

GIVEMORE SAMBADZI
and
SALATIEL NHUBU
versus
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
BHUNU J.
HARARE, 02 May 2012 & 09 October 2013

U. Sari for the applicants
The respondent in default

Unopposed application

BHUNU J: The facts that gave rise to this dispute are as follows:

In January 2010 the first applicant Givemore Sambadzi, purchased certain immovable property known as Stand 2048 Chadcombe township of Stand 1257 Chadcombe Township from one Charity Nyarai Mupaya and a Deed of Transfer was made in his favour. In November 2010, the first applicant then entered into an agreement of sale with the second applicant Salatiel Nhubu regarding this property.

However, he could not effect transfer to the second applicant as by then XN caveats had been placed on the property by one McDonald Freeman Tsambwa, who had also instituted proceedings with this court, on the basis that the said property belonged to his two minor children Chido Jacqueline Tsambwa born 24 July 1998, and Chikomborero Ronald Ralph Tsambwa born 23 August 2002 and had in fact been fraudulently sold by his wife Charity Nyarai Mupaya.

McDonald Tsambwa filed his principal application in case No HC 461/11 in January 2011 to which the first applicant in this case filed his notice of opposition which was answered by the McDonald Tsambwa. Heads of argument were filed by the first applicant in that matter (as Respondent) but it appears thereafter despite correspondence, McDonald Tsambwa did nothing to pursue his matter to finality. It was on this basis that a Chamber application was brought dismissing his case for want of prosecution. This dismissal was the basis upon which the Applicants in this case brought an unopposed application through their lawyer to get the Respondent in this present matter, the Registrar of Deeds to effect transfer to the second applicant. In response to various correspondence written by the applicants lawyers, Messrs P

Chiutsi seeking transfer, the Respondent wrote on 7 March 2012 stating that certain discrepancies had been noted in the sale of the property in question to the 1st Applicant which warranted cancellation of the Deed of Transfer 1559/2010. These were to the effect that transfer from minors Chido Jacqueline Tsambwa and Chikomborero Ronald Ralph Tsambwa required the masters consent and that this had not been obtained. Moreover, Charity Mupaya who had appointed Wesley Thabang Khanda as conveyancer did not appear anywhere in the previous Deed DT. 8339/2007.

He also noted that the extending deed made reference to one Lloyd Mudiwa Kativu instead of the two children, Furthermore, the Zimra certificate was for transfer Kativu to Tsambwa which meant no capital gains certificate was issued for the transfer. A discrepancy in the rates certificate was also observed. The Deeds office had indicated that the matter was under investigation as the transaction appeared not to have been properly done.

Applicants, through their lawyer sought an order through an unopposed application for transfer of the property to the second applicant in line with the agreement of sale entered into by the parties. The first applicant challenged the respondent's refusal on the basis that it is the respondent and the seller who can explain the alleged discrepancies as he was merely an innocent purchaser. They filed an unopposed application which was set down for hearing on the 4th of April 2012 whereby the Court directed that a copy of the chamber application for want of prosecution be attached. The matter was then postponed to 02 May where I raised the following queries:

- 1) The property was originally in the names of the two minor children Chido and Chikomborero Tsambwa born in 1998 and 2002 respectively.
- 2) The property was transferred from them in contravention of the law in that there was no involvement of the Master or authorisation of the Court as required by the law. If so, then the purported transfer from the two minor children was fraudulent and to that extent a nullity and of no force and effect at law. What this means is that whoever purchased the property might have acquired defective title incapable of transmission to any other person.
- 3) The purported previous transfer is fraught with other irregularities for want of compliance with statutory requirements regarding payment of capital gains tax and rates. This again points to fraud which vitiates the validity of the transfer.

- 4) The caveats in question were placed pending police investigations. There is no proof that the investigations have been completed.

