

ENNETY GUNDA
versus
OLIVER MASOMERA N.O.
and
TSITSI GUNDA
and
LANGTON MASHIRI
and
THE MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 5, 6, 7 and 8 November 2012 and 24 October, 2013

J. Mambara, for the plaintiff
S. Chatsanga, for the 1st, 2nd and 3rd defendants
No appearance for 4th and 5th defendants

CIVIL TRIAL

MAWADZE J: This is a rather unusual matter in which one of the issues to be resolved by this court relates to a maternity dispute. I must confess that I had for long labored under the mistaken belief that only paternity can reasonably be expected to be in dispute.

The plaintiff whose maternity is in dispute, issued summons out of this court on 5 November 2009 in which she sought the revocation of letters of administration issued to the first defendant, setting aside of the distribution of the estate of the late Cecilia Gunda, an order directing the re-administration of the estate of the late Cecilia Gunda, an order setting aside the transfer of rights, title and interest in stand number 5417 Glen Norah 'B' Township, Harare to third defendant and cost of suit.

The fourth and fifth defendants are cited in their respective official capacities.

The plaintiff Ennety Gunda and the second defendant Tsitsi Gunda share the same father the late Aaron Mukoki Gunda. There is a dispute as to whether they share the same mother the late Cecilia Gunda as is reflected on their respective birth certificates or that the plaintiff is not

born to the late Cecilia Gunda but to the late Aaron Mukoki Gunda's first wife as is alleged by the second defendant whose maternity is not in issue.

When the plaintiff instituted this action the first defendant was one Susan Zvinoira N.O. but she passed on before the trial commenced. The late Susan Zvinoira was being cited in her official capacity as the Executrix of the estate of the late Cecilia Gunda. A new Executor Oliver Masomera was subsequently duly appointed with this consent of all the interested parties, and substituted the late Susan Zvinoira as the first defendant. The estate of the late Cecilia Gunda is still to be wound up.

The third defendant Langton Mashiri purchased an immovable property number 5417 Glen Norah 'B' Township, Harare from the estate of the late Cecilia Gunda and took transfer of the said property.

In her declaration the plaintiff who purports to be one of the two daughters of the late Cecilia Gunda who passed on 13 December 2005 stated that her young sister the second defendant proceeded to register the estate of the late Cecilia Gunda without her knowledge. She said on 13 March 2006 the Master wrote a letter to the second defendant inviting her together with the late Cecilia Gunda's next of kin and all interested parties to attend an edict meeting of the estate of Cecilia Gunda. The plaintiff alleged that the perusal of the file of the estate of the late Cecilia Gunda shows no record of the persons who attended the edict meeting. The first defendant who then was Susan Zvinoira was at the edict meeting and appointed the Executrix of the estate of Cecilia Gunda and issued with letters of administration. The plaintiff contends that she is not known to the said Susan Zvinoira and is not related to her in any way.

The plaintiff further alleged in her declaration that there is no record to show whether the estate of the late Cecilia Gunda was advertised or summarily wound up as there is no certificate of authority to deal in any manner with the immovable property being number 5417 Glen Norah 'B' Township, Harare.

The plaintiff in her declaration further states that on 8 May 2006 the first defendant requested and was issued with authority to sell the same immovable property number 5417 Glen 'B' Norah Township, Harare. The authority was granted by the fourth defendant on 19 May 2006.

The gravamen of the plaintiff's claim is that the first defendant and the second defendant misrepresented to the fourth defendant concerning the children and interested parties in the estate of the late Cecilia Gunda resulting in the first defendant being unprocedurally appointed as executrix dative of the estate. Most importantly the plaintiff alleges that the first and the second defendant concealed from the fourth defendant that the plaintiff is a daughter of the late Cecilia Gunda and as a result of this misrepresentation the estate devolved to the second defendant alone. The plaintiff alleges that the estate was improperly wound up. Lastly it is the plaintiff's case that both the first and second defendant had no rights, title and interests over the property in issue number 5417 Glen Norah 'B' Township, Harare as such rights were procured by fraud. As a result the plaintiff's case is that no rights, title and interest were conferred to the third defendant.

The first and second defendants in their joint plea stated there was no misrepresentation made in connection with the administration of the estate to the late Cecilia Gunda. Instead they said all facts were duly disclosed and all procedures were followed by the fourth defendant. The first and second defendant said the immovable property in issue number 5417 Glen Norah 'B' Township, Harare was properly sold to the third defendant who has since acquired real rights over the property. According to the first and second defendants there is no basis for the re-administration of the said estate. Further the first and second defendants said if the plaintiff is entitled to a portion of the estate she can claim that portion as the proceeds for the sale of the immovable property are in the Guardian Fund. The first and second defendants submitted that the plaintiff's claim should be dismissed with costs.

The third defendant in his plea indicated that the plaintiff only surfaced at the pre-trial conference stage in case number HC 740/09 in which one Anderson Gunda and Daison Gunda were the plaintiffs but their *locus standi* was put into issue. In relation to the dispute the third defendant said he bought the immovable property number 5417 Glen Norah 'B' Township, Harare after the fourth defendant has authorized the sale of the property. The 3rd defendant stated that he is a *bona fide* purchaser of the property who has title to the property and that if at all the plaintiff has a claim she can lay her claim against the estate.

Due to the developments which have happened between the time the pre-trial conference was concluded and the time the trial started, all the parties at the commencement of the trial

agreed to revisit the joint pre-trial conference minute dated 21 January 2011. One of the developments is the passing on of Ms Susan Zvinoira and the appointment of Olive Masomera as the executor of the estate and also as the first defendant. The following issues were therefore referred for determination at trial by this court;

1. Whether or not the plaintiff should be considered as a beneficiary of the estate of the late Cecilia Gunda.
2. Whether or not the Master of the High Court's consent to sale the property in issue was properly given in the circumstances.
3. Whether or not the sale of stand no. 5417 Glen Norah 'B' Township, Harare to the third defendant was valid and whether or not the third defendant was a *bona fide* purchaser.
4. If the sale of the property to third defendant is not valid whether or not the sale should be set aside and the deed of transfer reversed.

The plaintiff Ennety Gunda gave evidence and called one Anderson Gunda as her witness.

The first defendant Oliver Masomera testified in his capacity as the new executor of the estate of the late Cecilia Gunda.

The second defendant Tsitsi Gunda testified and called the following witnesses;

- (a) Juliet Chinewaro whose father is a brother to the late Cecilia Gunda
- (b) Isaac Chigidi whose father and the late Cecilia Gunda were siblings

The third defendant Langton Mashiri testified and did not call any witnesses.

A total of 14 exhs were produced during the trial. I shall at this stage briefly comment on each of the exhs produced;

Exhibit 1 – this is plaintiff Ennety Gunda's birth certificate. It was issued on 18 May 1992 and her date of birth is 23 November 1980. Her father is stated as Aaron Mukoki Gunda and her mother as Cecilia Chigidi (Cecilia Gunda). What is important to note is that exh 1 supports the plaintiff's contention that she is the biological daughter of the late Cecilia Gunda. Another important aspect to note is that the plaintiff's birth certificate was only issued out 12 years after her birth.

