

THWASILE NGWENYA

APPLICANT

AND

MHLUPHEKI HLABANGANA

1ST RESPONDENT

AND

MESSENGER OF COURT

2ND RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 8 SEPTEMBER 2010 AND 23 SEPTEMBER 2010

Mr Siphuma for applicant
Mr Mazibuko for 1st respondent

MATHONSI J: The dispute in all these matters centres on the ownership of stand number 48170 also known as Block 45/1432 Mpopoma Township, Bulawayo (the house) and numerous proceedings have been brought before this Court and the Magistrates' Court over the years as the parties sought to outdo one another.

The said house was acquired by the late Willi William Ngwenya (William) who died on the 26th June 1995 from the City Council of Bulawayo and he held it by virtue of a lease to buy signed on the 8th January 1965. Prior to that the late William had married the late Georgina Ngwenya (Nee Nleya) (Georgina) and they had their marriage registered in terms of the Native Marriages Act 1940 (now the Customary Marriages Act [Chapter 5:07], on the 22nd February 1958. Georgina was registered as Williams' first wife and he subsequently took Rebecca Ngwenya as his second wife.

Thwasile Ngwenya (Thwasile) who is the Applicant in these matters is the son of the late William. As already stated the late William died on the 26th June 1995 and at that time Thwasile was a minor aged 17 years old having been born on 7th August 1978. It has not been established whether Thwasile was a legitimate child of William or an illegitimate one.

When asked to give more insight on that issue *Mr. Siphuma* who appeared for the Applicant could only say that Thwasile is the son of William and Rebecca and could not say whether, if indeed Rebecca was married to William, that marriage was legal. In fact he assumed that it was an unregistered union. The closest one comes to knowing the truth about the Applicant's status is what is contained in the affidavit of the late Georgina deposed to on the 31st January 2001, and filed as part of the record of the Magistrates' Court, where she says in paragraph 10:-

"The arrangement had been that First Respondent (Rebecca) would obtain pension benefits, insurance policies and household furniture, as the younger wife. She has no children with the deceased. Also she was not legally married to the late."

That averment has stood unchallenged in most of the court records which are the subject of this judgment. As what is not disputed can safely be said to be admitted, we can therefore assume that Thwasile is the illegitimate son of the late William.

Although the late Georgina was legally married to the late William and therefore entitled to inherit from him, for some reason she decided to be magnanimous and share the estate of his late husband with Rebecca and Thwasile. She appended her thumb print to an affidavit dated the 1st July 1996 which reads in part as follows:-

"I am giving the House Number 45-1432 stand Number 48170 to Mrs W. Ngwenya I.D No. 08-178956T56 and Thwasile Ngwenya the reason being that I am now too old. I am the first wife of the late Mr William Ngwenya."

It is not clear who this Mrs W. Ngwenya is but three other relatives of the late William also signed similar affidavits agreeing with Georgina's decision but making reference to the house being given to Thwasile and Rebecca.

It was on the strength of those affidavits, and one must add, that deposed to by Georgina as the lawful wife of William, that Thwasile was issued with a certificate of heirship according to customary law by the then, Community Court on the 2nd July 1996. Georgina apparently changed her mind and contested the appointment of Thwasile as heir by filing an application in the Magistrates Court alleging that she had been "tricked into signing an affidavit." She went on to explain that she had been made "to sign something totally different from what (she) understood to be signing (as she) needed to assist (her) in changing ownership of stand number 45/1432 Mpopoma township, into (her) name."

The Magistrates Court eventually reversed the appointment of Thwasile as heir to the estate of the late William and issued a certificate of heir appointing the late Georgina as the heiress instead. This was on the 7th December 2004. Meanwhile the same estate had been registered with the Assistant Master as DRB No. 463/98, it was wound up and authority given for the transfer of the house to the late Georgina. This was done.

