

TAZVITYA ARTHUR MUTANDWA
versus
SILVER ZHUWAKI
and
BRENDA CARO LEEFER
and
THE DEPUTY SHERIFF-HARARE
and
THE REGISTRAR OF DEEDS
and
MR. MANDIZVIDZA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 24 November 2008, 1 December 2008,
20 January 2009, 3 February 2009, 25 February 2009,
26 May 2009, 26 June 2009, 2 June 2010, 3 March 2011,
20 March 2011, 4 July 2011, 6 September 2011,
10 October 2011, 24 October 2011, 20 March 2012,
16 May 2012 and 17 April 2013

O Hute, for the plaintiff
C Kwaramba, for the 1st defendant
J Mutoono, for the 5th defendant

Civil Trial

BHUNU J: The plaintiff and first defendant are engaged in a vicious legal battle over the ownership of a certain piece of immovable property known as stand number 381 Goodhope Township. The plaintiff claims to have bought the property from one Robert Campbell Logan the heir to the estate of the late Johanna Francisca Logan. He has since obtained title. On the other hand the first defendant claims to have inherited the property in dispute from his late father one Lovemore Zhuwake.

The plaintiff's case is that on 15 August 2003 he bought stand 331 Goodhope Township from one Robert A Logan Campbell the heir to the estate of the late Johana Francisca Logan dully represented by the second defendant one Carol Leeper in her capacity as executrix testamentary. The sale was aborted on account that the stand had already been sold to someone else in consequence whereof the second defendant substituted stand 331

with stand 381 Goodhope being the stand in dispute. That much is not in dispute. The plaintiff has however failed to take occupation of the property because the first defendant has refused to vacate the property claiming that it was bequeathed to him by his late father one **Lovemore Zhuwake** in his last will and testament executed at Harare on 2 November 2004 of which paragraph 4 reads:

“4. **I GIVE, DEVISE AND BEQUEATH** the rest and residue of my estate of whatsoever kind and whatever situate, after payments of all debts, duties and testamentary expenses to my wife Gladys Banda and all my children namely, Stella Zhuwake, Dudzai Zhuwake, Ndiya Zhuwake, Silver Zhuwake and Nicholas Zhuwake as shall survive me as follows:

(i) **MY IMMOVABLE PROPERTY:** I have worked for Mrs. Maria Johanna Francisca Logan since 1975. Mrs. Logan is now late and her son Robert Adrian Campbell – Logan has now taken over the farm. I have set down with Robert Adrian Campbell with my two children Silver Zhuwake my son and Ndiya Zhuwake my daughter and resolved and agreed on terminal benefits and terms with Mr. Logan. Mr. Logan is subdividing the farm, developing it and selling the stands in other words he is selling the farm. We have then agreed that he is going to give me as my package allocation of four stands that is stand Number **381**, 420, 426 and 383. The two stands 426 and 381 though held under my title after transfer from the estate of the late Maria Johanna Francisca Logan Mother to Adrian will be given to my sons Silver Zhuwake and Nicholas Zhuwake with Silver getting Stand Number 381 and Nicholas Stand Number 426. I am to get Stand Number 383 where I will stay with my wife Gladys Banda and my daughters and this stand is for their benefit since the boys have been given theirs.

However it had been agreed that 420 was to be sold and proceeds therefrom given to me so that I develop my stand but 420 was sold to Mr. Newton Amos Murimirwa who is now the owner of the stand. I was not given the proceeds therefrom but have been promised to be given when the estate of Mrs. Maria Johanna Francisca Logan is finalised. I therefore give stand 383 to my wife Gladys Banda, my daughters Ndiya Zhuwake, Stella Zhuwake and Dudzai Zhuwake in equal shares and give to my son **Silver Zhuwake Stand Number 381** and to my son Nicholas Zhuwake Stand Number **426**.

I no longer have any interest in Stand Number 420 since it was sold to one Newton Amos Murimirwa who now owns it.”

What emerges quite clearly in the above extract from **Lovemore Zhuwake’s** last will and testament is that he was bequeathing to members of his family a claim he had against his former employer for terminal benefits. In paragraph 4 (i) he tells a patent lie that he had

acquired title and transfer of the disputed property. That lie prompted his executor, the late Israel Gumunyu to list stand number 381 as belonging to Lovemore Zhuwake's deceased estate in his First and Final Distribution Account. The executor then allocated the stand to the first defendant in terms of the defective will of his father.

