

FELICITY MAINGENI MATAKA  
and  
TINOTENDA ISAAC MATAKA  
and  
TADIWANASHE IVY MATAKA  
versus  
REUBEN MATAKA  
and  
SIKHUMBUZO MPOFU N.O  
and  
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
**ZHOU J**  
HARARE; 21 March & 27 November 2024

**Court application to dispose of a minor's property**

*R Mabwe*, for the applicants  
*G Madzoka*, for the first respondent  
No appearance for the second and third respondents

**INTRODUCTION**

ZHOU J: This is a court application to dispose of a minor's share in the immovable property known as stand number 156 Monavale Township of Mayfield Estate measuring 999 square metres held under Deed of Transfer number 4186/2010.

The first applicant is the biological mother, legal guardian and custodian of the minor child, Tinodaishe Lyanne Mataka. She has filed this application in her personal capacity as she wishes to dispose of the minor's share in the immovable property.

The second and third applicants are the siblings to the minor child. They consent to the granting of this application. They filed their supporting papers before this court consenting to the relief sought by the first applicant that their respective shares in the property be disposed of.

The first respondent, is the biological father of the minor child. He has been cited in his personal capacity and indicated his opposition to the relief sought in the application. The second

and the third respondents have been cited in their official capacity. Second respondent is the curator *ad litem* appointed to represent the minor child.

They did not appear before this court but elected to file their papers consenting to the order sought by the first applicant.

### **FACTUAL BACKGROUND**

The first applicant and the first respondent were once married. They divorced sometime in 2014. They used to co-own a certain piece of land known as stand number 156 Monavale Township of Mayfield Estate measuring 999 square meters held under Deed of Transfer number 4186/2010. It was their matrimonial home.

Following their divorce, the first applicant retained 50% ownership of the matrimonial home. The first respondent donated his 50% share to their three children, and the transfer was formalised through Deed of Transfer 5586/19, registering Tinotenda Isaac Mataka, Tadiwanashe Ivy Mataka, and Tinodaishe Lyanne Mataka as the new co-owners.

Upon registering the children as the new co-owners of the property through the deed of transfer 5586/19, the first respondent, without the first applicant's knowledge, included a restrictive condition. This condition prohibits the transfer of the 50% share held by the children without the first respondent's consent or until Tinodaishe Lyanne Mataka reaches 25 years old or becomes self-supporting.

The first applicant claims that despite the restrictive condition, she sought the first respondent's consent to dispose of the minor's share in the property. The first respondent withheld his consent, citing that the new property that the first applicant intended to purchase was significantly smaller and less valuable than the original Monavale property.

Despite, the restrictive condition, the first applicant sold her 50% Monavale property share to Nadenel Chang Family Trust on February 1, 2019. She utilized the proceeds to buy a 515 square metres vacant stand known as Stand Number 12453, Tynwald Township, Lot 3, Salisbury, which she claims to co-own equally with her three children.

According to the first applicant, significant developments have been made on the stand since its purchase. Specifically, a residential property has been constructed featuring a four-bedroomed house, comprising one en-suite bathroom, a combined lounge and dining area, kitchen, and a separate bathroom and toilet.

The first applicant states that the children were involved in designing their new home, tailoring it to their needs and preferences. Furthermore, it has been submitted by the first applicant that she and the children have since relocated from the Monavale property to their newly constructed Tynwald residence. She says it is modern in nature and has fitted wardrobes where the children can store their clothes, unlike the Monavale property which she described as old and dilapidated in its state.

The first applicant therefore prays that the share held by the minor child be disposed of so that she can use the proceeds of that sale to completely developed the Tynwald house and boost her poultry and catering business which has been sustaining her and the children for the past ten years.

What has prompted this application as it appears from the first applicant's papers, is the refusal by the first respondent to give his consent to the disposal of the minor's share in the property in question.