The Master of the High Court was accordingly directed:

- 1) To appoint a curator *bonis* for the two minor children Chido and Chikomborerero Tsambwa and to render a report to the Court.
- 2) To report this matter to the Anti-Corruption Commission which shall communicate its findings to the Master of the High Court.
- 3) In the meantime the caveats in question to remain in force.

Applicants' lawyers attempted to circumvent this order by filing yet another chamber application challenging this order and seeking upliftment of the caveats and seeking an order that the property be registered by the Respondent into the names of the second applicant in line with the dismissal of the case for want of prosecution.

The reports requested by the Court in its order of 2 May 2012 have been compiled and are on record thereby enabling a finalisation of the matter.

Rule 249 (1) (a) & (b) of the High Court Rules 1971 as amended which sets out the requirements is to the following effect:

Rule 249. Applications involving persons under disability or minors

- (1) In the case of any application in connection with-
 - a) The estate of a person alleged to be prodigal or under any disability, mental or otherwise, or
 - b) A minor

A chamber application, annexing the written consent of the person to be so appointed **shall first be made for the appointment of a curator *ad litem*.**

Section 91 of the Administration of Estates Act states as follows as regards alienation of immovable property by tutor or curator

“91. Prohibition of alienation of immovable property by tutor or curator

No tutor, either testamentary or dative, and no curator either nominate or dative, or curator *bonis* shall sell alienate or mortgage any immovable property belonging to any minor or forming part of any estate under the guardianship of tutor or curator, unless the High Court or any judge therefor has authorised such sale, alienation or mortgage

or unless the person by whom any such tutor testamentary or curator nominate has been appointed has directed such sale, alienation or mortgage to be made.”

The reasons that the law requires the appointment of a curator ad litem are well known in terms of their origins in common law. The presumption is that a person who is a minor is generally, barring exceptions, not competent to manage his or her own affairs. While such a minor may have parents who would ordinarily have rights above those of everyone else with respect to their off spring (save for the Court as upper guardian), parents cannot be so appointed in such matters involving property belonging to their offspring because of conflict of interest. Indeed parents may have interests that are at variance with those of the minor child. This is the basis for the law’s requirement that a disinterested party be appointed.

Once appointed, certain expectations are placed on a curator ad litem. In terms of r 249 (3) after he (or she) has conducted the necessary investigations, he or she is required to prepare a written report which shall be filed with the Registrar and a copy served on the applicant and all other interested parties.

In this particular case, none of the law’s provisions were followed. The necessary information that the curator ad litem would have gathered and placed before the Court in order for it to determine whether it would have been in the best interests of the minor children, Chipo and Zvikomborero to have their property sold, did not happen because no one was appointed to represent their interests. If a curator ad litem had been appointed as required by the law, then given their fiduciary nature which requires them to deal with the property with the same caution as if they were dealing with their own, they would have been able to investigate all facts and gather the necessary explanations which they would have placed in their report for the Court to make its decision regarding the sale of the property. Questions and anomalies would have been brought to the fore.

The Masters Report dated 8 May 2013 confirms that r 249 (1) (a) and (b) of the High Court Rules which spells out the procedures to be adopted was not followed. The report rightly emphasises that that any sale which violates this r is fraught with irregularities and is deemed invalid. There is in essence no sale in the first place.

This correct statement of the legal position by the Master that where a sale takes place without following the necessary procedures then the sale is invalid has consistent and unwavering support in our law for an obvious commonsensical reason besides the law itself.

In light of the Courts' role as upper guardian of all minors it cannot and should not sanction illegalities which deprive minors of their rights in property. In *Nemuseso v Mashita* HH 122-09 at p 9, in a case of similar ilk with respect to depriving minors of their property through unauthorised sale, save that it involved deceased estate, GUVAVA J cited the case of *Schiourt v Minister of Justice* 1926 AD 99 at 109 where INNES CJ held:

“It is a fundamental principle of our law that a thing done contrary to the prohibition of the law is void and of no effect. So that what is done contrary to the prohibition of the law is not only of no effect must be regarded as never having been done and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act”.

