

ESTATE LATE DOMINIC MUCHENJE MANDAZA
Represented by its Executrix Dative Molly Mandaza
versus
THE TRUSTEES FOR THE TIME BEING OF THE SEVENTH DAY ADVENTIST
ASSOCIATION SOUTHERN AFRICA
and
REGISTRAR OF DEEDS N.O
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 4 November 2020 & 11 November 2020

Civil Trial

N.P. Zhangazha, for the applicant
Advocate Ochieng, for the 1st defendant

TAGU J: This matter was filed as a Court Application to-

- a) Reinstate the Title Deed in the name of the applicant, which Title Deed is number 7572/90 in terms of section 8 of the Deeds Registries Act,
- b) Declare any purported transfer of Title from applicant as unlawful, invalid and of no force and effect and for such transfer to be cancelled and set aside;
- c) Order the 2nd respondent to cancel and set aside the transfer and Title Deed Number 10381/04 purportedly transferred from applicant and registered in the name of the Trustees for the time being of the Seventh Day Adventist Church, the 1st respondent herein.

The facts of the matter can be summarized as follows. The late Dominic Muchenje Mandaza purchased Stand 280 Helensvale Township of Lot 39A Helensvale measuring 1,5183 hectares and transfer was effected into his name on the 10th October 1990. The property is an

undeveloped Stand. One MOLLY MEMORY MANDAZA, the executrix dative still has the original Title Deed and the Diagram Deed of the Stand. She is the surviving spouse to the Late Dominic Muchenje Mandaza who passed on the 26th May 1993. She has been managing the Stand since the demise of her husband and continued to do so as executrix dative appointed in terms of letters of administration DR Number 1529/93.

On Friday the 5th of January 2018 as she intended to pay the rates and property tax of the said property she was informed by the City of Harare that the property was registered under the name of the 1st respondent. Her legal practitioners discovered that the transfer had been done in 2004 on 1st December 2004 under Deed of Transfer No. 10381/2004. She reported the fraud to the police under number RRB 340511. The conveyancer was none other than PRISCILLA SEKAI MADZONGA who was empowered by a Power Attorney executed by one Dominic Munyaradzi Mandaza who was purportedly acting by virtue of yet another General Power of Attorney granted to him by a "Dominic Muchenje Mandaza" on the 9th of November 2004.

The conveyancers for the transfer then availed copies of the documents which were used in the execution of the General Power of Attorney. These were a forged Zimbabwe Drivers Licence purported to be that of the late Dominic Muchenje Mandaza with a photo of an unknown person, an Identity card number different from the late Dominic Muchenje Mandaza, an affidavit used by the individual in which he states that he was the owner of the property in question and was leaving for Canada and empowering his son Dominic Munyaradzi Mandaza to act on his behalf in the sale of the property. There was also an Agreement of Sale dated the 6th of August 2004 between Dominic Munyaradzi Mandaza who was paid.

The applicant now applied to this Honourable Court to have the transfer which was made on behalf of the 1st respondent to be set aside and declared null and void as it was a result of fraud and to have Deed of Transfer Number 10381/2004 cancelled.

This court application was placed before KWENDA J on the 18th day of 2018. By consent of the parties the Court Application was referred to trial. The Rules of the High Court automatically applied.

A round- table meeting was held and parties failed to reach agreement and agreed to refer the matter to trial on the following issues captured on the parties' Joint Pre-Trial Conference Minute-

