Case 1 **HC 7285/21**

JOSEPH MABWE
and
BRIAN MABWE
versus
TINASHE MUCHIVETE ZENDA N.O.
and
TINASHE MUCHIVETE ZENDA
and
TARUN DEVELOPERS (PRIVATE) LIMITED
and
MINISTERS OF LANDS, AGRICULTURE, FISHERIES, WATER AND RURAL RESETTLEMENT
and
MASTER OF THE HIGH COURT
and
THE SHERIFF OF THE HIGH COURT

Case 2 **HC 897/22**

ADMIRE TANDAI MUTENGIWA
and
STRUGGLE MUNETSI MUTENGIWA
and
JOSEPH MABWE
and
BRIAN MABWE
versus
TINASHE MUCHIVETE ZENDA N.O.
and
TINASHE MUCHIVETE ZENDA
and
TARUN DEVELOPERS (PRIVATE) LIMITED
and
MINISTER OF LANDS, AGRICULTURE, FISHERIES, WATER AND RURAL RESETTLEMENT
and
MASTER OF THE HIGH COURT
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 17 October 2022, 18 January 2024, 29 January 2024, 6 March 2024 & August 2024

Opposed Applications-*Declaraturs* and Rescission of judgment

E Jera with PE Chivhenge, for the applicants in both Case 1 and Case 2
E Mubaiwa, for the 1st, 2nd and 3rd respondents in both Case 1 and Case 2

MUSITHU J: This composite judgment deals with two related matters that were argued at the same time at the request of the parties. Both matters are concerned with a farm known as Farm No. 383 Wilshire H.Q. Chivhu measuring 150, 8995 hectares (the farm). Case 1 is an application for a *declaratur* and consequential relief. The applicants seek the following relief:

> "IT IS ORDERED THAT:
> 1. The eviction of the applicants and their families from Farm No. 383 Wilshire H.Q Chivhu be and is here by declared unlawful.
> 2. Applicants' occupation of the Farm No. 383 Wilshire H.Q Chivhu be and is hereby restored.
> 3. The agreement of sale entered into between the 1st Respondent and the 3rd Respondent with respect to Farm H.Q Chivhu measuring 150.8995 hectares be and is hereby declared null and void.
> 4. The 3rd Respondent and all those claiming occupation through it be and are hereby ordered to vacate Farm Number 383 Wilshire H.Q Chivhu within ten (10) days of the granting of this order.
> 5. The consent to sell Farm Number 383 Wilshire Chivhu issued by the 5th Respondent be and is hereby declared null and void.
> 6. 1st, 2nd and 3rd Respondents be and are hereby ordered to restore the applicants to the status they were in prior to the unlawful eviction.
> 7. 1st, 2nd and 3rd Respondents be and are hereby ordered to pay the costs of suit on an attorney and client scale jointly and severally the one paying the other to be absolved."

. The application was opposed by the first, second and third respondents.

Case 2 is an application for the rescission of a judgment that the applicants claim was granted in error having been procured fraudulently. The applicants also seek certain *declaraturs* and consequential relief. The draft order sets out the relief sought as follows:

"IT IS ORDERED THAT

1. The order of this honourable court under Case Number HC 5898/21 be and is hereby set aside.
2. The 4th Respondent be and is hereby barred and interdicted from issuing a Deed of Grant, or transferring the farm No. 383 Wilshire H.Q, to the 1st Respondent or to the estate of the late Ben Tinawapi Mutengiwa.
3. The 1st Respondent be and is hereby directed to issue a lease to a person chosen by the family of the late Ben Mutengiwa in consultation with the descendants of the later Mabwe Mutengiwa.
4. It be and is hereby declared that Farm No. 383 Wilshire Headquarters Chivhu never formed part of the estate of the late Ben Tinawapi Mutengiwa and ought not to have been dealt with and or distributed under his estate registered under DR 1861/12.
5. The agreement of sale entered into between the 1st Respondent and the 3rd Respondent dated 2 December 2019 with respect to Farm 383 Wilshire H.Q. Chivhu measuring 150. 8995 hectares be and is hereby declared null and void.
6. The 3rd Respondent and all those claiming occupation through it be and are hereby ordered to vacate Farm Number 383 Wilshire H.Q Chivhu within ten (10) days of the granting of this order.
7. Paragraphs 3 of the Redistribution agreement signed by the beneficiaries of the estate of the late Ben Tinawapi Mutengiwa dated 13 November 2017 be and is hereby declared null and void.
8. The consent to sell Farm Number 383 Wilshire Chivhu issued by the 5th Respondent dated 30th November 2017 be and is hereby declared null and void.
9. The 2nd Respondent be and is hereby removed as the executor of the estate of the late Ben Tinawapi Mutengiwa and the 5th Respondent be and is hereby directed to appoint another person as the executor of the aforesaid estate in consultation with the family of the late Ben Tinawapi Mutengiwa.
10. 1st, 2nd and 3rd Respondents be and are hereby ordered to pay the costs of suit on an attorney and client scale jointly and severally the one paying the other to be absolved."

The application was also opposed by the first, second and third respondents.

Background to Case 1 and the Applicants' Case

The founding affidavit was deposed to by the first applicant. His evidence was as follows. The farm was owned by the State and under the control of the fourth respondent. In the 1960s, the State leased the farm to the late Mabwe Mutengiwa through a lease agreement between the Government and the late Mabwe Mutengiwa. Mabwe Mutengiwa died intestate in 1992. Mabwe Mutengiwa was survived by two wives and several children and grandchildren. The deponent was a son to one of Mabwe Mutengiwa's sons, Fradrick Mabwe who died intestate in 1994. The deponent claimed to have been born at the farm in 1966 and the farm had been his home since then.

Following the death of Mabwe Mutengiwa the first applicant and the extended family who included his uncle Herbert Mabwe remained in occupation of the farm. The late Ben Tinawapi Mutengiwa was appointed heir to the late Mabwe Mutengiwa's estate. The lease between the State and the late Mabwe Mutengiwa was ceded to the late Ben Tinawapi Mutengiwa.

