ELLEN CHARI (nee CHAKAUNYANA)
(In her capacity as Executrix Dative in estate of the
Late YOBE CHARI)
versus
TAKUDZWA MUNOPFUKUTWA
and
THE MASTER OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 2 NOVEMBER 2012 & 21 FEBRUARY 2013

A. Masango, for the applicant
J. Dondo, for the first respondent
No appearance for the 2nd & 3rd respondents

MAWADZE J: The facts of this matter are as bizarre as one can imagine. This is moreso when one considers the defence proferred by the first respondent to the relief sought by the applicant.

This is an opposed application wherein the applicant seeks the following relief;-

"IT IS HEREBY ORDERED THAT;-

1. The memorandum agreement of assignment of 29th August 2006 be nullified and house number 6106 New Tafara resort into the late Yobe Chari' name.
2. The first respondent and all those claiming occupation of house number 6106 New Tafara be evicted.
3. Costs of suit"

The applicant Ellen Chari nee Chakanyara instituted these proceedings in her capacity as the Executrix dative in the estate of the late Yobe Chari.

The first respondent whose relationship to the late Yobe Chari remains unclear has purportedly acquired rights, title and interests in house number 6106 New Tafara, Harare which belonged to the late Yobe Chari and is in occupation of the same. The second and third respondents are cited in the official capacities.

It is rather difficult to outline the background facts of this case in view of the rather bizarre facts alleged by the first respondent. Be that as it may, I shall endeavour to summarise some of the facts which seem to be common cause.

The applicant was married to the late Yobe Chari. She attached to her founding affidavit a copy of the marriage certificate Annexure 'B' which shows that the marriage [*Cap 5:11*] was solemnised at the Harare Magistrates court on 17 September 2003. My only brief comment is that parties seem to have left it very late in their lives to tie the knot as the applicant who is described as spinister was 57 years old and the late Yobe Chari described as bachelor was 68 years old.

It is common cause that the late Yobe Chari passed on 17 June 2004. The applicant attached the death certificate Annexure A to the founding affidavit. The late Yobe Chari owned an immovable property No 6106 New Tafara , Harare which is now the subject matter of the dispute between the parties. It would appear that the late Yobe Chari passed on only nine months after solemnising the marriage.

The applicant on 15 September 2011, some 7 years after the death of Yobe Chari, was appointed the Executrix dative of the estate of the late Yobe Chari as per the Letters of Administration attached as Annexure C. What is puzzling is that as per Annexure D also attached by the applicant, the first respondent had also been purportedly appointed as the Executor Dative of the estate of the Yobe Chari on 16 September 2005, some 6 years before the appointment of the applicant. Apparently as per the record both the applicant and the first respondent are executrix dative and executor dative respectively of the same estate of the late Yobe Chari. Each one of them claims to be the legitimate executor of the said estate.

The applicant in her founding affidavit states that after her appointment as the Executrix dative on 15 September 2011 she attended to the second respondent's offices executing her duties to administer the estate of her late husband Yobe Chari. She said to her utter surprise she discovered that the first respondent had already approached the City of Harare and effected cession of house number 6106 New Tafara, Harare into his name. The applicant was shown Annexure E the memorandum of agreement of assignment dated 29 August 2006. All one can observe is that Annexure E is not date stamped. It is

the applicant's contention that the first respondent used fake documents (purported letters of administration Annexure D and agreement of assignment Annexure E) to acquire rights title and interests in house number 6106 New Tafara , Harare. According to the applicant Annexure D and E are fake as they do not exist in the second respondent, the master of the High Court's offices. Further the applicant alleges that the first respondent is not even a relative of the late Yobe Chari nor a beneficiary of the estate of the late Yobe Chari but that he simply used fake documents to process cession of the immovable property house number 6106 New Tafara, Harare after he hoodwinked the second respondent by presenting the fake Letters of Administration Annexure D. It is upon this basis that the applicant seeks to have this process declared null and void which in essence means reversal of the cession process so that house number 6106 reverts to the estate or name of the late Yobe Chari. The applicant also seeks the ejectment of the first respondent from the same property.