- “2.1. Whether the General Power of Attorney in favour of Dominic Munyaradzi Mandaza dated 9 November 2004 is valid given that Dominic Muchenje Mandaza passed away on the 26th of May 1993;
- 2.2. Whether or not the Agreement of Sale dated 6th August 2004 is valid given that Dominic Muchenje Mandaza passed away on the 26th of May 1993.
- 2.3. Whether or not the immovable property in question was lawfully transferred from Dominic Muchenje Mandaza to the 1st Defendant under Deed of Transfer No. 10381/2004;
- 2.4. Whether, therefore, Deed of Transfer No. 10381/2004 should be cancelled and set aside in terms of Section 8 (2) (b) of the Deeds Registries Act (Chapter 20.05);
- 2.5. Whether, therefore, Deed of Transfer No. 7572/1990 dated 10 October 1990 and registered in the name of Dominic Muchenje Mandaza in respect of Stand 280 Helensvale Township of Lot 39A Helensvale situate in the district of Salisbury and measuring 1.5183 hectares should be revived in terms of Section 8 (2) (a) of the Deeds Registries Act [*Chapter 20.05*] in favour of the plaintiff.
- 2.6. Whether or not the 1st Defendant should pay costs of suit on a legal practitioner and client scale;
- 2.7. Whether or not the sale of the property to 1st Defendant was fraudulent and if so,
- 2.7. 1. Who committed the fraud?
- 2.7.2. Was the Executrix negligent in her duties?
- 2.7.3. Could she have been aware of the fraud if she had not been so negligent?
- 2.8. When did Plaintiff become aware that the property had been sold and how?
- 2.9. Where should the loss lie?”

Two witnesses testified in this case. One for the plaintiff and one for the defendant. At the close of the defendant's case the parties' legal practitioners undertook to file written closing submissions by the agreed date. None of the legal practitioners have done so for over a year now. The court was forced to write this judgment without any input from the parties' legal practitioners.

In an endeavor to resolve the issues listed above the plaintiff gave evidence through Mrs. Molly Memory Mandaza. Her evidence among other things was to the effect that the property in

question was allegedly said to have been transferred to the first defendant by Dominic Muchenje Mandaza yet her husband on the 1st of December 2004 under Deed of Transfer Number 10381/2004 yet her husband had passed on in 1993. He could not have been able to sign a power of attorney on the 9th of November 2004. She maintained that all people mentioned in the documents that was facilitated to transfer the property from her late husband's property are all fake persons. She said the son mentioned in the affidavit is a fictitious person as she does not know that person by the name Dominic Munyaradzi Mandaza. She gave further evidence that shows that some identification numbers used by the fraudsters were different from those of her late husband and she produced all these documents as exhibits. For example, she produced a letter from the Central Vehicle Registry dated the 24th of January 2019 where it is stated among other things that-

“RE: CONFIRMATION LETTER FOR MANFAZA DOMINIC MUCHENJE:

This is to certify that MANDAZA DOMINIC MUCHENJE, Identity Card Number 63-048235 S 68 is a holder of a **FAKE** Zimbabwean Drivers Licence.

Licence number 33358H belongs to MAROZVA LLOYD ID number 63-965479 T 47.

We do not have cases of duplicated licence numbers...”

She denied being negligent in the administration of the property in question and said she periodically visited the site and her children would also periodically visit the site and find it vacant. She denied she should have known of the sale of the property through advertisements as she was not buying Newspapers and she was not selling the said Stand. According to her the fraud was committed by Dominic Munyaradzi Muchenje together with the first defendant which should have verified the correctness of the transactions before going into the Agreement of sale.

In its defence the first defendant led evidence through STEPHEN MURAMBIWA MANGOMA who is part of the leadership in the church and part of the committee in the transactions. He said he is the one who signed the agreement of sale on behalf the first defendant. His evidence was that the church came to know of the sale of the property in question through an advertisement that was published in The Herald. The advertisement had been placed by TONY WEST REAL ESTATE AGENCY. As a church they just trusted Tony West Real Estate Agency and entered into the Agreement of sale. Under cross examination he confirmed that most of the

documents produced by the plaintiff's witness were fake. He confirmed that indeed a fraud was committed leading to the transfer of the property into their names. When asked by the counsel for the plaintiff whether the church would insist on the agreement once it is proven to be illegal, his response was as follows-

“As a church we have a human face, we believed it was legal, if the court finds its illegal we have to sit with owners and come to some agreement.”