Around April 2021, the entire Mutengiwa family was evicted from the farm through the execution of an order of this court of 10 October 2018 under HC 5558/18. Their houses were destroyed leaving them homeless. The order of this court that led to their eviction was granted by this court per MUNANGATI MANONGWA J in default. In that matter, the applicant was Tinashe Zenda (N.O.), who happens to be the first respondent herein. The first to fourth respondents were Herbert Mabwe, Elias Christopher Mutengiwa, the Master of the High Court and the Minister of Lands, Agriculture and Rural Resettlement. The order directed the eviction of the first and second respondents and those claiming occupation through them from the farm. The first and second respondents were also ordered to pay costs of suit on the legal practitioner and client scale.

The deponent claims that the eviction caught them by surprise. They approached the Police who advised them to seek legal representation. They had no resources at the time to engage legal practitioners for assistance. They engaged their legal practitioners of record in June 2021. The legal practitioners asked them to pay a deposit towards their fees which they did not have. This was also during the Covid 19 era and access to the courts was not easy. They had difficulties accessing the file for the farm at the offices of the fourth respondent. They ended up approaching this court for an order directing the fourth respondent and the director in the Ministry to allow them access to the records. That order was granted by this court per CHINAMORA J on 24 November 2021 under HC 5972/21.

The first applicant's investigations revealed that the executor to the estate of the late Ben Tinawapo Mutengiwa sold the farm to the third respondent herein. The fifth respondent had issued a consent to the sale of the farm. The farm was never owned by the late Ben Tinawapi Mutengiwa. The fourth respondent had at one point stipulated the requirements to be fulfilled before the farm was sold. Those requirements were never complied with prior to the sale of the farm.

The applicant was not a party to the application in HC 5558/18. He was never served with a copy of the application. He avers that he did not claim occupation of the farm through Herbert Mabwe or Elias Christopher Mutengiwa who were cited as the first two respondents in the matter. he claimed occupation of the farm by virtue of being a descendant of the late Mabwe Mutengiwa. The applicant averred that he could not be evicted from the farm based on an order that he was not party to. The first respondent as executor to the estate of the late Ben Mutengiwa was fully aware of the status of the farm and their interests. He therefore acted fraudulently when he approached the court for an eviction order that did not cite them. Elias Christopher Mutengiwa, the second respondent in that matter did not even stay at the farm. He had his own home in Wedza. There was no reason why he had been cited.

The first applicant averred that the sale of the farm to the third respondent was unlawful. The farm did not belong to the late Ben Tinawapi Mutengiwa, but to the State. Ben Tinawapi Mutengiwa only held personal rights emanating from the lease originally in the name of the Mabwe Mutengiwa. The first respondent was aware that the estate did not own the farm and could not sell it. It was because of that reason that he approached the fourth respondent for permission to sell the farm. In its response, the fourth respondent set out the requirements that had to be satisfied if the farm was to be sold. The requirements were that: an heir had to be appointed first; the lease was to be transferred into the heir's name, the heir had to apply for a deed of grant and a certificate of no present interest. The farm was only to be sold after a certificate of no present interest was issued. The applicants contend that none of the above requirements were satisfied before the farm was sold to the third respondent.

The first applicant further averred that the fifth respondent had no jurisdiction to issue any consent for the sale of the farm. He had no right to interfere in the inheritance of leases issued by the government. It was for the fourth respondent to decide how to proceed with the farm following the death of Ben Mutengiwa. The beneficiaries of the estate of the late Ben Tinawapi Mutengiwa could not decide on the fate of the farm as it was not estate property. The farm remained State land. Further, the late Ben Mutengiwa inherited rights to the farm following his appointment as heir to the estate of the late Mabwe Mutengiwa. Following his death, a new heir was supposed to be appointed *per stirpes* for the rights and interests of the late Mabwe Mutengiwa under the original lease to legally pass to the next person. The appointment of an heir

was a decision for all the descendants of the late Mabwe Mutengiwa, and not just the beneficiaries of the late Ben Mutengiwa's estate.

According to the first applicant, the requirement for a deed of grant was meant to ensure that the farm became legally owned by the heir as appointed. It was the deed of grant and the rights attendant thereto that would enable the heir to legally dispose of the farm. That took the first respondent as the executor out of the whole equation. The requirement for a certificate of no present interest was intended to ensure that the sale and disposal of the farm would comply with the provisions of the Land Acquisition (Disposal of Rural Land), Regulations, 1999.

The first applicant further averred that the third respondent's occupation of the farm was illegal. The third applicant had taken occupation of the farm after executing an order that was not directed to the persons who were evicted. The third respondent had to return the applicants to the position that they were in prior to the sale and purchase of the farm, including putting back the structures that were at the farm before the unlawful execution of the order of the court.

The first applicant sought costs of suit against the first, second and third respondents on the legal practitioner and client scale because of the manner they conducted themselves in the unlawful disposal of the farm.

In his founding affidavit, the second applicant associated himself with the averments made in the first applicant's founding affidavit. He made the following additional averments. He was the son of Noel Mabwe, who was one of the sons of Mabwe Mutengiwa. His father died on 11 November 2019. He retained possession of part of the farm through his late father who was himself occupying the farm as the child of Mabwe Mutengiwa. When he became of majority status, the second respondent claims that he got married and founded his own family whilst residing at the farm.

When he was evicted from the farm, he was not claiming occupation through Herbert Mabwe or Christopher Mutengiwa, the parties cited in the eviction order. He could not therefore have been evicted based on an order that was not applicable to him.