In his opposing affidavit the first respondent make what I would term very bizzaire averments. The first respondent puts into issue each and every allegation made by the applicant. The only fact the first respondent admits to would seem to be the fact that Yobe Chari passed on.

The first respondent makes the following averments;-

a) that the applicant does not exist as a person but is a fictional character created by one T. Savanhu and Nhende who are using this fictional character to institute these proceedings in order for them to acquire title on the said property.
b) that the marriage certificate Annexure B attached by the applicant is fake and was originated by this fictional character of the applicant. In fact the first respondent stated that this is confirmed by the registrar of marriages and that the marriage certificate number in issue as per the Registrar of marriage's records has the bride as Ellen Chingwaru and not the applicant.
c) that the applicant, who is a fictitious character is not known at house number 6106 New Tafara, Harare or No. 61643 New Tafara which she uses as her residential address. The first respondent proceeded to explain, again in a rather bizzaire and

incomprehensible manner how he acquired title, rights or interest in the property in issue No 6106 New Tafara Harare.

The first respondent alleges that he was related to the late Yobe Chari through marriage although he does not states the specific nature of the relationship. This was only explained by Mr Dondo for the first respondent in his submissions by stating that the late Yobe Chari was customarily married to one LEAH MUNOPFUKUTWA who happened to be the first respondent's aunt. According to the first respondent the late Yobe Chari and his aunt Leah Munopfukutwa each owned one half share (½) in stand number 6106 New Tafara Harare as per the order granted by DEVITTE J on 23 August 2000. The respondent submitted that when the late Yobe Chari passed on he had not paid out Leah Munopfukutwa her half (½) share in the property in issue. It is not clear from the first respondent's affidavit if his so called aunt Leah Munopfukutwa is deceased. However the first respondent said that when the late Yobe Chari passed on and had no children it was then agreed at a family level that the first respondent should inherit the property in issue No 6106 New Tafara Harare and that he simply fulfilled the wish by the family. The names of the family members are however not stated nor is it stated how these persons are related to the Yobe Chari. It is also important to note that the first respondent in the opposing affidavit makes no comment or mention of the alleged forged documents being the letters of administration Annexure D and the memorandum of assignment Annexure E. The first respondent did not seek to comment on the applicant's assertion that these documents are not only fake but were used by the first respondent to fraudulently acquire title, rights or interest in the property.

After I had painstakily explained the bizzaire facts as outlined by the parties I now turn to the merits of the application.

The main, if not the only point taken in argument by the first respondent is that there are serious disputes of facts in this matter which cannot be resolved on the papers without calling *viva voce* evidence. The first respondent further submits that the applicant should have known or ought to have known of this fact but nonetheless chose to proceed by way of a court application. Consequently the first respondent prays that the application be dismissed or as at the very most be referred to trial.

The celebrated authors HERBSTEIN & VAN WINSEN in the Civil Practice of the Supreme Court of South Africa 4th edition at page 234-5 had this to say on the undesirability of a party proceeding by way of motion proceedings where there are serious disputes of facts in the matter;-

> "It is clearly undesirable in cases in which the facts relied upon are disputed to endeavour to settle the dispute of facts on Affidavit, for the ascertainment of the true facts is effected by a trial Judge on considerations not only of probability, which ought not to arise in motion proceedings but also on credibility of witnesses giving *viva voce* evidence. In that event it is more satisfactory that evidence should be led and the court should have the opportunity of seeing and hearing the witnesses before coming to a conclusion."

See also *Masukusa v National Foods Ltd & anor* 1983 (1) ZLR 232 (H) at 236E-F. *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (H) at 222A and *Magurenje v Maphosa & anor* 2005 (2) ZLR 44 at 48 G-H.

