

MARKO MAVHURUME  
(in his capacity as Executor of the Estate of the Late Maikoti Emmanuel)  
versus  
CLEVER MAIKOTI  
and  
MASTER OF THE HIGH COURT  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE March 02 and October 13, 2011

### **Opposed Application**

*M. Mavhunga*, for the applicant  
*G.H. Muzondo*, for the first respondent.

CHITAKUNYE J: In this application the applicant sought an order declaring as valid an agreement of sale of an immovable property, namely Stand No. 4645- 139<sup>th</sup> Street, Warren Park D, Harare, he entered into as executor with Richard Kaitano. He also sought that 3<sup>rd</sup> respondent be ordered to register the said property into the name of the said Richard Kaitano upon all other conditions being fulfilled.

The brief background is as follows: - On 26 January 2002 the late Emmanuel Maikoti died. A dispute arose within the estate of late Emmanuel Maikoti as to whether Francisca Gombera was a surviving spouse or not. To resolve the dispute the parties involved approached the magistrates' court.

In the magistrates court case no. DRH 40/09, the first respondent, who is a brother to the late Emmanuel Maikoti, was the complainant and Francisca Gombera was the respondent. In that case first respondent argued that Francesca Gombera was not a surviving spouse whilst Francisca Gombera contended that she should be declared a surviving spouse of the late Emmanuel Maikoti. On 18 March 2008 the learned magistrate in his ruling said of Francisca Gombera:- "she cannot be declared a surviving spouse because she separated with the man in 1986. She can therefore be declared a beneficiary. Further that a neutral executor to be appointed."

On 8 April 2008 first respondent noted an appeal 'against the whole judgment of the magistrate'.

Whilst the appeal was still pending the applicant was appointed executor dative in the Estate Emmanuel Maikoti in February 2009 by the second respondent. This appointment was apparently as a consequence of the magistrate's ruling.

Though in his submissions applicant's counsel made effort to distance the appointment from the magistrate's ruling, it was apparent from the applicant's founding affidavit that he believed this was so. It was also apparent that his exercise of powers as executor was dependant on the outcome of the appeal. This is evident from paragraphs 8 and 9 of applicant's founding affidavit wherein he stated that:-

"8. The first respondent however noted an appeal under case number CIV 'A' 135/08 **against the idea of a neutral executor and the appointment of Francisca Gombera as beneficiary.**

9. After our appointment and the noting of an appeal by the first respondent who is not even a beneficiary, **we were orally advised by the second respondent to stop any administration until the appeal had been heard and determined.**"

(emphasis is mine)

On 10 June 2009 applicant applied for and obtained consent to sale Stand No. 4645- 139<sup>th</sup> street, Warren Park D, Harare and Stand No. 8574 Glen view 8, Harare, otherwise than by public auction in terms of s 120 of the Administration of Estates Act [*Cap 6:01*]. He however did not proceed to sell till after the appeal was heard.

The appeal was heard on 15 October 2010 and a decision pronounced. Confusion thereafter reigned as to the correct court decision. That confusion was clarified on 23 November 2010 when the two judges who had presided over the appeal confirmed that the correct order was that the appeal was upheld and the order granted by the lower court was set aside.

On 23 November 2010 applicant wrote to the second respondent seeking assistance to obtain a rates clearance certificate for the properties. The second respondent in his letter of 21 December 2010 refused to grant the request.

On 7 December 2010 the second respondent wrote a letter to the applicant directing applicant to hold the administration of the said estate. Apparently by then the

applicant had sold the property in question as the agreement of sale is dated 26 November 2009.

Faced with the above the applicant approached this court with an application seeking a declaratory order confirming the validity of the agreement of sale in respect of stand number 4645 139<sup>th</sup> Street Warren Park D and that the third respondent be ordered to register the said property into the name of the buyer Richard Kaitano upon all other conditions being met.

