

MODINA MUSIKA
versus
MELTA CHAGWIZA
and
MEMORY CHAGWIZA
and
TADIWA MAKAZA
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 20, 26 November 2024, 13 February & 19 May 2025,

Civil Trial

T M Muzenda, for the plaintiff.
M Muzaza, for the first, 2nd and third defendants.

MUNANGATI-MANONGWA J: One Jessie Chiremba (hereinafter interchangeably referred to as “the deceased or the testator”) died in 2013. There is a Will in the deceased’s name lodged with the Master’s office. The plaintiff who is the daughter and only surviving child of the deceased approached this court challenging the Will executed by the deceased on the ground of forgery. The deceased bequeathed her house being House No 6991B, Western Triangle, Highfields, Harare (“the house”) to the first defendant disinheriting the plaintiff who is her only surviving child. The Will further provides that, the house is to be inherited by the second and third defendants upon the first defendant’s death. On that basis, the plaintiff herein seeks an order to the following effect:

- a. *A declaratur* that the deceased’s alleged will dated 5 January 2013 be declared null and void since it is an act of forgery.
- b. That the estate of Jessy Chiremba shall be wound up intestate.
- c. That first Defendant pays costs of suit.

Facts

The background facts of the case are as follows: The deceased Jessie Chiremba who was a widow died on 25 February 2013 and is survived by her only daughter the plaintiff. Unknown to the plaintiff, the deceased allegedly executed a Will on 5 February 2013 which nominated the first defendant who is the deceased's granddaughter as a beneficiary of the only asset in the estate being the aforementioned house. Upon the first defendant's death, the house is to be inherited by the second and third defendants who are also the deceased's grandchildren. In the Will, the deceased further bequeathed her household goods to the first defendant and clothes to the first and second defendants. The Will was first presented at the deceased's memorial service when the uncles had requested for title deeds of the deceased's house. The plaintiff became aware that she was not a beneficiary of the deceased's house upon trying to register the deceased's estate with the office of the fourth defendant. The Will which was produced at the fourth defendant's office is similar to that which was presented at the memorial service.

The plaintiff dissatisfied with both the contents and signature on the will, challenges the authenticity of the purported last Will of her mother. She alleges that the signature on the will is different from that of the deceased and is an act of forgery. It is on this basis that the plaintiff prays for a declaratory order pronouncing the will to be null and void.

Plaintiff's evidence:

The plaintiff led evidence through two witnesses being herself and Leornard Tendai Nhari a handwriting expert. In her testimony she testified that she stayed with the first defendant since her childhood until she completed her Ordinary Level. She proceeded to testify that, the first defendant who is her brother's daughter forged the Will since she is a person of bad character and is untrustworthy since her childhood. She cited an incident in 1997 when the first defendant in her youthful age, stole money from one of their uncles which was intended to buy a tractor, money which was realized from selling cotton. She stated that first defendant was interrogated and admitted to the theft, but no police report was made. She conceded that the will she was shown at the fourth defendant's office was similar to that presented at the memorial service. She testified that at some point there was bad blood between her and the deceased, but denied that she did not visit. She stated that sometimes she would travel outside the country to South Africa in her trading ventures. She maintained that at some point when the deceased was ill, the first defendant as the

one who was living and taking care of the deceased at that moment, did not allow her and the uncles to see the deceased. She indicated that although the deceased was of old age and the two had their sour moments, they were still quite close to each other. Her demeanor did not impress the court as she was evasive and avoided questions. She called one witness to buttress her theory that the will was forged or a product of fraud.

Leornard Tendai Nhari's evidence.

This witness gave evidence that, he is a forensic scientist consultant and a handwriting expert who has worked in private practice and with CID Forensic Department and has been in practice for a number of years. He testified that in examining documents, the standard procedure is that five documents should be used for comparison purposes in the examination of a questioned document. In this case, he stated that he examined signatures on two documents namely, a photocopy of the agreement between the deceased and City of Harare and the original copy of the Will which was uplifted from the fourth defendant.

He testified that a person's signature can be affected in its physical appearance by either a person's state of mind, working surface, environment, state of health or age but such things do not affect the design and construction of the signature as signing is an art engrained in the brain. Upon being cross-examined whether the deceased's signature might have been affected by natural variation, he clarified that despite a person's signature not exactly being the same on face value, the differences he noted on the questioned documents could not be attributed to natural variation. He highlighted and demonstrated to the court that such differences are attributed to orientation of the signature which is different as well as pen stops during signing. In cross examination he further admitted that guidelines and protocols in examining handwritings are that it is ideal for a handwriting expert to work with original documents as photocopies are likely to miss some information, one should compare signatures from the same time frame and that at list five signatures samples should be used for comparison. His evidence was straight forward and he made concessions were necessary.

