

MICHAEL CHITATE
versus
ESTATE LATE MARIE JOAN McKELVEY
(Represented by the executrix testamentary Brenda Carol Leeper)
and
THE MASTER OF THE HIGH COURT
and
ROBERT ROOT REAL ESTATE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 June 2016

Civil action

Plaintiff in person
D. Ochieng for the 1st and 3rd defendants

CHITAKUNYE J. The plaintiff was employed by the late Marie Joan McKelvey also known as Marie Joan Quirke, herein after referred to as the late Marie, in 1992 as a guard and gardener. Later he became the caretaker at the late Marie's property namely number 68 Central Avenue Harare.

The late Marie died on 6 March 2009 at Marondera. The plaintiff has remained at 68 Central Avenue to date.

Brenda Carol Leeper was issued with letters of administration of late Marie in terms of the provisions of a Will executed by the late Marie on 25 September 2007. In her capacity as executrix testamentary, the first defendant in the administration of the estate opted to have the property in question sold. She obtained the requisite consent to sale from the second defendant. The third defendant as agent advertised the property for sale. The first and third defendants also sought the eviction of the plaintiff from the property. This did not augur well with plaintiff who believed he was a beneficiary to the estate.

On 27 March 2014 the plaintiff issued summons out of this court seeking, *inter alia*, an order:-

1. Nullifying the last testamentary Will allegedly left by the late Marie Joan McKelvey
2. Declaring the plaintiff a beneficiary of the estate late Marie Joan McKelvey
3. Interdicting the third defendant from selling the property situate at number 68 Central Avenue, Harare.

In his declaration the plaintiff alleged that he was employed by the late Marie in 1992. He was thereafter paid his wages till about January 1993. The late Marie then stopped paying his wages. She told him that he would benefit from her estate if she predeceased him and that she had already made him a beneficiary in her Will.

It was on that basis that he believed the executrix was supposed to consult him as a beneficiary before opting to sell the property.

The first defendant in her plea alluded to the fact that deceased left a Will in which Brenda Carol Leeper was nominated as Executrix testamentary. In that Will no legacy or bequest was made in favour of the plaintiff. The only beneficiary in the Will is the late Marie's daughter; namely, Carolyn Maria Christina Ashe. As far as the defendants are concerned the plaintiff was only an employee. In terms of the Will the plaintiff is neither an heir nor a legatee. He is also not a blood relation to the late Marie.

At a pre-trial conference held on 14 August 2015 the issues referred to trial were as follows:-

1. Whether or not the Last Will and Testament of the late Marie Joan McKelvey dated 25th September 2007 is valid.
2. Whether or not the plaintiff is a beneficiary of the estate of the late Marie Joan.

These are the core issues upon which evidence was to centre.

The plaintiff gave evidence and called one witness. At the close of the plaintiff's case the defendants applied for absolution from the instance.

In deciding whether to grant an absolution from the instance or not court is enjoined to consider the plaintiff's evidence and decide whether the plaintiff has established a prima facie case requiring defendants to be put on their defence.

In *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971(1) RLR 1 at p 5D-E BEADLE C J put the test as to whether to grant absolution or not as follows:-

“is there sufficient evidence on which a court might make a reasonable mistake and give judgement for the plaintiff?”

In *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341(S) at 343B-C GUBBAY CJ reiterated the test when he said that:-

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him.”

There must therefore be evidence led that addresses the issues to be determined. If the evidence led does not address the issues especially the core issues an absolution from the instance should be granted. It would serve no purpose to proceed with a trial where essential elements for the success of the plaintiff's case are missing or have not been established.

In casu, the plaintiff's case on the issues at hand appears not to have been established at all. The major thrust of the plaintiff's case according to his declaration was that the deceased had stopped paying him; she had then told him he would benefit from her estate if she predeceased him and that she had made him a beneficiary in her Will. See para 7 of his declaration. Nowhere in that declaration does he state that he had in fact been shown and seen for himself the Will, let alone the particular provision granting him beneficiary status. In his evidence, though vacillating and not wanting to concede, the plaintiff could not categorically deny that it was only a year after the filing of this case that he, in answer to another case between the parties, mentioned for the first time that he had in fact been shown another Will and another person Tawanda Ndabambi had also later seen the Will in a drawer. Tawanda Ndabambi had apparently become a tenant at the premises and it was during such tenancy that he had stumbled upon the Will in a drawer, which Will granted the plaintiff beneficiary status.

The plaintiff stated that the Will he saw in the drawer only dealt with one property of the late Marie; the property in question and no other. It is also a document whose whereabouts plaintiff is not aware of. He also could not state the period he saw the Will or when it is supposed to have been executed. In the same vein he could not say the Will he claims to have seen was the Last Will by the late Marie. Without the production of this Will it is not reasonable to expect its contents as supposedly observed by the beneficiary to be accepted.

The other ground upon which plaintiff sought the nullification of the Will registered with the Master of the High Court is that he suspects the signatures thereon were forged. In that regard he called in a forensic expert Mr. Nhari. Mr Nhari's evidence was to the effect that from the documents brought to him by the plaintiff he formed the opinion that the signatures were not by the same person. It is however pertinent to note that the standard signatures he was provided were mostly photocopies and not originals. An element of doubt was thus cast on the authenticity of these standard signatures more so when that was presented by a person who claims to be a beneficiary to the estate.

If one were to consider the findings of the expert favourably one could say the plaintiff established a *prima facie* case on the validity or otherwise of the Will. However the question

that arises is what purpose would be served by such a decision? I am of the view that a finding that the Will was not valid would *per se* not entitle the plaintiff to be a beneficiary. The plaintiff still has to establish that he is a beneficiary to the estate late Marie Joan McKelvey. A nullification of the will would only make the estate intestate. Intestate succession principles will not grant plaintiff beneficiary status.

For the plaintiff to succeed he needed to produce the Will he claims to have seen and not seek to rely on mere word of mouth that there was a will that cited him and the Late Marie's daughter as the two beneficiaries to the property in question.

It is in this respect that I am of the view that the plaintiff has not led any evidence upon which a reasonable court could or might find for him. The evidence led would at the most show that he may have a claim against the estate but not that he is a beneficiary in terms of a valid Will. The evidence does not in any way show that the plaintiff is heir or legatee to the estate. He can approach the court on a proper cause of action against the estate late Marie if he believes he has a *bona fide* claim against the estate.

Accordingly it is only fair and just that an absolution from the instance be granted with costs.

Kevin J Arnott, 1st and 3rd defendants' legal practitioners