

RICHARD GOVEREH

Versus

ESTER MAKASI

[In her capacity as the as the executor testamentary
Of the Estate of the Late Iddah Sharai Govereh]

and

TENDAI HAZEL MABUTO

and

IRENE LYDIA GOVEREH

and

STANEL CHIPANGA

and

MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 10 January 2023 & 10 May 2023

Opposed Application

Applicant, in person

FRT Chakabuda, for 1st respondent

ZISENGWE J: Lying at the heart of this dispute in the authenticity (and therefore validity) of a will purportedly left by the late Iddah Sharai Govereh (the deceased). The date of her demise is not apparent from the papers filed of record as neither party alluded to the same.

The applicant who is one of the deceased's children avers that the last will and testament filed by the 1st respondent with the Master of the High Court ("the Master") and accepted by the latter is a fraudulent document as it was never executed by the deceased. He seeks by means of a declaratory order, to have it not only declared null and void but also the removal of 1st respondent removed as executor of the deceased's estate. Additionally, he seeks what he terms a re-opening of the estate under cover DRM 57/20.

The key features of impugned will are that it revoked all previous wills, codicils or other testamentary disposition executed by the deceased. Further it nominated and appointed Esther Makasi (i.e the 2nd respondent) or family who, Sharai Govereh as the executor of her estate and perhaps most importantly through it, the deceased bequeathed a property identified as Stand No. 2562 Gwelo Township to the deceased's 8 children and grandchildren in equal shares. Conspicuous by his list of beneficiaries is the applicant.

According to the applicant the only valid and authentic will is left behind by the deceased on earlier one dated 14 May 2013 ("the first will") in that will the deceased bequeathed two properties to applicant and his brother Allan Phillip Govereh in equal shares. The properties were identified as Stand No. 4548 Mkoba 17, Gweru and Stand No. 2 Connaught Avenue also in Gweru.

It is pertinent to note whereas the will dated 14 May 2013 was prepared by Gundu & Dube Legal Practitioners of Gweru the 2016 will (the 2nd will) was prepared by Danziger & Partners also of Gweru.

Ostensibly as evidence of their deception and ill intent, applicant refers to several incidents an alleged attempt by the 1st, 2nd and 3rd respondents to fraudulently claim the deceased's pension funds using a forged document, which document was rejected by the responsible authority. He also refers to the alleged fraudulent sale of another piece of immovable property names 4548 Gwelo by the 2nd and 3rd respondents in 2011 using what he termed a forged power of attorney.

Pertinently however, the applicant avers that the property from which the 1st respondent sought this eviction, namely 2 Connaught Avenue where he is currently resident was not included in the 2nd will. He further asserts that a few other movable and immovable properties were deliberately left out of the inventory of the deceased's assets.

The key features of the 1st will are that through it the deceased appointed Mr Forward Gundu of Gundu & Dube Legal Practitioners (or any legal practitioner in that law firm) as the executor of her estate. Secondly and perhaps most pertinently through it the deceased bequeathed the following property to the applicant and his brother Allan Phillip Govereh, three sets of properties equal shares namely 2 Connaught Avenue, Lundi Park, Gweru, 4548 Mkoba 17, Gweru and the deceased's rural home and cattle thereon.

He attached to his founding affidavit a report in the form of an affidavit by one Leonard Tendayi Nhari, who holds himself out to be a Forensic Scientist on the authenticity of the signature appearing on the disputed will. In that report the Forensic Scientist stated that he carried out a comparison of the signature on the questioned document (ie the 2nd will) with 4 other standard documents signed by the deceased during her lifetime and from his analysis concluded the signatures in the 2nd will was not consistent with the deceased's signature and were therefore a forgery.

Ultimately therefore the applicant seeks an order in the following terms.

IT IS ORDERED THAT:

- 1. The application for a declaratory order be and is hereby granted.*
- 2. The will dated 23 June 2016 purported to have been signed by the late Iddah Sharai Govereh be [and is] hereby declared invalid.*
- 3. The 1st respondent be removed as the Executor Testamentary.*
- 4. The Estate of the late Iddah Sharai Govereh is hereby re-opened.*
- 5. Cost of suit on an attorney -client scale.*

The application stands opposed by the 1st respondent. However, the 1st respondent does not in the least address the allegation of forgery of the will, she appears content with the challenging the form which the applicant takes.