Defence Case:

The first defendant Melta Chagwiza's evidence:

The first defendant testified that she is the deceased's grandchild as her father was the deceased's son. She stayed and took care of the deceased for a very long time from 1991 to 2013 until her death. She mentioned that the deceased had been in good mental condition till her death. She maintained that she got to know of the Will in April 2013 when it was first presented by one of their relatives at the deceased's memorial service. She confirmed that it is the same Will as the one presented in evidence in court. The witness indicated that she was never involved in the execution of the Will.

She testified that the plaintiff was not close to the deceased and never visited her till her death since she once accused the deceased of witchcraft. She maintained that she stayed with the plaintiff while she was a teenager. She moved to live with the deceased because of the plaintiff's cruelty. She admitted to having stolen \$20 from her uncle in 1997 and attributed such conduct to immaturity. She mentioned that she once proposed an amicable way of resolving the matter pertaining to the Will and bequests therein but the plaintiff rejected and indicated that it should be decided by the courts. Upon being cross-examined, about managing the deceased's affairs, she stated that she just saw to deceased's welfare vis providing clothing, daily upkeep and food but denied that she kept her documents and that she knew of the Will or kept it. She denied knowing Jane Marutsi one of the witnesses to the will and testified that she met her for the first time after she was served with summons for this matter. She got emotional to the point of shedding tears while testifying about the death of the deceased. It is clear to the court that she was close to the deceased and her demeanor and the manner she answered questions leaves no doubt in my mind that she is a credible witness.

Second defendant Memory Chagwiza's evidence:

She is the plaintiff's daughter and a grandchild to the deceased. She stated that she stayed with the deceased for 21 years. She testified that the plaintiff and the deceased's relationship was sour and could not comment on their relationship after 1994. She got to know of the Will at the deceased's memorial service and denied knowing the witnesses to the Will. She stated that she got to know witnesses during this trial. Nothing much turned on this witness' evidence other than shed a bit of light on her mother's relationship with the deceased. The court however sensed some reluctance on the part of the defendant to be deeply involved in the dispute, understandably so, as the plaintiff is her mother.

The third defendant Tadiwa Makaza's evidence:

He is the first defendant's son and testified that when the deceased died, he was 12 years old hence he had no knowledge of facts relevant to this case. What he has knowledge of is that the issue pertains to a Will and the deceased's house. This court understands why this defendant had nothing much to say as the saga unfolded when he was very young barely into teenagerhood. The defendants called two witnesses being Jane Marutsi and Bertha Chibonda.

Jane Marutsi's Evidence:

She stated that she is a paralegal at Legal Resource Foundation and the one who assisted the deceased in drafting her will on 10 January 2013 when she came to their offices in Highfields in need of assistance in drafting her will. She testified that she explained to the deceased what a will is. She testified that although the deceased was of old age at that time, that is 84 years old, she could appreciate the processes during the drafting of her will. The witness stated that she drafted the will according to the client's instructions. She read out the contents to her and she confirmed the correctness thereof. She stated that she advised the testator to go away and come back later as she had to type the will. On 5 February 2013, the deceased returned and upon the deceased being satisfied with the contents of the draft will, the witness randomly picked two people from those who were in the queue waiting to be assisted, these people then signed as witnesses to the deceased's will. She testified that she gave the testator all three copies of the will to take to the Master of High Court for registration. She testified that she explained to the testator that she had to bring a copy back, had to keep one copy and the other one had to remain at the Master's office. She maintained that she never saw the deceased with anyone during the two days she assisted her. It was her evidence that she was not aware whether the testator brought a copy of the Will back as she thereafter moved from the Highfield office.

Upon having sight of the will in court, she confirmed that it was the very will she had drafted as her memory was refreshed by its contents thereof. She further indicated that, she had written the date in her own handwriting and that confirmed that the will was the same document that she had drafted. She clarified that she had finer details of what transpired as she was assisted by perusing the register at her offices. She presented to court a register which showed the names of the clients that visited the Legal Resources Foundation Highfield Office during the period that the now deceased also visited. The register showed the names, address, age, gender and reason for

visiting the Centre. The court's attention was drawn to the entry with the testator's details and the reason for visiting the Centre, which was, for assistance with the drafting of a will. This witness was consistent, she struck the court as a truthful witness and she produced documentary evidence to back up her story. The court has no reason to disbelieve her and hence accepts her evidence *in toto*.

Bertha Chibonda's evidence:

This witness stated that she is a police officer and confirmed that she was a witness to the will in question which she signed with her previous name M. Varukweza before changing to Bertha Chibonda. She testified that this happened when she went to the Legal Resources Foundation Highfield Centre seeking legal advice on issues pertaining to her divorce. She further stated that she was involved in the execution of the will when the person who assisted the deceased in drafting the will requested her to be a witness. She testified that the deceased signed the will in her presence. The witness stated that she signed the will together with another witness whom she met at the Centre and she neither knew her nor the testator prior to being called upon to stand as witness to the signing of the will. She maintained that, although she could not recall how many documents she signed as a witness, she confirmed her signature on the will upon being physically shown the will in court. She had a good recollection of the events even after a lapse of more than 12 years after she signed the will. She stated that her memory was refreshed upon sight of her signature and that of the deceased.

