

HB 50-17
HC 2836/16
XREF HC 1780/16
XREF HC1989/10

ESTATE LATE MUJUBEKI GUMBO
(duly represented by Mr Lovemore Gumbo
the duly appointed Executor)
and
EMMA GUMBO
versus
BONGAKELE DUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 3 MARCH 2017 AND 9 MARCH 2017

Opposed Application

Ms P Mvundla for the applicants
Ms L Mumba with *T Masiye-Moyo* for the respondents

MATHONSI J: The late Mujubeki Gumbo was a polygamist. He died in 2007 leaving behind two wives one of whom is the second applicant herein and ten children one of whom is Lovemore Gumbo the executor of his estate who is now representing the estate in this matter. The other off-spring of the deceased is Dennis Gumbo who was involved in the registration of the estate as DRBY212/07 and attended some of the meetings at that early stage which result was the appointment of one Stanley Ndlovu as executor of the estate under DRBY 212/07.

The same estate was apparently registered again as DRBY 483/10 whereupon Lovemore Gumbo was appointed executor dative of the estate. In his capacity as such he and the second applicant, one of the widows, issued summons out of this court in HC 2346/16 against the respondent and four others seeking an order:

- “(a) That the agreement of sale entered into between 2nd and 3rd defendants be and is hereby declared void *ab initio* and is accordingly set aside.
- (b) That the agreement of sale entered into between 1st and 2nd defendants be and is hereby declared void *ab initio* and is accordingly set aside.
- (c) 1st defendant be and is hereby ordered to forthwith vacate the premises of number 72758 Lobengula West Bulawayo.

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- (d) That, if title of property number 72758 Lobengula West has passed to 1st defendant the 4th respondent (*sic*) be and is hereby ordered to rescind transfer and register the property in 2nd plaintiff's name immediately upon granting of the order.
- (e) 1st, 2nd and 3rd defendants pay costs on attorney-client scale only if they oppose this action."

In their declaration they averred that Emma Gumbo lawfully inherited house number 72758 Lobengula West Bulawayo (the house) from the estate in 2010. When the executor tried to pass transfer from the estate to her they discovered that it had been sold by the third defendant therein, Stanley Ndlovu to the second defendant, Daught Ndlovu by virtue of the fact that the said Stanley Ndlovu had been clandestinely appointed executor in DRBY 212/07 when he had not been nominated at an edict meeting of the Gumbo family. The said family was not aware of the proceedings under DRBY 212/07.

They further averred that Emma Gumbo, as the widow, was not aware that Stanley Ndlovu had registered the estate and sold the house. He had no authority from the beneficiaries of the estate to dispose of the house. As the sale did not comply with the procedure providing for the disposal of property belonging to deceased estates, the sale of the house to Daught Ndlovu was null and void. Although the house was transferred from the estate to Daught Ndlovu in terms of a court order issued by this court in HC 1989/10 that suit was a sham and the order has since been rescinded following an application filed in HC 1780/16.

The house was subsequently sold and transferred to Bongakele Dube, the respondent herein by Daught Ndlovu but as the latter had not acquired any lawful right, the second sale was also a nullity. The applicants then prayed for the grant of an order aforesaid. The respondent entered appearance to defend and filed a plea. In that plea he denied virtually all the averments made by the applicants in their declaration and put them to the proof thereof. He made the point that while the court order made in HC 1989/10 was subsequently rescinded "all things suffered under it were not rendered null and void" the court order not having been void *ab initio* itself.

The applicants formulated the belief that appearance was entered for dilatory purposes. They then brought this application for summary judgment. Lovemore Gumbo stated in his founding affidavit that following the death of the deceased most of the family members, except

himself and her sisters, returned to their bases in South Africa and as such they did not have an opportunity as a family to sit down and deliberate on the registration and winding up of the estate. They only got that opportunity in 2010 whereupon they decided to register the estate and unanimously nominated himself as the executor resulting in the estate being registered as DRBY 283/10 and him being appointed executor of the estate.

