MAGAYA OBERT CHITSAMATANGA
and
MURORO AARON CHITSAMATANGA
and
BOAS CHITSAMATANGA
and
DORCAS MASHINGAIDZE (nee CHITSAMATANGA)
and
GRACE BWATIRIMBA (nee CHITSAMATANGA)
and
VONGAI CHARERA (nee CHITSAMATANGA)
and
MAGRET MUGOMBEDZE (nee CHITSAMATANGA)
and
ESINA NHERUDZO (nee CHITSMATANGA)
and
BERITA DENHERE (nee CHITSAMATANGA)
and
RIDIA CHITSAMATANGA (nee TEMBO)
versus
FANNUEL MOYO CHITSAMATANGA
and
GUTU & CHIKOWERO ATTORNEYS AT LAW
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 31 July 2007, 1, 2, 3 August 2007,
24, 25, 26 September 2008 and 2 February 2011

T Chipano, for the plaintiffs
V Muza, for the defendants

MAKONI J: The plaintiffs approached this court seeking an order declaring the will of the late Chitsamatanga, dated 26 May 2000, null and void, that the testator died intestate and an order for costs.

The basis for the order being sought is that at the time the testator executed the will, he was not in a mental state to execute a valid will as he was aged 86 and was senile.

Alternatively the testator could not appreciate the nature of his actions as he had high visual impairment. This necessitated that the will be read to him and he could have been misled into executing the will.

Alternatively the testator executed the will under the undue influence of the first defendant. The basis for the averment is that the testator bequeathed his entire estate to the first defendant contrary to his dying declaration that his estate devolves upon all his surviving children and his wife. The testator appointed the first defendant's attorneys as his executors of his will.

Further, alternatively, the testator executed a will contrary to the laws of Zimbabwe in that the will completely disinherits his only surviving spouse married to him in terms of the Marriage's Act [*Cap 5*:*11*].

The background to the matter is that the tenth plaintiff was married to the testator in terms of Marriages Act [*Cap 5*:*11*]. All the other plaintiffs and the first defendant are children born out of the marriage with the first defendant being the first born. During his lifetime, the testator was the registered owner of farm number 96 Lancanshire in Charter District measuring 125,581 8 hectare ("the farm"). He held it under Deed of Grant Number 5990/76. On 26 May 2000, the testator executed a will in which he bequeathed his entire estate, more specifically, the farm, to the first defendant. The testator passed on on 13 January 2005. After that the first defendant with the assistance of the second defendant registered the estate without consulting or informing the other members of the family including the tenth plaintiff. She only became aware when she sent the ninth plaintiff to the Master of the High Court to enquire about the procedure to register an estate. She consulted the other plaintiffs and they agreed to mount the present challenge to the will.

The tenth plaintiff was 92 years old when she testified in court. She might have been of advanced age but she had a very sharp mind. Her evidence was very clear that it has always been her husband's intention that all her children live on the farm. All the male children had been invited to come and set up their homes on the farm. The females were advised that in the event that they had problems in their marriages they could always come and live on the farm.

She was also very clear that they never went to Chivhu with the first defendant for the purposes of executing a will. The only time they requested the first defendant to accompany them to Chivhu was for the purpose of closing their bank accounts. She even recalled the amount she got which she then gave to the first defendant for safe keeping with instruction to hand it over to her relatives when she passed on.

The next witness Obert Chitsamatanga is a son to the testator and the first witness. He confirmed his mother's evidence that it had always been his father's wish that all his children

live on the farm. He also confirmed that his parents went to Chivhu in the company of the first defendant, to close their bank accounts. He did not know anything about the will until his mother had sent his sister to the Master of the High Court. They were advised by the magistrate at Chivhu to contest the will since it disinherited their mother.

He had not moved onto the farm as he had established his home in the communal lands. All his other brothers except for Boaz had been invited to come and set up homes on the farm. Boaz is mentally challenged. He was very clear that the signature on the will does not read Jairos. He said it was just a sribble. He said the first letter was J but he could not make out the others. He maintained this position even under searching cross-examination. He said after the deceased received treatment to his eyes, his vision was blurred. He would identify you by your voice if you were some distance away from him. The deceased had gotten to a stage whereby he would lead him wherever he wanted to go.

In cross examination, he was shown exhibit number 5. He agreed to writing the letter on behalf of the deceased. He denied that it suggested that the first defendant was being invited to take over the farm. My own analysis of the document does not support that position by the first defendant. The first defendant was being invited to come to the farm to discuss issues relating to the farm.

He denied that his father called for a meeting on 9 January 2005 to discuss about the inheritance of the farm. One of the people present of that day was Chief Chapwanya who was a deacon in the Anglican Church. He had come to pray for his father. He was accompanied by his nephew Jongwe. The only issue that was raised by the deceased was Aaron's disrespect for the first defendant.

