

JARVIS MUDZENGERERE	Plaintiff
versus	
ESTATE LATE JACKSON JEKERA	1 st Defendant
(also known as Chrispen)	
As represented by Japson Jekera cited in his capacity as heir.	
and	
CHITUNGWIZA MUNICIPALITY	2 nd Defendant
and	
HEZEKIA MUZOPA	3 rd Defendant

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 29 October 2010

G Muzondo, for plaintiff
J C Muzangaza, for third defendant

CHITAKUNYE J: On 13 March 1984 the plaintiff and the late Jackson Jekera entered into an agreement of sale of an immovable property namely, Stand no. 13451- Unit 'N' Seke. The agreement was reduced to writing. In terms of the agreement of sale the late Jackson Jekera sold his rights in the said property to plaintiff for the sum of \$1100 Zimbabwean dollars. The plaintiff paid a deposit of \$800 and the balance was to be paid by May 1984.

In HC 1375/91 the plaintiff applied for cession of the property from the late Jackson Jekera's name into his name. In his application the plaintiff alleged that he had paid the balance and so was entitled to cession. The late Jackson Jekera, on the other hand, opposed the application and contended that the plaintiff did not pay the balance. He instead averred that the agreement of sale was cancelled by mutual consent of the parties before the balance was paid.

From the documents filed of record and evidence adduced in court it is common cause that in or about May 1984 the plaintiff and late Jackson Jekera attended upon the second respondent for the purpose of effecting cession. The cession was not effected for some reason which the parties are not agreed. The plaintiff said that an agent of the second defendant advised both parties that the plaintiff's name did not appear on the second defendant's waiting

list for participating in the Home Ownership Scheme and because of that the plaintiff would have to be placed on a list and wait for a year before transfer to him could be effected.

The late Jackson Jekera on the other hand contended that the parties were told by the second defendant's agent that because the applicant lived in Highfield, an area administered by another local authority, the second defendant would not or never sanction or consent to the cession of late Jackson Jekera's rights in the property to the plaintiff. Faced with this situation the original agreement of sale was cancelled by mutual consent. As the late Jackson did not have money to refund the plaintiff, the parties entered into an agreement whereby the plaintiff was to place tenants in the house in question and collect rentals for a period of five years in order for him to recover his deposit of \$800. The late Jackson Jekera contended that he was thus perfectly entitled to cede his rights in the property to the third defendant because his original agreement of sale or cession with the plaintiff had been cancelled by mutual consent.

On June 10, 1992 the application (HC 1375/91) was argued before CHIDYAUSIKU J (as he then was). The honorable judge came to the conclusion that:

“In my view it is essential to determine what exactly happened on the visit to the second respondent's office and what the applicant and first respondent decided to do as a result of that. Their versions of what occurred are mutually destructive. That factual dispute, in my view, cannot be resolved on the papers. Neither party filed any affidavits from the agent of the second respondent regarding what he is alleged to have said nor was there any documentary evidence supporting the applicant's implied version that he placed himself on the second respondent's waiting list in anticipation of the cession as advised.” (See *Jarvis Mudzengerere v J Jekera* (known as Chrispen) & 2 Ors HH 170/92)

The learned judge therefore ruled that the factual dispute cannot be resolved on the papers and referred the matter for trial with appropriate directives. One of the directives was that -

“The applicant should file his declaration within 30 days of this order failing which respondent is given leave to apply for the dismissal of this action without notice to the applicant.”

On 10 June 1992 when HC1375/91 was argued Jackson Jekera was still alive. On 2 September 1992 when judgment was delivered he was no more as he had met his demise on 20 July 1992.

On 23 July 1993, the legal practitioners who had represented the late Jackson Jekera in the court case HC1375/91 responded to the plaintiff's legal practitioners' letters of 23 June

1993 and 23 July 1993 advising them that their client Jackson Jekera died in July the previous year. They also advised that to their knowledge no administrator had been appointed as yet. They went on to advise that in the circumstances the matter may not be pursued as framed.

On 2 June 1995 Ziumbe & Mtambanengwe formally filed a notice of renunciation of agency as apparently the plaintiff's legal practitioners had unabatedly continued to refer to them as the first defendant's legal practitioners. In the notice they reiterated the fact that Jackson Jekera died on 20 July 1992.

It was only on 15 March 2006 that the plaintiff's legal practitioners filed a Notice of Substitution in terms of r 85A of the High Court Rules seeking to substitute the late Jackson Jekera with Japson Jekera in his capacity as heir to the estate.

In terms of r 85A (2) (ii) the person to be joined or substituted must be served with the notice and copies of all documents previously filed or served in the proceedings. This the plaintiff did not do. In spite of the clear provisions in the rules on 13 June 2006 the plaintiff's legal practitioners filed a notice to plead and intention to bar against the first defendant and served it on Ziumbe and Mtambanengwe. On 19 June 2006 Ziumbe & Mtambanengwe responded by stating that they do not act for the first defendant.

