

SHOW MAGAISA
and
TALENT MUSARARA
versus
ADMIRE SONGORE

HIGH COURT OF ZIMBABWE
MUNANGATI MANONGWA J
HARARE, 11 & 27 October 2021

Opposed Matter

K.Maeresera, for the applicants
K.Gama for the respondent

MUNANGATI-MANONGWA J: The applicants herein Shaw Magaisa and Talent Musarara are husband and wife. The applicants have approached this court seeking an order declaring them to be the lawful holders of the rights, title and interest in Stand No 13469 Unit N, Seke, Chitungwiza (hereinafter referred to as “the property.”) The applicants further seek the eviction of the respondent and all those occupying the property through him and costs on a higher scale. The application is opposed by the respondent.

In seeking relief, the applicants rely on the following facts expounded in their affidavits: One Janet Margaret Chikwandami the registered owner of stand 13469 Unit N Seke Chitungwiza died intestate. Her estate was duly registered with the Master of the High Court. On 13 March 2014, the applicants entered into an agreement of sale to purchase the aforementioned property from Aniston Alois Musunga acting in his capacity as the Executor dative in the estate of the late Janet Margaret Chikwandani who passed on in 2004. The applicants have attached to the application, the letters of Administration which were issued to Mr Musunga authorising him to administer the estate. It is not in dispute that Mr Musunga had proceeded to sell the property relying on the consent to sale granted to him by the Master of High Court. The consent is attached to the application. The applicants aver that they paid the full purchase price for the property being \$7000. The applicants proceeded to have cession effected into their names at Chitungwiza Municipality.

The applicants state that efforts to take occupation of their property have been frustrated by the respondents' resistance to vacate. It is due to the respondent's stubbornness that they have been compelled to institute this application. The applicants claim they have been put out of pocket as a result of the respondent's conduct and thus seek costs on a higher scale. It is the applicant's case that the respondent once applied for an order in HC 7011/16 nullifying the consent to sale which had been issued by the Master and the application was dismissed by Zhou J.

When the matter was initially heard the respondent had raised a number of preliminary points which were contested by the applicants. All the points were dismissed by this court in a written judgment of 3 February 2021 and this court ordered that the matter be heard on merits. Upon resumption of the hearing Mr Gama for the respondent applied for the joinder of the Estate late Bigboy Songore on the pretext that as a prior purchase this matter could not be determined without the estate's participation. Upon enquiry by the court as to whether the estate was registered he stated that he had not ascertained that fact although he had recommended its registration. The application was opposed. Apart from the fact that the court had already determined the issue of joinder when it made its ruling on 3 February 2021, the application was thrown out as it had no merit. There was no applicant as the respondent had no *locus standi* to represent the estate let alone an estate which was not even registered.

On merits, the crux of the respondent's opposition is that the sale to the applicants was a fraud which the executor Mr Musunga was unwittingly made to commit. The respondent contends that his father the late Bigboy Songore purchased the property in 2007 from the late Janet Margaret Chikwandani's children, Cathrine Songore and Lister Musarara (in their capacities as heirs). The respondent contends that upon purchasing the said property the now late Bigboy Songore took occupation and thus the respondent is occupying the property at the late Bigboy Songore's estate's pleasure.

The respondent states that his father paid the full purchase price for the property and major improvements that include a boundary wall, a third living room, floors plastering, roofing, plumbing materials doors and other things were effected. The respondent revealed in his papers that his father the late Bigboy Songore was related to both beneficiaries Cathrine Songore and Lister Musarara. In that, regard applicants were aware of the sale. He alleges that it is upon the death of his parents that Cathrine Songore and Lister Musarara hatched the plan to resale the property by registering the estate of Jane Margaret Chikwandani in 2013

thus defrauding the estate of the late Bigboy Songore. He further submitted in his opposing affidavit that no purchase price was paid by the applicants for the property and the purported agreement of resell was meant to “deprive the purchaser’s estate of any rights to the property.”

The respondent further raised issue with the manner in which the cession form is filled in. His argument is that the part filled in by the cedent was not done correctly hence no cession took place. He submits that the transaction is a nullity.

The respondent admits that the application he made for the nullification of the consent to sale granted to Mr Musunga was dismissed because he had no locus standi to seek relief in question as he was not the appointed executor to the estate of his father Big boy Songore.

The respondent raised what he purports to be a constitutional issue. It was submitted on behalf of the respondent that s 41 of the Administration of Estates Act which limits the right of persons who are beneficiaries from disposing of property except where it is absolutely necessary is inconsistent with Section 71(2) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 hereinafter referred to as “the Constitution.”

Mr *Maeresera* for the applicant submitted that the respondent failed in challenging the process that led to the sale of the property in HC7011/16. He submitted that the sale remains intact as respondent did not take further action to reverse the sale. After the finalisation of the estate the applicants were duly registered with Chitungwiza Municipality as the purchasers of the immovable property. Given that all the processes up to distribution of the estate were done and the applicants’ acquired rights through cession and placed all the documents before the court, he urged the court to grant the relief sought. He submitted that respondent had no reason to remain in occupation, as he was neither the purchaser nor the legal representative of the estate.

Mr *Maesera* submitted that Mr *Gama* was bringing in the issue of a double sale which was never pleaded. Even so, there was no issue of a double sale as the sellers were different. He stated that the agreement of sale shows that respondent’s parents allegedly bought the property from C. Songore presumably Cathrine Songore who was not the sole beneficiary and had not gotten the consent of the other beneficiary Lister. The seller thereto could thus not transfer rights greater than she had although she was a beneficiary .He submitted that the agreement which the respondent relies on is invalid. Further he submitted

that the respondent is not seeking any relief from the court as he just wants the matter dismissed. The respondent had not sought the setting aside of the sale. He submitted that there should be no mention of a prior purchaser as the estate is not registered. He urged the court to visit the respondent with an order for costs on a higher scale as the opposition had no merit and is frivolous and vexatious. The sale by the Executor as duly sanctioned by the Master of High Court was the lawful transaction.