The next witness was Muroro Aaron Chitsamatanga, the second plaintiff and the third born to the late Chitsamatanga and the tenth plaintiff. His evidence was to the effect that the signature on the will could not be his father's signature. His father would sign J Chitsamatanga. He never saw any document where he signed 'Jairos'. He could not read the signature on the first page of the will. He was shown a book where the late would record his transactions. He identified the late's signature which reads "J Chitsamatanga". By the time it is alleged that he made the will, he was now using his thump print for a signature. This is after he had had his eyes treated in 2002. He was generally physically fit. He could not comment on whether his late father led the first defendant to the lawyers who drafted the will as he was in Bulawayo. He first got to know of the will when he was sent by his mother to Chivhu court to

register the Estate. He was then advised that those with civil marriages register their estates at the High court. His mother then sent his sister.

On 9 January 2005 the first defendant sent the first plaintiff to the village to call people who then gathered. There was chief Chapwanya, Jongwe, the first defendant, Boaz and himself. The only issue that the testator talked about was his (witness) disrespect of the first defendant. He never talked about the farm. It was the first defendant's hope that he could do so. He could not comment on whether the first defendant put undue pressure on the deceased to execute the will as he was in Bulawayo.

He indicated that he queried para 8 of the declaration with his erstwhile legal practitioners Messrs Musunga & Associates. He did not give them instructions that their father was senile. They did not agree on that issue that is why they changed lawyers.

He denied that his father signed the will. He conceded that he was not a handwriting expert but he knew how his father signed on documents. He commented that there was a difference between the signature on the first and the second page. He disputed that this could be attributed to the fact that his father was frail and had blurred vision. In any event by that time his father was using his thump as a signature. They failed to get evidence from the bank as they destroy documents after five years.

Under cross-examination he persisted with his evidence that the first defendant called people to the meeting of 9 January 2005. He disputed that it was his father who called for the meeting. He could not understand why his father would call for a meeting to discuss the inheritance of the farm in 2005 when he had executed a will in 2000.

On being asked by the court regarding the issue of senility, he explained that they never based their claim on senility but on the issue of the signature.

The next witness was the ninth plaintiff who is a daughter to the deceased and the tenth plaintiff. Her evidence was to the effect that the signature on the will was not her father's normal signature. She produced a diary where his signature appears on the first three pages. She first came to know about the will when her mother sent her to the Master of the High Court. A lawyer from the firm that prepared the will confirmed that there was a will.

Her parents requested the first defendant to take them to Chivhu so that they could close their bank accounts. His father always said the farm belonged to the children. She confirmed that her father was never senile until he died. Mr Musunga was not acting according to instructions when he put the issue of senility in the summons. After his father had received

treatment to his eyes, she observed that he could no longer read. He advised her that he now used his thump as a signature at the bank. Her parents had no knowledge of wills and of lawyers.

The plaintiff's evidence, in summary, is that the deceased never went to Chivhu, in the company of the first defendant, to execute a will. The signature on the will is not that of the deceased, as he used to sign "J Chitsamatanga", when he could. Later he would use his thump print for his signature. It has always been his wish that all his children live on the farm. He did not call for the meeting of 9 January 2005 and he did not declare the first defendant as his heir. The deceased was never senile.

From the evidence of the third and fourth witness, the issue of senility was never raised with Mr Musunga. He did not act according to their instructions when he included it as a claim in the summons. The issue of senility therefore falls away.

The first defendant gave evidence to the effect that between 1963 and 1972 his father would implore him to come and live on the farm as he was the eldest son. He could not at that time move to the farm because of other commitments. He finally agreed in 1991 and built some houses on the farm. He said the first plaintiff was aware of the fact that his father was asking him to move on the farm. He even wrote the letter dated 3 March 2004. Para 6 of that letter invited him to come and live on the farm as his home.

On 26 May 2000 his father enquired of him whether he was going to Chivhu to get some quotations. The father advised that he wanted him to take him and his mother to Chivhu to settle a certain issue. He took them to Chivhu were his father asked him to stop at the Post Office. From there he led them to 480 Jameson Street. Whilst there he enquired where he could get Gutu Legal Practitioners. He was advised that they had left that address five years back and that they re-located to 248 Goete Street. He drove them to that address where they found the offices of the legal practitioners. He left them there and later came back to collect them when he had finished his business. They were seated by the reception. He does not know what transpired in his absence and he did not enquire of his father.

He commented that his father's eye had been operated on and had no problems. He could see. He attended his daughter's wedding in December 2002. When they visited the legal practitioners, he is the one who led the way.