Exhibit 2 – is the second defendant Tsitsi Gunda's birth certificate. She was born on 21 March 1983 to Aaron Mukoki Gunda and Cecilia Chigidi (the late Cecilia Gunda). This birth

certificate was issued on 16 December 1988 when Tsitsi Gunda was only 5 years old. It supports the contention that the plaintiff and the second defendant are siblings.

Exhibit 3 – is the late Cecilia Gunda’s death certificate. She died on 13 December 2005 due to unnatural causes. The cause of death is stated as Hypovolemic shock due to cut of jugular vein artery and trachea stabbing secondary to assault. This occurred at the property in issue number 5417 Glen Norah ‘B’ Township, Harare. In simple terms the late Cecilia Gunda had her throat slit open with a sharp object. It has not been disputed during this trial that the late Cecilia Gunda was murdered in a very gruesome way in broad daylight at 5417 Glen Norah ‘B’ Township, Harare. It is also not in issue that Daison Gunda was arrested for the murder of the late Cecilia Gunda. Daison Gunda has since passed on before his murder trial. Daison Gunda and Anderson Gunda are siblings born to Aaron Mukoki Gunda and his first wife. They regarded Cecilia Gunda as a step mother.

Exhibit 4 – is the Death Notice in respect of Cecilia Gunda which was completed on 3 February 2006 and filed with the fourth defendant the Master, Estate Notice No. DR 265/06. It was completed by the second defendant Tsitsi Gunda as the only child of the late Cecilia Gunda. Janita Chigidi is registered as the next of kin. The plaintiff’s case is that this was a fraudulent misrepresentation by the second defendant to the fourth defendant in that the second defendant presented herself as the only biological daughter of the late Cecilia Gunda when in fact she is not the only surviving child as per exhs 1 and 2.

Exhibit 5 – is a letter by the fourth defendant, the Master to the Registrar General dated 7 February 2006 asking for the Registrar General’s assistance to the second defendant to obtain a death certificate for her mother the late Cecilia Gunda. The second defendant explained that this was occasioned by the fact that Anderson Gunda had confiscated the death certificate. What is important to note is that in that letter the second defendant is referred to as the only daughter of the late Cecilia Gunda.

Exhibit 6 – is a letter by the third defendant’s legal practitioners to Daison Gunda (now deceased) dated 3 October 2008 indicating that the third defendant had bought the property in issue number 5417 Glen Norah ‘B’ Township, Harare and has since registered it on 4 September 2008. This letter gave notice to Daison Gunda who was in occupation of the house to vacate by 31 January 2009.

Exhibit 7 – is a letter by the fourth defendant and undated to the Officer in Charge ZRP Glen Norah to recover Cecilia Gunda’s death certificate from her stepsons Anderson Gunda and Daison Gunda and hand it over to Mrs Susan Zvinoira who was handling Cecilia Gunda’s estate. This may have been written before recourse was sought from the Registrar General as per exh 5.

Exhibit 8 – is an advertisement in the Herald Newspaper for the sale of the house in issue number 5417 Glen Norah ‘B’ Township, Harare. This is the advertisement the third defendant alleges he responded to and subsequently purchased the house.

Exhibit 9 – is the Agreement of Sale between Cecilia Gunda’s estate represented by Mrs Susan Zvinoira and the third defendant for the sale of the property in issue number 5417 Glen Norah ‘B’ Township, Harare at a price of 4 trillion Zimbabwe dollars. It is dated 22 May 2008.

Exhibit 10 – is a mortgage bond in favour of Beverley Building Society in respect of the house number 5417 Glen Norah ‘B’ Township, Harare.

Exhibit 11 – is the Deed of transfer of the property in issue number 5417 Glen Norah ‘B’ Township, Harare from the estate of the late Cecilia Gunda to the third defendant and is dated 4 September 2008.

Exhibit 12 – is the fourth defendant the Master’s Report issued in terms of R248 of the High Court Rules in respect of these proceedings, especially the allegation made by the plaintiff.

Exhibit 13 – is the Deputy Sheriff’s return of service indicating that on 15 March 2010, Anderson Gunda, Daison Gunda, the plaintiff and other lodgers at number 5417 Glen Norah ‘B’ Township, Harare had been evicted.

Exhibit 14 – is a letter by plaintiff’s legal practitioners to the Deputy Sheriff dated 15 March 2010 (*the same day plaintiff had been evicted*) indicating that plaintiff is entitled to remain in the house number 5417 Glen Norah ‘B’ Township, Harare and should not be evicted.

I now turn to the evidence led in this matter.

Ennety Gunda gave very brief evidence in chief. Most of the issues relevant to the matter were extracted from her during cross examination.

Before I deal with her evidence I believe at this stage it is prudent to outline some historical facts to this matter which are largely common cause from evidence adduced from all the witnesses. This would make it easier at a later stage to understand the analysis of the evidence and findings made.

The man from whom this seemingly unending dispute arises, Aaron Mukoki Gunda married his first wife and the wife gave birth to Anderson Gunda, Daison Gunda and Salome Gunda. He separated from or divorced this wife and in the early eighties (1980 – 81) he then married Cecilia Gunda (nee Chigidi). They had the second defendant Tsitsi Gunda on 21 March 1983 exh 2. The issue which is heavily contested is whether Ennety Gunda born on 23 November 1980 is born to Aaron Mukoki Gunda's first wife as is alleged by second defendant and other witnesses or is born to Cecilia Gunda (nee Chigidi) as per her birth certificate exh 1 and Anderson Gunda's evidence.

What is not in dispute is that Aaron Mukoki Gunda died in 1999 leaving the now deceased Cecilia Gunda as the surviving spouse, he was residing at number 5417 Glen Norah 'B' Township, Harare with his family. The immovable property he left behind number 5417 Glen Norah 'B' Township, Harare (the house or the property) has seemingly become not only a curse to his family but the source of a serious and tragic dispute within his family. Briefly this is what followed after his death. A serious dispute arose over his estate – the house, between his surviving spouse Cecilia Gunda and his sons Anderson Gunda and Daison Gunda. The two sons did not want the house to be awarded to Cecilia Gunda their step mother. The dispute which the second defendant described as acrimonious and violent spilled to this court and Chinhengo J. dealt with the dispute which pitted Anderson Gunda and Daison Gunda on one side against Cecilia Gunda over this house. The house was awarded to Cecilia Gunda. Anderson and Daison Gunda appealed to the Supreme Court in case number SC 293/03. Meanwhile the parties were still staying in the house. On 15 September 2005 the Supreme Court dismissed the appeal by Anderson Gunda and Daison Gunda putting to rest their claim to the house which was awarded to Cecilia Gunda.

Cecilia Gunda never lived to meaningfully enjoy the benefit of her legal victory. Hardly three months later on 13 December 2005 inside that same house in broad daylight she was brutally murdered as her throat was slit open. Her stepson Daison Gunda was arrested for this heinous crime. The truth in that respect may never be known as Daison Gunda later died before the trial.

