VIOLER VAN EYSSEN

Versus

LORRAIN GERLACH (Nee VAN EYSSEN)

And

SHARON VAN EYSSEN

And

RODNEY VAN EYSSEN

And

BELINDA VAN EYSSEN

And

CHRISTINE VAN EYSSEN

And

SHELLY VAN EYSSEN

And

TANIA WOODS

And

MASTER OF THE HIGH COURT

And

RODNEY VAN EYSSEN N.O

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 8 MAY AND 16 MAY 2024

Civil Trial – State Case

B. Masamvu, for the plaintiff
N. Mashayamombe, for the 1st – 5th, 7th – 8th and 10th defendants

KABASA J: The plaintiff issued summons in which she sought the following relief:-

"(a) An order declaring that the last will and testament by the late Kenneth Gilbert Van Eyssen dated 12th April 2016 is null and void on the grounds that the deceased distributed movable property belonging to the plaintiff and that the deceased purportedly subdivided the immovable property being Plot 48 Primula Road, Trenance Bulawayo into various small portions without a lawful subdivision permit.
(b) Declaring that the late Kenneth Gilbert Van Eyssen died intestate and his estate should be administered accordingly.
(c) Cost of suit.

Alternatively
(d) The bequeathing of the plaintiff's movable property and Plot 48 Primula Road, Trenance Bulawayo as per the last will and testament by the late Kenneth Gilbert Van Eyssen dated 12th April 2016 is null and void on the grounds that the deceased distributed movable property belonging to the plaintiff and that the deceased purportedly subdivided the immovable property being plot 48 Primula Road, Trenance Bulawayo into various small portions without a lawful subdivision permit.
(e) Declaring that Plot 48 Primula Road, Trenance Bulawayo registered in the name of the late Kenneth Gilbert Van Eyssen be administered intestate.
(f) Costs of suit."

The claim, as elaborated in the declaration is premised on the fact that the late Gilbert who was married to the plaintiff under the then Marriage Act, [Chapter 5:11] left a will in which he bequeathed, *inter alia*, Plot 48 Primula Road Trenance to his children with each one getting an acre and two of the children getting an acre plus. The plot held under title 3233/1972 and registered in the deceased's name was purportedly subdivided without the requisite subdivision permit.

The claim is therefore anchored on that purported illegal subdivision which the plaintiff contends offends the provisions of the Regional Town and Country Planning Act [Chapter 29:12] thereby invalidating the will.

In defending the action the defendants contended that the absence of a subdivision permit limits the implementation of the administration of the estate but does not invalidate the will. The Regional Town and Planning Act is therefore not applicable.

After pleadings closed the parties attended a Pre-Trial Conference and there agreed that the facts were not in dispute. There was therefore no need to lead evidence save for the legal issue relating to whether in essence the late Gilbert's will amounted to subdividing the land without a subdivision permit.

The parties had not articulated the agreed facts but at the hearing of the matter as an opposed application (See r52 (5)) it was agreed that the facts as reflected in the defendants' heads of argument were the agreed facts.

The agreed facts were set out as follows:-

1. The late Van Eyssen drew up a manuscript will on the 12th April 2016. In terms of this will the testator bequeathed his entire estate to his seven children.
2. The deceased was survived by his wife, the plaintiff herein, to whom he made minor bequeaths of movable assets.
3. The two immovable properties of the deceased, a farm and a plot were shared in his will as follows:-
   The farm: - ½ share each to Rodney and Lorrain Gerlach (nee Van Eyssen)
   The plot: - An acre share each to 4 of the children and an acre plus share to the other 2 children.
4. A map drawn by the late Gilbert shows the location of the shares bequeathed to his children.
5. The title deed shows that the property is 2, 0075 ha in extent, in acres it translates to 4, 9605 acres.

The legal issues to be determined are:-

1. Whether the last will and testament of the late Gilbert Kenneth Van Eyssen had the effect of subdividing immovable property being Plot 48 Primula Road, Trenance, Bulawayo.
2. Whether or not, in the event of the last will subdividing immovable property there was a legal requirement to obtain a subdivision permit before distribution as per the will.

3. Whether the absence of a valid subdivision permit in respect of Plot 48 Primula Road Trenance invalidates the last will and testament of Gilbert Kenneth Van Eyssen.

The will and the title deed as discovered were to be the point of reference in argument. Counsel for the plaintiff's argument was that the immovable property was divided without a Subdivision permit. Such subdivision fell foul of s 39 of the Regional Town and Country Planning Act. The relevant section reads:-

> 39 "No subdivision or consolidation without permit:
> (1) Subject to subsection (2), no person shall –
> (a) subdivide any property; or
> (b) enter into any agreements:-
> (i) for the change of ownership of any portion of a property or
> (ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee or
> (iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or
> (iv) …
> (c) consolidate two or more properties into one property, except in accordance with a permit granted in terms of section forty."

The deceased, so counsel argued, was not exempted from complying with s 39 and by flouting its provisions the effect is to render the will void in t*oto* or alternatively in so far as it relates to the plot in question. Resultantly the plot must devolve upon the beneficiaries through intestate succession.

