DOUGLAS MAGARA
and
SCHENAIDE MAGARA
Versus
HAMUDI MAGARA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 25 October, 13 and 14
November 2023, 11 January, and 9 May 2024

Civil Trial: Challenging Capacity to Make a Will

Mr *B Pabwe* for Plaintiff
Mr *C Kwiriwiri* for first defendant

MUCHAWA J**:** This matter was originally filed as a court application on 25 October 2021 but was subsequently referred to trial on 30 June 2022 due to identified disputes of fact. In the draft order the then applicants sought the following relief:

"IT IS ODERED THAT:

1. The last Will and testament executed by the late Pepukai Simplisio Magara on is declared null and void. (sic)
2. The letters of administration issued by the 2nd respondent in August 2021 in terms of which 1st respondent was appointed the Executrix Testamentary of the late Pepukai Simplisio Magara is declared to be null and void.
3. The appointment of the 1st respondent as the Executrix Testamentary on the estate late Pepukai Simplisio Magarais declared to be null and void.
4. The 2nd respondent is directed to convene a meeting for the appointment of an executor to administer the state of the late Pepukai Simplisio Magara.
5. The 1st respondent shall pay costs of suit on the legal practitioner and client scale".

Background Facts

The late Pepukai Simpisio Magara who died on 28 July 2021 was a widower. He was survived by six children who include the two plaintiffs, the first respondent and three others. Following his death, a will was produced which was allegedly executed by him on 28 May 2017. In that will he appointed the first defendant as the executor of his estate and also bequeathed to him his immovable property being house number 2915 old Highfield Harare.

The second defendant issued out Letters of Administration in favour of the first respondent. The plaintiffs object to the validity of the will which was accepted and registered on the basis that the second respondent should have called a meeting of the interested parties before accepting the will and that the testator, Pepukai Simpisio had no capacity to depose to a will due to mental illness.

Upon referral to trial to trial there was only one issue for determination by the trial court. It is stated thus:

> "Whether or not the late Pepukai Simplisio Magara had the capacity to depose to a will as he did during the relevant period."

The Plaintiffs Case

The plaintiffs led evidence from the first plaintiff, a handwriting expert one Slevester Chaure and Doctor Kanoerera Petros Kusuta.

The plaintiff's evidence was to the following effect: he stated that he and the first defendant are siblings. At the time of his father's death, he is said to have been staying at his house 2915, 112 Street, Old Highfield with a caretaker called Nixon who had been employed by the first defendant. The first defendant who was based in the United Kingdom would come and go and occasionally stay with their father.

He claimed that the last will and testament in issue was a creation of the first defendant.

First plaintiff said he had been accused of battering their father by other siblings as he was staying with their father in 2017 together with his wife and two children. He had been forced to leave due to the toxic environment which had escalated to the extent of involving the police.

The first plaintiff claimed to have moved in to stay with his father in 2011 and left in 2017. He said he moved in as his father was old and he was suffering from dementia which was then particularly bad. He pinpointed to 28 July 2003 as the time that his condition deteriorated leading to his hospitalisation at Parirenyatwa Annex hospital. He claimed that another sibling one Ruth

Mugara and her friend Mr Munyaka were the ones who attended to his hospitalistion. The late Pepukai Simplisio Magara is said to have been discharged from hospital when his wife passed on, on 5 August 2003. It is alleged that it was at this point that their father was initially put on medication for dementia.

The first plaintiff stated that in 2004 there was no follow up on his father's medical condition and that he was then staying with the second plaintiff who is now deceased. It is alleged that he did not go for medical checkups. Due to his worsening condition, it is alleged their father even chased the second plaintiff from the house as he insisted, he wanted to be left alone. This was the situation until 2011 when the plaintiff claims to have moved in.

The state of his father then, is described as very bad and that a neighbor, Mr N Shangwa stepped in to take care of their father.

An incident was related which occurred in November 2013 when their father was very sick at night and upon attendance at the doctor the following day it was established he had high blood pressure. It is claimed that the doctor's report also said dementia had caught up and there was a hint of prostate cancer. The plaintiff pleaded financial incapacity by him, the second plaintiff and Ruth Magara as the reason why they failed to take their father for medical checkups at Annex.
In his evidence the plaintiff stated that his father was a highly educated police officer.

Despite stating that when he left in 2017 the environment at home was not conducive, the plaintiff said that he was in good books with his father even at that stage but only left for the sake of his wife and children.