After the burial of Cecilia Gunda her estate was registered with the fourth defendant by the second defendant who claimed to be Cecilia Gunda's only surviving child DR 265/06. On 29

March 2006 an edict meeting at which only the second defendant and the late Susan Zvinoira attended was held. Susan Zvinoira was appointed as the Executrix dative of the estate of Cecilia Gunda and on 4 May 2006 was issued with letters of administration. The second defendant Tsitsi Gunda then made an application to the fourth defendant to be allowed to sell the only immovable property in the estate of Cecilia Gunda which is the house or property in issue. The fourth defendant issued such authority on 16 May 2006 which then culminated in the advertisement of the house in the Herald - exh 8 to which the third defendant responded to and buying the house on 22 May 2008.

Meanwhile after the demise of the late Cecilia Gunda in December 2005 her protagonists and stepsons Anderson Gunda and Daison Gunda had remained in occupation of the house in question. They probably believed that the pronouncement by the Supreme Court was now of no consequence as the person to whom the house had been awarded was no more. They were jolted on 3 October 2008 when the third defendant through a letter exh 6 advised them that he had bought the property.

Anderson Gunda and Daison Gunda responded to this by instituting proceedings in case no HC 740/09 on 20 February 2009 in which the defendants are the same as in the instant case. It is also important to note that the prayer they sought in HC 740/09 is the same as in the instant case. The only difference between HC 740/09 and the instant case is that Anderson Gunda and Daison Gunda are no longer the plaintiffs but Ennety Gunda is now the plaintiff. The pleadings in HC 740/09 proceeded to pre-trial conference stage and Ennety Gunda unsuccessfully sought to be joined therein. After realizing the futility of their endeavours in HC 740/09 Anderson Gunda and Daison Gunda on 3 November 2009 withdrew the matter and tendered wasted costs. On 16 February 2010 CHITAKUNYE J. issued an order by consent for the eviction of Anderson Gunda, Daison Gunda and all those claiming occupation through them from the house in question. This resulted in their eviction as per exh 13.

Meanwhile when Anderson Gunda and Daison Gunda withdrew the case number HC 740/09 on 3 November 2009, the plaintiff in the instant case Ennety issued summons out of this court two days later on 5 November 2009 seeking the same relief sought by Anderson and Daison Gunda. Thus when Anderson and Daison Gunda were evicted from the house on 15 March 2010 the third defendant failed to take vacant possession as Ennety Gunda the plaintiff *in*

casu through her legal practitioners wrote the letter exh 14 indicating that she was occupying the house in her own right as a daughter of Cecilia Gunda and that she had issued summons out of this court, which matter was pending. This explains why efforts to prosecute her failed as she produced exh 1 as proof that Cecilia Gunda was her mother. This in a summary is the chronology of events leading to this matter.

I now revert to the evidence.

The plaintiff Ennety Gunda testified that as she is born to Aaron Mukoki Gunda and Cecilia Gunda and that the second defendant Tsitsi Gunda is her sibling (young sister). She said she only became aware that the estate of their mother Cecilia Gunda had been registered and the house sold when she was temporarily evicted and proceeded to protect her rights by instituting these proceedings. She moved back into the house the same day she was evicted and is residing there. She has put in two tenants from whom she collects rentals to date. She told the court that second defendant misrepresented to the fourth defendant that second defendant was the only child born to Cecilia Gunda - exh 4. She said she is not known to Mrs Susan Zvinoira and that she never had any dealings with her. All she wants is to have the sale of the house to the third defendant reversed to enable her to benefit from her mother's estate. She is not interested in the money allegedly paid by the third defendant for the house.

It was only under cross examination that meaningful evidence was extracted from the plaintiff. The plaintiff was unable to explain her marital status save to say she has two children with two different men. She grudgingly accepted that in 2005 she was in Njanja and not staying at the house. She was taken to task about the fact that she is born to Cecilia Gunda. She conceded under cross examination that she does not know her mother Cecilia Gunda's brothers and sisters. Her reason was that she has not visited her mother's maiden home since birth. When it was put to her that Tsitsi the second defendant knows very well her maternal relations her answer was that the second defendant is the one who used to visit the maternal relatives in Buhera. She was not able to explain why she would not, being the elder child, visit her maternal relatives.

The plaintiff was not able to explain why the second defendant's birth certificate was obtained 4 years earlier than hers despite that she was the elder child. She however denied that she shares the same mother with Anderson and Daison Gunda. She denied that Cecilia Gunda

only helped her to get a birth certificate by putting herself up as her biological mother since her own mother had long left and had a mental problem.

The plaintiff was not able to explain where she was most of the time and most importantly why Anderson Gunda and Daison Gunda would bring proceedings in HC 740/09 without her involvement and only sought to be joined thereto at the pre-trial conference stage. Plaintiff was unable to explain why she sought a joinder in the case HC 740/09 to Anderson and Daison Gunda who were not even Cecilia Gunda's children and not beneficiaries of the estate. She admitted under cross examination that she only instituted these proceedings *in casu* after HC 740/09 fell away. She however denied that Anderson Gunda was paying her legal fees and that she was being used to further his interests as they share the same mother.

The plaintiff was not able to explain the basis upon which she challenged the sale of the property to the third defendant. In fact she said she was not able to do so, save to insist that she is entitled to a ½ share in the said property as one of Cecilia Gunda's two daughters. The court was pleasantly surprised when plaintiff said she was not able to recall when Cecilia Gunda, her alleged mother died. This is surprising considering the manner Cecilia Gunda died *moreso* as she claims to be her elder daughter! My assessment of the plaintiff is that she was a very poor witness. It was evident that she was very guarded both in her evidence in chief and under cross examination. She lacked confidence despite the fact that exh 1 her birth certificate supports her case. She was not able to relate to the issues raised in her declaration and pleadings giving the impression that she lacked conviction in her own case. She was not able to explain meaningfully her maternal relatives. She could not convincingly explain why she would allow Anderson and Daison Gunda to institute proceedings in HC 740/09 excluding her when she and the second defendant were the only beneficiaries of the estate. She had no meaningful information to give as regards the fight over the house which ensued after their father died, between Cecilia Gunda *vis-à-vis* Anderson Gunda and Daison Gunda. Most importantly she was not able to explain her lack of interest in the estate of her mother especially after her painful death until she belatedly sought a joinder in HC 740/09. As I said the plaintiff Ennety Gunda was unimpressive and exhibited a very poor demeanor.

Anderson Gunda who testified in support of the plaintiff's case told the court that the plaintiff is born to Cecilia Gunda. He denied that he shares the said mother with the plaintiff. He

said he was born in 1974 and Daison in 1976 and that when Cecilia Gunda married their father he was 6 years old and she was pregnant with the plaintiff. He told the court that exh 1 shows the truth that the plaintiff is a biological daughter of Cecilia Gunda.

Under cross examination he confirmed the historical facts I have already alluded to in relation to the bitter fight he and Daison Gunda had with Cecilia Gunda over the house. He accepted that he and Daison Gunda wanted to benefit from the house, hence the appeal to the Supreme Court. He confirmed how Cecilia Gunda was gruesomely murdered soon after the Supreme Court judgment and that his young brother Daison Gunda was arrested for the murder. He admitted that he and Daison Gunda had serious disputes with Cecilia Gunda over the house to the extent that she sought protection orders against them. He admitted that he knew Mrs Susan Zvinoira who is the person who helped Cecilia Gunda in the fight over the estate of their father. He conceded that Susan Zvinoira knew the Gunda family very well and because she was very close to Cecilia Gunda.

