

BRENDA CAROL LEEPER N.O.
versus
MICHAEL CHITATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 17, 24 March and 4 May 2016

Opposed application

D Ochieng, for the applicant
Respondent, in person

TAGU J: The applicant, in her capacity as an executrix in the estate of the late Marie Joan McKelvey having been duly appointed as such by the Additional Assistant Master of the High Court of Zimbabwe, instituted proceedings against the respondent under Case No. HC 2334/15 (the main claim), claiming the eviction of the respondent and all persons occupying through him from the premises known as 68 Central Avenue, Harare. The property in question is an asset of the estate of the late Marie Joan McKelvey. The respondent was an employee of the deceased who occupied the property solely in his capacity as employee.

The history of the matter is that the respondent brought proceedings under Case No. HC 2573/14 claiming an order nullifying the last will and testament of the deceased and interdicting the sale of the property. The applicant then applied for the summary dismissal of the respondent's claim in case No HC 2573/14 on the basis that it was frivolous and vexatious. The respondent opposed the application for summary dismissal but failed to take further steps to prosecute his opposition for over 2 months. In the circumstances the applicant submitted that the respondent's entry of an appearance to defend the main action was an abuse of process and move for summary judgment to be entered against the respondent. The applicant's argument is that the respondent's employment with the deceased ceased three

months after the employer's death, that respondent's right to occupy any part of the property ceased one month after the end of his employment and that whereas the deceased died on 6 March 2009, the respondent lost all right to occupy any part of the property four months after that date, to wit, on 6 July 2009.

The respondent who appeared in person did not file any heads of argument. He however, stated that he was relying on his notice of opposition and made a few oral submissions. In his submissions the respondent told the court that the deceased who was his employer showed him a will that showed that he was to be an heir to the deceased. He said when he saw the notice of sale of the house in question it shocked him and he had to report the matter to the police. According to him the applicant's case is based on forgery. That is the reason why he is challenging the appointment of the applicant as an executrix and feels that the Will that was produced was fraudulently obtained. He claimed to be the rightful heir to the estate of his employer having been appointed in terms of a Will that has disappeared. To make matters worse his witness who had also seen the Will before it disappeared cannot be located and is believed to be somewhere in the Republic of South Africa.

In her heads of argument the applicant stated that a defendant will only defeat an application for summary judgment if he can:

“raise a *bona fide* defence – a “plausible cause” – with “sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence”. He must allege facts which, if established, “would entitle him to succeed”. See *Jena v Nechipote* 1986 (1) ZLR 29 (S), *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S – 139 – 86; *Rex v Rhodian Investment Trust (PVT) Ltd* 1957 R& N 723 (SR).”

Kingstons Ltd v LD Inson (Pvt) Ltd 2006 (1) ZLR 451 (S) at 458F – G.

However, if he should simply burden the court with contradictory averments that are demonstrably insincere, then he cannot be *bona fide*, and must fail.

Niri v Coleman & Ors 2002 (2) ZLR 580 (H) at 585F – 586D.

In *casu*, the applicant submitted that the respondent gave different versions which are difficult to prove. She said a cursory comparison of the respondent's averments in this and other litigation between the parties which the court was asked to take judicial notice of will confirm that the respondent is simply making his story up as he goes along and that he appears to be doing so in a bid to prolong the litigation and extent his wrongful occupation of the premise. For example, according to para 5, 6 and 7 of his declaration in case No. HC

2573/14, the essence of his claim was that he was the deceased's employee and the deceased "told him that he would benefit from her estate if she dies first". He repeated this first version in his affidavit in Case No. HC 9212/14.

She said subsequent pleadings and submissions in Case No. HC 2573/14 and Case No. HC 9212/14 pointed out the difficulty that even if the respondent were telling the truth, the proof of those dubious allegations would not entitle him to the relief sought. The deceased having "told him that he "would be" a "beneficiary" (which is itself a vague term) would not have been a valid testamentary disposition. See Wills Act [*Chapter 6.06*]; *Tavengwa v Tavengwa* 2005 (1) ZLR 33 (H) at 34 G- 35D. Since the respondent is in no way related to or entitled to be maintained by the deceased, nothing less than a valid Will could make the respondent a "beneficiary" of any kind. See Corbert, Hofmeyer and Kahn, *The Law of Succession in South Africa* (2 ed) at p 33. Even if the respondent were to prove that the deceased's Will should be invalidated (which he had no *locus standi* to do anyway) – *Kachingwe & Ors v Minister of Home Affairs & Ors* 2005 (2) ZLR 12 (S) at 22 G-23C – the invalidation of the Will would not have entitled him to any "benefit since he was not an heir on intestacy, and the alleged statement of the deceased would not have changed that fact.

Further inconsistencies appeared in para B1.2 where the respondent in case HC 9212/14 claimed that on some unstated date the deceased showed him a copy of a Will, and in para B1.5 presented a character named Tawanda Ndabambi whom he said also saw a copy of the Will in a drawer. Lastly the applicant attacked the veracity of the respondent's defence by saying in this opposing affidavit he invented a fourth version that he actually saw the Will. She argued that if indeed the respondent was telling the truth, surely he should have made such revelations at the first opportunity in his declaration in case HC 2573/14, or at least the next affidavit in case HC 9212/14 or even on the third occasion in his heads of argument in case HC 9212/14.

To sum it all, the applicant submitted that firstly respondent talked of a verbal assurance that he would be a beneficiary, and then said he heard of a Will that made him a beneficiary, and now says that he actually saw that Will. Unlike in the case of *Ashanti Goldfields Zimbabwe Limited v Matimura & Ors* 2011 (1) ZLR 270 (H) at 277, he failed to produce a copy of that Will to substantiate his claims.

Having considered the submissions by the parties I find that the respondent has failed to raise a *bona fide* defence to the applicant's claim both in fact and in law. There is no way an employee can become an heir to an employer unless specifically stated so in a Will. Even if he manages to succeed in having the deceased's will nullified he cannot automatically become a beneficiary to the estate. The respondent will have difficulties in proving the existence of another Will other than the one produced by the executrix. He has no copy and cannot tell where the original Will is. His vital witness has since migrated to the Republic of South Africa and it is a futile exercise to challenge the validity of the current will. He simply does not have any *locus standi in judicio* and is merely prolonging the winding up of the estate unnecessarily. The reason why he is clinging to the house is that he is deriving a benefit out of it by running his private business depriving the rightful beneficiaries of their rights.

In the circumstances it appears to me there is no impediment to the granting of the order sought by the applicant. It is therefore ordered as follows:

IT IS ORDERED THAT-

1. Summary judgment is hereby granted in Applicant's favour pursuant to which the Sheriff or his Deputy is directed to eject Respondent and all persons claiming occupation through him from the premises at 68 Central Avenue, Harare.
2. Respondent shall pay the Applicant's costs of suit.

KEVIN J. ARNOTT, applicant's legal practitioners
Michael Chitate, in person