

FREDDY CHIMBARI NO

versus

SIMBARASHE GODWIN MADZIMA

and

NIGEL MASIMBA MADZIMA

and

KENIAS MUTYASIRA

and

REGISTRAR OF DEEDS N. O

HIGH COURT OF ZIMBABWE

UCHENA J

Civil Trial

T.I Gumbo, for the plaintiff

A Muchandiona, for the 1st and 2nd defendants

UCHENA J: The plaintiff is the Executor dative of the estate late Charles Muzanya, which was before his appointment being administered by his predecessor Kenias Mutyasira the third defendant. The third defendant had during his administration of the estate sold Stand 79 Brackenhurst Township of Christmas Gift Extension Gweru to the first and second defendants. The fourth defendant is the registrar of Deeds who is being sued in his official capacity. He has transferred the property in dispute to the first and second defendants. The fifth defendant is the Master of the High Court who is also being sued in his official capacity. He initially appointed the third defendant executor of the late Charles Muzanya's estate, and authorised him to sale the property in dispute in terms of the late Charles Muzanya's will which he had accepted. He later instructed the third defendant to stop the sale. The sale was not stopped leading to the transfer of the property to the first and second defendants.

Many things went wrong in this case. The deceased left a will in which he disinherited his wife Jessy Muzanya who was staying in the property in dispute. She applied to this court for the setting aside of her late husband's will. Her application was granted by HUNGWE J on 21 June 2006 who ordered that

1. "The will of the late Charles Muzanya be and is hereby declared invalid and is set aside.
2. The first respondent be and is hereby ordered to stop administering and distribution of the late Charles Muzanya's estate in terms of the will.
3. The second respondent be and is hereby ordered to convene an edict meeting within 14 days from the date of this order to facilitate the appointment of an executor in terms of the Administration of Estates Act [Cap 6.01]."

The Master granted the third defendant authority to sale the house, though he belatedly withdrew the authority. The agreement was concluded on the basis of the master's authority. The third defendant gave his authority for the property to be transferred to the first and second defendants. The Master in his letter dated 3 May 2006 said he advised the third defendant of the withdrawal of his consent in August 2005. Transfer took place on 11 November 2006, when HUNGWE J's order was already in existence.

The facts, of this case establishes the following;

- 1 That the deceased's will was *void ab initio* as it contravened s 5 (3) of the Wills Act [Cap 6:06]
- 2 That the deceased's Will has been set aside by order of this Court.
- 3 That the third respondent was removed from being the executor of the deceased's estate and was replaced by the plaintiff.
- 4 That transfer of the property took place on the authorisation of an executor who at the time of transfer had been removed from office.

I am now called upon to decide whether the sale between the deceased's estate and the first and second defendants is valid. The answer is obviously a no as nothing can stand on nothing. The deceased's Will was a nullity as s 5 (3) of the Wills Act [Cap 6:06] prohibits a spouse from disinheriting his or her spouse through a will. It provides as follows;

"(3) No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of—
(a) any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons; or
(Z>) any person to receive any property, maintenance or benefit from the testator's

Section 5 (3) of The Wills Act prohibits a testator from making provisions which prejudices the rights of a spouse to whom he is married to a share in the deceased's estate in terms of any law, or any person from receiving any property or benefit from the testator's estate. In terms of s 3A of the Deceased Estates Succession Act [Cap 6:02] and s 68 F (2) (d) (i) of the Administration of Estates Act [Cap 6:01], the deceased's spouse is entitled to inherit from his estate.

Whether or not Jessy Mazanya is entitled to ownership of the property or a usufruct over it, it should not have been disposed of by the late Charles Muzanya in his will.

The deceased's will, has been declared invalid. The estate should therefore be wound up as an intestate estate. Therefore Jessy Muzanya is entitled to the house she was living in or a life usufruct over it. The house in dispute should therefore not have been disposed of in the deceased's will. The deceased's attempt to do so, was legally incompetent and therefore a legal nullity. The sale in spite of what appears to have been some form of official authorisation suffers the same fate of being a nullity. The deceased could not dispose of it to avoid his spouse Jessy's rights to it on his death. It follows that selling it on the basis of the deceased's will does not make it legal. What is prohibited is simply prohibited.

I am aware of the prejudice the first and second defendants may suffer as they paid value for the property. They can sue the estate and those, who assisted it to sell what could not be sold for what they lost in buying the property in dispute.

This is a case whose result does not, follow the plaintiffs or the first and second defendant's fault. They are all victims of official errors. They should therefore not be ordered to pay each other's costs.

In the result it is ordered that;

- 1 The agreement of sale entered into by and between the first and second defendant and third defendant in respect of Stand 79 Brackenhurst Township of Christmas Gift Extension Gweru is null and void and of no legal effect.
- 2 The transfer, and registration of the property in the names of first and second defendants by the fourth defendant is declared to be null and void and of no legal effect.
- 3 The fourth defendant is ordered to cancel the transfer to the first and second defendants, and reinstates title of the property to the estate late Charles Muzanya.

Atherstone & Cook, plaintiff's legal practitioners

Danziger & Partners, 1st and 2nd defendant's legal practitioners