Under cross examination Anderson Gunda vainly tried to deny what he had said in his declaration in HC 740/09 that only Daison Gunda and Tsitsi Gunda were staying at this house when Cecilia died which meant the plaintiff Ennety Gunda was not there. He was not able to explain why he and Daison Gunda brought the action in HC 740/09 instead of the plaintiff except to say they had excluded her as a girl child. He insisted that Cecilia Gunda's estate was not properly administered because the plaintiff who is Cecilia Gunda's other child was excluded as a beneficiary. He said Daison died end of 2010 or beginning of 2011.

While Anderson Gunda was calm and collected in his evidence it was evident that he has a vested interest in this house. This is clear when one considers that even after the Supreme Court's judgment he proceeded to institute proceedings in HC 740/09 seeking to benefit from the house. It is clear that he would support the plaintiff if that would indirectly benefit him. In relation to the administration of the estate he was not able to say why he believes it was improperly administered. His evidence should be assessed in the historical context of this case.

I now turn to the evidence led from the defendants.

The first defendant Tsitsi Gunda testified that she is the only surviving child of the late Cecilia Gunda. She said of all the children of Mr Aaron Mukoki Gunda, she is the only surviving child of the late Cecilia Gunda. She said all the four children of Mr Aaron Mukoki Gunda, that

is Anderson, Daison, Salome and the plaintiff Ennety share the same mother one Jestina Mupfuriridzwa. She did 'O' level and got married in 2000 after which she returned to stay with her mother at the house in issue. She stayed with the mother Cecilia Gunda from 2003 to 2005 until her death in circumstances already explained. She said she was staying with Anderson and his wife, Daison and his wife, who each had apportioned themselves rooms in the house. She shared a room with her mother and her child and there was a tenant occupying the kitchen who paid rentals to Anderson and Daison Gunda. After the murder of her mother in December 2005 and her subsequent burial at the rural home she never returned to the house in issue. The reason she gave was that the murder of her mother in that same house traumatized her and that Anderson Gunda who had not been arrested like Daison Gunda had threatened her that similar fate would befall her like her mother is she pursued the issue of the house. She married her current husband in 2009 and resides at Hopley Farm.

While she admitted that ex 1 plaintiff's birth certificate shows that she shares the same mother with the plaintiff, she however said that was not the correct position and that this fact was common cause within the Gunda family except that Anderson Gunda and the plaintiff for selfish reasons are now misleading the court. She said the fact is that her late father Aaron Mukoki Gunda requested her mother Cecilia Gunda to assist in obtaining plaintiff's birth certificate as plaintiff's mother had long left and plaintiff was about to write Grade 7 examinations. She explained that it is the reason why she got her birth certificate ex 1 in 1988 when she was about to start Grade one but the plaintiff Ennety Gunda only obtaining her birth certificate in 1992 despite that she was older to her and purportedly shared the same mother with her and they were all staying in Harare. She said the plaintiff's birth certificate was only obtained in 1992 to enable her to write Grade 7 examinations and plaintiff was then 12 years old.

In her evidence in chief the plaintiff said all her maternal relatives are aware of the fact that the plaintiff is not a daughter of Cecilia Gunda. She said the plaintiff is unable to call any such relative because she knows none. She said what is known in the family is that plaintiff was left by her mother Jestina Mupfuriridzwa under the care of the second defendant mother Cecilia Gunda who had just married Mr Aaron Mukoki Gunda when plaintiff was just 1 ½ years old and Cecilia Gunda took care of the plaintiff. She said this fact is well known in the family both from the paternal and maternal side although some relatives are no longer keen to tell the truth in view

of how her mother was killed. The plaintiff said she grew up knowing that the plaintiff is not born to her mother and she at no point believed they shared the same mother. She therefore denied making any misrepresentations in this Death Notice exh 4 when she said she is the only surviving child born to Cecilia Gunda. The plaintiff said this fact was notorious in their neighborhood because as they grew up Cecilia Gunda was known as (Mai Tsitsi) in the Gunda family and at no point was she called Ennety's mother despite that plaintiff was the older. The plaintiff said even the maternal relatives of the plaintiff, Anderson, Daison and Salome would visit the Gunda family to see all these four children who were being looked after by second defendant Tsitsi's mother Cecilia Gunda. She said that relatives would at times take the four children away leaving her behind and her mother had to explain to her that the 4 children shared the same mother.

The second defendant told the court that the plaintiff did not finish school but got married in 1997 in Mhondoro some 8 years before the death of her mother and 2 years before death of their father. She said it is not true that the plaintiff used to stay at the house in issue from 1997. She said from 1997 upto death of her mother the plaintiff was not staying at the house. She said she would only meet plaintiff at family funerals and that even when Daison Gunda died in 2010 the plaintiff was not staying at the house. She said even the period between 1999 to 2005 when Anderson and Daison Gunda were involved in this dispute over the house with her mother Cecilia Gunda plaintiff was not there but in Mhondoro. She said that is why even after 2003 when she returned to stay with her mother and both would flee from the house as result of threats and violence by Anderson and Daison Gunda plaintiff was not there and not involved. The second defendant explained that that is the reason why plaintiff would not know Mrs Susan Zvinoira, the Chairperson of Widows and Orphans Association who assisted Cecilia Gunda not only with legal advice in the estate dispute with Anderson and Daison Gunda but would provide food and shelter for Cecilia Gunda and second defendant each time they were chased away from the house by Anderson Gunda and Daison Gunda between 2003 to 2005.

The second defendant explained how Mrs Susan Zvinoira became entangled in the estate of the late Aaron Mukoki Gunda and later Cecilia Gunda. She said Mrs Zvinoira's Association helped widows and orphans in inheritance disputes and had assisted Cecilia Gunda who was at that time involved in a bitter fight with Anderson Gunda and Daison Gunda after the death of Mr

Aaron Mukoki Gunda over this house. She said Mrs Zvinoira provided her mother Cecilia Gunda with legal advice and at times food handouts as Anderson Gunda and Daison Gunda deprived her mother any benefits from their father's estate and money paid by tenants at the house. The second defendant explained in evidence that her own husband she first married in 2000 tried to help her mother Cecilia Gunda in this fight with money for legal advice and Anderson and Daison Gunda would harass him until her husband could not take it and their relationship broke down in 2003. The second defendant said her stay at his house with her mother, Anderson Gunda and Daison Gunda between 2003 to 2005 were traumatic as her mother Cecilia Gunda was constantly harassed, and threatened with assault. In fact she said that Anderson Gunda would threaten to cause the arrest of Cecilia Gunda for misrepresenting that Ennety the plaintiff was her daughter and obtaining a birth certificate for her effort for her ex h 1. The second defendant said she and her mother Cecilia Gunda would then flee and seek shelter at Mrs Zvinoira's house in Greendale, Harare. The second defendant said Mrs Zvinoira knew her family well and that she was the only daughter born to Cecilia Gunda and Aaron Mukoki Gunda. She explained that it is the reason why after the burial of her mother she went to stay with Mrs Susan Zvinoira in Greendale, Harare for 2 ½ months after which she fled to Chiweshe fearing for her life when she got word that Anderson and Daison Gunda were looking for her after she had registered the estate of her late mother.