The first respondent opposed the application. He queried why he had been cited as the principle respondent when no relief was being sought against him. He further contended that applicant had no *locus standi* to bring these proceedings before this court. On the merits first respondent argued that applicant's purported appointment as executor dative was a nullity as it was done in pursuance of a court judgment he had appealed against. The noting of the appeal automatically suspended that court judgment and so no valid appointment could be made based on a judgment whose operation had been suspended by virtue of the noting of the appeal.

The issues that arise for determination include:-

1. Whether the appointment of applicant as executor dative was lawful,
2. Did applicant have authority and capacity to sell the property at the time of the agreement of sale.; and
3. Is the agreement of sale concluded by applicant and another third party valid at law?

### **1. Whether the appointment of applicant as executor dative was lawful**

As has already been alluded to, the applicant's appointment was made after a magistrate's ruling in which the magistrate indicated the need for the appointment of an independent executor. That appointment appeared to have been on the strength of the magistrate's ruling. If that is so, as it should be, it follows that the ruling upon which the appointment was based had been suspended by virtue of the appeal. The appointment could not have been valid.

The applicant's counsel did not dispute that an appeal automatically suspended the operation of a judgment and that anything done in pursuance of that judgment would

not be valid. He however sought to argue that the applicant's appointment by second respondent was independent of the magistrate's order. That argument, in my view, was without merit. From the applicant's own papers it is evident that the appointment was in pursuance of the magistrate's ruling hence when that ruling was set aside, the second respondent directed applicant to stop the administration of that estate. Had the appointment been an independent act, not based on the court ruling, the outcome of the appeal would not have affected it at all. In this case the second respondent realized that the basis upon which he had appointed applicant had been taken away hence advised the applicant to stop administering the estate. It was also clear from the documents filed of record that neither the applicant nor the second respondent was alleging that the second respondent had done his own inquiry before appointing applicant as executor as required in terms of the Administration of Estates Act, [Cap 6:01].

The applicant's counsel alluded to the fact that applicant went ahead to sell acting on an erroneous order that had been issued. That again confirms that the basis for the appointment and authority was the magistrate's court ruling. Since that ruling was suspended by virtue of the noting of the appeal it follows that applicant's appointment in pursuance to a suspended court order could not be valid.

## **2. Whether or not applicant had authority and capacity to sell the property at the time of the Agreement of Sale.**

The next issue pertains to whether applicant had authority and capacity to sell the property at the time of the sale. In as far as I have concluded that his appointment was not lawful it follows that he could not have had the authority and capacity to sell. The Agreement of Sale is dated 26 November 2009. The judgment upon which he was appointed had been set aside on 15 October 2009. The confusion as to what the court decision was had been clarified on 23 November 2009. So in whatever way one looks at it, applicant had no authority and capacity to sell the property.

Though the applicant argued that he received the letter advising him that the appeal had in fact succeeded late, the correspondence that took place soon after the first court order, which later turned out to have been a wrong order, should have alerted him not to hastily

dispose of the property. For instance on 12 November 2009 the first respondent's legal practitioners wrote to the Master of the High Court asking for the directive to the executor to proceed with the administration of the Estate to be held in abeyance.

Paragraph 2 and 3 of that letter reads as follows:

“The administration of the above stated estate had been stayed as per your letter dated 24<sup>th</sup> June 2009 pending prosecution of an appeal in *Clever Maikoti v Francisca Gombera* Case No. CIV. ‘A’ 135/08 REF DRH 40/08. The appeal was heard and judgment delivered on 15 October 2009. Your office accordingly directed the Executor dative to “proceed with the administration and finalize this estate in the shortest possible time” in line with the court order.

In our view, the aforesaid order cries for consistency and reconciliation with the reasons as pronounced during the delivery of the judgment. We have since written to the Lordships' Clerk for clarification. Find attached a copy of the letter. It is our belief that the clarification is in the interests of all parties for the sake of finalizing the matter.”