### **PRELIMINARY POINTS**

The first respondent opposes this application. He raised two preliminary objections to the relief sought. The first preliminary objection is that the first applicant used an obsolete form, rather than the form in the High Court Rules of 2021 in bringing this application.

The first respondent's second preliminary objection is that the relief sought is incompetent. He argues that the first applicant seeks to dispose of the entire 50 percent share held by the children. He further argues that this claim is factually incorrect as the minor child, Tinodaishe Lyanne Mataka, holds only 16.67 percent share of the property.

In response, the first applicant disputes the first preliminary objection raised by the first respondent. She denies using the outdated form of the High Court Rules of 1971 in making this application.

On the second preliminary objection, she argues that the shares held by the three children are indivisible. She further argues that the special condition relied upon by the first respondent pertains to the collective 50 percent share held by the children, not the minor child's individual 16.67 percent share.

Despite initially raising the preliminary objections in the written submissions, the first respondent's counsel, Advocate *Madzoka*, opted not to motivate them during oral argument.

Consequently, the court considers these preliminary objections withdrawn and will not entertain them further.

### **MERITS**

On the merits, the first respondent opposed this application citing the following grounds of opposition.

He states that no consent was ever sought or obtained from him regarding the sale or transfer of the minor's share. He maintains that the first applicant pursued multiple unsuccessful court applications, rather than obtaining his consent as required.

The first respondent challenges the first applicant's claim that the restrictive condition was inserted without her consent. He counter argues that as the original owner of the share, he had a unilateral authority to impose conditions to protect the interests of his children. He argues that prior to donating his share, he was under no obligation to seek the first applicant's consent.

He further contests the validity of the sale of the first applicant's share, characterising it as 'clumsy.' He denies that the first applicant sold her full 50 percent share. He states that the first applicant contracted away the share of the minor child because the first applicant received the full purchase price for the entire property. He further argues that the rush to sell the first applicant's share was unwarranted as the Monavale property is indivisible.

The first respondent asserts that the Tynwald property has no title deed, therefore his children's interest which he sought to safeguard by inserting a special condition will be compromised. He further argues that the granting of this application risks jeopardising the children's real rights as there is insufficient proof that their 50 percent share will be safeguarded.

In addition, the first respondent avers that despite claims of completion, no documentation or proof was submitted to demonstrate that the Tynwald house is fully developed. Moreover, he noted that there are disparities in the property value. He argues that the Tynwald stand is smaller in size, as it is half the size of the Monavale property.

The first respondent states that the Monavale property has a significant advantage over the Tynwald property due to its modern two-bedroomed cottage, which generates extra monthly income for the first applicant and their children. In contrast, the Tynwald property is characterised as a basic, four-bedroom residence, devoid of any additional benefits or income-generating

features for the children. The first applicant counter argues that the Monavale cottage is severely dilapidated, rendering it uninhabitable. Consequently, it has remained vacant.

In response to the first applicant's assertion that she operates a poultry and catering business, which has been sustaining her and the children for the past ten years, and which she intends to fund with the proceeds from the sale of the minor's share, the first respondent contests its relevance, arguing that the minor child holds no shares or dividends in the poultry and catering company. He has prayed for dismissal of this application.

### **ISSUE FOR DETERMINATION**

The issue for determination before this court, is whether or not disposal of Tinodaishe Mataka's undivided share in the property known as number 156 Lyndhurst Road Monavale Harare is in the best interests of the minor child.

### **THE LAW**

It is trite that in every matter concerning a child, it is the child's best interests that are paramount. This position has been constitutionalised in Section 81 (2) of the Constitution. This is in tandem with international instruments to which Zimbabwe is a party. For instance, Article 3 of the UN Convention on the Rights of the Child and Art 4 of the African Charter on Rights and Welfare of the Child which protect the rights of children provide as follows;

*"In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."*

Section 81(2) of the Constitution of Zimbabwe states the following;

"A child's best interests are paramount in every matter concerning the child."