The second defendant broke down in court when she explained how the plaintiff Ennety Gunda had sought to exploit the fact that Cecilia Gunda had obtained a birth certificate for her and raised her up. She said the plaintiff was well aware of this but was keen to assist her siblings Anderson Gunda (and then Daison Gunda) in their fight over the house. She said even at the High Court at the time of this hearing Anderson approached her and her maternal uncles advising her to withdraw her defense to allow matter to be resolved by the Gunda family. The second defendant says the plaintiff did not stay at the house in issue but only came there for purposes of this trial.

The second defendant went on to explain her role in the registration of the estate of the late Cecilia Gunda and the disposal of the house. She said she was assisted in all this by Mrs Susan Zvinoira who had hitherto helped her mother. She said she registered the estate providing all information and signed Death Notice – ex h 4. She provided the information to the fourth

defendant of the property left by the deceased Cecilia Gunda and also that she, the second defendant is the only child. She denied ever making any misrepresentation to the fourth defendant. She said circumstances of how her mother Cecilia Gunda is shown in exh 1 as plaintiff's mother are clearly explained in her evidence.

In relation to the sale of the house in issue she said as the sole beneficiary of the mother's estate she realized she could not continue to stay in the house belonging to her mother where her mother was callously murdered, which house was still occupied by Anderson Gunda and Daison Gunda who were also threatening her. She decided to sell the house and later to decide what to do with the proceeds. She said the decision was her own and she advised Mrs Zvinoira, the Executrix appointed at the edict meeting, to act accordingly. Since she had left Mrs Zvinoira's residence for fear of her life she was later advised by Mrs Zvinoira how the house had been sold and that the proceeds had been paid into the Guardian Fund for safekeeping. She never got the opportunity to access the proceeds of the sale as she was fearful of the threats posed by Anderson Gunda and Daison Gunda who occupied the house. She said even after Anderson Gunda and Daison Gunda were evicted from the house as per exh 13 Anderson Gunda trekked her to Caledonia farm threatening her causing her to advise Mrs Zvinoira that she had to flee for her life. The second defendant said she only learnt of Mrs Zvinoira's death in 2011. She denied ever meeting or conniving with the third defendant who bought the house. She said Mrs Zvinoira only advised her that the third defendant had bought the house.

The second defendant's evidence remained largely unchallenged under cross examination. She was able to give a clear and coherent account of her life history and sequence of events from the time she got married in 2000 after the death of the father in 1999 to date. The second defendant clearly explained how she felt threatened by Anderson Gunda and Daison Gunda moreso after the death of her mother.

The second defendant told the court under cross examination that she attended the edict meeting with Mrs Zvinoira and could not have involved Anderson and Daison Gunda who were threatening her. She said her late mother's sister was also scared to be involved. She said she was not able to call her aunt Janita Chigidi as she could not raise the bus fare. In relation to the sale of the house she dismissed as false that she connived with the buyer. She said she was told that the house was sold in 2008 and she only met the buyer the third defendant at court in 2009

after they all had been sued by Anderson Gunda and Daison Gunda in case number HC 740/09. She denied that she presented herself as a minor to anyone. The second defendant insisted that she authorized the Executor to sell the house and was not personally involved. She was asked why she never sought to get proceeds of the sale. In response she said at the time she met Mrs Zvinoira and advised the house had been sold for 4 trillion Zimbabwean dollars she was told the money had been put in trust in a Guardian Fund and she was to be advised by Mrs Zvinoira how to access the money only to later learn that she had died. The second defendant said she believed the Master of the High Court is keeping the money and it is safe. She insisted that she has yet to benefit from the proceeds of the sale of the house as she is currently survived on vending.

My assessment is that the second defendant's evidence reads well. Her demeanor in court was beyond reproach. Despite the lengthy and incisive cross examination she was subjected to, the second defendant remained unshaken. The material aspect of her evidence remains largely unchanged. I fully understand the second defendant's emotions when she broke down crying. The history of this matter speaks for itself. I therefore find the second defendant to be a credible and well meaning witness.

The second defendant's evidence on the maternity of the plaintiff was to a large extent corroborated by Juliet Chinewaro and Isaac Chigidi both maternal relatives of the second defendant. Juliet Chinewaro regards the late Cecilia Gunda as her aunt. Her father and Cecilia Gunda are siblings. She was born in Buhera in 1956 and only did Grade 3. She said she initially got married in Buhera to her first husband but they divorced after which she came to Harare to work as a maid in 1980 when she was in her mid 20s. She told the court that the late Cecilia Gunda had three children, all female, that is Tecla, Laizah and Tsitsi. Tecla and Laizah were born from her first marriage and only Tsitsi is born to the Gunda family. She saw the late Cecilia Gunda married Aaron Mukoki Gunda in 1981 and that before Cecilia Gunda married Aaron Mukoki Gunda they were staying together. She said after Cecilia Gunda's marriage to Aaron Mukoki Gunda the plaintiff's mother later came and left the plaintiff Ennety in the custody of Cecilia Gunda. By then she said Cecilia Gunda had no child born of her marriage to Aaron Mukoki Gunda and Cecil Gunda virtually became the mother for the plaintiff as she used to carry the plaintiff on her back. Juliet Chinewaro said by then the second defendant Tsitsi had not been

born as she was only born in 1983. She dismissed untrue that the plaintiff Ennety Gunda is a daughter of Cecilia Gunda.

Juliet Chinewaro explained that exh 1 - plaintiff's birth certificate does not reflect the truth. In fact she said her aunt Cecilia Gunda explained to her that her husband Aaron Mukoki Gunda had persuaded Cecilia Gunda to assist in obtaining a birth certificate for the plaintiff Ennety and to present herself as Ennety's biological mother. Juliet Chinewaro said she even warned Cecilia Gunda her aunt that this may cause problems for Cecilia Gunda but Cecilia Gunda explained that she was duty bound to assist her step daughter the plaintiff. She confirmed that Cecilia Gunda was always known in the area and in the Gunda family as Tsitsi's mother (Mai Tsitsi) and not Ennety's mother (Mai Ennety).

Under cross examination Juliet Chinewaro told the court that Cecilia Gunda went to stay with Aaron Mukoki Gunda as his wife in 1981 and that by then she was not pregnant. She said she later fell pregnant and gave birth to Tsitsi, the only child she had with Aaron Mukoki Gunda. She told the court that Cecilia Gunda was close to her as an aunt and that she is aware that plaintiff Ennety Gunda was only brought back by her mother who had left Aaron Mukoki Gunda to be looked after by Cecilia Gunda who by then had no child with Aaron Mukoki Gunda as the second defendant Tsitsi was not yet born. She told the court that she knows how the second defendant was born as Cecilia Gunda was in labour for 2 to 3 days resulting in second defendant being born through a caesarian section. She insisted in cross examination that Cecilia Gunda told her about exh 1 - plaintiff's birth certificate before and after obtaining it and that she had done so to enable the plaintiff to write examinations. She did not attend the edict meeting as she was at rural home. She explained that Janita Chigidi mentioned in exh 4 - Death Notice is a sister to Cecilia Gunda but is now also late.