The First and Second Respondents' Case

Tinashe Muchivete Zenda deposed to the opposing affidavit in his personal capacity as well as being the executor dative to the estate of the late Ben Tinawapi Mutengiwa. The

opposing affidavit raised the following preliminary points. The first respondent challenged the applicants' *locus standi* to institute the present proceedings. He averred that Mabwe Mutengiwa died before 1997, when the legal position was that an heir inherited immovable properties of the deceased estate in his individual capacity, and not in a representative capacity. The property inherited would be the heir's personal property. That position was changed by Act 6 of 1997, which provided that an heir would inherit the deceased's name and personal artifacts such as the knobkerrie. The immovable properties would be inherited by the surviving spouses in respect of the houses they lived in and in equal shares in all the immovable properties between the surviving spouses and the deceased's children.

The estate of the late Mabwe Mutengiwa was dealt with under customary law and the farm was awarded to the late Ben Tinawapi Mutengiwa as an heir under the old law. He thus inherited the farm in his individual capacity. The farm was registered in the name of the late Ben Tinawapi Mutengiwa. The first and second applicants were not beneficiaries to the estate of the late Ben Mutengiwa, and therefore had no *locus standi*, to institute the present proceedings. Beneficiaries to that estate were the deceased's wives and children who decided what to do with their late father's estate. The estate had since been finalized and beneficiaries had received their shares.

The second preliminary point was that an existing court order could not be set aside through a *declaratur*, but a rescission of that order. The applicants had to deal with that order first before seeking a *declaratur* of their rights herein. The court was urged to dismiss the application based on the preliminaries.

As regards the merits, the first respondent made the following averments. The applicants were never evicted from the farm because they were not in occupation of that farm. The parties that were on the farm were successfully evicted as confirmed by the Sheriff's return of service. The applicants were never mentioned as occupying the farm in past proceedings or complaints lodged with the fifth respondent. At a meeting held at the first respondent's offices on 13 November 2017, the applicants did not attend. The relatives of the deceased who attended were Herbert Mabwe, Elias Christopher Mutengiwa and Phillimon Mutengiwa.

The first respondent also averred that the sale of the farm did not involve the applicants but the first respondent and the third respondent. The third respondent was entitled to remain in

occupation of the farm whose vacant possession it got after the Sheriff enforced the order of this court. The applicants did not have a basis of nullifying the agreement that they were not parties to. The hardships pleaded were not true since the applicants were never in occupation of the farm. The second respondent also averred that had the applicants been in possession of the farm, they would have been aware that it was included in the estate of the late Ben Mutengiwa and that the beneficiaries of that estate had agreed that it be sold. Further, several visits had been made to the farm by the valuer and prospective buyers, and if the applicants were indeed in occupation of the farm, they would have been aware of the impending sale.

The first respondent contended that the fifth respondent had every reason to grant the consent to sell in terms of s 120 of the Administration of Estates Act. The deed of grant was being prepared in the name of the late Ben Mutengiwa's name. The sale of the farm without a Certificate of no present interest made the sale voidable at the instance of the aggrieved contracting party and not the applicants.

Third Respondent's Case

The opposing affidavit was deposed to by Johnson Gapu, in his capacity as a director of the third respondent. The deponent averred at the outset that the applicants lacked *locus standi* in their individual or representative capacities. The late Ben Mutengiwa was the heir to the estate of the late Mabwe Mutengiwa. The applicants had not even been cited in the proceedings under HC 5558/18. They could not seek to reverse the order granted in that matter through filing another application instead of seeking the rescission of the order granted in that matter.

As regards the merits, it was averred that the applicants could not seek the nullification of an agreement that they were not parties to. The applicant could also not seek the eviction of the third respondent who was a *bona fide* purchaser. The applicants were not interested parties, and neither were they beneficiaries to the estate of the late Ben Tinawapi Mutengiwa. The consent to sell the farm issued by the fifth respondent was legal as it was issued in terms of the law. The third respondent also averred that the farm had been paid for in full and what was left was the issuing of the deed of grant, an issue the estate was regularizing. The farm belonged to the estate of the late Ben Mutengiwa and had been fully paid for. That was the reason why the responsible Ministry was prepared to issue a deed of grant.

The Answering Affidavit

In response to the first and second respondent's opposing affidavit, the applicants denied that they lacked the requisite *locus standi* to institute these proceedings. They insisted that the late Ben Mutengiwa never inherited the farm, but only acquired personal rights through a lease agreement. The fact that the applicants were not beneficiaries to the estate of the late Ben Mutengiwa did not disentitle them from seeking the relief they sought herein. The applicants further averred that they were not seeking the rescission of the order that led to their eviction. They were challenging the illegal eviction carried out at the instance of the first respondent. There was no need to apply for rescission of that court order. They had been evicted without a court order.

The applicants persisted with their averments that the actions of the first respondent were both fraudulent and an abuse of the office of executor. They also insisted that it was within their rights to seek the nullification of the agreement of sale of the farm to the third respondent because it was a nullity at law. The applicants also claimed that the first respondent went on to apply for the issuance of a deed of grant in the name of the late Ben Mutengiwa under HC 5898/21, which confirmed that the sale was a nullity in the first place. The consent to sale issued by the fifth respondent was improperly issued as it authorized the sale of an asset that the deceased did not own.

As regards the third respondent's opposing affidavit, the applicants averred that they were challenging an unlawful eviction that left them homeless. They were not cited in the court order that led to their eviction. The farm was illegally sold to the third respondent. The applicants contended that they had a real and substantial interest in the matter because they were challenging an illegal process that left them homeless. The agreement of sale to the third respondent was a nullity and the third respondent was not a *bona fide* purchaser. The farm did not belong to the late Ben Mutengiwa and for that reason it could not have been sold as an asset of the estate. Ownership was proved by registration of title and not a lease. Ben Mutengiwa never possessed ownership rights in the farm.

Background to Case 2 and the Applicants' Case

Case 2 is an application for the rescission of a judgment that the applicants claim was granted in error having been procured fraudulently. The first applicant deposed to the main founding affidavit, with the second applicant associating himself made by the first applicant. The judgment that the applicants want rescinded was the one granted by MHURI J under HC 5898/21 on 19 January 2022. The applicants herein contend that the judgment was issued in error in the absence of the parties affected by it. They also contend that the order was procured through the fraud of the first and second respondents, who wanted to cover up the illegal sale of the farm to the third respondent.