What Lovemore Gumbo did not say is that upon the deceased's death in 2007 some of his siblings including his brother Dennis Gumbo and one of the widows who happens to be the first plaintiff in the main action and the second applicant herein did find the opportunity to register the same estate as DRBY 212/07 and did manage to appoint Stanley Ndlovu as executor. They also succeeded in advertising the estate having commenced the winding up process after which the house was sold to Daught Ndlovu.

He managed to sell the house inherited by one of the widows but came unstuck when he tried to sell the house in Lobengula West inherited by the second applicant. This is because the said house had already been transferred to Daught Ndlovu who in turn transferred it to the respondent. Investigations carried out revealed that his father's estate had been clandestinely registered by Stanley Ndlovu, a neighbour of theirs, who also obtained Letters of Administration through misrepresentation. He had then fraudulently sold the house to Daught Ndlovu "without the knowledge and consent of the second applicant" and also without the knowledge and consent of the Master, that is in violation of s120 of the Administration of Estates Act [Chapter 6:01].

He stated that Stanley Ndlovu admitted having defrauded the estate upon being interrogated by the Zimbabwe Republic Police in the course of an elaborate plan involving Daught Ndlovu. Against that background the applicants managed to have the court order granted in default in HC 1989/10 in terms of which the house was transferred to Daught Ndlovu, rescinded.

As Daught Ndlovu had purported to sell the house to the respondent when he had acquired no lawful right over the house that second sale was null and void. This is because Stanley Ndlovu had no lawful right to pass to Daught Ndlovu who, by the same token did not acquire any lawful right which he could pass to the respondent. For all those reasons it is the

applicants' view that the respondent cannot possibly have a *bona fide* defence and accordingly they should be granted summary judgment.

In his opposition the respondent makes the point that in the main cause, HC 2346/16, he has filed a counter claim which the court ought to pronounce a final judgment on. As far as he is concerned he has a *bona fide* defence to the applicants' claim because in March 2014 he responded to a newspaper advertisement for the sale of the house. When he met Daught Ndlovu the latter exhibited cession documents showing he had rights over the house. Further checks at the Municipality of Bulawayo revealed that Ndlovu's title was not being challenged. As a result he entered into a sale agreement with Ndlovu, paid the full purchase price and took transfer.

The respondent denied that registration of the estate as DRBY 212/07 was fraudulent given that it was done by none other than the second applicant herself who, together with Jerita Gumbo and Phileni Gumbo had then attended at the Additional Assistant Master's office and appointed an executor. He attached documents to that effect and also to the effect that Dennis Gumbo the deceased's son and the second applicant had deposed to affidavits in the process of the winding up of the estate under DRBY 212/07 to the effect that the house would be inherited by the second applicant. Those family members also attended an edict meeting before the Additional Assistant Master, P Dube (a magistrate) on 25 April 2007 and appointed Stanley Ndlovu as executor dative of the estate.

In that regard, the respondent stated, the appointment could not be said to be clandestine or fraudulent especially as there is evidence that the second applicant signed the letter of appointment. He submitted an affidavit deposed to by Daught Ndlovu in HC 705/12 in which he stated that the second applicant participated in the sale agreement and received the purchase price. At paragraph 5 in his response to the affidavit of Lovemore Gumbo he said:

“5. AD PARA 9

The estate was registered in 2007 by the 1st respondent who I now believe was instructed or nominated by Emma Gumbo and the relation of the late Emma Gumbo's husband. Please find attached as Annexure 'B' a copy of the advert of the Estate Late Mjubeki Gumbo and the late's death certificate, copy of which I obtained from Emma Gumbo on the day I bought the house. What I can confirm is that when I bought the house, Emma

Gumbo is the one who received the purchase price and she showed me the original death certificate.”

The respondent stated that the documents he relies upon show that the second applicant was dishonest. She was involved in the first sale of the house and in the appointment of the executor in the initial winding up. Daught Ndlovu went further to accuse her of attempting a double sale of the same house.

