VICTORIA MATUNGA
and
EVER MATUNGA
versus
MUNEMO MUNEMO
and
BIGGY MUNEMO
and
MUNYARADZI MUNEMO
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 28 February 2018 and 14 March 2018

Opposed Application

B Maruva, for the applicants
D *Matawu,* for the 1st, 2nd and 3rd respondents

MATANDA-MOYO J: The applicants applied for the nullification of a will of their late father that they purported was a forged one. In the will, the deceased, John Munemo Matunga bequeathed his entire estate to the first, second and third respondents who are his grandchildren. The applicants alleged that the signature(s) on the will differed from that on a cession agreement that was signed by the deceased in 1982.

The first, second and third respondents on the other hand averred that the will was indeed valid and expressed the wishes of the testator. They also raised a point *in limine* that the issue of signatures raised a material dispute of facts and could not be decided on the papers.

A reading of the documents filed of record reveals that the first respondent was appointed as executor to the estate of the late John Munemo Matunga on 14 September 2012. This was after the death of one Fungai Tawodzera who had been appointed as executor testamentary in the disputed will. The first respondent is also named as a beneficiary in the disputed will. In her founding affidavit, the first applicant referred to the first respondent as

Munemo Munemo (also known as Lovemore Munemo). She did not refer to the first applicant as also being the executor of the estate of the late John Munemo Matunga. It is trite law that an executor must be made a party to any action brought by, for or against a deceased estate- See *Klepman* v *Law Union and Rock Insurance.* [1] In *Nyandoro and Anor* v *Nyandoro and others*, [2]KUDYA J stated that in our law, in terms of s 25 of the Administration of Estates Act [*Chapter 6:01*] a deceased estate must be represented by an executor or executrix duly appointed and issued with letters of administration by the Master of the High Court. Therefore the failure by the first and second applicants to cite the executor of the estate of the late John Munemo Matunga is fatal to the application.

Assuming that the first and second applicants had properly cited the executor, their application would also still fail on the point *in limine* raised by the first, second and third respondents. Although to the naked eye, the signatures on the 1982 cession document and those in the will look different, it is not the duty of the court to make a determination on this factor without the benefit of expert evidence. In *Gunda and Anor* v *Gunda and Anor*, [3]the Supreme Court took cognisance of the fact that the High Court had reached a conclusion that the purported signature of the testator was not genuine and that this was the conclusion reached by the handwriting expert. In *Manolakasis* v *Estate Late Dr John J. Manolakakis and Ors*, [4] MAKONESE J made reference to s 18 of the Civil Evidence Act [*Chapter 8:01*] which provides as follows:

> "Comparison of any disputed handwriting with any handwriting proved to be genuine may be made by any witness, and such writings and evidence of any witness with respect to them may be adduced to prove the genuineness or otherwise of the handwriting in dispute."

In declaring the will null and void, it is pertinent to note that the court relied on the evidence of handwriting experts. The court also relied on the evidence related to the circumstances surrounding the writing and discovery of the will.

The importance of having the evidence of an expert was aptly captured in *Naude and Ors* v *Naude and Anor*, [5]as follows,

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[1] 1957(1) SA 506.

[2] HH-89-08

[3] SC 39/05

[4] HB-105-14

[5] High Court of South Africa (Eastern Cape Division) Case no. 4349/14

> "Ms. Palm stated that handwriting is based on two principles, namely habituation and individualisation of writing. As explained by her, people are creatures of habit and handwriting is a collection of those habits……Every person has a unique set of habits which they produce within their writing and which sets them apart from any other person. Handwriting, however is not static but dynamic and a person's habituation changes over a period of time."

Time and again the courts have warned legal practitioners not to bring to court cases on motion well knowing that there is a material dispute of facts which was aptly defined by MAKARAU J (as she then was) in *Supa Plant Investment (pvt) Ltd* v *Chidavaenzi*[6] as follows:

> "A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In the present circumstances, it is not possible for the court to make a definitive finding on whether or not the signature(s) on the disputed will are genuine or forged without expert evidence. That issue therefore constitutes a material dispute of fact as does the issues relating to the circumstances surrounding the making of the will and its production to the fourth respondent.

In passing, I wish to comment on the acceptance of a will by the Master of the High Court. The stamp from the Master's Office which has the words, "accepted" may have led to the mistaken belief that acceptance of a will means that the will is valid. Section 11 of the Wills Act [*Chapter 6:06*] states that every deed being or purporting to be a will, codicil or other testamentary instrument must be registered with the Master or Assistant Master who is duly authorised to open the documents. The registration of the will is mere evidence that a will or document purporting to be a will has been registered. This means that if a will meets all the formalities of writing, signing and attestation, the Master has no choice but to register it for purposes of administration of the testator's estate. If the validity of the will is challenged, the Master or Assistant Master has no authority to decide on the validity or legal effect. This is expressly provided in the proviso to s 11 which reads as follows:

> "Provided that- Notwithstanding any such registration, all questions as to the validity and legal effect of every such deed shall be reserved and remain for the decision of the court."

Perhaps the time has come for the Master to change the stamp so that it indicates that the will has been registered on a specified date rather than indicate that it has been accepted.

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[6] HH-92-09

The Master has authority in terms of s 8(5) of the Wills Act to determine whether or not a document that does not meet all the formalities, should be registered as a last will and testament for purposes of the administration of an estate of the person who made the document. Any person who is aggrieved by the Master's decision to accept the document as a last will and testament may approach the courts for relief.

Accordingly it is ordered that.

1. The application be and is hereby dismissed.
2. The 1st and 2nd applicants shall pay the costs.

Zuze Law Chambers, 1st and 2nd applicants' legal practitioners
Coghlan, Welsh and Guest, 1st, 2nd and 3rd respondents' legal practitioners