Just as in Case 1, the applicants herein aver that the farm was never owned by the late Ben Tinawapi Mutengiwa, and the first respondent should not have dealt with it as an asset of the estate of the deceased. Further, the law relating to the sale of rural land, and the conditions set by the fourth respondent for the disposal of the farm had not been complied with at the time of the sale.

The first applicant's version of events was as follows. He was the first born son of the late Ben Tinawapi Mutengiwa, who died intestate on 9 November 2010. Following the death of Ben Mutengiwa, one Philemon Mutengiwa who was their nephew was appointed the executor to the estate of the late Ben Mutengiwa. During the first half of the 2017, the first applicant claimed to have received calls from the first respondent inviting him, his mother and siblings to attend to his office as he was now handling the estate of their late father. They attended three meetings at the first respondent's offices as follows. The first meeting was attended by the applicants and their mother, Dorothy Mutengiwa. The meeting was aborted because the other family members were not in attendance. The first respondent however told them that he had been appointed as a neutral executor after the Philemon Mutengiwa failed to wind up the estate within 6 months as required by the law.

The second meeting was attended by the applicants, their mother and Tsitsi Mutengiwa, their sister from a different mother. The third meeting was attended by the applicants, their mother, one Cynthia Dzvairo, Tsitsi Mutengiwa, Chido Mutengiwa Tacey Mutengiwa who was representing Abedinigo Mutengiwa, a minor then but now deceased. There was also Herbert Mutengiwa, a brother to the deceased, Philemon Mutengiwa the former executor and Christopher Mutengiwa, a brother to the deceased. At the meeting, the first respondent advised the brothers to

the deceased that they had no role to play as they were not beneficiaries to the late Ben Mutengiwa's estate. The first respondent also advised the meeting that the late Ben Mutengiwa was the rightful owner of the farm, having inherited it in his personal capacity from the late Mabwe Mutengiwa.

According to the applicants, the deceased's brothers were not convinced with the explanation as they argued that the farm belonged to their late father and was home to the descendants of the late Mabwe Mutengiwa. The first respondent did not budge and threatened the deceased's brothers with arrest, as the meeting was only for beneficiaries of the late Ben Mutengiwa's estate. The deceased's brothers remained quiet thereafter. The first respondent advised the beneficiaries that he wanted them to sign a Redistribution Agreement that he had prepared. He threatened to report them to the fifth respondent if they refused to cooperate.

The applicants claim that together with their mother, they raised the issue that the farm that had been included in the Redistribution Agreement did not belong their late father. The first respondent insisted that they sign the document notwithstanding their reservations to the contrary. He told them that he had limited time to wind up the estate and so they had to sign the document. He was however going to investigate the status of the farm. If it belonged to their late father, he was going to sell it. If it did not belong to their late father, then he was not going to sell it. The applicants claim that they even proposed that the farm be put in a trust so that it benefited the other family members, but the first respondent would have none of it. The applicants claim that they were left with no option but to sign the Redistribution Agreement.

The applicants claim that the first respondent told them that he was going to sale one of the properties, either the farm or the Kuwadzana house to raise funds for his and the fifth respondent's fees. If the beneficiaries did not want that to happen, then they had to raise the funds themselves. They advised him that they had no resources to pay the fees and that was the reason why they had chosen a family member to act as the executor of their late father's estate. The applicants claim that the first respondent told them that he was proceeding in the manner he had highlighted, and they could not do anything to him as he had been appointed by the fifth respondent.

The applicants claim that they later received a letter from the first respondent advising them that Herbert Mabwe had lost his battle for the farm in court. Attached to the letter were the

writ of ejectment, issued pursuant to the order by MUNANGATI MANONGWA J and the court order itself. The applicants contend that a perusal of the record in HC 5558/18 showed that the court order was issued on the basis that the Herbert Mabwe and Elias Christopher Mutengiwa were hampering the first respondent in the execution of his duties as an executor. The court did not declare who the owner of the farm was.

Disgruntled with the way the first respondent was proceeding, the applicants' mother wrote to the fifth respondent seeking the removal of the first respondent as executor. The letter dated 5 April 2019 did not elicit a response from the fifth respondent. On making a follow up, the applicants were advised that the letter had been referred to the first respondent. They could not do anything further in view of the threats the first respondent had already made to them. According to the first applicant, sometime in early December 2019, he received a text message from the first respondent informing him that a buyer had been found for the farm, and Tsitsi had accepted the buyer's offer. The first applicant called the first respondent and informed him that the other siblings were against the sale of the farm and were not accepting the offer.

The first respondent asked the applicants for their bank account numbers so that he could deposit proceeds of the sale of the farm. The applicants refused to furnish their bank accounts. The first respondent then wrote to the beneficiaries advising them to collect their money from the fifth respondent's offices, but they refused and have not done so to this date. The letter of 2 July 2020 from the first respondent addressed to the beneficiaries read as follows:

> "RE: ESTATE LATE BEN TINAWAPI MUTENGIWA DR 1861/12:
> BENEFICIARIES FUNDS
>
> The above matter refers.
>
> The estate account for Ben Tinawapi Mutengiwa was confirmed. We are therefore asking you to go and get your shares of $39 898.77 each, which was deposited into the Master's Guardian Fund Account totalling $199 493.85 (hereto attached).
>
> We kindly advise you to visit The Master of High Court for your shares."

The applicants and the other beneficiaries did not collect their share as directed by the letter. Sometime in 2021, the children and grandchildren of the late Mabwe Mutengiwa were evicted from the farm, and their homes were destroyed. This was done to pave way for the occupation of the third respondent. The applicants claim that this happened because of the

unilateral actions of the first respondent to sell the farm without their consent. The applicants aver that all along they believed that their father's brother, Herbert Mutengiwa and the other family members had taken steps to have the order under HC 5558/18 reversed. On seeking legal advice, they were informed that the persons who should challenge the conduct of the first respondent were the direct beneficiaries of the late Ben Mutengiwa's estate.