The plaintiff said that he had failed to get the medical reports from Parirenyatwa but those from the local clinic, particularly from Dr Kusuta. He claimed that the first defendant had custody of all medical records from Parirenyatwa.

In addition, the plaintiff said that his father was a deep traditionalist, who at some point was a member of ZINATHA so he could not have drafted a will. He recalled that both his father and mother had always said the house in issue was a family home. He even claimed that the extensions to the house done by the first respondent were done without their father's blessings though done during his lifetime.

Under cross examination, the plaintiff confirmed that he was the older one to first defendant but attributed the power welded by the first defendant to his manipulative nature. He averred that

the first defendant has a history of steroid use for body building, suffers mood swings and has a strong character. He testified that the first defendant bashed him and broke his glasses during their mother's funeral but had no evidence of this.

When it was put to the plaintiff that he was chased by his own father in 2017 as he was a drunkard and had tried to sell the house, he denied this.

It was put to the plaintiff that as he moved out on 22 April 2017, he could not have been aware of his father's mental state on 22 May 2017 when he signed the will, he explained his departure was strategically engineered to pave way for the fraudulent will.

On being questioned about the documents he gave to the handwriting expert, in particular ST5 which was signed on 21 May 2017, a day before the will, which was tendered as a known sample, the plaintiff explained that he had only tendered it to show that it was a wrong document and he handed it in with the first defendant's permission. He however accepted that ST5 is proof that his father granted first defendant power of attorney.

It was also put to the plaintiff that he had deserted his father when he was seriously ill as per his allegation, but he said he had been forcefully moved out by first defendant and Ruth.

The handwriting expert gave evidence next. His qualifications are given as that he is a certified handwriting Expert (CHE) IFS India IFS/C/2022-0124 and National Diploma in Forensic Science and Crime Investigations. He claims to have worked as a registered private investigator with a certificate of approval from the Ministry of Home Affairs Controller of Private Investigators under license number B9a/1/2001. He is currently employed at Slevchad Forensic Investigators (Pvt) Ltd as a Forensic Document Examiner. His duties include performing forensic examination and analysis of documents, hand writings and signatures, amongst other things.

In the course of such duties, the witness was requested by the plaintiff to do a forensic examination of documents being the will as the questioned document and ST1, ST2, ST4, ST5 and ST6 as the standard samples. He did this and came up with a report. He walked the court through this report in his evidence. His findings were that some features highlighted in his report in the samples were inconsistent with the will. He found that there were some personal characteristics which individualize a person such looping and angulation inconsistent between the questioned signature and the supplied samples / standards and the extent variation was said to lead the conclusion that these were penned by two different persons.

The witness explained that inconsistences amongst individualizing characters are expected to vary whilst a person is still learning to write at early childhood development level. Such variations for a person above 25 years of age are said to be very rare as one's handwriting will then be in the subconscious memory and even if asked to write their signature in a dark room the signature would be similar save for size, line quality etc; but looping and others remain the same.

The witness clarified that this would apply even for someone who is over 80 years unless there are some underlying factors such as drug influence, mental condition, or other health conditions. He conceded that age can also affect instructions and execution.

Document ST5 which was signed a day before the questioned will was stated to have inconsistencies pointing to two different people having signed them.

Under cross examination, the witness was asked why he referred to the standard documents as purported samples and he explained that he had not verified them as signed by the late Pepukai Simplisio Magara and it was up to the parties to verify the authenticity of the samples.

When it was put to the witness that the plaintiff has disowned ST5 and possibly the samples, he said it would be up to the court to decide.

Under cross examination the witness went as far as saying that the variations in the documents he examined are unexplainable and are therefore unnatural so he would not know the reason for them.

It was confirmed that the signatures in ST1 to ST4 are different but said it was not his duty to focus on such differences. He refused to be drawn to conclude that the late Pepukai Simplisio Magara had one signature which he however signed differently.

After intense cross examination the witness conceded that the standard samples vary amongst themselves and there are inconsistencies. He was asked whether he had factored age to explain the variation and the said he had not considered age or all other factors. Had left it to the parties as he believed no reasonable person would question a document which they bought.

