the Magistrates' court, he was now of the view that the matter before me was not *res judicata.* In my view the concession made is proper. The requisites for a successful plea of *res judicata* have been set out in a number of judgments from this court and the Supreme Court. The plea of *res judicata* is a form of *estoppel* to bring finality to litigation which has been determined by a court of competent jurisdiction. The court must be satisfied that the previous matter was between the same parties or their privies, must have been on the same subject matter, founded on the same cause of action and the earlier court must have given a final and definitive judgment on the matter. (See *Kawondera* v *Mandebvu* S 12/06, '*O*' *Shea* v *Chiunda* 1999 (1) ZLR 333 and *Le Roux* v *Le Roux* 1967 (1) SA 446)

An examination of the record from the Magistrates' court shows that the case before that court was indeed pertaining to the same parties, on the same subject matter and with the same cause of action. The applicant in that case instituted proceedings to evict the respondents. However a reading of the judgment shows that the applicant's counsel is correct in arguing that the requirements for a plea of *res judicata* have not been fully complied with as it is quite apparent that the magistrate in that case determined that he could not deal with the matter as he lacked jurisdiction. Having said that he was clearly not a court of competent jurisdiction to have dealt with the matter and correctly dismissed the application.

The respondents counsel submitted that the point of *locus standi* should be upheld as it has merit. He submitted that Lovemore Magwenzi could not lawfully stand in the place of the executor unless the Master of the High Court had authorized him to do so. He argued that Lovemore Goredema was the executor testamentary of the deceased's estate. The deceased's will gave him assumptive powers in terms of paragraph 3 of his will. The executor thus could only appoint another in his place in terms of section 28 of the Administration of Estates Act [*Cap 6:01*] ("the Act"). He argued that as he had not done so Lovemore Magwenzi was not properly before the court and the application should fail on this basis. He further submitted that the special power of attorney signed by the executor on 23 February effectively handed over complete control of the executors functions to Lovemore Magwenzi. He thus argued that the executor had abdicated in his functions.

The applicant's counsel submitted in response that the executor had not in any way abdicated in his functions. The power of attorney was made specifically to authorize Lovemore Magwenzi to prosecute this matter. He argued that the executor had filed the application in the Magistrate's court and when that application was dismissed he decided to ask Lovemore Magwenzi to act on his behalf in this matter. He also submitted that section 28 of the Act had no application in this case as Lovemore Goredema was still the executor in the deceased's estate.

I, however, did not find any merit in the applicant's argument. Firstly an examination of the record of the Magistrates' court shows that although the matter was filed in the name of the executor the person who actually appeared and gave evidence was Lovemore Magwenzi. Apart from using the executor's name in the application he did not play any role at all in the matter. In my view it was Lovemore Magwenzi who also dealt with the matter at that court. In

the case before me the executor has not filed any papers in support of the application. Although his name has been used in the application before me the information contained in the papers relate to Lovemore Magwenzi who refers to himself as the executor. It would seem to me that the respondents' are correct when they state that the executor has no interest in the matter but it is Lovemore Magwenzi who has always taken an active role in this matter.

Secondly the wording of the special power of attorney does not appear to restrict the powers that have been given to Lovemore Magwenzi by the executor. It is in my view necessary to set out in full the wording of the special power of attorney. It states:

> "I, Lovemore Goredema born on 9 November 1948 and identity number 63-449191L 63 of 15 Kwadikwidi Street Chitungwiza do hereby appoint Lovemore Kuwawoga Magwenzi born 25 October 1947 I.D Number 63-166393 X 47 of 6193, 87th Crescent, Glen View 3 Harare <u>to be my lawful agent to represent me as an executor of the estate late Robert Tendayi Magwenzi DR 364/2001." (underlining is my own)</u>

A proper interpretation of the wording of the power of attorney in my view appears to grant Lovemore Magwenzi all the powers granted to the executor to administer the estate of the deceased instead of the executor. The power of attorney does not restrict or limit Lovemore Magwenzi's power with regards to the estate. His appointment as agent is not just for the purpose of prosecuting this matter but it appears to authorize him to do everything that the executor would do in respect to the estate.

