

REPORTABLE (61)

**CHIDO ERICA MATEWA (In her capacity as Executrix Dative of the Estate Late
Judith Matewa)**

**v
CITY OF HARARE**

**SUPREME COURT OF ZIMBABWE
BHUNU JA, MUSAKWA JA & MWAYERA JA
HARARE: 3 JUNE 2022 & 30 JUNE 2023**

Appellant in person

J. G. Nyati, for the respondent

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MUSAKWA JA: This is an appeal against the whole judgment of the Administrative Court (the court *a quo*) in which it dismissed the appellant's application for review.

FACTUAL BACKGROUND

The appellant is the *executrix dative* of the late Judith Matewa's estate (the deceased). The respondent is responsible for urban planning and development. In 1987 the late Stephen Matewa, who was the deceased's husband acquired stand number 431 Mandara Township of subdivision A of Lot 2 of Mandara of The Grange. He was granted a subdivision permit SD/241A by the respondent. The subdivision resulted in the creation of stand numbers 730, 731, 732 and 733. Stand number 733 was to be used for a road servitude. The subdivision

was done under ten conditions with clause 7 thereof providing that stand 733 should be transferred to the City of Harare for road purposes.

Clause 5 of the conditions of permit SD/421A provided that Stephen Matewa was to construct an asphalt road on stand 733 at his own cost which would eventually be handed over to the respondent. On 7 October 1987 the late Stephen Matewa wrote a letter to the respondent in which he stated that the construction of the road on stand 733 was beyond his financial capability. When Stephen Matewa passed on in 1993 part of his estate was distributed except stand 733 which was reserved for road construction. Stephen Matewa was survived by his wife Judith Matewa, who inherited his estate excluding stand 733. Later, Judith Matewa passed on. Upon Judith Matewa's death the appellant was appointed the *executrix dative* to Judith's estate hence her interest in this matter.

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It is alleged by the appellant that the issue of the road construction was silent from 1987 until June 2021 when the respondent, without notice and consent of the appellant, began preparations to construct a road on stand number 733. The appellant felt that the respondent's action was prejudicial to the estate of the late Judith Matewa as the land was private property. In her view, before any developments could be carried out on the land, she ought to have been consulted and her consent should have been secured.

The appellant's allegations are contrary to a letter dated 7 October 1987 written by Stephen Matewa. In that letter, Stephen Matewa wrote to the respondent admitting that he was aware that he was expected to construct two roads as part of the respondent's condition for the

subdivision permit and that the cost of constructing the roads was beyond his means. In addition, Stephen Matewa suggested to the respondent that the respondent construct the roads itself for the benefit of the community. Further to that, he offered to sell two of his plots and to give 12½ per cent of the proceeds thereof to the respondent.

In response to Stephen Matewa's letter, the respondent's Director of Works (the Director) wrote that the respondent was unable to assist because the roads were on private property. Further to that, the Director stated that Stephen Matewa had to meet the costs of construction. Upon completion he was to hand over the roads to Harare City Council. The Director concluded by stating that any future development of the land had to comply with the requirements of the permit.

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In June 2021, the respondent began preparations for the construction of the road on stand number 733.

The appellant made an application in the court *a quo* seeking a review of the respondent's decision to construct the road as she believed that this constituted a gross irregularity. She vehemently contested the decision by the respondent as she was of the view that the respondent had encroached onto private property. The appellant argued that the respondent's conduct in acquiring the property without communicating or reaching a settlement with the owner was improper. *Per contra* the respondent submitted that stand 733 was a road servitude and belonged to it through Deed of Transfer 5994/87.

In dismissing the application, the court *a quo* found that the appellant laboured under the misapprehension that stand 733 was part of Judith Matewa's estate. Aggrieved by this decision, the appellant lodged the current appeal on the following grounds:

GROUND OF APPEAL

1. The court *a quo* erred in holding that the issue for determination was ownership of stand 733, Mandara Township, Harare.
2. The court *a quo* grossly erred in not dealing with any of the grounds of review raised by the appellant.

Before this Court, the relief sought was as follows:

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RELIEF SOUGHT

WHEREFORE, the appellant prays that:

1. The appeal be allowed with costs.
2. The judgment of the court *a quo* in case number ACC 18/21, be and is hereby set aside.
3. The matter under ACC 18/21 be and is hereby remitted to the court *a quo* for determination before a different judge.