The last witness for the plaintiffs was Doctor Kanoerera Petros Kusuta. He stated that he is a medical doctor who holds a degree in Medicine and Surgery having graduated from the University of Zimbabwe in 2013. He is currently doing fellowship as a surgeon and is employed at Madokero Medical Center and spends time at Parirenyatwa as part of his training.

He testified that he was managing the late Mr Pepukai Simplisio Magara at his surgery at Machipisa and would conduct home visits from March 2021 to the date of his demise.

Doctor Kusuta stated that when he initially attended to Mr Magara, his symptoms were of bladder obstruction as he could not pass urine frequently. He then investigated him for prostate cancer. What struck him in the consultation was that the late Mr Magara was exhibiting dementia. Upon probing he was advised that he had in fact been so diagnosed in 2003 at Parirenyatwa Annex hospital. When he questioned whether they should treat him for that, he says the relatives said that they had done a lot, but nothing had worked. He also identified that Mr Magara had chronic kidney disease which had likely developed from prostate cancer. The family is said to have said that due to advanced age they did not want to investigate further. Another ailment he noted was deep vein thrombosis due to non-movement.

To manage the different conditions, Doctor Kusuta said that he would conduct home visits and sometimes send his nurse. Mr Magara is said to have passed on at Madokero Medical Center and the cause of death was multi factorial stroke, kidney problems etc.

On the dementia, Doctor Kusuta said that the family informed that they had visited several psychiatrists both in government and in private practice yet there was no change so he did not put him on any medication.

During the home visits, the witness said that he noticed that there was a young man staying with Mr Magara as a caregiver. He stated that he went there twice and noted that Mr Magara was disoriented in time and in and place and would be covered in urine or feaces. In both instances he stated that he would be unable to communicate with Mr Magara but would restrain him to give him medication. On the first visit, he stated that Mr Magara was able to walk on his own but was bedridden during the second visit.

When asked about whether all the medical afflictions he had mentioned would affect cognitive capacity, he isolated dementia but said in the late stages of chronic kidney diseases, this too could affect mental capacity.

The witness explained that as dementia was diagnosed in 2003 and it is a degenerative disease, the condition must have worsened by the time he was alleged to have executed the will and on his own he would have been incapable of signing a legal document.

In emphasis the doctor said that from his mental state examination he concluded that Mr Magara had dementia based on his history taking and asking of certain questions.

Under cross examination the witness confirmed that he keeps records of his attendance on patients and held records at both the Machipisa surgery and Madokero. He said instead of supplying those records in support of this case, he had written a report summarizing what was done on the patient in September 2021. According to him, there was no need to bring the medical notes.

The witness explained that he had relied on the history provided by the plaintiff and his own mental state examination as that is how they work in his profession. He said he had not verified this with Parirenyatwa Hospital as getting records from government institutions is cumbersome.

According to the doctor, the family had scud Mr Magara had been admitted at Parirenyatwa and another private institution. Upon attending to the patient in 2001, the witness said it would be hard to say that the dementia was not there in 2017 particularly as the history supplied had pointed to 2003 as the initial diagnosis.

When asked about how dementia affects one's mental state, the witness explained that presentation varies, and some people have little or no symptoms. He said it is neuro degenerative as the brain tissue starts to waste away. This is said to affect cognitive behavior on a day-to-day basis and the executive function is affected.

The witness was questioned as the state of the deceased in 2012 when he signed some documents and he said there was some executive dysfunction but he might not know the extent. As to 2017, the witness stated that he is sure the deceased had some executive dysfunction because of the degenerative nature of the disease.

This marked the end of the plaintiff's case.

Defendant's Case

Two witnesses gave evidence in support of the first defendant's case being the first defendant himself and one Mr Aleck Makanda a Commissioner of Oaths.

The defendant confirmed that he and the plaintiff are blood brothers. He refused having chased the plaintiff from the house as there was no bad blood between them and their father would run his own affairs, so he had no power to kick out another sibling. He claimed to love and respect his brother, the plaintiff.

The plaintiff is narration that the defendant had forged his father's will to disinherit all other siblings was said to be a lie.

He explained that their father was signing in different ways and some of the documents went some ten years back hence some features would change.

This witness questioned the authenticity of the samples ST2 and ST3. ST2 was said to be unprofessional as there is no letter head. The signature therein is said to be different from all other signatures. It was also criticized for just being a photocopy and not an original ST2 is a p 73 of the record.

ST3 which appears on p 74 was doubted because, it too is a photocopy, and the signature therein is different from the one in ST2.

