REPORTABLE (29)

Judgment No. S.C. 133/2001
Civil Appeal No. 292/00

(1) EGA WASHINGTON SANSOLE N.O.
(2) CECILIA ZODWA NEHWATI
(3) THE ASSISTANT MASTER - HIGH COURT

v (1) CHARLES NCUBE (2) ANNE JOSEPHINE NCUBE
(3) NEGOLOBELO DANIEL NEHWATI (4) MANO NEHWATI

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
BULAWAYO, NOVEMBER 27, 2001 & MAY 30, 2002

E W Sansole, for the first and second appellants

G Nyoni, for the respondents

CHIDYAUSIKU CJ: The first appellant is the executor of the estate of the late Francis Mwene Nehwati (hereinafter referred to as "the deceased"). The validity of the will, in terms of which the appellant was appointed executor, was successfully challenged in the court *a quo*. The second appellant is the wife of the deceased and the main beneficiary, in terms of the will being challenged, of the deceased's estate. The respondents are relatives of the deceased who successfully applied for the setting aside of the deceased's will.

The respondents, the applicants in the court *a quo*, contended that the deceased revoked the disputed will before his death. The learned judge in the court *a quo*, having agreed with the above contention, concluded as follows:

"In my view, the second respondent is still entitled to benefit as if there was no will because although the previous will was revoked, there was not yet a valid will to replace it at the time of the deceased's death.

Accordingly, I make the following order –

1. The will of the deceased Francis Mwene Nehwati executed on 14 December 1990 is declared to have been revoked by the deceased prior to his death.

2. The estate of the deceased is to be distributed in terms of the Deceased Estates Succession Act [*Chapter 6:02*].

3. The second respondent's rights to the estate are to be regulated by section 3 of the Deceased Estates Succession Act.

4. The Assistant Master is to convene the usual meeting of the parties and consider appointing an independent executor and administrator of the estate.

5. The costs of these proceedings are to be borne by the estate."

The appellants were dissatisfied with the judgment of the court *a quo* and now appeal against it.

The facts of the case are as follows –

The deceased signed and executed a will on 14 December 1990. The will was prepared by the first appellant who is a legal practitioner and a former friend of the deceased. In terms of the will the first appellant is the executor of the deceased's estate and the second appellant is the main beneficiary.

Shortly after the signing of the will the second appellant left the matrimonial home and commenced divorce proceedings against the deceased. According to the pleadings in the divorce case, it was common cause that the marriage had broken down irretrievably. The parties, however, disagreed on how the

matrimonial assets should be distributed. Negotiations over the distribution of the matrimonial property were protracted and acrimonious. The deceased died on 24 February 1999 before the negotiations were concluded and the divorce could be granted.

When the second appellant left the matrimonial home she went to live at the first appellant's house and later moved to his farm just outside Bulawayo. The deceased and the first appellant were the best of friends and this development soured that friendship.

The first respondent averred in his founding affidavit that the deceased had advised him that he, the deceased, had withdrawn his will from the first appellant with the intention of formally cancelling it and executing another will excluding the second appellant as a beneficiary of his will. He also avers that he was advised by Sansole & Senda, the first appellant's firm of legal practitioners, which firm had drafted the will, that the deceased had taken his original will and that they did not believe it to be in their possession. This turned out to be incorrect as the original will was subsequently found at the offices of Sansole and Senda.

The first appellant's response to the averment that the deceased had retrieved the original will from his firm of legal practitioners is contained in para 10 of the first appellant's replying affidavit. It reads as follows:

> "The correct position is that it is not a copy of the deceased's will which I could not locate. It was the original. The safety of all original wills of my clients are kept in a separate cabinet which is under the care and control of my secretary. When I retrieved the file, I saw there on the copy of the will … an entry made by me on the copy that the deceased had taken his will.

> Subsequently, my secretary, Mrs Constance Ngwenya, advised me that the original was, in fact, in the cabinet. As a result, I informed the applicant of this discovery. If the applicant is challenging the validity of this will, he has not said so."

On this evidence, the probabilities are that both the first appellant and the deceased believed erroneously that the copy given to the deceased was the original will.

The first appellant also initially agreed to withdraw as executor upon the request of the respondents. The second appellant objected and the first appellant withdrew his resignation as the executor.

It has also been averred, and not seriously disputed, that while the deceased was in Hwange Hospital he sent for Mr Justice Kamocha. Mr Justice Kamocha did visit the deceased and, upon the deceased's request made during this visit, prepared a draft will for the deceased to sign. The deceased succumbed to his illness and died before signing the will prepared by Mr Justice Kamocha.

The deceased, after separating from the second appellant, married Jessie Ncube in accordance with African custom.

The appellants' contention, which was rejected by the court *a quo*, is that the will executed by the deceased on 14 December 1990 is valid, was never revoked and accordingly the deceased's assets should be distributed in accordance with that will.

The learned judge in the court *a quo*, as I have already stated, rejected the contention and concluded that the will had been revoked. The learned judge also

rejected the unsigned will as the new will and ordered that the estate of the deceased be distributed on the basis that he had died intestate. I find myself in agreement with the reasoning and conclusion of the learned judge in the court *a quo*.