According to the applicants, the first respondent made them sign the Redistribution Agreement on 13 November 2017, before he had verified the ownership status of the farm. The letter requesting confirmation of the status of the farm was written to the Provincial Lands Office, Marondera on 24 November 2017, and the fourth respondent responded to the letter on 24 November 2017. The fourth respondent's letter confirmed that the late Ben Mutengiwa held a lease for the farm. On 13 February 2018, the first respondent wrote another letter to the Lands Officer responsible for Mashonaland East, a Mrs Muzengeza. The letter sought the ownership status of the farm and whether it had been fully paid. The letter also stated that the beneficiaries wanted to sell the farm to raise the fifth respondent's fees and share the proceeds from the sale of the farm. Part of the proceeds would also go towards paying off what remained outstanding with the fourth respondent. The fourth respondent responded through a letter of 26 February 2018, outlining the requirements for the disposal of the farm.

The applicants contend that all these enquiries that were made after the signing of the Redistribution Agreement were calculated to enable the first respondent to then use the pre-signed documents to achieve his desire of selling the farm at all costs without their consent. The applicants contend that it was wrong for the first respondent to proceed with the process for the disposal of the farm before the status of that farm had been ascertained. The purported authority based on the Redistribution Agreement was also invalid.

The applicants also contend that the order of this court was granted in error. This court had the power to rescind it in terms of r 29 of the High Court rules, 2021. The applicants further contend that as beneficiaries of the estate of the late Ben Mutengiwa, they were affected by the order in the sense that it excused the first respondent from complying with the conditions set by the fourth respondent, to the prejudice of the beneficiaries.

The first respondent is also accused of misleading the court in his application for the issuing of a deed of grant. In his founding affidavit, he told the court the court that the farm

belonged to the estate of the late Ben Mutengiwa, when it did not. If the farm belonged to the estate, then the application would have been unnecessary. Had the court been aware of this position, then it would not have granted the application. The first respondent did not disclose to the court that he had already sold the farm illegally, since he had not complied with the conditions set by the fourth respondent. The order granted by MHURI J directed the fourth respondent to issue the deed of grant in the name of a dead person, which was legally incompetent. The court fell into error in granting the application. The first respondent realized that he had failed to comply with the conditions set by the fourth respondent, and he surreptitiously sought an order compelling the fourth respondent to issue a deed of grant.

First and Second Respondent's Case

The opposing affidavit raised the following preliminary points. The first was that the applicants lacked *locus standi* to challenge the sale of the farm, to interdict its transfer or to seek rescission of the court order. Their contention was that the farm did not belong to the estate but to the fourth respondent. They had no interest in the regularity of a court order that dealt with rights that were not theirs. It was further averred that the applicants could not seek the setting aside of the Redistribution Agreement or parts of it without joining the other parties to that same agreement.

The first respondent also contended that the applicants could not seek to invalidate an agreement on the basis that they were misled by a person who was not part to that agreement. The agreement was between the applicants and their relatives identified in it. Even if it were true that they were misled, the applicants could not be released from their agreement without involving the other parties who signed the agreement. There was therefore no cause of action for the relief sought.

The last preliminary point was that the applicants had no cause of action from which to challenge the sale or to procure an interdict. The estate from which they derived their rights was a lessee at the farm. The lease created personal rights between the estate and the deceased. Those rights were terminated by the lessee's death. The applicants had no lease to inherit and no basis on which to launch their claim for an interdict. Even if the lease existed, it would only give them rights of occupation of the farm and not ownership.

As regards the merits of the application, the first respondent denied that the order sought to be rescinded was granted in error. The applicants had no interest in the land and could not seek to regulate how the fourth respondent dealt with his property. There was therefore no illegality to talk of in the manner the sale was done. It was true that the late Ben Mutengiwa did not own the farm. It was equally true that the applicants did not own the farm. They therefore had no right to complain about the sale of land which they accepted was not theirs. The applicants had no reason to complain if the fourth respondent had not complained. The first respondent denied that the fourth respondent's conditions were not complied with. Even if they were not complied with, it was not for the applicants to complain since they had no interest in the farm.

The first respondent also averred that he acted on the basis of the permission given by the beneficiaries, the authority of the fourth respondent and the agreement of the fifth respondent. The decisions of these parties remained extant. He denied that he threatened the applicants or the beneficiaries as alleged. He had not been called to answer to allegations of fraud or abuse of office. The first respondent also averred that the reason he wrote to the fourth respondent was not to ascertain the ownership status of the farm. It was meant to get the fourth respondent to provide information of what the estate needed to do to obtain registered title in and sell the farm. The first respondent also averred that he derived no benefit from the sale of the farm, since he could still claim his fees whether the farm was sold or not.

Further according to the first respondent, the lease which the applicants sought to leverage on ceased to exist upon the death of Ben Mutengwa. That lease created personal rights which were extinguished by death. It was up to the fourth respondent to decide what to do with the farm following the lessee's death. The fourth respondent chose to permit the sale of the farm. The applicants had nothing to inherit.

The alleged infringements would have prejudiced the fourth respondent and not the applicants. Fourth respondent could sue on his own, but he agreed to the sale and had not complained. The applicants could not complain on his behalf. The conditions of the sale, such as the certificate of no present interest were meant for the benefit of the fourth respondent. If any fraud was committed, it was against the fourth respondent and not the applicants. The first respondent also averred that the applicants contradicted themselves in alleging that the farm was

incapable of being sold, yet at the same time lamented that they did not participate in the sale through an heir. It was either the farm was capable of being sold by or through the executor or it was not.

The first respondent denied that he misled the court into granting an order compelling the fourth respondent to issue a deed of grant. The relief sought was against the fourth respondent who chose not to oppose the application. He had not sought the rescission of that order so they was no fraud on him or the court.