Juliet Chinewaro gave free flowing evidence. No meaningful in roads were made in respect of her evidence in cross examination. Her demeanor was good. She is closely related to Cecilia Gunda and stayed with her in Harare even before Cecilia Gunda married Aaron Mukoki Gunda. I find no reason why she would not know the children born of Cecilia Gunda and Aaron Mukoki. I am inclined to accept her evidence.

The testimony of Isaac Chigidi who was born in 1971 (is now 41 years old) is that his father and Cecilia Gunda are siblings. He regards the late Cecilia Gunda as an aunt. He grew up

in rural Buhera. He told the court that when Cecilia Gunda married Aaron Mukoki Gunda she only came back when the second defendant Tsitsi who was then 3 years old and introduced as Cecilia's daughter with Aaron Mukoki Gunda. Isaac Chigidi told the court that he does not know plaintiff Ennety Gunda but saw her for the first time at court. He told the court that plaintiff is not born to Cecilia Gunda. He explained that he is not aware how exh 1, plaintiff's birth certificate was obtained as he was staying in the rural home. No meaningful questions were put to him in cross examination.

The evidence of Juliet Chinewaro and Isaac Chigidi who are close relatives of the late Cecilia Gunda corroborates the second defendant's evidence on the dispute of the plaintiff's maternity. These two witnesses have no interest in the matter. I find it strange that they would disown the plaintiff Ennety Gunda in preference of the second defendant Tsitsi Gunda if both were born to their relative Cecilia Gunda. I find no possible motive for them to mislead the court.

It is common cause that a birth certificate is an official document which *prima facie* is proof of the biological parents of the person to whom it relates. I however do not believe that its mere existence becomes irrefutable evidence of one's paternity or maternity. In a proper case, like *in casu*, evidence may be led which can show on a balance of probability that the person indicated as the mother or father of the bearer of such a birth certificate is not the biological parent. While I am of the firm view that DNA tests would have been more conclusive if not most appropriate in this case to deal with this dispute of the plaintiff's maternity I am satisfied that on evidence led this court can make a proper and informed finding of fact in this regard. I have already explained why I am inclined to accept the evidence of the second defendant, Judith Chinewaro and Isaac Chigidi in this regard. I need to explain why despite the existence of exh it 1 - plaintiff's birth certificate, I am not persuaded that plaintiff is Cecilia Gunda's biological daughter.

While I accept that exh 1 - is a genuine document issued by the Registrar of Births and Deaths, sufficient persuasive evidence have been led to explain why the information which reflects Cecilia Gunda as plaintiff's mother is not true. It is not beyond human experience for persons to make such a misrepresentation to the Registrar of Births and Deaths for various reasons. In a proper case where clear evidence has been led, this court can properly make a finding of fact that the information in exh 1 as regards plaintiff's maternity is incorrect.

Evidence had been led as to why Cecilia Gunda misrepresented herself as the plaintiff's mother in exh 1.

I am not persuaded by the evidence of the plaintiff Ennety Gunda and Anderson Gunda in this regard. Anderson Gunda's evidence is tainted by the vested if not even misguided interest he has in the house. His conduct in this whole saga totally discredits him and enjoins the court to deal with his evidence with utter most caution. His fight for this house is legendary and a matter of record. It seems he cannot come to terms with the fact that at the death of his father this house was properly awarded to Cecilia Gunda and that after Cecilia Gunda's death her estate devolves to her direct progeny. Anderson Gunda was prepared to institute ill fated proceedings in a bid to get this house. The plaintiff's birth certificate exh 1 may well be his last draw card. I find him to be an incredible witness.

The plaintiff Ennety Gunda as already said was a very poor witness. All she could say is that she is a daughter of Cecilia Gunda on account of exh 1 her birth certificate. She was not able to address or controvert evidence led in relation to exh 1.

I also find the plaintiff's conduct to be inconsistent with the fact that she is Cecilia Gunda's daughter but a sibling of Anderson and Daison Gunda. If plaintiff was indeed Cecilia Gunda's daughter she would not have failed to know the bitter wrangle which ensued between Cecilia Gunda and her steps sons Anderson Gunda and Daison Gunda. She would not fail to know Mrs Zvinoira who fought from her alleged mother's corner, providing legal advice, shelter and food hand outs. The plaintiff's demeanor was self-evidently poor moreso when she casually testified on the callous murder of Cecilia Gunda, whose date of death she cannot even recall! This is so because she is a step daughter to her and was not even living at that house at the material time, but only surfaced to thwart the eviction of her siblings Anderson and Daison Gunda using her birth certificate - exh 1 as these siblings can thereafter lawfully claim occupation of the house through her.

The total lack of interest in Cecilia Gunda's tribulations in her life time and in her estate after her death by the plaintiff is shocking. It can only be explained by the fact that plaintiff is not Cecilia Gunda's child. I find it strange that she would peacefully cohabit with both Anderson Gunda and Daison Gunda who had tormented her so called mother moreso after her brutal murder. Is it possible for her if she was Cecilia Gunda's daughter to happily share the

same house with Anderson Gunda and Daison Gunda given the history of this matter if she was not their sibling. The plaintiff also surprisingly took no action to protect the estate of her mother who had died virtually fighting the step sons over the same house. She did not bother to register the estate at all or to inquire anything about it. She was happy to allow Anderson Gunda and Daison Gunda in HC 740/09 to sue her sister the second defendant and her benefactor Mrs Zvinoera. She was even prepared to fight in Anderson Gunda and Daison Gunda's corner in HC 740/09 by seeking a joinder and when this failed, she then instituted these proceedings. It is this conduct I find consistent with the fact that she is not a daughter of the late Cecilia Gunda despite the existence of exh 1. She is a useful pawn in Anderson Gunda's fight for the house and she too would benefit from such a stance and as at now she is getting rentals. Her birth certificate - exh 1 seems to be her meal ticket. It is my finding that although exh 1 reflects Cecilia Gunda as the plaintiff's mother evidence led does not support this position. I am inclined to find in favour of the second defendant in this regard.

Assuming I am wrong in arriving at that conclusion, I still have to consider whether in the circumstances of this case there is basis to reverse the transfer of said property from the third defendant who has since acquired real rights over the property.

It is clear from the written submissions by the plaintiff that the plaintiff has now abandoned the basis upon which the administration of this said estate was being challenged. The plaintiff had made allegations of non-compliance with the provisions of the Administration of Estate Act [*Cap 6:01*]. The plaintiff had alleged that this non-compliance was engineered by the first and second defendants with the complicit of the fourth defendant and also connivance of the third defendant and with the intention of disposing of the house in issue. Allegations were made that the estate of Cecilia Gunda was improperly registered and false information used. It was alleged that the edict meeting was not properly advertised. The appointment of the Executor was put into issue. The disposal of the house was challenged (see the plaintiff's declaration).

After the evidence of the new executor Oliver Masomera and the third defendant Langton Mashiri the plaintiff has now shifted ground and as per closing written submissions, the plaintiff is now challenging the whole process not on the basis alleged of non-compliance with the provisions of the Administration of Estate Act [*Cap 6.01*] but is now on the common law

platform of fraud. One is not sure at what point this Damascene feat engulfed the plaintiff. Let me deal with the evidence of the executor and the third defendant.