It is common cause in this case that a will can be revoked by a testator. I agree with this proposition. It is also common cause that the *onus* to prove revocation rests upon the party alleging such revocation and such *onus* is discharged on a balance of probability – see *Marais v The Master and Others* 1984 (4) SA 288; *The Law of Succession in South Africa* by Corbett, Hahlo, Hofmeyr and Kahn p 86.

The issue that fell for determination in the court *a quo*, and which this Court has to decide, is the sufficiency of the evidence adduced by the respondents to prove that the deceased revoked the disputed will before his death.

The respondents relied on both direct and circumstantial evidence as proof of the revocation. In particular the respondents relied on the following direct and circumstantial evidence –

(a) the deceased's withdrawal or repossession of his will from his erstwhile legal practitioner, the first appellant;

(b) the pending divorce between the deceased and the second appellant and the deceased's customary law marriage to Jessie Ncube before his death;

(c) the deceased's instruction to Mr Justice Kamocha to draft him another will.

I will deal with the above *seriatim*.

The deceased withdrew his will from the first appellant, who had prepared it and obviously kept it for safe-keeping. The Court can take judicial notice of the fact that most people keep their wills with their legal practitioners, bankers and such like people held in trust. Why then would the deceased seek to withdraw his will from the first appellant? No explanation by the first appellant has been proffered. The first appellant was not only the deceased's legal practitioner but his personal friend.

After withdrawing the will, the deceased did not take it to another lawyer or institution for safe-keeping. Given this situation, the inescapable inference is that he repossessed the will from the first appellant with the intention of altering it. Indeed, there are numerous other factors pointing in the same direction. It is virtually undisputed that the deceased told his son, the first respondent, that he repossessed his will because he wished to revoke it.

Apart from this, where a will that was known to be in the possession of the testator cannot be found after his death, there is a presumption that it was lost or destroyed by the testator *animo revocandi* – see *Nelson v Currey* (1886) 4 SC 355 at 356; *Wynne v Estate Wynne* 1908 25 SC 951 at 960; *Ex parte Slade* 1922 TPD 220; *Ex parte Redgrove* 1941 (2) PH G.50; and *Davis v Steel and Ericksen N O* 1949 (3) SA 177 at 183.

This presumption is based on the probability that a testator will take steps to preserve his last will and that if it is lost or destroyed he would become aware of the loss and would take the necessary steps to restate his disposition in a new will. See *Ex parte Warren* 1955 (4) SA 326.

In casu, the deceased was not only aware of the loss of his will but took steps to draft a new will which, if it had been properly executed, would have effectively revoked the disputed will.

The unaccounted for will was a copy and not the original. According to *Voet* 28.4.1 and *Van der Linden* Inst 1.9.11., the destruction of a copy of a will will not constitute a revocation of the will. The accuracy of this wide and sweeping proposition is doubtful. The learned authors Corbett, Hahlo, Hofmeyr and Khan in their book *The Law of Succession in South Africa* at p 90 comment on this statement of the law by *Voet and Van der Linden* as follows:

> "While it is true that the destruction of a copy of a will does not ordinarily give rise to the inference that the testator intended to revoke his will, it would seem wrong to elevate the views of the above authorities into an immutable rule. There may be clear evidence as to why the original will was not destroyed and that the testator destroyed the copy *animo revocandi*. In these circumstances the destruction of the copy should result in an effective revocation."

The above view of the learned authors is in accord with commonsense. Whether the destruction of a copy of a will constitutes revocation or not is essentially a question of fact and evidence and not law.

In casu both the first appellant and the deceased erroneously believed that the will repossessed by the deceased was the original and not a copy. The deceased must have believed the will that he had was the original. I have some difficulty in accepting that the destruction of a copy in the belief that it was the original could be critical to the determination of the existence or otherwise of the *animo revocandi*.

Turning to the relationship between the deceased and the second appellant at the time the will was repossessed, it is apparent from the pleadings in the divorce proceedings that the marriage had irretrievably broken down. The parties were locked in a serious tussle over who should get what matrimonial property. The second appellant was the main beneficiary in terms of the contested will. It is highly improbable that the deceased would vigorously refuse to give his assets to the second appellant upon divorce but seek to let her have the same upon his death. It is equally improbable that the deceased would marry another woman and bequeath his estate to the woman he was divorcing. All these factors are supportive of the respondents' contention that the withdrawal of and the unaccountability of the will in the possession of the deceased establishes *animo revocandi*.

Finally, the deceased instructed Mr Justice Kamocha to draft another will for him shortly before he died. That will was not properly executed. The court *a quo* was quite correct in rejecting it as the will of the deceased. That invalid will, however, provides explicit evidence of the deceased's state of mind. That document explicitly reveals that the deceased intended to revoke the disputed will. Indeed, if that will had been properly executed, the issue of the deceased's *animo revocandi* in

respect of the disputed will would not have arisen. That *animo revocandi* of the deceased cannot be given effect to, not because it did not exist, but because it was not expressed in the form and manner prescribed by law. It certainly provides evidence to enable the court to determine the state of mind that accompanied the deceased's withdrawal and subsequent loss of the contested will.

In the result, I am satisfied that this appeal is devoid of merit and it is hereby dismissed with costs.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Sansole & Senda, first and second appellants' legal practitioners

James, Moyo-Majwabu & Nyoni, respondents' legal practitioners