

DISTRIBUTABLE (34)

Judgment No. SC 37/04

Civil Appeal No. 354/02

STELLA		GUYO		v
(1) MUSHONGA	&	ASSOCIATES	(2) COLLET	JOHN
		MAWIRE		
(3) THE MASTER		OF THE	HIGH	COURT
(4) THE REGISTRAR		OF DEEDS	(5) THE	DEPUTY
		SHERIFF		

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & GWAUNZA JA
HARARE, FEBRUARY 17 & JUNE 10, 2004

J Munyuki, for the appellant

H Simpson, for the first respondent

No appearance for the second, third, fourth and fifth respondents

CHEDA JA: The appellant was married to Agrippa Guyo, who died at Chinhoyi on 10 December 1997. The late Agrippa Guyo had a second wife, Sandra Guyo. He married both wives married according to customary law. Agrippa Guyo's estate consisted of, among other things, a house at No. 676 Delmitis Road, Orange Grove, Chinhoyi, a house at B3448 Gunhill, Chinhoyi, a house at Chikonohono, another building complex and some shops.

According to the Master's report, the estate was initially registered at Chinhoyi magistrate's court. A son of the deceased was appointed executor, but subsequently died. The provincial magistrate for Chinhoyi, in his capacity as

Assistant Master of the High Court, appointed and authorised Shepherd Mushonga of Mushonga & Associates to administer and distribute the estate of Agrippa Guyo, including transfer of stand no. 4449, Cold Stream into the names of Stella Guyo and Sandra Guyo, and to sell house no. 676 Delmitis Road, Chinhoyi (“the house”). With this authority, Shepherd Mushonga sold the house to the second respondent for \$1 million.

Stella Guyo has now complained that she did not consent to the sale of the house at that price. She says she agreed with the first respondent to sell the house for \$2 million after some advertisements failed to attract a buyer for \$2,5 million or \$3 million. She later learnt that the house had been sold for \$1 million.

Stella Guyo launched an application at the High Court seeking an order:

- “1. That the ... Agreement of Sale as between the first respondent and the second respondent be and is hereby cancelled.
2. That the fourth respondent be and is hereby ordered to cancel the transfer of house no. 676 Delmitis Road, Orange Grove, Chinhoyi in favour of the second respondent.
3. That the first respondent be and is hereby removed from his position as Executor of the estate of the late Agrippa Guyo.

4. That the first respondent bears the costs of this action.”

The judgment of the court *a quo* is incomplete and starts as follows:

“... and soon afterwards it applied for a set down days (*sic*). By this time the applicant had not been moved to file either an answering affidavit or even heads of argument.

The applicant only filed the answering affidavit in March of 2002, well after the first respondent’s heads of argument had been filed and the first respondent had already prepared the records for setting down. The applicant filed her heads (of argument) on 3 September 2002, accompanied by a court application for this application; that is, the upliftment of the ‘automatic bar’.”

The application for the upliftment of the bar was opposed on the basis that the applicant showed serious negligence which the court ought not to condone. The court *a quo* then decided that, even in the absence of the first respondent's legal practitioner, it was not inclined to grant the application.

It was submitted in the court *a quo* that the applicant’s legal practitioner did not attend timeously to both the preparation and filing of the record, the answering affidavit and heads of argument. The applicant was to file her heads of argument not later than 17 January 2002. She only filed them on 3 September 2002, a delay of eight months.

The court *a quo* also considered the merits and stated as follows:

“I consider, having perused the papers, there are so many contradictions in the applicant’s case that do indicate and strengthen the first respondent’s case against her.”

The appellant sought to challenge Mr Mushonga’s appointment and

authority. A copy of the authority issued by the Chinhoyi magistrate shows that Mr Mushonga was properly appointed and authorised to sell the house, the subject of the complaint.

Mr Mushonga's affidavit shows that the appellant and her relatives were given an opportunity to find a buyer at the price the appellant wanted but failed to do so. Stella Guyo confirms this in her letter to The Ombudsman. The affidavit of Sandra Guyo shows that the two families discussed and were happy with what was being done.

Sandra Guyo says it was only after Stella Guyo held separate meetings with her own children that she raised different issues to those that were agreed on. Mr Mushonga's affidavit confirms this and adds that by then the two widows had got a house from the estate transferred into each one's name. Stella Guyo was also aware that there was a debt to be paid to CABS. Sandra Guyo also reveals that Stella Guyo preferred that the house in the high density suburb should be sold, yet the proceeds of that house would not clear the debt to CABS.

It is for the reasons given above that I agree with the court *a quo* that condonation was properly declined.

Even on the merits, my view is that the appellant has no prospects of success.

The appeal has no merits and it is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

Mugabe, Munyuki & Partners, appellant's legal practitioners

Mushonga & Associates, first respondent's legal practitioners