The question to be answered in this matter is therefore whether there are serious disputes of facts which cannot be resolved on papers filed without calling *viva voce* evidence. I am not persuaded by the respondent's argument in this regard. I am rather inclined in this case to adopt the robust approach enanciated by GUBBAY JA (as he then was) in *Zimbabwe Bonded Fibreglass 1981 (Pvt) Ltd v Peech 1987* (2) ZLR 338 (S) at 339 C-D where in it is stated;

> "It is, I think, well established that the motion proceedings a court should endeavour to resolve the dispute raised in affidavits without hearing of evidence. It must take a robust and common sense approach and not an overfastidious one, always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a bona fide and not merely an illusory dispute of fact."

Let me now deal in specific terms with the so called disputes of facts raised by the first respondent.

a) <u>Whether the applicant exists</u>

The assertion that the applicant does not exist and is a fictional character is puzzling. The first respondent does not even bother to explain the objective basis of the assertion and how a party who has instituted proceedings, attested to both the founding and answering affidavits and attached relevant documents with her marriage certificate can be said to be

a fictional character. Even Mr Masango for the applicant was baffled by this allegation He clearly states that the applicant exists and had instructed him in this matter. I am equally baffled by this allegation. Who then proceeded to register the late Yobe Chari's estate at the second respondent's offices and was issued with the letters of administration Annexure C if the applicant does not exist. There is no objective basis at all the support this allegation. The inescapable conclusion is that there is an imaginary dispute of fact.

b) Whether the marriage certificate No. 2144/2003 dated 17 September 2003 (between the applicant and the late Yobe Chari) is fake. (Annexure B)

The first respondent alleges that the marriage certificate Annexure B is not genuine but was originated by the applicant the same person the respondent alleges does not exist. Again the first respondent does not provide any iota of evidence to support this but merely makes a bold assertion. The first respondent alleges that the registrar of marriages had confirmed this fact but attaches no such evidence. In a bid to bolster this rather strange allegation the first respondent then made a very confusing allegation that the marriage certificate produced by the applicant Annexure B belongs to one ELLEN CHINGWARU. Again no such marriage certificate is attached by the first respondent. Instead the first respondent conveniently refers to marriage number 4228/2003 when it is clear from Annexure B that the marriage number is 2149/2003. The relevance of Ellen Chingwaru is not explained. Is the first respondent alleging that the late Yobe Chari was also married to the so called ELLEN CHINGWARU. Where is the proof? So is the first respondent's alleging that his called aunt Leah Munopfukutwa was also the wife of the late Yobe Chari? All these issues are unexplained by the first respondent yet he alleges that this amounts to serious dispute of fact.

The real dispute between the parties which the first respondent conviniently avoids is whether the first respondent legally acquired the rights, title and interest in the immovable property No 6106 New Tafara Harare. Put differently, the question is whether there is a serious dispute of fact as regards the first respondent's alleged illegal conduct in obtaining the letters of administration Annexure D and the memorandum of assignment Annexure E.

The first respondent did not bother explain in his papers how he obtained the letters of administration Annexure D which the applicant alleges were obtained fraudulently. It cannot be disputed that the first respondent used Annexure D dated 16 September 2005 appointing him the Executor Dative of the estate of late Yobe Chari to obtain Annexure E dated 29 August 2006 which authorised him to obtain title, rights and interest in the property in dispute. The first respondent is not keen to explain in his papers whether he followed due process and whether everything is above board. This was necessary in view of the applicant's allegation.

From the papers filed of record the first respondent dismally failed to rebut the allegation that he acted improperly in using Annexures D and E and acquiring title rights and interest in the property in dispute. In his opposing affidavit the first respondent alleges that he derived such authority from the order granted by DEVITTE J on 23 August 2000 in as a matter between Leah Munopfukutwa as the plaintiff and the late Yobe Chari as the defendant which reads as follows;-

"Whereupon after reading documents filed of record;-

It is ordered;-

a) that the defendant be and is hereby ordered to pay to the plaintiff an amount of $70 000,00 being a one half share of stand 6106 New Tafara Mabvuku, Harare.
b) that the defendant be and is hereby ordered to pay interest on the said amount at the rate of 25% per annum calculated from the date of judgment to the date of payment.
c) that the defendant pays costs of suit."