In the year 2007 the third defendant who had also bought the same property from the late Jackson Jekera in 1989 made an application to serve his own application by advertisement in HC 1107/07. Initially the plaintiff opposed the application but later withdrew the notice of opposition. As a result in HC 1107/07 the third defendant was granted the following order:-

- “1. That leave be and is hereby granted to the applicant to publish a notice in The Herald newspaper, calling upon all and any persons having an interest in the estate of the Late Jackson Jekera, also known as Crispin Jackson, in particular in the immovable property called stand 13451 Unit N, Seke, Chitungwiza currently registered in the name of the said Jackson Jekera in the register of occupations kept by the second respondent, to show cause, if any, within fourteen days of the date of such publication, why-
 - (a) the interdict placed by this Honourable Court on the 2nd day of September 1992, by judgment number HH 170/92, in case number. HC 1375/91, should not be set aside;
 - (b) the right , title and interest in the aforesaid immovable property should not be registered in the name of the applicant;
 - (c) the Deputy Sheriff, Chitungwiza, should not be authorized and required, in the place and stead of the Late Jackson Jekera, to sign all documents and perform

all deeds necessary to effect the said cession of the right, title and interest in the said immovable property to the applicant;

- (d) the second respondent should not be ordered to facilitate and to record such cession in its books; and
- (e) anybody unsuccessfully opposing this application should not be ordered to pay the costs of the application.

2. That the format of the said notice for publication shall be approved by the Registrar of this Honourable Court.
3. That copies of the application and of this order be served on the second and third respondents, as well as on the Master of this Honourable Court, at their respective addresses.”

In The Herald of 21 April 2008, the third respondent placed an advertisement in terms of that court order. Apart from the plaintiff no one came up to contest the application. The plaintiff’s contest was based on his claim in HC 1375/91.

At a pre-trial conference it was resolved that the two matters, that is HC 1375/91 and HC 1107/07, be consolidated and be dealt with at the same time.

In HC 1375/91 the issues for trial were identified as –

1. Whether or not the plaintiff complied with all his obligations under his Agreement of Sale with the first defendant in respect of Stand 13451 Unit N Seke.
2. What, if any, was the impediment to cession of rights from the first defendant to the plaintiff?
3. Whether or not such impediment, if any, was overcome.
4. Whether or not the plaintiff is entitled to evict the third defendant from the property in question.

In HC 1107/07 the issue for determination was identified as:-

Whether or not the right, title and interest in the aforesaid immovable property should be registered in the name of the applicant.

At the hearing the plaintiff’s counsel applied for default judgment against the first and second defendants. He argued that after the matter HC 1375/91 was referred to trial plaintiff filed the requisite declaration and asked the first defendant to plead. The first defendant did not file any plea as a result the plaintiff served him with a notice to plead and intention to bar. In as far as the first defendant did not file a plea he is automatically barred. Counsel for the third

respondent opposed the application contending that the plaintiff had not served the first defendant.

At the end of the argument and as is evident from the sequence of events outlined above, it was common cause that at the time HC 1375/91 was referred for trial Jackson Jekera was no more. It was also common cause that the plaintiff took over a year to attempt to serve a declaration which should have been served in 30 days from the date of the judgment. It is also not disputed that the plaintiff was notified that Jackson Jekera had died. Despite that notice the plaintiff did not seek to substitute, or serve on, the executor of estate late Jackson Jekera. Instead the plaintiff kept on serving documents on Ziumbe & Mtambanengwe even after that firm had indicated their client had died and no executor had been appointed to their knowledge and had renounced agency. The question one may ask is: what is the effect of the demise of a party to court proceedings in this respect?

The plaintiff's insistence that service on Ziumbe & Mtambanengwe of the declaration and other subsequent documents was valid was without merit. It should be clear that once a legal practitioner's client dies that legal practitioner ceases to have that client. The legal practitioner's mandate dies with the client. The legal practitioner cannot grant himself the mandate to act for or to represent the estate of his late client. It will be upon the executor or whoever will be placed in charge of the estate to give mandate to legal practitioners of his choice to represent the estate of the late in any legal proceedings. In *casu* the plaintiff's legal practitioners ought to have realized the need to substitute the first defendant with the executor of the estate as soon as they learnt of his demise. Upon ascertaining the executor it was incumbent upon them to serve the declaration on that executor in compliance with the directive in HH 170-92.

In as far as the plaintiff was required to serve his declaration on the executor of the estate late Jackson Jekera in terms of HH 170-92 that was not done. It cannot therefore be said that that executor is in default.

As a consequence the plaintiff's application for a default judgment against estate late Jackson Jekera (the first defendant) could not succeed.

After I ruled against that application for default the plaintiff applied for a postponement of the matter. Unfortunately there was no merit in the application. Clearly the plaintiff had not acted diligently in prosecuting his case. So many years had lapsed without the plaintiff effectively attending to service on the executor of estate late Jackson Jekera.