Issue for determination.

Whether or not the will executed on 5 February 2013 is an act of forgery?

The plaintiff is challenging the authenticity of the will. She claims the will is a forged document so she is challenging the signature on the will and asserting that the signature does not belong to the testator. The onus therefore lies on her to prove her case by substantiating the allegations of forgery. In trying to do so the plaintiff called in a single witness Mr Nhari who is a qualified forensic scientist and thus a handwriting expert. Despite acknowledging that natural variations would affect the signature he maintained that the signature could not have been that of the testator given the design and construction of the questioned signature on the Will which he deemed inconsistent with the standard signature as presented on a City of Harare purchase agreement.

The dynamics to handwriting were enunciated in the South African case of *Naude and Ors v Naude and Anor* [2017] ZAECGHC 26 where the court held as follows:

“Ms Palm stated that handwriting is based on two principles, namely habituation and individualization of writings. As explained by her, people are creatures of habit and handwriting is a collection of those habits ... Every person has a unique set of habits which they produce within their witting and which sets them apart from any other person. Handwriting, however is not static but dynamic and a person’s habituation changes over a period of time.”

This observation is important in that given that handwriting is not static but dynamic it becomes important to compare signatures of the same era or period. In *casu* the expert witness agreed that variations in signatures occur and these depend on where you are signing, state of mind, health status, the environment working surface, age and other factors. The document used as depicting the testator’s correct signature include a document signed when she was allocated a house in 1992. This was considered as the standard document which was then compared with questioned document (the will) bearing her signature appended 21 years after, when she was 84 years old.

In *Manolakakis v Estate Late Dr John J. Manolakakis and Ors* HB 105/14 whilst making reference to s8 of the Civil Evidence Act [*Chapter 8:01*], MAKONESE J held that comparison of any disputed handwriting with regards to its genuineness may be proved by evidence of any witness.

It stands to be clarified that expert evidence is used to guide the court but the court is obliged to consider all evidence at hand and ultimately make a decision after a careful assessment of all the facts at hand. Apart from using photocopies rather than originals the comparative analysis by the handwriting expert is problematic given the difference in the time spans. The single document with the standard signature examined was signed long back by the testator and is on a photocopy as opposed to originals which casts doubt on credibility of the findings made by the expert. The court in *Chitate v Estate Joan McKelvey & Ors* HH 368/16 was faced with the same situation and the court declined to accept expert opinion where the questioned documents were mostly photocopies. Mr Nhari admitted that the ideal situation is to work with original documents and further that the standard guidelines require five (5) samples of the standard signature. He conceded that he just had to work with what was available. This in the court’s view limited the scope of the examination more particularly when it is accepted that no two signatures from an individual are exactly the same an adage confirmed by the expert witness Mr Nhari as accepted in

forensic science. In this case, expert evidence led is not decisive as against evidence of witnesses who testified to having been involved in the execution of the will and were physically present when the testator endorsed her signature on the will.

In *casu* evidence of Bertha Chibonda and Jane Marutsi is decisive given that they both identified their writing on the Will in dispute, which evidence was never challenged. Bertha Chibanda identified her signature on the Will whilst Jane Marutsi stated that she wrote the date in her own handwriting. Vital is that the two witnesses never knew each other and both testified that they were present when the will was signed by the testator. These witnesses are not interested parties in so far as they did not know the testator prior to her seeking services and neither did they know the beneficiaries. More convincing and decisive is Jane Marutsi's evidence which pointed to a log-in register at Legal Resources Foundation Centre which proved that indeed the testator sought assistance and executed her will there. The same evidence shows that indeed the testator was assisted through the process of drafting and executing the will by Jane Marutsi. The Master's report which was before the court and was not challenged confirmed that the testator physically left a copy at the Master's office.

The totality of the above evidence points to the fact that the deceased sought assistance in the crafting of her will, signed it in the presence of two independent witnesses and she left a copy with the Master. Mere allegations by the plaintiff that the first defendant forged the Will by bringing into the picture the first defendant's youthful character as being untrustworthy Will not suffice. The plaintiff failed to prove how the first defendant could have forged the signature on the will given that no evidence adduced shows that she was ever involved in the execution of the will or its retention at the Masters' office. It is the court's finding that the signature on the will is not an act of forgery. In the court's view, this is one of cases where the challenge to the authenticity of the Will is solely based on the expectation that parents should bequeath assets to their children. Such myth cannot be sustained given the provisions of s5 (2) of the Wills Act which state that a testator has a right to bequeath his or her assets to whoever other than his children or relatives.

Given the foregoing, the plaintiff has failed to prove her case on a balance of probabilities hence her claim must fail. Accordingly, the following order is made:

1. The plaintiff's claim is dismissed with costs.
2. Consequently, the Will of Jessie Chiremba dated 5 January 2013 remains valid.

MUNANGATI-MANONGWA J:.....

Hungwe and Partners, plaintiff's legal practitioners.

Wintertons Legal Practitioners, first 2nd and third defendant's legal practitioners.