ST4 which is on p 75 was said to be from POSB. The defendant claims to have driven his father there and says they did their own checks on his mental capacity in his presence and signed the document. This document was authored in 2012 and according to this witness, his father had full mental capacity.

ST5 on page 76 is the power of attorney executed a day before the will on 21 May 2017. The defendant questioned how the power of attorney could be accepted and the will questioned on account of incapacity.

This witness stated that he came to stay with his father in May 2012 as he was starting a business which was initially located at 30 Lobengula in Southerton and then moved to Highfield Junction, shop number 4 where it is currently trading from. He testified that in 2017 he was staying with his father who was in very good health.

According to the defendant, their late father was never diagnosed with dementia at any time. He said he had never seen any documents to that effect nor any prescription.

According to the witness, he had a first letter in which Doctor Kusuta never spoke of dementia. This alleged first letter is however not part of the bundle of documents.

This witness said that as Doctor Kusuta said that he first attended to Mr Magara in March 2021, there is no way he would have known of his condition in 2017.

Commenting on the nature of the relationship between the plaintiff and their late father, the defendant said it was horrible and painful to watch and their father even called the plaintiff a devil because of his violence in the way he would speak to their father.

The plaintiff is alleged to have moved to stay with his father when he was fifty-eight years old and unemployed. He is said to have moved in with his mother-in-law, sisters in law plus his wife and children. Their father is said to have hated this invasion, especially as the plaintiff was not paying any utility bills leading to the electricity bill shooting up to US$5000. Of the children brought, it is alleged that one was plaintiff's stepson from his wife. The defendant states that it was him and his wife who covered the electricity, water and grocery costs up to $10 000. 00. This is alleged to have been their father's breaking point and he sent plaintiff and his company packing.

The defendant claims to have first known about the will from Mr Makanda after his father's death in the first week of August 2021.

During cross examination, it was put to the defendant that he had extended the house and he explained that his sister Ruth had put in a slab in the 90s and then put in the extension which is one bedroom from what used to be the porch.

He also stated that the plaintiff had moved in with his family and company in June 2010 until 2017. This moving in was said to have been staggered with plaintiff and his wife moving in 2010, then 2011 it was stepson Tafadzwa. Some three years later the mother-in-law is said to have started by visiting then she stayed. Thereafter the wife's sisters including one from South Africa would occasionally come and stay for as long as she wanted plus another two from Mbare. The witness explained that the lounge would be used as a bedroom, his father had his own bedroom, as he did whilst the plaintiff and his wife and stepson used the other bedroom.

The plaintiff and his family are said to have been hiding bills and the accumulated bills running to about US$10 000.00 were cleared by the defendant.

The defendant stated that he has family in England but also runs a business here in Zimbabwe and in Lilongwe, Malawi.

It was put to the defendant that in April 2017 he had supported Ruth Magara in getting a peace order against the plaintiff. He explained that the plaintiff was resisting moving out of the house, yet their father no longer wanted him there as he was abusive.

The defendant insisted that the signature on the will was that of their late father as the Commissioner of Oaths Mr Makanda presided over it.

The defendant's evidence that the POSB had done a mental health check was questioned and he explained that banks do these checks to protect elderly clients.

Mr Aleck Makanda was the second witness to testify in support of the first defendant's case. He explained that he is Commissioner of Oaths based at Machipisa Business Centre. He said that he met the defendant when he first met the late Mr Magara. Mr Magara had gone to his office and explained he wanted assistance in writing a will to deal with his property. On this day Mr Magara is said to have been accompanied by two of his children who were in the car.

There was a subsequent meeting at Mr Magara's house, the deceased is said to have said he wanted to appoint one of his sons as heir upon his demise. He also wanted to know about payment for the will and indicated that the first defendant would pay for it. He says he then advised him to give first defendant a special power of attorney to enable him to pay for the will, amongst other things. He then executed the special power of attorney appointing the first defendant. That power of attorney appointing the first defendant. That power of attorney appears on page 76 of the record and is ST5.

Another visit was made to Mr Magara's house for the drafting of the will.

Mr Makanda explained that he was given instructions that the defendant should become the sole owner of the immovable property. This has dictated to him and he wrote it in the form he had brought, read it out to Mr Magara who confirmed that the will reflected his instructions and he proceeded to sign.