In proceeding with his case the plaintiff gave evidence after which the third defendant gave evidence. In his evidence the plaintiff explained how he paid for the house after which the late Jackson Jekera and himself approached the second respondent for transfer. Transfer was not effected due to the fact that he was not on the housing waiting list. It was his evidence that after a year he looked for the Late Jackson Jekera to no avail. He only found him in 1989 and by then the third defendant had already bought the same property.

The third defendant gave evidence basically on his claim that the property should be ceded to him as he bought the property in July 1989 and he fully paid for it. He took occupation in that same year and he has been in occupation since. At the time of purchase he was not aware of any prior purchaser.

In 1991 he was served with court papers in HC 1375/91 in which the plaintiff was seeking his eviction from the house in question. He maintained that he is a *bona fide* purchaser for value.

From the evidence adduced it is apparent that this is a question of competing interests. Both the plaintiff and the third defendant are seeking cession of rights and interests in house number.13451 Unit N Seke. In HC 1375/95the plaintiff's case is principally and substantially against the seller. In order for the plaintiff to obtain judgment against the seller the proceedings must be brought to the notice of the seller. The issues that were referred to trial begged for the seller's participation and required the plaintiff to also produce or tender certain evidence. In *casu* I ruled that the plaintiff had not properly served the declaration, amended declaration and other pleadings on the seller. In the circumstances the plaintiff could not ask court to grant him relief against a party who was not aware of the proceedings

It may also be noted that in his evidence in court the plaintiff still did not adduce such evidence as to answer the issues referred to trial on his claim.

In HC 1107/07 the third defendant's claim is essentially against the seller also. However in his case the third defendant in light of difficulties in locating the executor to estate late Jackson Jekera applied for service by advertisement. Through that he was able to place a newspaper advertisement for all with interest in the property in question to come up. He thereafter proceeded with his application in terms of s 3 of the Titles Registration and Derelict Lands Act, [Cap 20:20]. That section provides that:

“Any person who, by prescription or by virtue of any contract or transaction or in any manner, has acquired the just and lawful right to the ownership of any immovable

property in Zimbabwe registered in the name of any other person and cannot procure the registration of such property in his name in the land register, the register of occupation stands or the register of claims, as the case may be, in the manner and according to the forms for that purpose by law provided, by reason of the death, mental incapacity, insolvency or absence from Zimbabwe of the person in whose name such property stands registered as aforesaid or of any person or persons through or from whom such right has been mediately or immediately derived or owing to any other cause may apply to the High Court to order the registration of the title to such property in his name in the land register, the register of occupation stands or the register of claims, as the case may be in Zimbabwe.”

Counsel for the third defendant argued that the third defendant is a person who by contract has acquired a lawful right to ownership of immovable property which property is presently registered in the name of another and is unable to procure registration into his name through the normal channels by reason of the death of the seller.

The third respondent has complied with r 248 order 32 in that the application has been served on the Master of the High court.

Another dimension was the contention by the plaintiff’s counsel that this was a case of a double sale. In the event of a double sale then the first sale ought to be preferred. Counsel for the third defendant argued that the plaintiff can still not succeed as the first sale has not been proved even from the plaintiff’s evidence. Be that as it may court can still use its discretion in favor of the third defendant. Firstly the third defendant was not aware of the prior sale; secondly for close to two years after he took occupation the plaintiff never raised any claim against him or the seller. Thirdly the third defendant has been in occupation of the property since 1 October 1989, a period in excess of 20 years.

I am of the view that because of the various reasons outlined above the plaintiff’s case cannot succeed. As for third defendant I accept that he has made out a case for the relief he is seeking. The plaintiff’s counsel indicated that he was acting *in forma pauperis* and so no order for costs should be made against his client. That being the case no order for costs shall be made against the plaintiff.

Accordingly the plaintiff’s case is hereby dismissed. The third defendant is hereby granted the following order:

1. The interdict placed by this court on 2 September 1992, by judgment number HH 170-92, in case number. HC 1375/91 be and is hereby set aside.

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HH 244-10

HC 1375/91

HC 1107/07

2. The right, title and interests in Stand 13451 Unit N, Seke be registered in the name of Hezekia Muzopa, the applicant in case number. HC 1107/07.
3. The Deputy Sheriff, Chitungwiza be and is hereby authorized and required, in the place and stead of the Late Jackson Jekera, to sign all documents and perform all deeds necessary to effect cession of the right, title and interest in Stand 13451 Unit N, Seke to the Hezekia Muzopa.
4. The Chitungwiza Municipality be and is hereby ordered to facilitate and to record such cession in its books.

Garabga, Ncube & Partners, plaintiff's legal practitioners.

Muzangaza Mandaza & Tomana, 3rd defendant's legal practitioners.