In *Mackintosh (Nee Parkinson) v Mackintosh* SC37/18 at p 15 para 33, where the court held that,

"A court, such as the court a quo, must always keep in mind that the interests of the minor children are paramount. In considering those interests, the court should not allow itself to be misled by the appearances that the parties give. It must, in addition to any evidence given, be guided by its own experiences and sense of what is fair..."

It is therefore necessary to analyse the factual matrix involved in order to arrive at a conclusion on what is in the child's best interests, since ultimately it is the child's needs which should be prioritised.

## **ANALYSIS**

The first applicant as the mother, legal guardian and custodian of the minor child has alluded to certain circumstances to support the disposal of the child's share in the property.

After she disposed of her share in the Monavale property, she acquired a new property which she says she has fully developed and has since relocated to with her children. She states that all the children are beneficiaries of this new property. She produced an agreement of sale annexed as Annexure E which cites all the three children as purchasers of the new property.

What can be noted from the above is that the first applicant before seeking the court's leave to dispose of the minor's share has demonstrated consideration for her children's well-being by providing alternative shelter where the children are currently residing at. This act itself is an indicator of a mother who has the best interests of her children at heart.

Not only has she provided alternative shelter for the children, but she has demonstrated exceptional consideration for her children's needs and preferences by involving them in the design and construction process of their new home. This approach by the first applicant indicates prioritisation of children's comfort and happiness and empowerment through inclusive decision-making. The circumstances unequivocally support granting the application, as the first applicant has established her genuine commitment to the children's best interests.

Pursuant to the children's relocation to Tynwald, it is evident that they have successfully integrated into their new environment, notwithstanding initial challenges. The curator's report confirms this positive outcome, noting that Tadiwanashe and Tinodaishe initially expressed concerns about downsizing and adapting to the new setting. However, they have since settled comfortably.

The Curator and the Master of the High Court have supported the granting of this application, stating that the actions and circumstances unequivocally support granting of this application. The court's attention has been drawn to the fact that there has been no interruption of the children's education. They have continued attending the same schools. Their daily school schedule has remained unaffected. They enjoy their new surroundings.

The first applicant raises concerns about the potential risks to the minor child if her share of the Monavale property is not disposed of. Specifically, she submits that there will be co-ownership complications. She avers that it will be difficult for the minors to co-own the property

with strangers. Furthermore, she raises safety concerns, as she alleges that in the Monavale area crime rate has increased, with frequent cases of robberies which pose a threat to the children's well-being. She contrasts this with the Tynwald area which she alleges is relatively secure and is still developing, with less people.

On the defence case, the first respondent has relied on the caveat he inserted in the deed of transfer. He argued that the second and third applicants failed to obtain his consent before disposing of their shares in the property. This fact is undisputed. However, two uncontested facts undermine this argument. The first being that the second and third applicants have attained the age of majority granting them the legal capacity to make decisions for themselves. The second one is that they are holders of real rights over the immovable property in question. The first respondent's reliance on the caveat in the deed of transfer is irrelevant to the disposal of their share in the property. The second and third applicants' legal capacity and real rights render the consent unnecessary. The applicants having approached this court as the upper guardian of children, this court's authority supersedes the first respondent's consent. Therefore, the first respondent's caveat-based argument does not impact the disposal of the minor's share, rendering it irrelevant to the case at hand.

Another argument submitted by the first respondent was that the Tynwald house is smaller in size compared to the Monavale property. The court finds that the size difference does not prejudice the minor child's interests. The child's fundamental need for shelter remains met. The first respondent's intention as it appears from the very outset was for the children to always have a roof over their heads. That has not been disregarded by the first applicant. She has secured alternative accommodation, ensuring the children retain a home and remain sheltered. The disposition of the Monavale property does not render the children destitute. Their basic need for housing is still fulfilled.