APPELLANT'S SUBMISSIONS

The appellant submitted that stand 733 constitutes private property. She submitted that her late father had approached the respondent in 1987 requesting it to help in the

construction of the road and the respondent declined stating it was private property. She further submitted that the construction of the road will compromise developments that have been made on the property.

RESPONDENT'S SUBMISSIONS

Mr *Nyati*, for the respondent argued that the property in question was duly transferred to the respondent's in terms of the law. He further argued that the respondent, as the administrative authority, acted in terms of the Regional, Town and Country Planning Act [*Chapter 29:12*]. According to Mr *Nyati*, as long as the subdivision permit remains extant there is no way the land in question can revert to the appellant.

ISSUES FOR DETERMINATION

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- 1. Whether or not the court *a quo* erred in resolving the matter on the basis of ownership of stand 733 Mandara Township, Harare**
- 2. Whether or not the court *a quo* did not deal with the grounds for review that were raised by the appellant.**

APPLICATION OF THE LAW TO THE FACTS

- 1. Whether or not the court erred in resolving the matter on the basis of ownership of stand 733 Mandara Township, Harare**

It was Ms Matewa's argument that the construction of the road on the stand remains the obligation of the appellant hence the respondent cannot rescind the obligation without

negotiating with the appellant and compensating for investments done on the property. She is of the view that the stand or property in question is private property. It is apparent from the permit that stand 733 is no longer private property. This development came about when the deceased applied for a subdivision of stand 431 Mandara Township, Harare. Clause 7 of the permit that created the stand provides as follows:

“Stand 733 shall be transferred to the City of Harare for road purposes.”

The permit is quite clear that stand 733 belongs to Harare City Council. The permit does not provide for any compensation to the appellant upon the completion of the road. It is inconceivable that the appellant could aver that the respondent began preparations for the construction of the road without negotiating with the appellant and compensating for investments done on the property. Road construction was part of the permit agreement and was done with no provision that the late Stephen Matewa would be compensated. To suggest that compensation should be made would be improper.

The court *a quo* cannot be faulted for finding that stand number 733 is not private land, regard being had to clause 7 of the permit that created the stand. Stand 733 is not part of the late Stephen Matewa’s estate as it is a road servitude in favour of the respondent. The plan and diagram on p 20 of the appeal record stipulates that the land which is described as a road shall be transferred to the City of Harare for road purposes. The road reservation is still extant as it was never set aside. Hence, the respondent as the owner of the property in question was not obliged to consult the appellant first before making preparations for constructing a road.

The late Stephen Matewa even wrote a letter dated 7 October 1987 in which he pleaded with Harare City Council to construct the road as he was financially incapacitated to do so. The part pertinent to the resolution of this matter reads as follows:

“The plot now was surveyed and subdivided. We are building on one of the plots. There are two uncompleted roads on two sides of this property. According to your conditions these are to be constructed by me as the developer. I am not developing this area for financial gain. I only bought the land in order to build a house. The cost of building these two roads are beyond my means.”[My emphasis]

The above correspondence shows that the appellant could not reasonably have been surprised by the respondent’s preparatory measures to construct a road, which in any case was the late Stephen Matewa’s responsibility as he was supposed to meet the costs. It is unbelievable why the appellant feels aggrieved yet the liability to construct the road has been taken off her shoulders.

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One of the conditions on the basis of which the permit was granted was that provided in clause 7 *supra*. Thus, a conclusion can be drawn that stand 733 is not a standalone property but a road. In light of the foregoing s 156 of the Urban Councils Act [*Chapter 29:15*] (the Act) comes into play. The provision reads as follows:

“156 vesting of land, roads and sanitary lanes

The property of and in all lands, roads and sanitary lanes or any part thereof within a council area to which the inhabitants of the municipality or town have or acquire a common right shall be vested in the municipality or town, and sections 56 and 57 of the Regional, Town and Country Planning Act [*Chapter 29:12*] shall apply, *mutatis mutandis*, in relation to any such road or sanitary lane.”