The position of the first and second defendants has been that the estate of the late Cecilia Gunda was properly administered and that all legal requirements were followed. They have insisted that the appointment of the late Susan Zvinoira was above board just like the appointment of her replacement Oliver Masomera which is now not contested.

The new executor Oliver Masomera testified and his evidence remained largely unchallenged on material issues. He is now seized with the administration of the estate of the late Cecilia Gunda which is yet to be finalized. He took the court through the process of the administration of an estate in terms of the Administration of Estate Act [*Cap 6:01*] (hereafter the Act). In broad terms he said the process involves registration, administration, distribution and finalisation. In *casu* he said what has been done is the registration and part of the administration. The distribution and finalisation is outstanding. In terms of s 5 of the Act the registration of the estate can be done by a relative or connection. The first defendant Tsitsi Gunda is daughter to Cecilia and therefore a relative. The late Susan Zvinoira from the evidence which is irrefutable was well known to Cecilia Gunda and therefore was a connection. This means that the first and the second defendants could properly register Cecilia Gunda's estate.

According to Oliver Masomera all the relevant documents which are the Death Notice - exh 4 and preliminary inventory were lodged. The relevant fee for an edict meeting was paid. He said there is evidence in the file that there was an advertisement for the edict meeting as he found proof of such payment. Oliver Masomera said an edict meeting was properly held in terms of s 25 of the Act and attended by the first and second defendants, whereupon Susan Zvinoira was appointed the executrix and the second defendant Tsitsi Gunda signed waiver of security, which means the late Susan Zvinoira was now authorized by the fourth defendant, the Master to administer the estate. The relevant administration entails advertising for debtors and creditors lodging of accounts and or distribution plan.

As per exh 12 the Master's report compiled in terms of r 248 of the High Court Rules 1971 an edict meeting was properly held after the estate had been duly registered. The master attached the minute sheet of the edict meeting and copies of letters of administration issued to Susan Zvinoira. The Master confirmed that the edict meeting was advertised.

Oliver Masomera testified that the second defendant then wrote to the Master seeking authority to sell the house in issue in terms of s 120 of the Act. The second defendant Tsitsi Gunda testified that she is the one, as a beneficiary who instructed Susan Zvinoira to sell the property. The Master granted the authority and the sale was effected which sale can be by private treaty done by a registered estate agent. As per exh 12 the Master had this to say in relation to the sale of the house;

“I reiterate that the disputed property was legally sold after the executrix acquires proper documentation as per our law. It does not need one to have real rights or title to enable the same of estate assets. The law governing disposal of estate assets requires the executors to have the master’s consent to enable such a sale.”

Oliver Masomera in his evidence stated that the plaintiff as per the file DR 265/06 did not assert any of her rights accorded to her in terms of the Act. She did not seek any amendment to the Death Notice- exh 4 in terms of s 5 (4) of Act after the estate was registered within the prescribed period of 14 days. No initial objections were raised in terms of s 58 (8) of the Act or in terms of s 116 or 117 of the Act.

According to Oliver Masomera Susan Zvinoira was supposed to lodge an account after the sale of the property which was not done. He was not able to get Susan Zvinoera’s file to ascertain why this was not done and why the proceeds of the sale were paid into the Guardian Fund. Under cross examination Oliver Masomera stated that after the death of Cecilia Gunda on 13 December 2005, her estate was registered on 3 February 2006 after which the property was sold in 2008. He conceded that all things equal the estate should be wound up within 6 months. As per exh 12, the Master, while reiterating the need to timeously finalize the administration of the estate, such delay is also blamed on Anderson Gunda and the late Daison Gunda who have at all times had been in occupation of the property to the prejudice of potential beneficiaries and or the buyer. He said that if Anderson Gunda and Daison Gunda had been evicted this would pave way for the executrix to prepare and lodge the first and final account distributing the proceeds to potential beneficiaries.

The evidence of Oliver Masomera is well corroborated by the Master’s report - exh 12. It confirms the position that the law was complied with in the registration of the estate and in all the processes done to date in terms of the Act. It has been shown that the disposal of the property to a 3rd party was in accordance with the law. It has not been said by the plaintiff how the

relevant Act has not been complied with and the allegations in the plaintiff's declaration are therefore incorrect. What is clear is that there has been a delay to finalise the administration of the estate by advertising to creditors and lodging the relevant accounts. The bottom line is that the estate of the late Cecilia Gunda is still to be wound up and is still under administration. Neither Oliver Masomera nor the Master explained why the proceeds of this sale were allegedly paid into the Guardian Fund which payment into such a fund would be governed by s 51,61,80, 92, 93 or any other reason.

I now deal lastly with the third defendant Langton Mashiri's case. Langton Mashiri is the one who purchased the property in issue.

In his testimony Langton Mashiri stated that he only knew Susan Zvinoera in connection with the case and that he only met the second defendant Tsitsi Gunda well after he had bought the property in issue and the proceedings in HC 740/09 had commenced as the second defendant had attended a pre-trial conference.

Langton Mashiri's evidence is that he responded to an Advertisement in the Herald on 12 May 2008 - exh 8 for the sale of the house. This is how he subsequently met the late Susan Zvinoera. He explained that he telephoned one Amanda whose details were given in the Advertisement. Amanda represented Property Heights Estates Agency and they met at Kurima house offices. Amanda told her that she was an agent of Baywood Real Estate represented by one Mukandawire. Amanda then invited him to meet the late Susan Zvinoera. He said Susan Zvinoera then explained to him that the house advertised for sale belonged to the estate of the late Cecilia Gunda. He was shown the letters of administration issued by the Master to Susan Zvinoera. He was also shown the authority granted by the Master for the sale of the said property. Langton Mashiri said he asked to verify the authenticity of all these documents with the Master's office at the High Court. Susan Zvinoera obliged and took him to the Master's office where the Master confirmed the authenticity of the letters of administration and the granting of authority to sale the property and that Susan Zvinoera was the Executrix of the estate of the late Cecilia Gunda. Langton Mashiri said this convinced him that and the transactions were above board and legitimate. They then proceeded to Baywood Real Estate where an agreement of sale exh 9 was concluded on 27 May 2008. Langton Mashiri explained how he secured the funds to purchase the property. He said he obtained a loan from Beverly Building Society for 4 trillion

Zimbabwean dollars and for other legal fees. He secured the loan through his employer who registered a mortgage bond - exh 10. His employer's legal practitioners acted on his behalf and instructions from the seller Mrs Zvinoera was that the full purchase price be transferred to Robson Makonyere Law firm and this was complied with through an RTGs on 30 May 2008 and he was given a copy of the RTGs. He would not know what Susan Zvinoera did with this 4 trillion he paid. The ownership of the property was transferred to him and he obtained the Deed of Transfer - exh 11 on 4 September 2008.

Langton Mashiri explained how soon thereafter he attempted to get vacant possession of the property and has failed to date.