Also cited by JUSTICE GUVAVA were Lord Denning's words best described as clarifying what constitutes a nullity for would be doubters, as stated in *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) and reiterated with approval by SANDURA J as he then was in the case of *Mugwebie v Seed C Ltd and Anor* 2000 (1) ZLR 93.

“If an act is void then it is at law a nullity. It is not only bad but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without further ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

In *Katsande v Katsande* HH 113 of 210 again a case where there was a similar non observance of requisite formalities in the sale of property belonging to minors, CHITAKUNYE J also stated that where an act is a nullity, the innocence or otherwise of the third party is of no assistance at all. He cited MAKARAU J in the case of *Katirawu v Katirawu and 3 ors* HH 58/07 at page where MAKARAU J P as she then reiterated that the rights the second respondent in that case believed to have purchased, were tainted with the same illegality and amounted to nought. As she stated it was as if there was never a sale. In this case the first applicant, Givemore Musambadzi's purchase of the property under circumstances which did not observe the law regarding minors' property rendered the sale void from the beginning and it matters not that it was not his fault as he alleged.

His recourse is against the person who sold the property to him, that is Charity Mupaya only and not McDonald Tsambwa. The parties are married according to [Cap 5:11] and according to s3 of the Guardianship of Minors Act, though a husband acts in consultation

with his wife, he is ultimately the guardian of the children.¹ He was not involved in the defective sale and was in fact instrumental in bringing to light the procedural and fraudulent shortcomings of her actions that had taken place without his knowledge.

The Court Order of 2 May 2012 required that the matter be referred to the Anti-Corruption Commission for investigation. On 13 November 2012 the Anti-Corruption Commission advised in writing that it had come to their attention when they were about to investigate the matter as ordered, that the ZRP Commercial Crimes Unit had since completed investigations in the same case and were holding the docket pending set down. (Harare CR 1089/07/10 and CCU DR 30/6/10. They were therefore holding off investigations whilst awaiting the outcome of the CCU case, for the avoidance of duplication.

The police correspondence to the Anti-corruption commission dated 23 October 2012 reveals that there was indeed a case to answer. Four accused persons were arrested and the docket was referred to court for the public prosecutors opinion; the public prosecutor's advise was that the docket will be successfully prosecuted upon the arrest of the core accused person Mildred Roki Chikuriwo; the second accused person who was Tsitsi Nyamupanda had died in South Africa and the other three are locatable namely Michael Limosa Welsy, Thabang Khanda and Euphrasia Mupedzisi; the core accused Mildred Roki Chikuriwo is believed to be staying in the United Kingdom.

Justice for Children was appointed as curator *bonis* for the two minor children Chido and Chikomborero Tsambwa when it became apparent to the Court that the procedures for the appointment of a curator ad litem had not been followed and their interests may have been compromised. Mr Caleb Mutandwa a registered legal practitioner offering voluntary services to Justice for Children, who acted as curator *bonis* raised serious concerns regarding the sale of the property to the first applicant in his report filed on 29 April 2013.

The report of the curator *bonis* in this case is vital in a number of respects. He was the one appointed and requested to investigate what transpired on behalf of the minor children on behalf of the court. As a curator *bonis*, the expectation was that he would on behalf of the minor children carry out this investigation with the rigour and urgency attendant upon his fiduciary role. I am satisfied judging from the thoroughness of his report in unpacking the Deed of Transfer, that he has put in his report the relevant facts that relate to the minor children's

¹ (Granted the new Constitution lays the foundation for challenging inequality, but it was not then in force.)

interests that aid this Court in arriving at decision in concluding this matter. Indeed from the factual content of his Report, which suggest chicanery gone awry, can be gleaned the very essence of the reasons why the law so stringently requires the appointment of a curator ad litem to represent the interests of minor children.