Georgina died on 12 February 2005 but not before she had made a Will in terms of which she bequeathed the house to someone else. Georgina's estate was registered with the Assistant Master as DRB NO. 1457/05 and Janet Mpofu was appointed executrix of that estate. She set about winding up the estate which was advertised in accordance with Administration of

Estates Act. Thwasile did not lodge a claim against both estates of the late William and Georgina.

On the 6th November 2006, acting in her capacity as the executrix of the estate late Georgina, Janet Mpofu signed an agreement of sale in terms of which, he sold the house to first Respondent (Hlabangana) who then paid the purchase price in compliance with the agreement.

On the second May 2007, Hlabangana instituted proceedings under case number HC 956/07 against Janet Mpofu in her capacity as the executrix of the estate late Georgina, Bulawayo City Council and the Assistant Master seeking an order compelling transfer of the house in terms of the sale agreement. The order was granted on 26 July 2007 and the house was later transferred into Hlabangana's name in compliance with that order. In case number HC 258/08 Thwasile is seeking an order for the rescission of that order.

In pursuance of his newly acquired right Hlabangana instituted proceedings against the occupants of the house in the Magistrates Court and obtained an order of eviction. In case number HCA 30/08 Thwasile is appealing against that decision.

Meanwhile Thwasile filed an application against Janet Mpofu, the Estate late Georgina Nleya and Others in case number HC 633/07 seeking an order inter alia reversing the transfer of the house to the late Georgina and confirming him as the heir to the estate of the late William. An order was granted in his favour on 5th July 2007 and it reads as follows:

"IT IS ORDERED THAT:

1. The bequeathment of the house number 45/1432 Mpopoma Bulawayo in her Last Will and Testament dated 21 August 2004 be and is hereby declared null and void.
2. The fifth Respondent be and is hereby ordered to deregister Georgina Nleya as the lease holder of house number 45/1432 Mpopoma, Bulawayo.

3. Applicant be and is hereby confirmed as the heir to the Estate of the Late Willi William Ngwenya and as such house number 45/1432 Mpopoma, Bulawayo be transferred into his name.
4. Costs of suit.”

The order in question poses some serious difficulties to the extent that in its present form, it is unenforceable and indeed difficult to comprehend. Clause 1 of the order is meaningless. Clause 2 is not spared either because to the extent that the late Georgina was appointed heiress to the estate William by the Magistrates Court as far back as 7 December 2004, she was entitled to take transfer of the house and could not lawfully be “deregistered.” This is particularly so as Thwasile did not contest the appointment of Georgina until she died.

Clause 3 of the order also has the challenge that Thwasile could not be confirmed heir when an heiress had already been appointed and that appointment had not been set aside. Moreso, the heiress had already passed on.

In case no. HC 376/08 Hlabangana is seeking a rescission of that order. Thwasile did not attempt to enforce that order.

When Hlabangana attempted to evict Thwasile and those claiming through him from the house, he promptly filed an urgent application under case no. HC 815/08 for a stay of execution pending the hearing of his appeal and obtained a provisional order to that effect on the 17th April 2008. The confirmation of that order is opposed.

In case no. HC 1093/08 Hlabangana is seeking authority to execute the eviction judgment pending appeal arguing that although ideally such application should have been made in the court a quo this was rendered impossible after Thwasile obtained a provisional order out of this Court barring his eviction.

At the hearing the parties agreed that all the four matters be consolidated and argued at the same time so that one judgment disposing of all of them may be made.

I have stated that the status of Thwasile appears to be that of a child born outside wedlock under circumstances where Georgina had a registered marriage with the late William. Accordingly, whether under Customarily law or under General Law, he could not inherit the estate late William ahead of his wife. His claim to heirship can therefore not be premised upon our inheritance law. Finding himself in serious difficulty in that regard *Mr Siphuma* submitted that by consenting to the appointment of Thwasile as heir, Georgina had signed away her right to inherit the estate and therefore could not unilaterally renege from the agreement. According to *Mr Siphuma*, Thwasile's claim could be said to be based on some contract between the parties.