Another defence raised by the first respondent in contesting the granting of this application, was that the Tynwald house lacks title deeds, unlike the Monavale property. This was not disputed by the applicants. He argued that this difference jeopardises the child's secure ownership. However, it is the court's finding, that no evidence has been tendered before the court to suggest that the first applicant will fail to obtain title deeds. Despite the absence of title deeds in respect of the Tynwald property, no prejudice or potential harm to the minor child has been demonstrated by

the first respondent. No disputes or obstacles to obtaining the title deed have been cited. The absence of a title deed for the Tynwald property does not warrant denying this application.

The first respondent also alleged that the minor's share in the immovable property has already been disposed of. He argued that the first applicant received the full purchase price for the property. *Advocate Madzoka* for the first respondent argued that an illegality had been committed when the first applicant sold the minor's share prior to her seeking a court order. He submitted that in this application the court is being called upon to reaffirm an illegality. The basis of his argument was the transfer clause contained in the agreement of sale between the first applicant and the Nadenel Family Trust. The presence of a transfer clause in the agreement of sale attached as Annexure D is not an indication that the first applicant has disposed of the minor's share.

Moreover, the first paragraph in this agreement of sale refers to the 50 percent share owned by the first applicant which is being sold to the family trust. In the same agreement it is stated that the other 50 percent share of the property is held by the children and will only be disposed of after the correct court procedures have been adhered to. The court finds that the alleged illegality has not been proved.

On the allegation that the first applicant received the full purchase price for the property, there is no proof to that effect. A reading of the first respondent's opposing papers indicates that the property in Tynwald built on about 500 square meters cannot fetch a value of more than one hundred thousand united states dollars. That being the case, the court finds it highly improbable for a property double the size of Tynwald house to realise an amount less than US\$ 100 000. The sixty-six thousand five hundred united states dollars received by the first applicant was for the 50 percent share she sold to the Nadenel Family Trust and it was not for the entire property.

The first applicant as she submitted in her papers intends to use the proceeds of this sale to finance her business. The first respondent has however found an issue with this, as he alleges that this business or company which the first applicant intends to finance is of no benefit to the minor child as she is not a shareholder in the company in question. These averments cannot justify dismissal of the application. The business is already running. It has sustained her and the children for the past ten years. This court finds no issue or fault on the part of the first applicant as she intends to boost a business that has been sustaining her and the children. The minor child has benefited from this business. Moreover, the fact that the first applicant is the custodian of the minor



child means that the interests of the child in question will be catered for and she will benefit from this business as she has been doing in the past.

In the case of *Machacha vs Mhlanga HH 185/23* MUNANGATI-MANONGWA held that, “parents should not use their children as pawns in their divorce and marital disputes.” The best interests of the children reigns supreme over the parties’ inclinations. This reasoning must be applied in *casu*. The children have relocated to Tynwald. It has been four years since they vacated the Monavale property and new occupiers have taken occupation. No disruption has been done to their daily routine. The first applicant as the legal guardian and custodian of the children already has a source of income that has been sustaining her and the children.

Now that the first applicant has disposed of her share in the Monavale property. It is unduly burdensome for the minor child to co-own the property with the new owners. Her siblings have given their consent for their share to be disposed of.

In all the circumstances, this is an appropriate case for the application to be granted.

In the result, **IT IS ORDERED THAT:**

1. The application to dispose of and transfer the 50 % share in a certain piece of land situate in the district of Salisbury called stand number 156 Monavale Township of Mayfield Estate measuring 999 square meters held under deed of transfer number 5586/19 held jointly by Tinotenda Isaac Mataka, Tadiwanashe Ivy Mataka and Tinodaishe Lyanne Mataka be and is hereby granted.
2. The first respondent shall bear the costs of suit.

**ZHOU J:** .....

*Matsika Legal Practitioners*, for the applicants  
*Mataka Legal Practice*, for the first respondents