

BUSI MAPHOSA

Versus

DYLAN KAWARA

And

MAREVERWA SMART MASHAYAMOMBE
(In his capacity as the Executor Dative in the
Estate of the late Richard Mashayamombe)

And

MASTER OF THE HIGH COURT (N.O.)

And

GETRUDE SIWELA

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 29 JANUARY & 4 FEBRUARY 2010

C P Moyo for applicant
N Ndlovu for 4th respondent
No appearance from 1st, 2nd, 3rd and 5th respondents

Opposed Court Application

KAMOCHA J: The applicant in this matter seeks an order from this court in the following terms:-

“It is ordered that:-

- (a) The agreement of sale between applicant and 1st respondent entered into on October 15, 2003 be and is declared to be valid and lawful;

- (b) The agreement of sale between 1st, 2nd and 4th respondents over the immovable property known as 231 New Luveve, Bulawayo be and is hereby declared to be null and void thus unenforceable;
- (c) 5th respondent be and is hereby ordered to amend its records so as to reflect that the rightful owner of 231 New Luveve, Bulawayo is applicant; and
- (d) 1st and 2nd respondents to pay costs of this application.”

The applicant Busi Maphosa and Dylan Kawara signed a memorandum of agreement of sale of an immovable property known as number 231 New Luveve Township, Bulawayo hereinafter referred to as “the property” on 15 October 2003. Busi Maphosa – the applicant paid the purchase price in full and was given vacant possession of the property in terms of the agreement, from 31 December 2003 up to this date. The original owner of the property died in 1983. At the time of the sale Dylan Kawara advised the applicant that the property he was selling belonged to a deceased estate and that Mareverwa Smart Mashayamombe had been appointed the executor of the estate in terms of a will. The testator was Dylan Kawara’s grandfather who bequeathed the property to his grandson Dylan Kawara.

When the grandfather died on 21 November, 1983 the property vested in the grandson, Dylan Kawara. According to *The Law of Succession Through the Cases* by Tila Isakow at page 98, in the absence of a contrary intention in the will, expressly or by necessary implication, a bequest takes effect on the testator’s death, and is unconditional. The heir or legatee may alienate his rights thereto and he may therefore sell them or they may be attached in execution at the instance of his creditors unless the will contains some prohibition.

The will of the late Richard Mashayamombe was accepted by the Master although it did not fully comply with the formalities for the execution of a will. The Master must have been satisfied with the document in terms of section 8(5) of the Wills Act [Chapter 6:06]. There was no appeal against the Master’s decision to accept the will.

The court therefore finds that Dylan Kawara was entitled to sell his rights, and interest in the property.

The next issue to be determined is that of the double sale since the same property was later sold to Getrude Siwela the 4th respondent.

The law relating to double sales was long settled and is repeated almost daily in this court. The property has not yet been transferred to any of the buyers. In a situation like that the first buyer who is the first in time is favoured by the law. The second buyer should look to the seller for damages. There are no special circumstances in this case why the law should favour Getrude Siwela.

Judgment No. HB 6/10

Case No. HC 1237/08

X Ref 281/09

In the result I would grant the application in terms of the draft.

Messrs Moyo & Nyoni, applicant's legal practitioners

Messrs Cheda & Partners, 4th respondent's legal practitioners