Counsel cited the case of *Chioza* v *Siziba* SC 4-2015 for the proposition that a flouting of s 39 renders the will illegal and unenforceable.

In *Chioza* v *Siziba* (*supra)* the court stated that the agreement therein was for the sale of an unsubdivided portion of a stand and as at the date of the conclusion of such agreement no permit granted in terms of s 40 of the Act was in place.

The partitioning of the plot constitutes a subdivision and without the requisite subdivision permit, such subdivision is unlawful.

Counsel further cited the case of *X – Trend –A – Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S) where MCNALLY JA said:-

> "Section 39 forbids an agreement for the change of ownership of any portion of property except in accordance with a permit granted under s 40 allowing for a subdivision."

The late Gibson's will violated this provision and so fell foul of the law.

In a nut shell counsel's argument was that the bequeathing of the plot to the deceased's children amounted to subdividing without a subdivision permit.

Mr Mashayamombe, counsel for the defendants held a different view. Counsel argued that the testator created joint undivided shares in the property in favour of his children and described these as shares. The children were therefore joint owners of undivided shares of the immovable property. There was no subdivision as envisaged by s 39 and so s 39 is not applicable.

To that end counsel relied on the decision in *Fernandes* v *Fernandes* HH 815-16. In that case two brothers co-owned an undivided share of the property. They fell out and one brother entered into an agreement with a third party in respect of his share of the property. A challenge to that agreement on the basis that it fell foul of s 39 of the Act was dismissed by the court.

In dismissing the point of illegality of the one brother's agreement with a third party, the learned Judge had this say:-

> "When Vereno sold to Hudgame, he was not selling a subdivision of the property. He was not selling a section or sections of the premises. Equally, Hudgame was not buying a subdivision or sections of the premises. No transfer of a subdivision or sectional title of the premises would transfer from Vereno to Hudgame by reason of that agreement.
>
> The Regional, Town and Country Planning Act was plainly irrelevant."

In casu the testator owned an undivided share of the plot and he bequeathed the same to his children stating the shares of the undivided land each one was to use. In other words, like the Fernandes brothers the children are all to be co-owners of this plot with each one utilizing the portion bequeathed to them. In the event that any one of them invited a stranger to that portion of their share of the whole that person would become a co-owner of that property, joint co-owner with the rest of the other children.

The effect of the will so counsel argued, was to make the testator's children joint owners of undivided shares of the plot. The children may in turn sell the entire plot and share equally the proceeds or alienate their undivided share making the one to whom such is so alienated a co-owner with the others.

I find merit in this argument. I am not persuaded by counsel for the plaintiff's argument that by bequeathing the plot as he did the testator was subdividing it without a subdivision permit.

It is trite that courts lean in favour of respecting the wishes of a testator unless of course such is tainted with illegality. *In casu,* the testator was desirous to leave his plot to his children and that is the effect of that portion of the will.

Did he require a subdivision permit before bequeathing the property as he did? I think not.

I equally find the argument that a will is not an agreement as was the case in *X – Trend – A Home* v *Hoselaw Investments (Pvt) Ltd*, persuasive. There was no agreement for change of ownership of any portion of the property in question. The property was bequeathed to the deceased's children in equal shares except for the two children whose share includes the homestead and other buildings. To hold that the will is invalid and that the estate should be administered per intestate succession is to completely ignore the testator's wishes.

Should the beneficiaries seek to have the property subdivided so that each one owns their own subdivided share then there may be scope to seek a permit as envisaged by the Act.

I am not persuaded to subscribe to the argument that there is an illegality in the will. To that end therefore I find it unnecessary to consider the issue of severability as argued in the alternative by counsel for the defendants. I did not consider it necessary to deal with the 3 issues raised separately as they raise one and the same point, the legality of the will or the portion bequeathing the plot.

The portion of the will which deals with the plot suffers no illegality and there is therefore no scope justifying severing such portion from the rest of the testator's will. The will did not have the effect of subdividing the plot as envisaged by s 39 of the Act. The Act is therefore not applicable on the facts of this case.

The plaintiff has attempted to defeat the testator's wishes before in an action where she sought to argue that the testator had unlawfully disinherited her. That argument was not available to her as there was no legal impediment to the testator bequeathing property which belonged to him. (*Chigwada v Chigwada* SC 188/20)

The attempts are aimed at subverting the testator's wishes and it appears the plaintiff re-groups and attacks from a different angle but with the same end goal. This has stalled the finalisation of the administration of the estate which has been held in abeyance for close to 5 years now. Litigation is not about ingenuity where a litigant keeps finding other possible ways of getting the desired result through mounting different arguments.

I am of the view that a case for punitive costs has been made. Costs are in the discretion of the court and where a litigant is bent on dragging a matter endlessly, the court must show its displeasure through an appropriate award of costs.

That said, the plaintiff has failed to make a case for the relief she sought.

In the result the plaintiff's claim is dismissed in its entirety, with costs at legal practitioner-client scale.

Masamvu and Da Silva-Gustavo Law Chambers, plaintiff's legal practitioners
Mashayamombe and Company Attorneys, 1st – 5th, 7th – 8th and 10th defendants' legal practitioners