

SYLVESTER MUZANENHAMO
(In his capacity as executor of the estate the late
Jane Muzanenhamo)

versus

ESTATE LATE KAINOS GADAGA
(represented by Golden Gadaga)

and

TAFADZWA GADAGA

and

THE DIRECTOR OF HOUSING CITY OF HARARE

and

THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE

GOWORA J

HARARE, 16 March and 7 June 2006

Opposed Court Application

S Mushonga, for the applicant

Mrs M Harvey, for the respondent

GOWORA J: After hearing Mr *Mushonga* for the applicant, I dismissed this application and ordered that the applicant pay the costs of the first and second respondents. I have now been requested to furnish reasons for my decision and these are they.

The applicant is the Executor Dative of the estate of the Late Jane Muzanenhamo who died at Harare on the 6th May 2003. She was the applicant's paternal aunt. He is in occupation of a residential property known as Stand 3750 Kuwadzana 3. The stand in question had been purchased by the late Kainos Gadaga who however had no resources to develop it. As a result, on 5th August 1984 his aunt had entered into an agreement of sale with the said Gadaga in terms of which she was granted by way of a donation, his right title and interest in the stand. It is contended by the applicant that the right, title and interest in the stand were as a consequence passed to Jane Muzanenhamo by the said Gadaga. According to the applicant, he had grown up in the house with his aunt and it was his contention that, apart from paying for its purchase she had developed it. After she died on 6th May 2003 the applicant had remained in occupation of

the house. In August 2005 the first and second respondents had visited him at the house and threatened to forcibly evict him therefrom. Arising from that conduct he has approached this court for an order in the following terms:

1. That the 1st and 2nd respondents cause the cession of Stand 3750 Kuwadzana 3, Harare to be registered into the name of the applicant as Executor Dative of the Estate of the late Jane Muzanenhamo within fourteen days of being served with this Court Order.
2. Upon the 1st and 2nd respondents failure the Deputy Sheriff be and is hereby authorized to sign all relevant papers to pass cession of the title interest and rights (*sic*) which the 1st and 2nd respondents' father had in the property into the Applicant's name and the 3rd respondent be directed to accept these papers and pass the cession into Applicant's name.
3. The 1st and 2nd respondents be barred from forcibly entering upon and removing applicant and all those claiming occupation through him. Upon 1st and 2nd respondents entering and occupying stand no 3759 Kuwadzana 3, Harare the Deputy Sheriff be and is hereby authorized to eject the 1st and 2nd respondents and all those claiming occupation through them.
4. That the 1st and 2nd respondents pay the applicant's costs of suit in the event of them opposing this application they pay attorney and client scale costs of suit. (*sic*)

Only the first and second respondents filed papers in opposition. The City of Harare has not opposed the grant of the order being sought. The basis of the application by the applicant is a document, Annexure BB, which is referred to in his papers as an affidavit. Annexure BB is to the effect that the stand was given to Jane Muzanenhamo by Kainos Gadaga on 8th August 1984. The alleged reason for the donation of the stand was that Gadaga had failed to raise the required deposit fees for the stand. It is further alleged in the "affidavit" that the said Gadaga had been staying in Tafara with his

family which place remained his residence until he died. Jane Muzanenhamo had allegedly applied for a loan from the Municipality of Harare for a loan which she utilized to develop the house. He had apparently wanted to effect a change of name in her favour but had died before that could be done.

The applicant contends that the document is an affidavit. An affidavit must be sworn before a person competent to administer an oath. The applicant in his affidavit makes the averment that the document was sworn to before a magistrate. The document bears the stamp of the magistrates' court. The person who signed as commissioner of oaths is not identified, nor is he described as a commissioner of oaths. There is, in fact, no indication that the document was signed by a commissioner of oaths. In the circumstances the document is not an affidavit. What it is in effect a written statement not made on oath. As a consequence I have no evidence before me that the stand in question belongs to none other than the estate of the late Kainos Gadaga. The applicant has failed to prove that Gadaga had during his lifetime given away his rights in the stand to Jane Muzanenhamo. It is accepted by the respondents that the late Jane Muzanenhamo had in fact caused some rooms to be added to the core-house that was on the stand at the time it was acquired by their father. This in my view cannot be proof that Jane had extended the house because she had been given title to it. If the stand was donated to the applicant's aunt, then the onus to prove the donation lay on the applicant who has failed to discharge the onus.

In my view the probabilities favour the respondents' position that the late Jane Muzanenhamo was given a right to live in the property by their father. The usufruct would have only been in favour of Jane Muzanenhamo and cannot be claimed by the applicant. The applicant cannot in his own right claim the usufruct which is a personal right and which cannot be transferred. It, the right of occupation, would have died with the applicant's aunt.

The applicant is not a beneficiary to the estate. He does not state that there are no beneficiaries to the estate of Jane Muzanenhamo, and in the circumstances I am not convinced that he would be entitled to have the

property registered in his name, even if he had been able to establish that it had been donated to his aunt. His appointment as an executor to the estate of Jane Muzanhamo does not entitle him to have rights in the property ceded to him.

It was for these reasons that I dismissed the application with costs.

Mushonga and Associates, applicant's legal practitioners
Byron Venturas & Partners, respondent's legal practitioners