Further, he could not challenge the death certificate that proved beyond doubt that all the transactions were done after the owner had log passed own. He further confirmed Tony West Real estate confirmed a person that does not exist. He was asked the following pertinent questions and he gave revealing answers-

“Q- So Tony West facilitated a fraud?

A- Yes, given the documents before me.

Q- So the fraud was not hidden at all, Tony West, Conveyancers and Church would have seen the fraud if they cared to look? (that is at documents)

A – Church relied on Tony West and Costa, so it was not hidden.

Q- 1st defendant said all this happened because plaintiff was not diligent, careful, what is your comment given the evidence adduced?

A – Church has human face, when such things happen, people must sit and map a way forward. Given the time lapse the opinion is correct.”

The first defendant's witness further said he could not bring the various documents used in the transactions to court as evidence. His answers were that he merely relied on Tony West Real Estate Agency.

ANALYSIS

Having carefully considered all the evidence adduced before me the Court came to the following conclusions. The position of the plaintiff is very clear. It has the original Title Deed and the Diagram Deed to the said property in the possession of the executrix dative. In situations like this a *bona fide* owner receives the previous Title Deed to the property when transfer has been effected into another unlawfully. In *casu* the sale of the property to 1st defendant was fraudulent. The fraud was facilitated by a Dominic Munyaradzi Mandaza assisted by Tony West Real Estate Agency and Coster or the conveyancer. The applicant did not at any time lose

its right of ownership notwithstanding the purported transfers. She was not negligent in any manner. She was not aware of the fraud up until the time she went to pay the rates for the said property when she was told that the account has since been changed unto the 1st defendant's name by official from City of Harare. It is entitled to vindicate its property from whoever has possession of it. The loss must therefore lie on the 1st defendant. I say so because-

- a) The General Power of Attorney of Dominic Munyaradzi Mandaza dated 9 November 2004 is invalid given that Dominic Muchenje Mandaza passed away on the 26th of May 1993.
- b) Consequently, the Agreement of Sale dated 6th August 2004 is invalid.
- c) The immovable property in question was unlawfully and fraudulently transferred from Dominic Muchenje Mandaza to the first defendant under Deed of Transfer No. 10381/2004.
- d) Therefore, Deed of Transfer No. 10381/2004 should be cancelled and set aside in terms of Section 8 (2) (b) of the Deeds Registries Act [*Chapter 20.05*].
- e) Also Deed of Transfer No. 7572/1990 dated 10 October 1990 and registered in the name of Dominic Muchenje Mandaza in respect of Stand 280 Helensvale Township of Lot 39A Helensvale situate in the district of Salisbury and measuring 1.5183 hectares should be revived in terms of Section 8 (2) (a) of the Deeds Registries Act [*Chapter 20.05*] in favour of the plaintiff.
- f) Since plaintiff own its case the 1st defendant must pay the costs of suit on a legal practitioner and client scale as it was negligent in the manner it entered into the Agreement of sale.

IT IS ORDERED THAT

1. Deed of Transfer No. 7572/90 dated 10th October 1990 and registered in the name of Dominic Muchenje Mandaza, the Applicant, in respect of Stand 280 Helensvale Township of Lot 39A Helensvale and measuring One Thousand Five and Eighteen three (1.5183) hectares be and is hereby revived in terms of section 8 (2) (a) of the Deeds Registries Act [*Chapter 20.05*].
2. The Registrar of Deeds, 2nd respondent herein, be and is hereby ordered and authorized to cancel and set aside the following Title Deed and to make the appropriate endorsements on the relevant Deeds and entries in the registers in terms of section 8(2) (b) of the Deeds Registries Act [*Chapter 20.05*]:

- (i) Deed of Transfer No. 10381/2004 dated 11th November 2004 in respect of the property, purportedly transferred from Dominic Muchenje Mandaza and registered into the name of The Trustees for the time being of the Seventh Day Adventist Association of Southern Africa.
3. 1st respondent be and is hereby ordered to pay costs on a higher scale.

Chinz Law Chambers, plaintiff's legal practitioners
Coglan, Welsh & Guest, 1st defendant's legal practitioners.