Third Respondent's Case

The third applicant averred that there was no basis on which the applicants could seek the cancellation of its agreement of sale with the first respondent. The agreement emanated from a Redistribution Agreement which the applicants signed themselves. No criminal complaint had been raised against the first respondent by the applicants or the other beneficiaries. The third respondent insisted that it had the right to remain in occupation of the farm, as the sale of the farm was lawful. The farm had been fully paid for by the late Ben Mutengiwa. The appointment of an heir was not necessary under the present inheritance laws. Any rights that the deceased had in any property could be sold if the beneficiaries agreed to the sale.

In short, the third respondent's case was that the sale of the farm was valid, and the applicants had no cause to complain about the disposal of a farm that was not theirs.

The Applicants' Answering Affidavit

In response to the first and second respondents' opposing affidavit, the applicants insisted that they had the requisite *locus standi* to institute the present proceedings. They averred that by his conduct, the first respondent arrogated to himself, powers that he did not have from the beneficiaries. They applicants claimed that they were denied the opportunity to deal directly with the fourth respondent and agree on the way forward on the fate of the farm. The applicants also denied that the *non joinder* of other interested parties was fatal.

The applicants also averred that if personal rights were terminated by the death of the late Ben Mutengiwa, then the first respondent himself had nothing to do with the farm. By involving himself in the farm, he went out of his mandate and took away the rights of the family members

to deal directly with the fourth respondent. The fourth respondent had not decided to sell the farm to anyone. The farm was sold by the first respondent on the basis that the deceased owned the farm. The applicants therefore had authority to challenge the sale of the farm.

As regards the opposing affidavit of the third respondent, the applicants averred that the third respondent held no rights at all. The third respondent had no basis to speak on behalf of the other parties. It had no reason even to oppose the application.

The Submissions on the preliminary points

Preliminary points were raised by the respondents across the two matters. At the commencement of oral submissions, for convenience the parties counsel agreed to make submissions on the preliminary points across the two matters. I will however deal with the respective preliminary points separately as they relate to the two cases to avoid convoluting issues that may be peculiar to the individual cases.

Case 1

In Case 1, the first and second respondents raised two preliminary points. The first was that the applicants lacked *locus standi* to institute the present proceedings. The second preliminary point was that an existing court order could not be set aside through a *declaratur*, but through an application for the rescission of that order. The third respondent also raised as a preliminary point, the lack of *locus standi* on the part of the applicants.

Absence of *locus standi* Case 1

In Case 1, the first and second respondents argued that the applicants had no *locus stand*i to institute the current proceedings. This was because the late Ben Mutengiwa inherited the lease to the farm in his personal capacity. The applicants were not listed as beneficiaries of the late Ben Mutengiwa. They had no say in what happened to the estate. In his submissions, Mr *Mubaiwa* for the first, second and third respondents submitted the applicants were required to establish direct and substantial interest in the subject matter of the litigation, being the farm. The

applicants had no right, lease or usufruct in the farm. At common, law the owner of the property had the right to deal with the property as he pleased.

In response, the applicants insisted they had the requisite *locus stan*di to seek the orders they sought in this matter. According to Mr *Jera* for the applicants, the applicants were only required to demonstrate that they had a direct and substantial interest in the matter at hand. They had an interest in the farm that was unlawfully and improperly included in the estate of the later Ben Mutengiwa. The farm was sold to the third respondent unlawfully. The applicants had been residing at the farm during their entire lives and considered it their permanent home.

In their book *The Civil Practice of the High Courts of South Africa,* authors *Herbstein & Van Winsen*[1] make the following pertinent observations on the question of *locus standi:*

> "This question involves consideration of whether the party is enforcing a legal right and has sufficient interest in the relief claimed. It is important to note that a person who has an interest in the relief claimed may, nevertheless, not be able to claim that relief if the claim is not based upon a legally enforceable right……"

In their heads of argument, the applicants cited the following passage from the same authors in which the concept of a direct and substantial interest was explained as follows:

> "A direct and substantial interest has been held to be an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. It is a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists."[2]

What emerges from the above exposition of the law is that a person's interest in the cause must be predicated upon a legally enforceable right. The mere existence of an interest in the subject matter of litigation or relief claimed is not sufficient to clothe one with the requisite *locus standi,* if such an interest does not translate into a legally enforceable right.

There is no doubt that the applicants herein had an interest in the farm for reasons explained in their affidavits. Their connection with the farm was through their respective fathers who were the direct descendants of Mabwe Mutengiwa who had the original lease for the farm. They claimed to have been born and raised at the farm. The question that arises therefore is whether that interest translates into a legally enforceable right at law. In their own words, the

[1] Fifth Edition Vol 1 at p 185
[2] At p 217

applicants were not beneficiaries to the estate of the late Ben Mutengiwa who held rights in the farm based on a lease agreement that he inherited from the late Mabwe Mutengiwa. That lease agreement created personal rights as between the late Ben Mutengiwa and the State as represented by the fourth respondent.

The applicants contend that the farm was not estate property, and therefore it was wrong for the first respondent to have dealt with it as such. It follows that the party with a legally enforceable right was the one who took over the lease agreement from the late Ben Mutengiwa. The farm was not owned by the late Mabwe Mutengiwa or Ben Mutengiwa. It was owned by the State. The two deceased lease holders indeed held enforceable legal rights based on their lease agreements with the State. The applicants had no such enforceable legal rights against the fourth respondent or anyone for that matter. Their occupation of the farm was based on rights that accrued to the late Ben Mutengiwa by virtue of the lease agreement. In other words, they resided at the farm at the pleasure of Ben Mutengiwa by virtue of the subsisting lease agreement. That lease was terminated by the death of the late Ben Mutengiwa. Ben Mutengiwa died with his enforceable legal right to the farm.