Ms Mvundla who appeared for the applicant submitted that to the extent that the agreement of sale involving Stanley Ndlovu and Daught Ndlovu was entered into without the consent of the Master and therefore in breach of s120 of the Administration of Estates Act [Chapter 6:01] it was a nullity. The subsequent sale involving Daught Ndlovu and the respondent which was standing on nothing was also a nullity in equal measure. She relied on the authority of *Chinogura v Chiseko and Another* HH 201-12 and *Dondo Muganhiri and Others* HH17-15 (both unreported) in which the point is made that whether the purchaser of a property without the consent of the Master given in terms of s120 of the Act purchased the property in good faith is immaterial where the person selling it is appointed under a clear misrepresentation of facts. The court would not allow property sold by a person who obtained authority to sell through misrepresentation to pass merely because the other party was an innocent purchaser.

Ms Mumba for the respondent submitted that the authorities relied upon by the applicants are distinguishable because they related to proven cases of fraud or misrepresentation which is not the case here. In the present case the alleged fraud by Stanley Ndlovu has not been established. It is that allegation which must be put to the test at the trial given that the second applicant appears to have been behind the activities of that executor and the winding up pursued by that executor has not been nullified by either the Master or the court. I agree.

The law applicable to an application for summary judgment is settled in this jurisdiction. It is an extra ordinary remedy available only to a party whose claim is unassailable. It denies a party who has shown an inclination to defend a claim, the opportunity to do so. It is a procedure conceived so that a *mala fide* defendant might be summarily denied, except under onerous conditions, the benefit of the *audi alteram partem* principle because all the proposed defences to

the claim are unarguable both in fact and in law. See *Bulawayo City Council v Dicks Auto Parts (Pvt) Ltd* HB 245-16; *Chrisma v Stutchberry* 1973 (1) RLR 277.

On the other hand in order to defeat such an application the respondent must set out a *bona fide* defence by alleging facts which, if established at the trial would entitle him to succeed. The defence must be stated with sufficient clarity and completeness to enable the court to determine whether the opposing affidavit discloses a *bona fide* defence. See *Kingstons Ltd v L D Ineson Pvt Ltd* 2006 (1) ZLR 451 (S) 458 F-G. In short he must show that there are triable issues.

In this case we have two diametrically different versions but what is clear is that the second applicant is at the centre of the issue. If indeed she was involved in the registration of the estate as DRBY 212/07, the appointment of Stanley Ndlovu as executor and the sale of the house to Daught Ndlovu as alleged, surely that paints a completely different picture of the status of the sale to Daught Ndlovu which can scarcely be dismissed merely on the basis that there was no compliance with s120 of the Act. After all in our law a person cannot be allowed to benefit from his or her own unlawful conduct.

The fact that the estate was registered twice is confirmed by the Master in his report dated 21 November 2012 submitted in terms of r248 of the High Court Rules, 1971 in HC 705/12. In that report the Master does not say that the registration of the estate in 2007 and indeed the appointment of Stanley Ndlovu as executor were fraudulent. He only expresses his personal opinion on the legality of the first sale, which is of very little value to the court. He correctly leaves that to the court in his report dated 13 December 2016 in respect of this application.

It is significant that in his latest report the Master acknowledges that:

“---I have however regrettably noted that there was some confusion, misrepresentations and misleading statements in various proceedings instituted before this Honourable Court hence a multiplicity of applications. In the result, I will stand guided by this Honourable Court and abide by its decision.”

It is not without reason that the Master has now washed his hands clean, Pilate style, in this matter surrendering it to the court, and in my view therein lies the pressing need to refer the matter to trial. Clearly there are triable issues which cannot be resolved by summary judgment.

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I also strongly recommend that the parties should consolidate all the outstanding matters relating to this dispute so that they are resolved by trial action all at the same time.

In the result it is ordered that:

1. The summary judgment application is hereby dismissed.
2. The matter is hereby referred to trial for a determination of all the contested issues.
3. The costs of this application shall be costs in the main cause.

Mutuso, Taruvinga & Mhiribidi, 1st & 2nd applicants' legal practitioners
Messrs Masiye-Moyo & Associates, respondent's legal practitioners