In response, Mr *Gama* (for the respondent) in pursuant of the constitutional issue raised in the respondent's affidavit fervently argued that a sale by a beneficiary is not automatically null and void. As s 41 permits same. He submitted that the words "absolutely necessary" in s41 of the Administration of Estates Act need be excised from that section so that the provision is consistent with the constitution. He thus urged the court to indirectly apply s71 ss 2 of the Constitution in the resolution of the matter such that it can be taken that the beneficiaries Cathrine Songore and Lister Musarara lawfully disposed of their inheritance when they sold to the respondent's parents even before the estate was registered.

Mr *Gama* further submitted that there was a double sale as the property was sold to two different people hence the laws pertaining to a double sale have to be considered. He submitted that the prior purchaser is in occupation and could lose his investment if the order is granted. He maintained that no rights passed to the applicants given the cession form, which was incorrectly filled in. Argument was persisted with that the respondent and two other beneficiaries are in occupation through the prior purchasers their parents hence the claim for eviction was not sustainable. He maintained that the opposition to the application was necessary because of the special circumstances of the case hence punitive costs were not warranted as the sale to the applicants was a fraud and hence a nullity.

It is common cause that the estate of the late Jane Margaret Chikwandani was duly registered, Letters of Administration duly issued and consent to sell the property in issue granted by the Master. A sale was concluded and cession effected into the names of the applicants. All this is on record. None of these processes have been reversed and neither is there an application to set any of those processes aside.

It is pertinent to consider the position of the respondent *vis* his defence. The respondent seeks to rely on a sale, which he was not party to and makes allegations of fraud which are not buttressed by any evidence placed before the court.

He is not denying that he is resident on the property in issue rather he seeks to justify his occupation. He claims that he is residing on the property on the basis that same was purchased by his now deceased parents. He pleads ownership by his deceased parents. Of note is the fact that the estate is not before the court and hence the respondent cannot plead the case of the estate *moreso* when he is not the executor. If any improvements were made by his deceased parents it is the estate which has to raise such a claim through the executor. Of fatal consequence is the fact that the estate itself is not even registered. Mr Gama for the respondent categorically stated that he had recommended the registration of the estate to his client but was not sure whether it had been registered. In any case the estate is not even before the court. The respondent cannot plead the estate's case alleging purchase of the property hence his whole factored challenge of the sale to the applicants is without basis as he has no *locus standi* since he is not the executor.

Equally in the face of proof of purchase of the property by the applicants and the recognition of the applicants by Chitungwiza Municipality as the purchasers of the property his opposition cannot stand.

The respondent and his legal practitioner dwelt a lot on allegations of fraud, double sale and even went to the extent of raising what is perceived to be a constitutional issue, suffice that all this was a wild goose chase. All these points can validly be raised by the estate through its executor and not the respondent in his individual capacity. Clearly the legal practitioner for the respondent failed to decipher issues and hence he pursued arguments which certainly did not apply in this case. In the face of a sale which remains intact and legal processes which remain unchallenged it is difficult to see how without a counter-claim nor an application to set aside the sale to applicants, the respondent would expect to be successful. This is even complex when the respondent concerned is not even clothed with the legal capacity to represent the would be prior purchasers. Resultantly the respondent has no legal basis to resist eviction.

The applicants seek a declaratur. For an applicant to get such relief the applicant must show that he is an "interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest". See *Munn Publishing (Pvt) Ltd v ZBC* 1994(1) ZLR 337 (S) AT P343-344. Whilst the applicant has a

direct and substantial interest in the subject matter of the suit the court is at pains to appreciate why the applicant would seek a declaratur as against the respondent. The respondent is not the alleged purchaser of the property neither is he claiming ownership in his own right. Most pertinent the Chitungwiza Municipality has already accepted the applicants as the holders of the property in question when it endorsed the cession. The respondents appear in the books of the Municipality as the proper holders of rights to the property. In such instances it is the court's view that the granting of the declaratur becomes academic. This is because there is no valid contestation to their claim that they hold rights to the property. It is the court's view that given the adversary the applicants chose to bring before the court the relief of a declaratur is not appropriate in the circumstance.

However there is no reason why the applicants cannot succeed in their claim for eviction given the foregoing findings by the court. As regards the claim for costs on a higher scale it is this court's finding that the respondent had no case from the onset. He does not deny being resident at the property in question, he bases his resistance on the rights due to an estate which is not even registered. Upon an application by him challenging the consent to sell granted to Mr *Musunga* the court categorically advised him that he had no *locus standi* when it came to raising issues about the house on behalf of his parents. That was in 2016. It is thus baffling why he has not properly followed procedure and register his parents' estate so that the estate's interests can be protected. Numerous arguments which are not applicable herein including a constitutional issue were unnecessarily raised. Whether this was due to lack of proper legal advice or otherwise, is a question for another day. The court finds that the respondent's defence was frivolous, uninformed and unnecessarily meant to delay relief to the applicants. The court is thus convinced that an order for costs on a higher scale is justified herein.

Accordingly it is ordered as follows:

1. The respondent and all those claiming occupation through him be and are hereby ordered to vacate Stand 13469 Unit N Seke Chitungwiza within ten (10) days from the date of service of the order failure of which the Sheriff shall effect eviction.
2. The respondent shall pay costs of suit on a legal practitioner and client scale.

Chizengeya Maeresera & Chikumba, applicant's legal practitioners
Gama & Partners, respondent's legal practitioners