There is therefore merit in the respondents' preliminary point that the applicants lacked a direct and substantial interest that was legally enforceable against anyone. The genesis of the applicants' problems is the default judgment granted by this court on 10 October 2018 under HC 5558/18. According to the applicants, that judgment led to their eviction from the farm even though they were not cited as parties in that matter. That brings in the additional dimension of the effect of that judgment on the applicants and their standing. In their amended draft order, the applicants do not seek the setting aside of that order under HC 5558/21.

The applicants cannot seek the *declaraturs* herein in the face of a court order that led to their eviction. The alleged illegal eviction was the reason why they approached this court for relief. Because they do not have direct and substantial interest, which is legally enforceable, it follows that the applicants lack the requisite *locus standi* to institute the present application for the various *declaraturs* they seek. They cannot also seek the rescission of the order by MHURI J because they do not have any legal connection with the farm. Even if they had attempted to deal with the order by MUNANGATI MANONGWA J in HC 5558/21, their claim would suffer the same fate. They cannot assert a legally enforceable right in the subject matter of the litigation which is

the farm. Their application is therefore incompetent, and it must fall on this basis alone. Having made that finding, it therefore becomes unnecessary to traverse the merits of the matter.

Absence of *locus standi* Case 2

Case 2 sought the rescission of the judgment granted in HC 5898/21 on the basis that it was granted in error through acts of fraud committed by the first respondent. The only difference between the position of the applicants in Case 1 and Case 2 is that the applicants in Case 2 were the sons of the late Ben Mutengiwa. They were beneficiaries to the estate of the late Ben Mutengiwa. The order they want rescinded was granted by MHURI J in HC 5898/21 on 19 January 2022. That order compelled the fourth respondent herein to issue out a deed of grant in the name of the late Ben Mutengiwa, within ten days of the date of the order, failing which the Sheriff was required to sign all the necessary papers on behalf of the fourth respondent to give effect to that order.

The applicants' *locus standi* was challenged on the basis that according to their own pleaded case, the farm belonged to the fourth respondent and not the estate of their late father. They averred that the first respondent committed an act of fraud in handling the farm as estate property when their father merely held lease rights. They could not seek to interdict the transfer of the farm, or the rescission of the court order in HC 5898/21, when they had no direct and substantial interest in the same farm.

In their response, the applicants averred that as beneficiaries to their late father's estate, they were interested parties in the winding up of his estate. They had a right to be consulted in the decisions relating to the estate. The first respondent could not argue that because the farm did not belong to the estate, the beneficiaries had no right to challenge his actions. The applicants contend that for as long as what was done, had been done under the name of the estate, they had a right at law to challenge those actions because they affected the estate under which they were beneficiaries.

The principle of *locus standi* as summarized it in my analysis of Case 1 applies with equal force to the present matter. The applicants' claim must not just end with the asserting of a direct and substantial interest in the relief claimed pertaining to the farm. They must also demonstrate the existence of a legally enforceable right that entitles them to seek relief in

connection with the farm. In paragraph 8 of his answering affidavit, the first applicant made the following point:

> "If personal rights were terminated by the death of my late father, then indeed the 1st Respondent had absolutely nothing to do with that farm and that is the end of the matter. It is as simple as that. By dealing with the farm he went out of his mandate and took away the rights of the whole family to discuss the issue directly with the 4th Respondent and agree on the fate of the farm."[3]

There is a tacit admission that the personal rights that the late Ben Mutengiwa held in the farm were terminated upon his death. The first respondent should not have concerned himself with the fate of the farm. What is lost to the applicants is that once they accept that the farm did not belong to the estate and had to be dealt with outside the ambit of the estate laws, then they had to demonstrate a legally enforceable right to institute proceedings in connection with the farm.

Following the death of Ben Mutengiwa, the farm reverted to the fourth respondent as the owner. It is the fourth respondent that had the final decision concerning the fate of the farm. The fact that the first respondent proceeded to deal with the farm as an asset of the estate, when in fact it was not, did not vest the applicants with a legally enforceable right in that farm. It is a matter that the fourth applicant ought to have dealt with appropriately as the authority vested with rights over State land.

In view of the foregoing the court determines that there is merit in the respondents' preliminary objections in both Case 1 and Case 2. The applicants have failed to establish a direct and substantial interest in the subject matter of the litigation which is legally enforceable. The applicants have no legally enforceable rights in the farm. The applicants are not properly before the court.

Events following the reserving of judgment

After hearing counsels' submissions in the two matters, I reserved judgment. As I was preparing judgment, I received on 12 June 2023, a letter from the applicants' counsel in both cases drawing my attention to a judgment by TSANGA J in *Dorothy Mutengiwa* v *Zenda & 9 Ors* HH 365/22 (HC 4190/21). The applicants' counsel reckoned that the judgment dealt with some of the issues that arose for determination in the two matters that had been argued before me. I

[3] Page 84 of the record

invited all the parties to chambers for a case management, and it emerged that counsel held divergent views regarding the significance of that judgment to the two matters before me. I invited counsel to file further submissions addressing the court on whether the judgment had a bearing on the matters already argued. I will give a brief background to that judgment before analysing its import.

In the *Mutengiwa* v *Zenda & 9 Ors* referred to above, the applicant was the surviving spouse of the late Ben Tinawapi Mutengiwa. She had a civil marriage with the deceased, having been married in 1986. The marriage had not been dissolved at the time of the deceased's death. The parties acquired an immovable property in Harare known as Number 2084, 212 Street, Kuwadzana 2, Harare. The deceased also customarily married Memory Mutengiwa the second respondent in that matter. In terms of the Redistribution Agreement prepared by the first respondent herein and signed by the beneficiaries, that property was awarded to the all the children of the deceased, provided Dorothy Mutengiwa was to have a usufruct over the property. After her usufruct, the deceased's children were to decide what to do with the property.