The late Mr Magara is said to have explained that he was not in good books with the plaintiff and his daughter had fallen in love with his friend. The father is also alleged to have said that at some point, the plaintiff had wanted to sell the house behind his father's back.

Afrter the drafting of the will, Mr Makanda said that he called a legal practitioner, one Isaiah Sithole and took him to Mr Magara's house and introduced him to assist including on the lodging of the will.

When he went for the drafting of the will, Mr Magara is said to have dismissed a young man, presumably a worker and that left only the two of them. The witness denied that the will was forged by the first defendant as the late Mr Magara endorsed the signature in his presence.

Mr Makanda explained in cross examination that he has been a commissioner of oaths for 22 years and is a retired army captain who also runs a small debt collection company.

The witness said he had not divulged the contents of the will to the defendant until his father's demise.

It was put to the witness that as a Commissioner of Oaths he was not supposed to drafts wills. To this, Mr Makanda retorted that had assisted then roped in the lawyer for further management.

Counsel stated that it was an offence for the witness to draft wills. Mr Makanda said he had been careful to rope in the lawyer who had endorsed his source document, and he had no knowledge of a law barring him from drafting wills.

The witness was questioned on the distribution list on p80 of the record which is commissioned but not signed. He explained that this was just a comment and the complete will is on p79 where the deceased signed. The fact that the will was accepted by the Master was explained to mean that he had done a good job.

When asked whether he would be able to tell if someone has mental challenges especially if they are elderly, he said he would from their manner of speaking and walking though this might not apply to everyone suffering from dementia. The witness stated that the deceased conveyed his instructions lucidly and there was no reason to doubt his mental capacity.

Analysis of evidence

The plaintiff claimed that his father was admitted at Parirenyatwa Annex hospital in 2003 through their sister Ruth and her friend. She was however not called to testify. According to him, there was no further follow ups at Parirenyatwa Annex hospital, as he did not have finances. On the contrary Doctor Kusuta testified that according to the history given to him the deceased had been admitted at Parirenyatwa Annex hospital and another unnamed private institution. He did not say the patient had defaulted due to failure by the family to get him treated due to lack of finances. On the contrary, his narrative was that they said they had attended severally at Parirenyatwa Annex hospital and some private doctors to no avail as all treatment had not worked. The family is said to have then said to him in 2021, that there was no need for any medication for dementia. This key inconsistency is worrying especially as there are no medical reports or prescriptions from 2003. All there is, is Doctor Kusuta's report of 2021 yet the will was executed in 2017.

The plaintiff glossed over his relationship with his father and said that at the point of his departure in 2017, they were in good books, this is a stark contrast from what emerged in evidence. It came out that at some point there was a peace order. The plaintiff is said to have gradually moved in with his wife, stepson mother in-law and 3 sisters in-law would come and go at will but were seemingly camped there. Against this backdrop is the unrefuted claim that utility bills ran into several thousands of United States dollars and the plaintiff did not lift a finger to pay leaving the burden on the first defendant. In his own evidence, the plaintiff said that the police were involved as his father was a retired senior police officer. This does not point to any cordial relationship. The plaintiff's attempt to place all the blame on the first defendant and Ruth was not convincing.

The plaintiff did not help his case by seeking to disown the same standard sample documents which he had given to the handwriting expert when cracks began to appear in his case.

I did not find the plaintiff to be a credible witness due to the above reasons.

The handwriting expert could not satisfactorily explain away the seeming inconsistencies in all standard samples amongst themselves and as against the questioned document. He did not consider the effect of age on variations in handwriting amongst other factors. I generally found the handwriting expert's evidence unsatisfactory given the factors he conceded to under cross examination. He fell short of accepting that the deceased signed all his documents in varying ways as shown by the different looping and angulation, amongst other things.

The doctor's expert evidence unfortunately covered the time of his attendance on the deceased, which was from March 2021, some four years after the deceased had executed his will. Though he made conclusions about the degenerative nature of dementia, he conceded that this may lead to executive dysfunction, but he cannot be sure of the extent of this. The probity of his evidence from the period stretching from 2003 was dented by the fact that the history he claimed to have gotten from the family was not tallying fully with that of the plaintiff.

His evidence was therefore not of much use to assist the court in resolving the question whether the late Pepukai Simpisio Magara had the capacity to depose to a will "during the relevant period." (my emphasis) such relevant period is 22 May 2017.