There is also no requirement for consent in the presence of the clear and precise permit. Title to stand 733 was given to Harare City Council through Deed number 5994/87 which provided that stand 733 was set aside as a road in terms of s 42(1)(a) of Act 22 of 1976. It is trite law that an owner of property has exclusive rights to the property.

Moreover, the title deed signed and sealed at Harare on 27 August 1987 by the Registrar of Deeds reads:

“NOW THEREFORE, I the Registrar of Deeds, do hereby issue Title Deed unto the
CITY OF HARARE

In respect of

CERTAIN piece of land situate in the District of Salisbury

CALLED

STAND 733 MANDARA TOWNSHIP OF STAND 431

MANDARA.”

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The title deed of the property bears the name of the respondent, which *ex facie* is evidence of ownership. It is also important to take note that the case that is before this Court is that the respondent constructed a road on land that was confirmed by the Registrar of Deeds to belong to it. The law of property gives the owner of land the right to freely enjoy his or her property without the interference of third parties. The owner of a property has exclusive rights to deal with it as he or she wishes. In *casu*, Harare City Council cannot be faulted for not consulting the appellant’s before beginning the construction of a road on the stand in question.

Further, the respondent holds the authority to construct roads in Harare. The respondent did not interfere with the appellant’s right to freely enjoy the property. Ownership is

the mother of all real rights. Having real rights over the property, the respondent acquired exclusive rights over the property. Under property law, the registration of a real right protects its holder against the public at large. In other words, once a real right has been registered, it becomes enforceable against the whole world. The respondent in this case registered its title to the property in good faith. It has real rights over the property and it has the prerogative to enforce that right over the appellant. There was no need to consult or compensate the appellant.

It is the duty of the courts to protect the rightful owners of property. This principle of law was clearly articulated in the case of *Alspite Investments (Pvt) Ltd v Westerhoff 2009 (2) ZLR 226 (H)* at 237 D-F where MAKARAU JP, as she then was, said:

“It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the other child or the number of lollipops that the owner child may be clutching at the time. It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it.” [My emphasis]

In the case of *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co. (Pty) Ltd 1976 (1) SA 441 (A)* at p 452 the court said:

“Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner.”

Based on the foregoing, the decision of the court *a quo* cannot be faulted. The respondent had no obligation to consult and inform the appellant about the road construction on

stand number 733. There is no basis to interfere with the decision of the court *a quo* on the basis that it should not have been determined on the basis of ownership. It can be observed that it is the ownership of stand 733 which gives the respondent the right to construct the road. On this basis, the application for review by the appellant in the court *a quo* was unfounded.

2. Whether or not the court *a quo* did not deal with the grounds for review that had been raised by the appellant.

In the court *a quo*, the appellant was challenging the construction of a road on stand 733 by the respondent without her consent. In the appellant's view, this constituted an illegality and a breach of her proprietary rights. In the determination of the review proceedings before it, the court *a quo* was of the view that the issue of ownership was pertinent to resolving the matter placed before it.

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It is proper for a court to decide only one of the issues raised by a party when such issue is dispositive of the entire dispute between the parties. This position was held in the case of *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors 2008 (1) ZL 198 (S)*. Having looked at the grounds that had been raised, the court *a quo* correctly found that the issue of ownership was key to the determination of the matter. Once the court *a quo* made that finding the other grounds fell away.

It is my considered view that all the grounds of review that the appellant had raised in the court *a quo* speak to the issue of ownership. By deciding on the question of who the owner is, it was the court *a quo*'s way of dealing with the issue of breach of proprietary rights raised by the appellant which in my view was correct. The issue of ownership was pertinent to the

resolution of this matter. The issue of proprietary rights could only be answered by making a determination on ownership. The question of ownership answered all the grounds of review that had been raised.

DISPOSITION

In view of the foregoing, I find that there was no misdirection on the part of the court *a quo*. The facts of the matter are such that the appellant cannot be granted the relief which she seeks. The appeal lacks merit. Since the appellant was acting on behalf of an estate, there is no need to burden the estate with the costs of suit. It is accordingly ordered as follows:

The appeal be and is hereby is dismissed with each party to bear its own costs.

BHUNU JA: I agree

MWAYERA JA: I agree

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Gambe Law Group, respondent's legal practitioners