HC 946/2003

ARCHLOVE JULIUS SHATA
and
NOLEEN CHAMUNORWA
versus
WILSON TATENDA MANASE [N.O.]
and
THE REGISTRAR OF DEEDS [N.O.]

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 5 and 12 February 2003

Urgent Chamber Application

J.S. Mandizha, for the applicant
W.T. Manase, for the first respondent
No appearance from the second respondent

KAMOCHA J: This is one of those typical double sales that have inundated the High Court these days. What happened was this. During the month of October, 2002 advertisements were flighted in the print media about the sale of a property known as stand number 108943 Salisabury Township also known as number 45 Newmarch Road, Hillside, Harare. The house was part of a deceased estate whose executor was a legal practitioner known as Mr Wilson Tatenda Manase of Manase and Manase. Mr Manase was to handle the sale although he delegated some one in the law firm to deal with the matter.

The applicant responded to the advertisement and made an offer for 20 million dollars which was accepted by the person delegated by Manase. A memorandum of agreement of sale was signed by the purchasers and Manase's delegate on 23 October 2002.

Clause 1 of the agreement of sale reads as follows:

"1. Purchase Price and Terms of Payment

The purchase price for the property is $20 000 000,00 (twenty million dollars). The purchaser shall pay a deposit of $10 000 000,00 upon signing of this agreement and the balance shall be paid in 2 equal instalments starting on or before 30 November 2002 and on 11 December 2002."

The purchasers honoured their obligation and paid $10 million on

signing the agreement of sale and the balance of $10 million was paid in full on 18 November 2002.

Thereafter the purchasers sought to have the property registered in their names. After a couple of visits to Manase and Manase they were informed that the surviving spouse was no longer interested in abiding by the contract because the prices of houses had sky-rocketed due to hyperinflation in the country. Attempts to see Mr Manase were without success. They had been trying to see him from November 2002 until January 2003. At no stage were they told that the property was in fact being sold to a third party. Mr Manase appeared to be avoiding them. Eventually, they sought legal advice on 14 January 2003 and the legal practitioners addressed a letter to Messrs Manase and Manase.

In response to that letter Mr Manase, on 23 January 2003, took the stance that as the executor of the said estate he was not sanctioning the transaction. He asserted that all documents pertaining to any estate transaction had to be signed by the executor and not a clerk as happened *in casu.* He stated that he was in the United States of America when the agreement was entered into and signed and went on to say that he did not approve the agreement and had not even sanctioned it. Having made those assertions he then enclosed a cheque in the sum of $20 million and concluded that he did not want to keep the purchasers' money in their trust account.

Mr *Manase* maintained that stance at the hearing of the application. He also put in issue the urgency of the matter saying that the applicants knew that he was not approving of the sale as early as December, 2002. They, therefore, should have launched this application that time. His argument is untenable in the light of the fact that at no stage did he inform the applicants that the property was being sold until the 23rd of January 2003. He in fact was responsible for the delays that occurred since he avoided the applicants when they wanted to discuss the mater with him. Hence the matter does not cease to be urgent because of the delays occasioned by him. The applicants only knew that the property

was going to be sold after their receipt of the letter of 23 January 2003 to which they replied saying that if they did not receive written assurances by midday the next day, to the effect that the property would not be sold to a third party, they would be approaching the courts for redress. Having received no joy they then instituted this application on a certificate of urgency. That, in my view was the proper and correct thing to do.

That, however, had been overtaken by events unbeknown to the applicants. The house had already been sold to a third party known as Rutendo Musanhi. Mr *Manase* never disclosed this to the applicants. In his letter of 23 January 2003 he made no mention that the property had been sold and that transfer had already taken place. He was clearly not candid with the applicants and their lawyers. His law firm prepared the Deed of Transfer and lodged it with registrar of deeds on 19 December 2002. The next day 20 December the registrar of deeds signed the Deed of Transfer. He cannot be heard to say, a month later, that he was not aware that the property had been sold and transfer taken place.

Not only was he not candid with the applicants and their legal practitioners, but he was also not candid with the court itself. When he was presenting his argument he stated that Rutendo Musanhi the new buyer offered to buy the property for $30 million which was acceptable to him. He then sold the property for that amount. The court directed him to produce the Deed of Transfer which was duly produced. It revealed that the whole of the purchase price amounting to $25 000 000,00 had been satisfactorily paid and secured. So the property was not sold for 30 million dollars after all.

As regards the argument that all documents pertaining to any estate transaction have to be signed by the executor and not a clerk, I am not with Mr Manase. In my view, an executor can authorise some other person to carry out some or all of his functions on his behalf. In *Bramwell and Lazar NN.O vs Lamb* 1978 (1) SA 380 COLMAN J had this to say at 283H:

> "It is a common practice, and a convenient one for an executor to authorise his co-executor or some other person to carry out some or

all of his functions on his behalf."

The learned judge continued at page 384A and said:

> "An executor, as I see the matter, may not appoint someone to act instead of himself, so as to relieve himself of responsibility; but he may appoint someone, for whose acts he will be responsible, to act on his behalf, and that is what, in my judgment, the second plaintiff did in the present case."

What an executor is prohibited to do is abdication, not delegation. *In casu* Mr *Manase* delegated an officer in their law firm to act on his behalf so he is responsible for the acts of his delegate. In any event not only did Mr *Manase* authorise that particular official to sign the agreement of sale on his behalf but he also authorised another, legal practitioner, in their law firm, who was not a co-executor to sign the Deed of Transfer on his behalf. He quite clearly was again not candid with the court when he made the submission that all documents pertaining to any estate transaction had to be signed by the executor himself. His actions which are contrary to his assertions confirm that it is a common practice for an executor to authorise some other person to carry out some or all of his functions on his behalf.

In conclusion I would grant a provisional order in these terms.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicants are granted the following relief:

> That the second respondent be and is hereby interdicted, prohibited and restrained from transferring rights, title and interest in Stand No. 105943, Salisbury Township, situate in the district of Salisbury, measuring 1457 square metres, popularly known as No. 45 Newmarch Road, Hillside, Harare.

Mandizha & Company, applicants' legal practitioners.
Manase & Manase, respondents' legal practitioners.