Regarding the events of 9 January 2005, his evidence was that his father's relatives visited him. These included Chief Chapwanya, his wife, Sidney Jongwe, Rodwell Tashaya,

Majaya Orbert, Francis Chenjerai, Boaz. He was also present. His father raised the issue of Aaron's disrespect for him (the first defendant). He also said if he passed on, the farm would be inherited by him (the first defendant). When this was said, their mother was sitting by the steps that faced the kitchen and she could hear what his father was saying.

He testified that the signature on the will was his father's signature. He produced two letters, exh 9a and 9b. He explained that if you look closely at them, you will note that the letters 'R', 'S' and 'J' match with those on the will. He did not forge the will. He commented that the signatures on the will reflect that the author was old. His father was 85 years old then.

He confirmed using Messrs Gutu & Chikowero as his legal practitioners. He said he got to know about them on 10 March 2005 after his father's death. His brother, Aaron, had obtained a peace order against him, so that he would be prevented from setting foot on the farm. He then decided to consult legal practitioners. He decided to consult those legal practitioners who had assisted his father. He consulted Mr Chikowero ("Chikowero"). When Chikowero went through the affidavit, he enquired of the first defendant whether he was the one who had accompanied his parents to see him. When he answered in the positive, Chikowero advised that the purpose of the visit was to make a will to the effect that upon his death, the first defendant would inherit the farm.

He said at all material times, his mother was aware of the position. She was influenced by Aaron and three of her sisters to shift her position. The other plaintiffs who did not attend, i.e. fourth, third, seventh and eighth plaintiffs had no interest in the matter.

He ended his evidence in chief by commenting that her mother can continue to stay on the farm at her homestead.

In cross-examination he confirmed that he had obtained his father's death certificate and prepared the inventory for the registration of his father's estate. The estate was registered by Messrs Gutu & Chikowero.

On being asked about the contradiction between his summary of evidence and his evidence in chief regarding the issue of whether or not he knew his father's business when he took them to Chivhu, he insisted that he did not know why they had gone to Chivhu. He explained that he gave evidence that his mother's fears were allayed after the will was done because he had been informed by Chikowero when he saw him in connection with the peace order. After his father's death and had got to know about the will, he did not inform his mother and the other siblings as Chikowero had said he will inform them.

He agreed with the plaintiffs that his father would sign J Chitsamatanga but he said he used the signature for his farm business and at the bank. He signed the will "Jairos" as he was aware that the name Chitsamatanga did not appear on the title deed. He denied that his father was now using a thump print.

On being asked by the court to clarify how he had come to know Chikowero, he said he taken his parents to the reception of Messrs Gutu & Chikowero and left them there. When he had finished his business he went to collect his parents. He found them seated at the reception. As he was in the reception Chikowero entered and enquired of him whether he was the one who had brought his parents. Chikowero did not introduce himself but he asked him his name. When he told him he just said "Ok". He commented that maybe his name coincided with what he had done. He does not know whether it was by coincidence that Chikowero came to the reception.

His next witness was Benjamin Chikowero, a partner in Messrs Gutu & Chikowero. He is in charge of the Chivhu office. He has been in practice for 11 years.

On 26 May 2000 he received a new file from the reception. The testator and his wife were ushered in. They gave him instructions to execute a will bequeathing his farm to one of his sons Fanuel. He requested for the testators identification particulars and those of Fanuel and the title deed to the farm and was furnished with the documents. The testator requested that he ("Chikowero") be the executor of the estate. He then requested the testator and his spouse to leave his office. He drafted the will. When it was ready, he called them back to his office. He read the first draft to them. The testator confirmed the correctness of the contents of the draft will. The final copies were done. He requested his receptionist and two students on attachment to come to his office. He read the final draft in their presence. The testator again confirmed the correctness of the contents. He signed on the cover of the will. He directed the testator and witnesses where to sign. The testator did not object to the will being lodged with the Master of the High Court for safe keeping.

There was no suggestion that the testator was mentally unstable. He gave his instructions very well. He executed the will in the official language but explained the contents in the vernacular. When he went to the reception to leave the will he met the beneficiary who was taking away the testator and his spouse. He enquired as to who he was and he told him. He got to know of the testator's death when he was consulted by the first defendant in connection with the peace order application filed by the second plaintiff. He advised the first defendant

that he will register the estate first and then advise all the interested parties. He registered the estate. On a date when he was at the Master's Office, he met the testator's wife and others intending to register the estate. He then advised them that he had registered the estate.

Under cross examination, he insisted that he saw the testator's spouse and some other person at the Master's Office. He said the meeting at the Master's office and the peace order proceedings pre-empted his disclosure of the will to the interested parties. He did not include the issue of the will in the notice of opposition to the peace order proceedings as it was irrelevant. He denied that the delay in advising the interested parties about the existence of the will smached of bad faith and that he had an interest in the estate. He admitted that it was not wise to take up the peace order matter when he was an executor in a will where the first defendant was a beneficiary.