That letter was copied to applicant's legal practitioners.

On 13 November 2009 applicant's legal practitioners wrote to the respondent's legal practitioner to the effect that there was nothing unclear about the judgment and so the applicant should proceed. However, in their letter dated 19 November 2009 to the Registrar of the High Court, they confirmed in their own words, that there was indeed an anomaly. In that letter they wrote, *inter alia*, that:-

“The above matter refers, and your letter dated 17 November 2009 in which the Honourable Justices Karwi and Uchena asked us to comment on the contents of the letter written by Messrs Garabga, Ncube and Partners, legal practitioners dated 11 November 2009. We have since perused all the relevant correspondence and confirm that when the appeal was heard on 15 October 2009 before the Honourable justices Karwi and Uchena, an order was made dismissing the appeal. In addition, an order was made quashing the proceedings in the *court-a-quo* on the basis that the proceedings had been presided over by two different Magistrates which rendered them grossly irregular.”

The above confirms the inconsistency that the first respondent's legal practitioners had correctly said needed reconciliation. When the clarification came it confirmed that in effect the appeal had succeeded.

It is my view that the applicant had no authority and capacity to sell at the time of the purported agreement of sale.

### **3. Whether the Agreement of Sale was valid.**

The next issue was whether the agreement of sale was valid. In so far as I have concluded that the applicant had no authority and capacity to sell it follows that whatever he purported to do was invalid.

Applicant tried to argue on the basis of the case of *K. Mutyasira v Barbra Gonyora* HH 218/10. That case was referred to me in terms of Order 38 r 313 of the High Court Rules, 1971. The issue for determination was whether Mr. Mutyasira was entitled to be paid in United States dollars for his curator's and executor's fees when that work was done in the year 2005 when the Zimbabwean dollar was still in circulation..

The question as to whether Mr. Mutyasira should be paid for the services he rendered before he was removed from the office of executor had been decided by KUDYA J in *B. Gonyora v K. Mutyasira and The Master of the High Court* HC 5567/05 and HC221/06. In his judgment in respect of those two cases KUDYA J ruled that K. Mutyasira's appointment was null and void. He however went on to say that Mr. Mutyasira should be paid the curator and executor fees up to the time when he was served with the application in HC 5567/05 challenging his appointment. This is the aspect applicant sought to rely on.

It is however my view that that case is distinguishable. In that case the Curator and executor had been appointed and had performed some services before his appointment was challenged. The judgment did not validate what he had done but merely allowed him to get his fees for work done before he was notified of the challenge to his appointment. The judge disallowed any claim for what was done after Mr. Mutyasira had been notified of the challenge to his appointment.

In *casu* applicant is not asking for fees for work done before the challenge to his appointment, but is asking for validation of a sale he conducted at a time for all intents and purposes he had no authority. He was appointed at a time when the directive for such appointment had been appealed against. He thereafter went on to sell the property after

the appeal had succeeded and the directive had by virtue of that, become of no force and effect.

Lastly it may also be noted that both parties accepted as common cause that in *Eshuwet Maikoti v Marko Mavhurume and 4 Others* HC 1787/10, Eshuwet Maikoti obtained a judgment by default against the applicant declaring the applicant's appointment as Executor dative in the Estate of the late Emmanuel Maikoti (DR 1809/07) null and void. The sale of Stand 8574, Glen View Township, Harare in similar circumstances was set aside. This order was granted on 15 September 2010 and by the date of this hearing on 2 March 2011, the applicant had not taken any steps against that default judgment. If applicant's appointment as executor in the same estate has already been declared a nullity and such declaration has not been challenged this court cannot find otherwise on the same appointment.

When all is considered, I am of the view that the application cannot succeed

Accordingly, the applicant's application is hereby dismissed with costs.

*Messrs Mavhunga & Sigauke, applicant's legal practitioners*  
*Garabga, Ncube & partners, 1<sup>st</sup> respondent's legal practitioners.*