In this regard she avers firstly that the application itself is fatally defective in that plaintiff seeks a declaration of facts, something not contemplated by section 14 of the High Court Act, [Chapter 7:06]. According to her section 14 can only be employed where a party seeks a declaration of rights.

Secondly, it is the 1st respondent's contention that the applicant opted for the wrong procedure by proceeding by way of application. According to her there are material disputes of

not least the signature on the disputed will. The 1st respondent therefore prays for a dismissal of the application on that basis alone.

Thirdly, the 1st respondent contends that a claim for removal of an executor by way of declaration is irregular as this can only be done via section 85 of the Administration of Estate Act, [Chapter 6:01]. According to her not only a declaration an inappropriate remedy for removal of an executor but also no gross misconduct has been alleged let alone proved against her as required by section 85 of the Administration of Estate Act, [Chapter 6:01].

Finally, the 1st respondent questions the propriety of seeking the reopening of the estate when same has not yet been wound up. She avers in this regard that the administration of the estate is still on its infancy and therefore it would be absurd to seek the re-opening of such an estate.

The applicant is a self-actor and did not file an answering affidavit nor did he submit heads of argument.

Before addressing the above points in *limine* raised by the 1st respondent, it is perhaps necessary to stress once again that it is undesirable for a respondent in an opposed application to refrain from commenting on the merits of the application purportedly on the basis that in his view the application is fatally defective for want of compliance with one rule or another. He should endeavour to transverse all the material allegations contained in the applicants founding affidavit to obviate the need for him to file an affidavit on the merits should the points in *limine* be dismissed or otherwise fail to dispose of the matter.

Whether a declaratory order is the appropriate relief order.

The application pointedly refers to a court application for a declaratory order in terms of section 14 of the High Court Act. The question is whether the set of reliefs sought can be obtained via declaratory order as contemplated in section 14 of the High Court Act.

Section 14 of the High Court Act reads:

*“14 High Court may determine future or contingent rights
The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”*

The requirements for the granting of a declaratory order are well known.

In my view the primary issue is the validity or other wise of the impugned will. If upon proper inquiry and same is found to be legitimate, the most of the applicants' contentions naturally fall away. An obverse finding however will naturally yield and an opposite result. The 1st respondent will be obliged relinquish her position as executrix testamentary because her holding of that position was void *ab initio* on the first place.

The only two outstanding issues as of now are firstly whether an application for declaratory order is the appropriate remedy in instances of contestation of the validity of a will. Secondly, whether there are material disputes of fact rendering the dispute incapable of resolution on the papers.

The learned author D Meyerowitz in his book the The Law and Practice of Administration of Estates, 5th edition at page 33 has this to say:

"Setting aside of wills"

Onus

A will which is regular on the face of it is presumed to be valid unless it is declared invalid and the onus of proving its invalidity is on the person who challenges it; Rapson v Patteril 193 AD 417, Kunz v Swart & Ors 1924 AD 618, see also Tregaea v Godart 1939 AD 16, Edmunds v Edmunds NO 1946 WLD, Lewin v Lewin 1969 (4) SA 241 (T)."

Evidence will be admitted of the surrounding circumstances, the state of the testator's mind, as well as statements made by the testator.

It is clear therefore the invalidity of a will is by way of a declaration to that effect.

Regarding material disputes of fact. The 1st respondent, as earlier stated fell into error by failing to address the all important question of her reaction to allegation that the will is a forged document. She only made oblique reference to the same. It needs to be stressed that a material dispute of fact arises where the respondent denies material allegations made by the applicant produces positives evidence to the contrary; *Room Hire Co. v Jeppe Street Mansions 1949 (3) SA 1155, Ismail & Anor v Durban City Council 1973 (2) SA 362 N, Cosmas Chiangwa v David Katerere & Ors SC61/21.*

It is incumbent upon the respondent to place sufficient facts to establish the existence of material disputes of fact. The respondents' mere allegations of the existence of a dispute of fact is not sufficient. The court should however determine whether or not such a dispute of fact

actually exists; *Peterson v Cuthbert & Co. Ltd* 1945 AD 420 at 428. However, in appropriate situations a bare denial of the material allegations without giving evidence in support of the denial may be sufficient to create a material dispute of fact unless the applicant can show that the denial is *mala fide* and unsupportable ; see *R Bakerspty Ltd v Rato Bakers* 1948 (2) SA 626 (T).