The first respondent was not part of proceedings in the matter between Leah Munopfukutwa and the late Yobe Chari. The order granted by DEVITTE J does not confer upon the first respondent any rights in respect of No. 6106 New Tafara Harare. Even Mr Dondo for the first respondent abandoned this clearly misleading averment and conceded that what the first respondent alleges is incorrect. Where then does this leave the first respondent's case? The question now is whether the first respondent properly registered the estate of the late Yobe Chari and was appointed as the Executor Dative.

The master prepared report in terms of Rule 248 (1) of the High Court Rules 1971. There are two reports. The first one compiled on 13 January 2012 after the master was served with the copy of the application is devoid of detail and is unuseful. I requested the master in terms of Rule 248 (1) to compile a supplementary report addressing the issue of whether there was double registration of the estate of the late Yobe Chari, whether both the applicant and the first respondent were appointed executors of the same estate and the status of the estate in question. A detailed supplementary report

dated 19 October 2012 was compiled by the master and the master makes very useful insights which I shall summarise as follows;-

a) that the estate of the late Yobe Chari was properly registered in terms of the Administration of Estates At [*Cap 6:01*] by the applicant as a surviving spouse on 7 July 2011 and that an edict meeting was held on 17 August 2011 and the applicant was appointed the Executrix dative and is the only legal executrix of the estate.

b) that the Letters of Administration Annexure D in possession of the first respondent purporting to appoint him as the Executor Dative of the estate of the late Yobe Chari is fraudulent as it did not originate from the master's office. Infact the master attached to this report a letter written to the police dated 30 July 2010 asking the police to investigate the matter as to how the first respondent obtained fake Letters of Administration Annexure D.

c) that the reference number on the Letters of Administration possessed by the first respondent Annexure D refers to the estate of the late Dennis Mashonganyika which estate is still under administration and is not relevant to the estate of the late Yebo Chari. It is also important to note that the report to the police on 30 July 2010 was well before the applicant had registered the estate of the late Yebo Chari.

d) that the first respondent cannot purport to have administered the estate of the late Yebo Chari and also awarding himself the sole asset of the estate.

The master's report is clear that there is no double registration of the estate of the late Yebo Chari. This makes it abundantly clear that the first respondent acquired rights over the property in issue No 6106 New Tafara, Harare through an illegal act of using forged document Annexure D. There is therefore no basis upon which the purported cession should not be reversed and thereafter to allow the estate of the late Yebo Chari to be administered in terms of the relevant Act.

The first respondent has dismally failed to show that there are serious disputes of facts in the matter. The alleged dispute of facts are imaginary and illusory. There is therefore clear basis to grant the relief sought by both in respect of the reversal of the cession and

the eviction of the first respondent who has not shown the basis upon which he occupies the premises including all those who claim occupation of No. 6106 New Tafara through the first respondent.

In the result, I make the following order.

1. It is ordered that the memorandum of agreement of assignment of 29 August 2006 be nullified and that Number 6106 New Tafara Harare resorts to be registered into the name of the late Yobe Chari.
2. It is ordered that the first respondent and all those claiming occupation of house number 6106 New Tafara Harare through the first respondent shall vacate house number 6106 New Tafara Harare within seven (7) days of this order being served upon them failing which the Deputy Sheriff is authorised and directed to evict the first respondent and all those claiming occupation of the said house through him.
3. The first respondent shall pay the costs of suit.

Musunga & Associates, applicant's legal practitioners
Dondo & Partners, 1st respondent's legal practitioners.