The Master of the High Court was not amused when he discovered that he had in fact been misled into approving a first and final distribution account based on lies. In his report dated 20 December 2009 he recommended that the distribution in question be declared null and void and he undertook to report both the executor and the first defendant to the police for fraud. The report reads:

"I confirm being served with a copy of the application in terms of the High Court Rules 249 as amended. I have gone through the applicant's declaration affidavit. The administration done in case DR 471/07 I recommend that the Honourable Court declare it null and void on the ground that the(y) misrepresented to the Master that they have title deeds to the properties.

I respectfully highlight to this Honourable Court that I am reporting this matter to CID Fraud squad for further investigation failure to produce the said title deeds within 14 days. All documents with the applicant I confirm were issued by the Master and they are authentic."

True to his word the Master reported the matter to the police and shortly thereafter the executor Mr Gumunyu committed suicide on 9 December 2010, as will more fully appear from his death certificate filed of record. It is however, not clear whether the suicide had anything to do with this case, for dead men tell no tales. The long and short of it all is however, that it is now common cause that Lovemore Zhuwake was in fact telling a lie when he stated in his last will and testament that he had obtained title and transfer of the property in dispute. This explains why the first defendant is now seeking transfer of the disputed property into Lovemore Zhuwake's deceased estate. Thus the first defendant's claim to **Stand Number 381 is based on a defective fraudulent will.**

The first defendant and the then executor to his late father's estate did not help matters by lying and misleading the Master of the High Court that they had title deeds to the disputed property. As I have already pointed out the late Love Zhuwake's will reads badly because it is based on a claim rather than rights flowing from a contractual arrangement with his previous employer.

Section 5 of the Wills Act provides for what dispositions a subject can lawfully make in a valid will. It reads:

“Power to make dispositions by will

- (1) Subject to this Act and any other enactment, every person who has capacity in terms of section *four* to make a will may in his will -
- (a) make provision for the transfer, disposal or disposition of the whole or any party of his estate and;
 - (b) make provision for the custody or guardianship after his death of any of his minor children; and
 - (c) make any other lawful provision, disposition or direction whether in respect of his own or any other property or in respect of any other matter.”

On a proper reading of the above section it is clear that the first defendant could only make a valid lawful disposition of the disputed property in his will if he was the lawful owner of the property. This explains why he had to lie in his will that he had title to the property. His narration of the basis of his disposition however clearly establishes that he had a claim against his former employer for terminal benefits. This also explains why the first defendant and the executor to his father’s deceased estate had to perpetuate the lie that the deceased had title to the property in dispute well knowing that he did not. That being the case, all what the deceased father could bequeath to his son was the right to claim his terminal benefits.

It is plain as day light that had the first defendant and the executor to his father’s deceased estate not lied that his late father had title to the disputed property the Master would certainly not have listed it as part of the late Lovemore Zhuwake’s deceased estate. The listing of the property as part of the late Lovemore Zhuwake’s property was a legal nullity and of no force or effect as it was based on fraud. What is a nullity at law is something that never happened in the eyes of the law. What this means is that in the eyes of the law there was no distribution of stand number 381 Goodhope Township as claimed by the first and fifth defendants.

By the same token, the final distribution account apparently approved by the Master was equally a nullity. That being the, case that was an exercise in futility because in the eyes of the law there was no final distribution account approved by the Master at any time in respect of the property in question. For obvious reasons the first defendant cannot be allowed to benefit from his fraudulent conduct coupled with his late father’s equally culpable conduct for to do so would be unlawful and unjust. The function of the courts is to do justice and not to legalise, entrench and perpetuate illegal criminal conduct.

On the other hand the undisputed evidence before me establishes beyond any shadow of doubt that the plaintiff received untainted lawful title derived from **Carol Leeper** the lawful executrix testamentary to the estate of the then registered owner of the property one **Johana Francisca Logan**. That being the case his claim and title to the property in dispute cannot be impugned.

The first defendant's conduct in resorting to fraud in an attempt to deprive the plaintiff of his property is particularly reprehensible such that an award of costs at a higher scale is warranted.

In the result the plaintiff's claim can only succeed at the expense of the first defendant's counterclaim. It is accordingly ordered:

1. That the first and second defendants be and are hereby ordered to give vacant possession of stand number 381 Goodhope Township to the plaintiff within (7) seven days of service of this order.
2. In the event that first and second defendants fail to comply with the above order, the Deputy Sheriff is directed to evict the first defendant and all those claiming occupation through him from stand number 381 Goodhope and to give vacant possession to the plaintiff.
3. That defendant's counterclaim be and is hereby dismissed in its entirety.
4. That the defendant be and is hereby ordered to pay costs of suit at the legal practitioner and client scale.

O Hute & Partners, plaintiff's legal practitioners
Mbidzo, Muchadehama & Makoni, 1st defendant's legal practitioners
Chadyiwa & Associates, 5th defendant's legal practitioners