In the present matter, through 1st respondents’ denial of the allegation of the invalidity of the 2nd will is indirect, it is nonetheless unmistakable. She avers in paragraph 3 and 4 as follows:

- “3. *I am obliged to respond in opposition to the applicants’ cause in its entirety and an opposed to the propriety and competence of the application together with the relief sought*
- 3.1 *... [not relevant]*
- 3.2 *applicant misses the simple point that what therefore relates to me is that which occurred upon my capacitation on the demise of Iddah Sharai Govereh in term of which I became nomini officio testament.*
- 3.3 *... [not relevant]*
- 3.4 *I am therefore a creature of the Last Will and Testament executed by the deceased on 23rd June, 2016 which was prepared by Messrs Danziger & Partners at Gweru, Zimbabwe.*
- 4. *The invalidity or otherwise of a Last Will and Testament accepted by the 5th respondent upon registration of a deceased estate cannot be resolved on the papers.*
- 4.2.1 *Witnesses who appended signatures in the presence of the deceased testator are not before the court to dispose of a factual inquiry as to whether or noy the testator signed on the Last Will and Testament which is in issue. There is a dire need to lead evidence in this respect.”*

Implicit in the above averments is the denial by the 1st respondent that the 2nd Will is invalid. Quite the contrary she maintains that the will is legitimate and therefore valid. Therefore, exists a material dispute of fact. The only question being the fate of the application on account of the existence of material disputes of fact exists.

The Court has four options in this regard firstly, it can dismiss the application should the applicant known of the existence of disputes of fact or have foreseen the existence of disputes of fact arising, *Masakusa v National Foods Ltd & Anor* 1983 (1) ZLR 232.

The second option is to order the parties to go to trial in terms of Rule 46 (10) of the High Court Rules, 2021. Thirdly, it can hear oral evidence on the issue on a particular disputed fact in

terms of rule 58 (12). The fourth option is to take a robust and common sense approach and decide the matter on the available evidence.

Although the general approach is to take a robust common sense approach and decide the matter on the available evidence (*Muzanenhamo v Officer in Charge CID Law Order & Ors* 2013 (2) ZLR 604 & *Soffiantini v Mould* 1956 (4) SA 150 (E)), such an approach is inapplicable in the present case.

In *Chirinda v Chitepo & Anor* SC 42/92 which *inter alia* involved a disputed signature of the deceased on an agreement of cession.

I must hasten to point out that with regards to the appropriate procedure for the setting aside of a will, D. Meyerowitz, op at states as follows at page 34:

“Procedure

Proceedings to set aside a will as invalid should usually be brought by way of summons and action; Steenkamp v Steenkamp 1915 CPD 176. If, however the fact are not disputed or if the interested parties consent or do not object after receiving notice of the proceedings, the court may decided the matter on notice of motion.”

Be that as it may, the court in application proceedings is faced as in this case, with material disputes of fact has four options which appeared to differ from the signatures in other documents signed by the deceased in his lifetime, the SC in overturning the High Courts’ decision to dismiss the claim held that the dispute should have been referred to trial. The court had this to say:

“I adopt a similar approach and refer the matter to trial “

Accordingly, the following order is hereby made.

IT IS ORDERED THAT

1. The matter is hereby referred to trial in terms of rule 46 (10) of the High Court Rules 2021 to determine the validity of the will purportedly executed by IDDAH SHARAI GOVERH dated 23 June 2016, subject to any directions as the Court might give.
2. Costs are in the cause.

Chakabuda Foroma Law Chambers, 1st & 2nd respondents' legal practitioner