I tend to agree with *Mr Mazibuko* for the first Respondent that the fact that the interested parties found it necessary to get Georgina to sign an affidavit in which she purported to give the house to Thwasile was a realisation that she is the one who was entitled to inherit from her late husband. There is nothing in the papers to suggest that her consent was irrevocable and she gave a satisfactory explanation that she had been tricked into signing away her right when she thought she was signing to get transfer of the house to her name. I therefore conclude that Georgina was entitled to challenge the appointment of Thwasile as heir and did successfully do so.

Having come to that conclusion it means that Georgina was entitled to have the house transferred to her name after the death of her husband and she did secure that transfer. Coupled with the fact that Thwasile did not lodge a claim when the late William's estate was

dealt with and did not challenge the appointment of Georgina as heiress, his challenge has come rather late in the day.

Thwasile was therefore not entitled to the order granted to him on 5th July 2007 which itself is riddled with its own problems of enforcement and meaning. That order cannot stand and Hlabangana's rescission of judgment application in Case no. HC 376/08 has merit.

It must follow that Thwasile cannot successfully challenge the order granted in favour of Hlabangana in Case no. HC 956/07 which should stand. Accordingly Thwasile's rescission application in Case No. HC 258/08 is without merit and cannot succeed.

Thwasile obtained a provisional order for stay of execution under Case No. HC 815/08 on the strength of his appeal against the eviction order issued by the Magistrates Court. Ideally that application should have been made in the Magistrates Court by virtue of the provisions of section 40(3) of the Magistrates Court Act [Chapter 7:0] which says:

"Where an appeal has been noted the Court may direct either that the Judgment should be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

In addition to that Applicant has not disputed that he has not provided security in breach of Order 31 Rule 2(2) of the Magistrates Court Rules which is peremptory in its application. *Mr Mazibuko* attacked the notice of appeal submitting that it was fatally defective for a number of reasons including that it does state not which part of the judgment of the Magistrates Court is being appealed against in breach of Rule 29(1)(c) of the Supreme Court Rules, it does not contain the nature of the relief sought in breach of Rule 29(1)(e) and does not state the Appellant's address for service in breach of Rule 29(1)(f) and Rule 10(1).

A fatally defective appeal cannot be amended see *Gosha v Gosha* SC 123/96 at page 2 of the cyclostyled report. However I do not consider it necessary at this stage to decide the fate of that appeal as it is not before me. The weaknesses in that appeal are however useful in determining whether to confirm or discharge the provisional order as well as to weigh the merits of Hlabangana's application for leave to execute pending appeal.

I am persuaded that the appeal has diminished prospects of success and for that reason the first Respondent should not be prejudiced in the enjoyment of her right over the house. In any event, the house was sold to her by a person with ostensible authority to do so. She is therefore an innocent third party who enjoys the protection of the law especially as she has already taken transfer of the house. Accordingly her application in Case No. HC 1093/08 is meritable.

In the result, the following order is made, namely that:

1. The Application for rescission of the judgment of this Court made on 26th July 2007 filed as Case NO. HC 258/08 be and is hereby dismissed with costs.
2. The application for rescission of the judgment of this Court made on 5 July 2007 filed as Case No. HC 376/08 is granted with costs and the order made under Case No. HC 633/07 is hereby rescinded.
3. The provisional order granted on the 17th April 2008 in Case No. HC 815/08 be and is hereby discharged with Applicant in that matter to bear the costs of suit.
4. The application in Case No. HC 1093/08 succeeds and the Applicant in that matter is granted leave to execute the judgment of the Magistrates Court in Case No. 02/2008

pending the appeal filed as Case No. HC 30/2008 and the first Respondent in that matter shall bear the costs of that application.

Mathonsi J.....

Messrs Sansole and Senda, applicant's legal practitioners
Calderwood, Bryce Hendrie and partners, first Respondent's legal practitioners