Mr *Muhlolo* argued that what the executor had done was delegate his functions and he relied on the case of *Shata & Anor* v *Manase N.O. & Anor* HH 44-03 where this very point was discussed. At p 2 of the cyclostyled judgment KAMOCHA J stated as follows:

> "In my view, an executor can authorise some other person to carry out some or all of his functions on his behalf. In *Bramwell & Lazar N.N.O* v *Lamb* 1978 (1) SA 380 COLMAN J had this to say at 283H:
>
> > 'It is a common practice, and a convenient one for an executor to authorise his co-executor or some other person to carry out some or all of his functions on his behalf'.
>
> The learned judge continued at p 384A and said:
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> > 'An executor, as I see the matter, may not appoint someone to act instead of himself, so as to relieve himself of responsibility; but he may appoint someone, for whose acts he will be

> responsible, to act on his behalf, and that is what, in my judgment, the second plaintiff did in the present case'.

What an executor is prohibited to do is abdication, not delegation."

In the above stated case the executor, a legal practitioner, asked a clerk in his law firm to negotiate and sign an agreement of sale relating to an estate property on his behalf. He also authorized another legal practitioner to sign the power of attorney to pass transfer. He could not conclude the sale himself as he was in the United States of America on business. The wife of the deceased sought to renege on the sale as the prices had escalated. Mr Manase sought to challenge the legality of the sale on the basis that he had not concluded the sale. The court in that case correctly held that the clerk had been authorized to conclude the sale on behalf of the executor. These facts can be distinguished from the facts of this case where the executor has done nothing at all in relation to the estate. The only person who is acting on behalf of the estate is Lovemore Magwenzi. It would seem to me from the evidence placed before me that Lovemore Goredema has effectively abdicated his functions as executor in favour of Lovemore Magwenzi and this he cannot do.

Even if I am wrong in coming to this conclusion I take the view that the executor, being an executor testamentary, could only delegate his function in terms of the Act. D. Merowitz in "*The Law and Practice of Adminstration of Estates*" 3rd ed at p 77 states that an executor may only assume a co-executor to act with him in the administration of the estate if he was expressly given this power by the will of the testator. It is apparent that the executor in this case had the power of assumption that he was granted in paragraph 3 of the will. Where an executor assumes another person as executor by virtue of a power conferred upon him in terms of a will then s 28 of the Act must apply. The section provides as follows:

28 Assumption of executor under power contained in will

(1) Nothing in this Act shall prevent a testamentary executor from assuming another person as executor under a power conferred on him by the testator in his will or codicil:

Provided that no person shall be entitled or qualified to act as assumed executor unless—

(*a*) he is the testator's surviving spouse or next of kin or is registered in terms of the Estate Administrators Act [*Chapter 27:20*]; and

(*b*) the Master has granted him letters of administration as such during the lifetime of the testamentary executor.

(2) The Master shall grant a person letters of administration as an assumed executor in terms of subsection (1) if the Master is satisfied that the power of assumption under the will or codicil concerned has been properly exercised.

(3) Every provision of this Act and any other law relating to executors shall apply to persons who are assumed as executors under this section.

[Section substituted by section 68 of Act 16 of 1998]

My understanding of this provision is that where a testamentary executor decides to assume another person as executor of the estate the person concerned must be a relative of the deceased and the Master must approve the appointment. In other words a person who is appointed by a testamentary executor as an executor may only assume executorship provided there is compliance with both paragraphs (a) and (b) of subs (1). In my view the applicant in this case complied with the first part as he chose Lovemore Magwenzi, who is a brother of the deceased and may thus be considered as a next of kin. The applicant has however not complied with the second part which requires that the Master grant Lovemore Magwenzi letters of administration.

I find therefore that the respondent has successfully shown that Lovemore Magwenzi has no *locus standi* to seek the eviction of the respondents. On this basis the point *in limine* raised by the respondents succeeds.

Costs as a general rule follow the cause but in this case it was submitted by the parties that no order should be made with regards to costs.

In the result I make the following order:

1. The application is hereby dismissed.
2. The costs of this application shall be costs in the cause.

Mushonga, Mutsairo & Associates, applicant's legal practitioners
Muza & Nyapadi legal practitioners, 1st, 2nd and 3rd respondents' legal practitioners.