

TAWANDA LAMECK MUZONDA
and
TICHAONA MCDONALD MUZONDA
and
KUDZAI MARCELINE MUZONDA
and
PARADZAI EDMUND MUZONDA
and
CHIPO MUZONDA
versus
LORRAINE USAYIWEVHU
and
DEPUTY SHERIFF CHITUNGWIZA
and
DIRECTOR OF HOUSING CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 11 January, 2012

Opposed Application

C Chengeta, for the applicants
C Takaendesa, for the 1st respondent
No appearance for the 2nd and 3rd respondents

MUTEMA J: The dispute in this case is centred on intestate succession. The applicants are the offspring of the late Moses Muzonda, who died intestate on 23 September, 1997. Richard John Chimbari of RJC Executor Services (Pvt) Ltd was appointed executor dative of the deceased estate on 12 March, 2004 to wind up the estate which he did via a first and final administration and distribution account on 23 April, 2004, which the Master of this court approved on 20 August, 2004. The estate had only one asset, an immovable property in the form of house number 5694 Unit J, Seke, Chitungwiza. That house the executor awarded to the five applicants in equal shares of 1/5 each. It is from this house that the applicants desire the court to grant an order for the eviction of the first respondent.

It must be pointed out here that at the hearing I expunged the following documents from the record – the first respondent’s supplementary notice of opposition for being filed after the applicants’ answering affidavit had been filed without leave of the court thereby breaching Order 32 r 235 and the applicants’ supplementary answering affidavit for not being

stamped by the registrar and for not being signed by the deponent as well as the commissioner of oaths.

The terse averments by the applicants are as follows:

The first respondent is a paternal aunt to the applicants. House number 5694 Unit J Seke, Chitungwiza originally belonged to Lameck Usayiwevhu, their paternal grandfather who died on 31 October, 1997. Because the grandfather had another immovable property in Harare, he could not have the Seke house registered in his name. He then arranged that the house in Seke be registered in his daughter Annie Muzonda's name, to be transferred later into his son Moses Muzonda's name. The grandfather's intention in this regard is corroborated by his "will" dated 18 June, 1997 (annexure "E" to the first applicant's answering affidavit). Although the document is not a valid will for want of being witnessed by two witnesses (having been witnessed by only one), it shows or reveals the grandfather's intention in para 2 whose English translation reads: "2 the Seke house 5694 Unit J goes to Moses M Usayiwevhu, but must not be sold." In keeping with the grandfather's original intention, his daughter Annie Muzonda ceded the house to the applicants' father on 13 April, 1993. Annexure "F" to the first applicant's answering affidavit is a cession form wherein Annie Muzonda ceded stand 5694 Unit J to Moses Muzonda with the blessings of the local authority. When Moses Muzonda died in September, 1997 the family relatives arranged that the first respondent should stay in the contentious house until the first applicant, who then was aged 16 years, attained majority age. In 2001 the first applicant asked, the first respondent to cede *vacuo possessio* of the house to him. However, the first respondent refused to do so, alleging that the house did not belong to the applicants. The applicants then approached the Master who proceeded to appoint an executor dative to administer the late Moses Muzonda's estate. This process culminated in the executor awarding the house to the applicants in equal shares as stated above. The house was subsequently registered in the applicants' names. Thereafter the applicants again asked the first respondent to give them vacant possession of the house but she refused alleging that she was the owner.

On her part, the first respondent's contention is that there was never an arrangement by relatives for her to stay at the property in question. The property was registered in her sister Annie Muzonda's name after it had been donated to her by their late father. The applicants' father Moses Muzonda fraudulently registered the property in his name. The dispute regarding ownership of the property is still pending at the High Court due to the death of her sister Annie Muzonda, who died on 27 October, 2005.

The matter is yet to be finalised once an executor is appointed to administer Annie Muzonda's estate. She averred that the applicants cannot inherit this property while the dependents of the late Lameck Usayiwevhu are still alive. In her peroration, she averred that the applicants adopted a wrong procedure since there are so many material disputes of fact which cannot be resolved on the papers but via a trial.

From the parties' respective heads of argument, four issues stand out for my resolution. They are:

1. The applicants' *locus standi* to evict the first respondent from house number 5694 Unit J Seke;
2. Validity of the cession of the property from Annie Muzonda to Moses Muzonda;
3. Whether there is a matter regarding the property pending before the High Court; and
4. Whether there are material disputes of fact needing resolution by way of trial.