He testified that before the sale had been concluded he had gone with valuers to the house in issue as per the requirements of his employers who secured the loan on his behalf. He realised that there were people occupying the property. Susan Zvinoera had told him that Anderson Gunda and Daison Gunda were residing at the property. After the conclusion of the sale he then instructed his legal practitioners to give the requisite 3 months notice to the occupants of the property to vacate and such notice was issued in October 2008 and expired on 31 January 2009. See - exh 12. This was the start of his tribulations.

Langton Mashiri said before he could take occupation of his property Anderson Gunda and Daison Gunda issued summons out of this court – HC 740/09 – against him, Mrs Susan Zvinoera and Tsitsi Gunda claiming that the property had been improperly sold to him without them being involved. This matter HC 740/09 dragged on until the pre-trial conference stage at which stage Anderson Gunda and Daison Gunda withdrew their claim and an order by consent granted by my brother CHITAKUNYE J on 16 February 2010 paving the way for the eviction of Anderson Gunda and Daison Gunda and all those claiming occupation of the property through them for Langton Mashiri to get vacant possession. This was duly done as Anderson Gunda and Daison Gunda were served with notice to vacate but they did not comply. They were duly evicted on 15 March 2010 as per exh 13 as they had not complied with the court order granted by consent. Langton Mashiri said he proceeded to secure the property in the presence of the Deputy Sheriff and went home to convey the good news to his family and to collect the goods for his family to start a new chapter in the newly acquired house. His joy was short-lived. On his return he now found that the plaintiff Ennety Gunda was now in occupation of the property. He

reported this defiance of a court order to Police and the plaintiff Ennety Gunda was arrested. The plaintiff Ennety Gunda then produced a letter from her legal practitioners indicating that she had instituted these current proceedings and could not be evicted. See exh 14. Langton Mashiri said since then he has not been able to occupy the property. He explained the anguish and pain he has suffered by paying rentals for his current lodgings and the repayment of the loan for the purchase of the house which he has since finished using proceeds from his salary.

Langton Mashiri gave his evidence very well and he was an impressive, sincere and well meaning witness. Under cross examination he was taken to task on why he believed the beneficiary of the property was a minor as per his plea. He explained that he had made that impression when he learnt that the purchase price had been paid into the Guardian Fund. He reiterated that he did not know the second defendant Tsitsi Gunda until the court proceedings in HC 740/09 which was well after the sale of the house. On how the purchase price was paid Langton Mashiri said his legal practitioners were instructed to pay the purchase price to the seller's legal practitioners and that this was done as he himself did not personally handle this transactions. Langton Mashiri explained that although the Herald advertisement had put the prize for the property at 2.5 trillion Zimbabwean dollars he subsequently bought it for 4 trillion Zimbabwean dollars due to the hyper inflation obtaining at that time. He denied that when he bought the house he was aware of the dispute surrounding the house. Instead he said all Mrs Zvinoera explained was that the owner of the house Cecilia Gunda had died in that house not that the occupants of the house would cause him problems.

The evidence of Langton Mashiri already said reads very well. The lukewarm cross examination he was subjected did not alter at all the colour of his evidence. The question to be answered is whether there is a legal basis to reverse the transfer of the property from Cecilia Gunda's estate to Langton Mashiri or to consider Langton Mashiri as an innocent purchaser who now has acquired real rights over the said property.

The Master as per exh 12 is of this view that Langton Mashiri is an innocent third party whose real rights over the property should be protected. I have already alluded to the fact that the plaintiff has abandoned the basis upon which claim for the reversal of the transfer of the property to Langton Mashiri was premised which was none compliance with the Act [*Cap 6:01*]. This concession although belated is well informed as evidence led does not make such an argument

sustainable. The plaintiff has decided to rely on the common law ground of fraud. I turn to that issue.

In the case of *Katirawu v Katirawu & Ors* 2007 (2) ZLR 64 (H), it was held that a beneficiary in the estate has capacity to approach this court at common law to move the court for the removal of an executor whose appointment would have been induced by fraud. The plaintiff, as is more apparent in the written closing submissions is alleging that the appointment of Susan Zvinoera as the executrix of the estate was induced by fraud which would make it null and void *abinitio*. The reasoning by the plaintiff is that once such a finding is made the consequences are that all what the executor did is of no legal effect including the purported sale of the house to the third defendant.

The question which has exercised my mind is whether on the facts of this case the plaintiff has indeed established the alleged fraud. The case of *Katirawu v Katirawu & Ors* supra which the plaintiff has heavily relied is distinguishable on facts from the matter at hand. In that case the first respondent who was one of the deceased's sons forged a death certificate and induced the Master to appoint him as the executor and sole beneficiary of his father's estate. He also gave a false name to the Master and disposed of an immovable property to a third party under the guise of such false identity. *In casu* both the first defendant and second defendant did not forge any document. The second defendant is a daughter of the late Cecilia Gunda. She has maintained the stance that she is a sole beneficiary of the estate. I have already discussed at length why I hold the view that the plaintiff has failed to prove how she is a beneficiary. The late Susan Zvinoera who was initially appointed the executrix was never removed from such a position until this time of her death. The first defendant's appointment is now not in issue.

The plaintiff has failed to establish any impropriety in an administration of the said estate. I have already made a finding that the estate was properly registered and the appointment of the executor was done lawfully. The disposal of the house was done in compliance with the law. There is therefore no evidence adduced by the plaintiff to prove any fraud in this matter. I am not persuaded by the argument that the first and second defendants misrepresented to the Master the maternity of the plaintiff.

Lastly, it is also my finding that there is no basis at law to reverse the sale and subsequent transfer of the house from Cecilia Gunda's estate to the third defendant. There is no evidence led to support the assertion that the third defendant connived with the first, second and fourth defendants in this matter. The third defendant's position is akin to an innocent purchaser in matters similar to double sales see *Crundal Brothers (Pvt) Ltd v Lazarus N.O. & Anor 1991 (2) ZLR 125 (S)*; *Mwayipaida Family Trust v Madoroba & Ors 2004 (1) ZLR 439 (S)*.

It is clear from the evidence led that the third defendant was entirely ignorant at the relevant time of the claims of the plaintiff in relation to the estate of the late Cecilia Gunda and he took transfer of the said house in good faith for value. The fact that the executor deposited the proceeds of the sale into the Guardian Fund is neither here nor there. The third defendant's real right in this house in issue can not in my view be disturbed.

In conclusion, it is my finding that the plaintiff has not shown that she is a daughter of Cecilia Gunda and therefore a beneficiary of the said estate despite the existence of exh 1, her birth certificate. The consent granted by the fourth defendant, the Master for the sale of the property in issue was properly made in the circumstances. The sale of the house in issue, stand number 5417 Glen Norah township 'B', Harare to the third defendant is above board and therefore valid. The third defendant is indeed a *bona fide* purchaser hence there is no basis to set aside the sale of the house and to reverse the transfer of the property.

As regards costs, my view is that the issue of costs should follow the result.

In the result I make the following order;

1. The plaintiff's claim be and is hereby dismissed.
2. The plaintiff shall bear the costs for the first, second and third defendants.

Messrs J. Mambara & Partners, plaintiff's legal practitioners

Chatsanga & Partners, 1st, 2nd and 3rd defendant's legal practitioners