The court determined that the contracting of a customary marriage against the backdrop of the Dorothy Mutengiwa's general law marriage was a nullity. The second respondent in that matter, Memory Mutengiwa was not a surviving spouse in terms of the law. The only law that was applicable to the estate was the Deceased Estates Succession Act [*Chapter 6:02*], under general law. In terms of s 3A of that law, only the surviving spouse inherited the house. The court further determined that in view of the existing civil marriage, the deceased's estate could only have been wound up in terms of the general law under the Administration of Estates Act. The court proceeded to grant the following order:

> "1. The distribution agreement signed by the applicant and the 2nd-9th respondents dated 13th November 2017 is hereby declared void ab initio and set aside as the estate fell to be governed by general law.
> 2. The first and final distribution account in the estate of the late Ben Tinawapi Mutengiwa DR 1861/21 approved by the Master of the High Court on the 4th of June 2020 is hereby declared invalid and set aside.
> 3. The 1st and 10th respondents are directed to proceed with the distribution of the Estate Late Ben Tinawapi Mutengiwa DR 1861/21 in terms of section 3A of the Deceased Estates Succession Act [*Chapter 6:02*] and award the Kuwadzana house to the applicant.
> 4. The first respondent to pay the costs of suit on an ordinary scale."

The court also highlighted that it was careful to confine the declaratory order to the Kuwadzana house which had clearly been acquired as the matrimonial property of the deceased and the applicant.

In paragraph 6 of the amended draft order in Case 2, the applicants wanted para 3 of the Redistribution Agreement signed by the beneficiaries of the estate late Ben Tinawapi Mutengiwa declared null and void. Paragraph 3 of the Redistribution Agreement is the one that directed that the farm be sold to the best advantage of the deceased's children and the proceeds therefrom shared equally among the deceased's children.

In their supplementary submissions, the applicants argued that the order by TSANGA J invalidated the Redistribution Agreement and the approved distribution plan. That order remained extant and binding on the first respondent. He could not seek to sustain actions done based on an invalid Redistribution Agreement. The applicants also argued that the orders under paras 1 and 2 of the order by TSANGA J were of general application, and they affected the validity of the Distribution Account, in its entirety. The applicants averred that they demonstrated their entitlement to the relief sought.

In response, the first and second respondents submitted that TSANGA J had made it clear that her order was confined to the Kuwadzana House. Issues pertaining to the farm were never canvassed in her judgment. Case 1 and Case 2 were also confined to the farm. Whichever law was applied, the farm still devolved upon the deceased's children and the surviving spouse. The first respondent had written to TSANGA J through her assistant seeking clarity of the contentious provisions in the judgment. In her response through the registrar, TSANGA J commented as follows:

"The Judge is *functus* and stand by the order given as per paragraph 3. No further comments."

The first respondent submitted that it was therefore wrong for the applicants to interpret the judgment issued by TSANGA J as covering the whole estate.

In its submissions, the third respondent averred that the TSANGA J's judgment was irrelevant to the determination of the issues arising in the two matters. The third respondent was not even a party in the proceedings before TSANGA J, and the judgment was therefore not binding on it. Further TSANGA J's judgment had not dealt with the validity of the sale of the farm to the third respondent since it was not a party to those proceedings. It was further averred that the

applicants did not derive any standing from that judgment. The judgment was actually adverse to the applicants who were the respondents in that matter.

Having considered counsels' submissions on the effect of the judgment by TSANGA J, I was not persuaded that the judgment ameliorated the predicament that the applicants find themselves under in the two matters. When the learned judge was approached by the parties for her comments, she advised the parties that she was *functus*, and in any case stood by the order given in para 3 of her draft order. Para 3 directed the respondents to proceed with the distribution of the estate in terms of s 3A of the Deceased Estates Succession Act and award the Kuwadzana house to the applicant in that matter. In her judgment, she had also made it clear that the *declaratur's* were confined to the Kuwadzana house.

Further, even assuming that the Redistribution Agreement had been set aside, the dispute in the two matters before me revolved around the farm. I have already determined that the applicants in both cases have failed to establish the requisite *locus standi* to petition the court for the specific relief they sought under the Case 1 and Case 2. The setting aside of the Redistribution Agreement does not change the status of that farm. It remained the property of the State following the death of Ben Mutengiwa. The applicants still had no rights in the farm because according to them, it was not an asset of the estate. The fourth respondent as the administering authority had not issued a lease to any of the applicants or other beneficiaries following the death of the lease holder.

I therefore agree with the respondents' submissions that the judgment by TSANGA J is irrelevant to the matters before me.

Costs of suit

The respondents sought the dismissal of both applications with costs on the attorney and client scale. The circumstances of this case dissuade me from making any order of costs at all against the applicants in both cases. The entire record of proceedings doesn't make for pleasant reading. The manner in which the first respondent conducted himself as the executor dative to the estate of the late Ben Mutengiwa is highly reproachable. While I should be careful not to stray into the merits of the dispute having decided both cases based on preliminary points successfully raised by the respondents, there is clearly something wrong with the manner the

affairs of the estate and the farm were handled, that warrants an investigation of the entire chain of events leading to the disposal of the farm to the third respondent.

There was disharmony between the beneficiaries of the estate and the first respondent, an unhealthy situation that is not expected between the executor of an estate and the beneficiaries. It appears some decisions were foisted on the beneficiaries, and TSANGA J noted as much in her judgment. Certain formalities were not followed in the sale of the farm. The mere fact that the first respondent may have escaped culpability based on technicalities does not make him entirely blameless. The third respondent was at the tail end of the dispute between the main feuding parties. Its position was dependent on the finding the court were to make on the way the matters of the farm and the estate were handled. It is the court's view that all the respondents are not entitled to any costs of suit.

DISPOSITION

Resultantly it is ordered that:

In respect of Case 1:

1. The application be and is hereby dismissed.
2. Each party shall bear its own costs of suit.

In respect of Case 2:

1. The application be and is hereby dismissed.
2. Each party shall bear its own costs of suit.

Moyo and Jera, legal practitioners for the applicant in Case 1 and Case 2
Hungwe and Partners, legal practitioners for the 1st and 2nd respondents in Case 1 and Case 2
Chiminya and Associates, legal practitioners for the third respondent in Case 1 and Case 2