Under part C of his Report in paragraph 14 he reveals the following anomaly regarding the Deed of Transfer from which the first applicant drew his purported ownership:

“The Deed of Transfer No. 1559 from which Givemore Sambadzi derives his alleged ownership has a fatal error which he admitted but sought to impute on the conveyancer. It is common cause and indeed accepted by Givemore Sambadzi that immediately before he acquired ownership of the immovable property in dispute, it was registered in the names of Chido Jacqueline Tsambwa born on 24 July 1998 and Chikomborero Ronald Ralph Tsambwa born on 23rd August 2002 under Deed of Transfer Number 8339/2007. Deed of transfer 1559/2010 however provide in the Extension Clause that:

As will more fully appear upon reference to Deed of Transfer NO. 6255/98 dated 1 July 1998... and to the subsequent Deed of Transfer, the last of which was made in favour of Lloyd Madiwa Kativu and Mellody Kativu on 31 December 2007 (registered 8339/2007)”

As he rightly concludes:

“There was an attempt to disguise what appears to be fraudulent dispossession of the minor children of their immovable property. The last deed of Transfer Number 8339/2007 is misrepresented as having been made in favour of Lloyd Madiwa Kativu and Mellody Kativu yet it was held by minor children who had acquired title from the Kativus. Lloyd Kativhu and Mellody Kativu held ownership in the property under Deed of Transfer Number 6255/1998”.

In para 15 of his report Mr Mutandwa as curator *bonis* reveals some more evidence illustrative of the fact that the sale was about as far away as the sun in having the minors interests at heart. According to his report:

Section 11 of the Deeds Registries Act [Cap 20:05] provides that

“Transfer of land and cession of real rights therein shall follow the sequence of successive transaction in pursuance of which they are made.... It shall not be lawful to depart from any such sequence in recording in any Deeds Registry any change in the ownership in such land or real rights....

The Deed of Transfer Number 1559/2010 from which Givemore Sambadzi derives alleged ownership omitted the children’s names and included the names of Lloyd Madiwa Kativu and Mellody Kativu. This clearly violates these peremptory provisions of the law. This could have been deliberately done to ensure that the Registrar of Deeds would not require High Court authority to alienate the minor

children's property. Indeed Givemore Sambadzi alludes to the possibility that the whole transaction was shrouded in some fraudulent scheme which this honourable court cannot just ignore. Givemore Sambadzi was advised of all these anomalies by the Registrar of Deeds in a letter dated 7 March 3 202 which he attached to his application in HC 2868/12. His only response was to blame the conveyancer and the Registrar of Deeds. This however does not justify depriving the minor children of their property”.

He concludes his report with the recommendation that notwithstanding the dismissal of McDonald's Tsambwa's case HC 416/11 for want of prosecution, in line with the fact that the Court as upper guardian of all minor children cannot turn a blind yet when children are being deprived of their rights and recommends that the Deed of Transfer to Givemore Sambadzi should be cancelled and that the Registrar of Deeds should restore the Deed of Transfer Number 8339/2007 in favour of Chido Jacqueline Tsambwa and Ronald Ralph Tsambwa.

I have already dealt with the issue of the invalidity of the sale for failure to adhere to the requisite of the law on the sale of property regarding minors as well as the law's position on these matters. The curator *bonis*'s Report sheds further light by contextualising that invalidity in light of the facts. It is reprehensible that adults should endeavour to fraudulently deprive minors of their rights. For that reason alone costs at a higher scale are warranted.

It is therefore ordered that:

- a) Deed of transfer no. 559/2010 in favour of Givemore Sambadzi is cancelled.
- b) The Registrar of Deeds restores Deed of Transfer Number 8339/2007 in favour of CHIDO JACQUELINE TSAMBWA born on the 24th of July 1998 and CHIKOMBORERO RONALD RALPH TSAMBWA born on 23rd August 2002.
- c) Applicants to meet costs of suit at the legal practitioner client scale.

P Chiutsi legal practitioners, applicants legal practitioners

Machanga and partners, the curator's legal practitioners