He does not know whether the first defendant knew the purpose of the visit by his parents. He said it would be speculation to say he knew since the testator produced his identification document. He said the tenth plaintiff was present throughout the process. He denied that the first defendant was his client before the peace order issue. He insisted the testator and his wife came to his offices as he satisfied himself through their identification documents.

The next witness was Edwin Mharadzi Muzembe Chapwanya. He is the Chief of the Chapwanya clan in Buhera. He is related to the testator through ancestry. On 9 January 2005 he attended a gathering at the testator's farm. He was invited by the first defendant. He went with his uncle Sidney Jongwe and his wife. Present were the testator's children i.e the first defendant, the first plaintiff and second plaintiff. The testator's wife was sitting outside on the steps. Also present was Rodwell Tashaya and Francis Chenjerayi.

The testator talked about the second plaintiff's disrespect for the first defendant. He said in the event of his death, the farm would be inherited by the first defendant as he is the eldest son. He did not want the second plaintiff to built on the farm but if he needed land to farm he would consult the first defendant as he had assaulted him. The tenth plaintiff was within hearing. He denied that the sole purpose of the meeting was to talk about the second plaintiff's disrespect for his brother.

In cross examination, after some probing, he admitted staying at the first defendant's place awaiting to give evidence. He insisted that the tenth plaintiff was not in the kitchen.

As I have already alluded to in this judgment, the plaintiffs no longer rely on the ground that at the time of execution of the will, the testator was not in a mental state to execute a valid will in that he was aged 86 and senile. It was their evidence that they never gave such instructions to Mr Musunga. The main ground falls away.

The first alternative claim is that the testator could not appreciate the nature of his actions because he had high visual impairment which necessitated that the contents of the will be read to him by some other party. This claim presupposes that the testator executed the will but did not appreciate the nature of his actions. This is in direct conflict with the plaintiffs' evidence. The tenth plaintiff's evidence was that they never visited any lawyers for purposes of executing a will. There is therefore a contradiction in the plaintiff's evidence.

The second alternative in para 11 of the declaration again pre-supposes that the testator executed the will under the undue influence of the first defendant. Again this is in direct conflict with the plaintiff's evidence.

The two above alternative claims resulted in the formulation of the first issue which is whether or not the testator executed the will under the undue influence of the first defendant.

The thrust of the plaintiffs' evidence is that the testator did not execute any will. He did not visit the offices of Messrs Gutu & Chikowero for purposes of executing a will. The signature on the will is not that of the testator. By the time the will was said to be executed, the testator would use a thump print for a signature. He did not know anything about lawyers. The net effect of this evidence is that their late father did not execute a will. Unfortunately this is not what they pleaded in their pleadings.

On the other hand the first defendant's story makes very interesting reading. He is led by his old and fragile father to offices of legal practitioners. The father must have suspected that the lawyers might need documents. He got possession of the first defendant's I.D. The first defendant does not talk about this aspect in his evidence. He speculates that his father might have signed "Jairos" because the name Chitsamatanga does not appear on the title deed. Chikowero had, according to his evidence, the title deed and the testator's I.D. He did not comment about the discrepancies of names. By chance, the first defendant and Chikowero meet in the reception as the first defendant collected his parents. Chikowero did not introduce himself but when the first defendant was served with peace order papers he consulted Chikowero. The two arranged for the registration of the Estate without informing the other relatives. Chikowero represents the first defendant in the present proceedings. Of the people

who attended the meeting of 9 January 2005, he decided to call Chief Chapwanya and leaves out the testator's brothers who were present. He hosts the witness and yet the witness had a relative where he initially stayed.

The first defendant's story might make interesting reading but it does not assist the plaintiffs' case. The plaintiffs have failed to establish on a balance of probabilities that the testator executed a will under the undue influence of the first defendant.

The second issue is whether or not the will is contrary to the laws of Zimbabwe in so far as it disinherits the surviving spouse. In my view this is a very important point of law which has to be determined by our courts. However the parties in this matter did not give it the due importance it deserved, in their submissions. The plaintiffs' dealt with the issue in two paragraphs and the defendant in one paragraph. The submission do not offer any assistance to the court for it to make an informed decision.

I will refrain from making a determination of the issue based on the cursory submissions made by the parties.

In the result the court will make the following order:

1) The plaintiffs are granted absolution from the instance.
2) The plaintiffs to pay the defendants costs.

Madanhi Mugadza & Co Attorneys, plaintiffs' legal practitioners
Gutu & Chikowero Attorneys-At-Law, 1st and 2nd defendant's legal practitioners