I will deal with the issues below:

Whether there is a matter regarding the property pending before the High Court

In the first respondent's opposing affidavit the averment regarding this issue is simply that "the dispute regarding the property is pending at the High Court." No case number pertaining to the matter is cited. It was only in the heads of argument that "Case Number 12129/04" was alluded to. Therein the first respondent stated that the "matter was dismissed on a technicality by the Honourable JUDGE HUNGWE on 29 November 2004. The Honourable Judge ruled that the matter was not urgent and Annie Muzonda was supposed to proceed by way of ordinary application. ... She subsequently died on 27 October 2005 without instituting the court application proceedings."

From this peroration by the first respondent, it goes without quarrel that if the matter was dismissed (whether on a technicality or otherwise) and the proper application has not been instituted to date, then there is no such case pending before the court. Even if I were minded to assume for a moment that the alleged defence of *lis alibi pendens* exists in *casu*, given that the court has a discretion as to whether or not to uphold the defence, it seems to me that on the facts of this case, there is every reason to exercise that discretion and ignore the existence of another dispute for the sake of equity and convenience. See *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC); *Geldenhuis v Kotze* 1964 (2) SA 167. It would, in my view, be quite

unconscionable to uphold such a defence where a matter has not been prosecuted for close to eight years with no sign as to when it is likely to be proceeded with.

Validity of the Cession of the Property from Annie Muzonda to Moses Muzonda

The contention here is that Moses Muzonda fraudulently registered the property in question in his name without Annie Muzonda's knowledge who later sought legal recourse against her brother. Fraud should not only be pleaded but must be proven. In the instant case apart from the first respondent's bald allegation of fraud there is no iota of evidence that the deed of cession was fraudulently acquired. There is no allegation that Annie Muzonda's signature which appears on it was forged. Although the document titled "will" is not a valid will for want of signatures of two witnesses that document's relevant paragraph pertaining to the testator's intention or wish regarding the house in issue does buttress the applicants' assertion that their grandfather bequeathed the house to their father. This also corroborates the validity of the cession from Annie Muzonda to Moses Muzonda. The cession involved a third party who is the secretary of the board of the municipality who would not have approved it if there was fraud. There is a presumption of regularity. The cession is accordingly found to be valid.

The applicants' *locus standi* to evict the first respondent from the house

The contention by the first respondent in this regard is that since the house in question formed part of the late Moses Muzonda's deceased estate, and nowhere is it stated that that estate has been wound up, it is only the executor Richard John Chimbari and not the beneficiaries who has the *locus standi in judicio* to sue.

I must confess that I was at sea as regards the basis of this argument given that annexure "C" to the first applicant's founding affidavit is clear and unequivocal. This is the first and final distribution account in terms of which the executor awarded the house to the applicants herein in equal shares of 1/5 share each. The master approved the account on 20 August, 2004. Once the account was approved the executor became *functus officio*. The first respondent was therefore digging in the ashes in contending that it is the executor and not the beneficiaries who has the *locus standi* to bring this application. It is accordingly clear as day follows night that the applicants do have the *locus* to institute these proceedings.

Whether there are material disputes of fact needing resolution by way of trial

From the papers filed of record as well as the oral submissions by the first respondent there is nowhere where the alleged material disputes of fact are specified. The authors Herbstein and Van Winsen in *The Civil Practice of the Superior Courts in South Africa* 3rd ed at p 61 state that it is trite that the court, can only entertain proceedings on motion where there is no genuine dispute of fact. At p 62 the authors state that the determination of the question whether a real and genuine dispute of fact exists is a question of fact for the court to decide. The respondent's allegation of the existence of such a dispute is not conclusive.

In *Peterson v Cuthbert & Company Limited* 1945 AD 420 at 428, it was held that in every case the court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence because if this were not done the respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.

In *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92/09 at p 4 MAKARAU J (as she then was) stated:

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

This is not the position in *casu*. The nearest the first respondent went in her endeavour to raise any material disputes of fact was to allude to the three issues enumerated *supra* which I have already determined on the papers in favour of the applicants. These did not require any oral or further evidence for their determination. They did not even require me to adopt a robust approach in determining them. In the event, no material disputes of fact exist.

In the result, the application be and is granted in terms of the draft order as follows:

IT IS ORDERED THAT:

1. The first respondent give vacant possession of house number 5694 Unit J, Seke, Chitungwiza to the applicants within three (3) months of the date of this order;
2. Failure to comply with para 1 above, the second respondent evict the first respondent and all those claiming occupation through her, from house number 5694 Unit J, Seke, Chitungwiza and hand the house over to the applicants; and
3. The first respondent shall pay costs of this application.

Pundu & Company, applicants' legal practitioners

Hangazha & Charamba, 1st respondent's legal practitioners