The plaintiff unwittingly included the power of attorney document executed a day before the will as a standard sample. Included too were documents signed in 2012 when the doctor said

there would be executive dysfunction. It was disingenuous for the plaintiff to question some of the standard samples he had supplied.

The evidence which was led in support of the plaintiff did not tilt the scales in his favour. On the other hand, the first defendant gave his evidence clearly. He was not successfully controverted in his claim that his father had not suffered from dementia from 2003. His evidence on the unhappy relationship between the plaintiff and their late father was clearly backed up with probable causes for the same. His claim that the plaintiff had tried to sell the house behind their father's back was not refuted. He accompanied his father to Mr Makanda's offices.

The first defendant testimony was corroborated by that of Mr Makanda who was instructed by the deceased to write the will and used a form to fill in the instructions. Mr Makanda clearly related his role in the will drafting including how he got a lawyer involved at the end. He was unshaken under cross examination when he was quizzed about his failure to appreciate his role as commissioner of oaths. He correctly stated that he was unaware of any law which barred him from assisting someone in drafting a will. Mr Makanda confirmed that the deceased had signed the will in his presence. I found the first defendant and Mr Makanda to be credible witness.

Application of the Law to the facts

Section 4 of the Wills Act [*Chapter 6:06*] provides as follows:

> "Capacity to make a will
>
> 1. Subject to this Act, every person who is over the age of sixteen years may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of this act
>
> …….
>
> 4. The burden of proving that
>
> (a) At the time of making a will the testator was mentally incapable of the appreciating the nature and effect of this act; or
>
> ……..
>
> Shall rest on the person alleging it"

In *casu* it is the plaintiff alleging that the late Mr Magara was mentally incapable of appreciating the nature and effect of his act. He bears the onus to prove same. From my analysis of the evidence, he has failed to prove that.

In the case of *Chitsamatanga & Ors* v *Chitsamatanga & Ors* HH 32/11 the plaintiff approached the High Court seeking an order declaring the will of the late *Chistamatanga* dated 26

May 2000 null and void. It was alleged that at a time the will was executed the deceased who was aged eighty-six was not in a mental state to appreciate the nature and effect of his act. One averment made was that the testator had bequeathed his entire estate to the first defendant contrary to his dying declaration that his estate devolved upon all the surviving children and his wife. The court held that the plaintiff failed to establish on a balance of probabilities his averments. Absolution from the instance was granted.

In *Matanga* v *Denhure and the Master* HH 87/08 the court in dealing with a case involving a challenge of a will on grounds of mental incapacity stated that the one who alleges must prove and that there was need for medical evidence from those present at the time of writing the will and need for an expert where allegations of forgery are made.

In *Kethel* v *Kethel* 1948 (3*) SA* 797 an action was brought to set aside a will on the grounds of the testator's mental incapacity. There was evidence that when the testator made the will he was suffering from arteriosclerosis, the effect of which was said to be gradual slowing down of his mental faculties. The court held that the evidence presented fell far from short of convincing the court that the testator was mentally incapable of making his will in 1947.

This instant case suffers the same fate. It is not enough for plaintiff to hold on to some alleged declaration by his father and mother that the house was for the family and could not therefore be sorely bequeathed to the first defendant in the face of the will accepted by the second defendant. The mere advanced age of the late Mr Magara is not enough too as that does not mean mental incapacity. This is as per *Chitsamatanga supra.*

It was incumbent upon the plaintiff to provide medical evidence of the mental state of the testator as of 22 May 2017, not some four years later. I rely on *Matanga v Denhure supra* for this conclusion. I have already impugned the forensic expert's evidence as unsatisfactory.

The doctor's evidence relating to the degenerative nature of dementia which he only diagnosed in 2021 well after the will was executed is inadequate given the findings *Kethel V Kethel supra*. Doctor Kusuta's evidence fell far short of convincing the court that the late Pepukai Simplicio Magara was mentally incapable of making his will in May 2017.

Costs

The first defendant prayed for costs on a higher scale, but these were not motivated for. I will award cost on an ordinary scale.

Disposition

The plaintiff having failed to discharge the onus of proving that the late Mr Pepukai Simplisio Magara was mentally incapable of making his will in May 2017, the matter be and is hereby dismissed with costs.

Venturas and *Samkange*, plaintiff's legal practitioners
*Kwiriwir*i *Law Chambers*, first defendant's legal practitioners