KENIYA MASENDA
versus
WASHINGTON MASAWI
And
CHITUNGWIZA TOWN COUNCIL

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE, 6 August 2003 and 3 September 2003

Unopposed Matter

Miss D. *Tomana*, for applicant

CHINHENGO J: On 22 May 2003, a provisional order was issued by this court in favour of the applicant in the following terms:

"TERMS OF THE ORDER MADE

1. That you show cause to this Honourable court why a final order should not be made in the following terms:
   a) That the 1st Respondent be and is hereby ordered to sign all documents necessary to effect cession of rights, title and interest in House No. 1748 Unit A Seke, Chitungwiza to the Applicant within ten days of the date of this order.

   b) That failing compliance by the first Respondent with paragraph 1(a) of this order, the Deputy Sheriff, Chitungwiza, be and is hereby empowered and directed to sign in 1st Respondent's stead, all the documents necessary to effect cession of rights, title and interest in the property in question to the Applicant.

   c) That the 1st Respondent pay the costs of this application.

2. Pending the finalization of this matter –

   a) The 1st respondent be and is hereby interdicted and restrained from transferring, ceding or in any way alienating or encumbering his right, title and interest in the property aforedescribed to any person other than the applicant and;

b) The Second Respondent be and is hereby interdicted and restrained from in any way giving effect to any transfer, cession or in any way alienation or encumbrance of the 1st Respondent's right, title and interest in the property aforedescribed to any person other than the applicant.

3. That service of this Provisional Order be effected as follows:

a) on the 1st Respondent, by publication in a shortened form, approved by the Registrar of this Honourable Court, in the Government Gazette and in any Friday Edition of the Herald; and

b) on the 2nd Respondent, by the deputy Sheriff at 2nd Respondent's office."

The applicant duly published the provisional order in the form approved by the Registrar of this court in the Government Gazette and in the *Herald* Newspaper and served a copy of it upon the second respondent.

The respondents did not file any papers in opposition and the matter was enrolled on the unopposed roll on Wednesday 6 August 2003 for the confirmation of the provisional order. I directed the applicant's legal practitioner to file written heads of argument in order to satisfy me that the procedure which the applicant had adopted was correct. Those heads of argument were submitted to me on 8 August.

The issue on which I directed that heads of argument be filed arose from the following facts: In his founding affidavit in the application for a provisional order the applicant alleged that in September 2001 he entered into an agreement in terms of which the first respondent "sold" to him the first respondent's rights, title and interest in House No. 1748 Unit A Seke, Chitungwiza ("the house") for $320 000 payable to Messrs Sawyer and Mkushi Legal Practitioners, pending cession of the first respondent's rights in the house to the applicant. I have placed the word "sold" in quotation marks because the

use of that word was commented upon by McNALLY JA in *Gomba v Makwarimba* 1992 (2) ZLR 26 (S) at 27 G – 28 A as follows:

> "As so often happens, the parties have used the word "sale" to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. Compare *Majuru v Maposa* S-172-91 (not reported).
>
> It is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions.
>
> In this case the respondent was not the owner of the disputed immovable property but merely a "lessee-to-buy". The contract in terms of which the respondent acquired and held her rights in the property and which defined her rights in the property, was not before the court. No was the owner cited as a party".

The second respondent refused to pass on the rights in the house to the first respondent because it was of the view that the first respondent, being the lawful heir in the estate of his late father, the actual holder of the rights in the house, should have had the rights in the house passed on to him first before they could be ceded to the applicant. The second respondent had also advised the applicant and the first respondent that it would take at least one year to effect a cession of rights in the house from the first respondent's late father's estate, in reality from the Executor, to the first respondent. Because of the possibility that this cession of rights would take a long time, the applicant authorized Messrs Sawyer and Mkushi to release the purchase price to the first respondent. The funds were released on 24 September 2001.

In his affidavit the applicant averred that towards the end of 2002 certain "bills and documents' from the second responded reflected that the first respondent had become the lawful holder of rights in the house. The applicant, with a view to have the cession effected in her favour, attempted to locate the first respondent from that time but she was

unsuccessful. His whereabouts are unknown. The applicant said that she performed all her obligations in terms of the agreement between her and the first respondent and that she was entitled to the cession of rights in the house. In para 9 of the affidavit she stated:

> "I now approach this Honourable Court for relief in terms of the Titles Registration and Derelicts Lands Act [*Chapter 20:20*)."

and prayed for the relief in the provisional order. The Chamber application to which the affidavit and draft provisional order were attached reads:

> "Chamber Application in Terms of Section 3 of the Titles Registration and Derelicts Lands Act [*Chapter 20:20*]
>
> Application is hereby made for an order in terms of the Draft Provisional Order annexed to this application on the grounds that –
>
> 1. The Applicant is a Purchaser of the immovable property in question.
>
> 2. The Applicant has acquired rights in the immovable property in question; she is entitled to obtain cession of rights, title and interest in her name, but the first Respondent's whereabouts are unknown.
>
> 3. The applicant is therefore applying by way of Chamber Application in terms of the Titles Registration and Derelict Land Act, [*Chapter 20:20*]. Leave is sought to serve the provisional order by way of publication in the Government Gazette and a Friday edition of the *Herald*."

The provisional order was granted on the basis of this application and the affidavit by the applicant.. The issue which concerned me was whether the procedure adopted by the applicant i.e. making a Chamber Application in terms of the Titles Registration and Derelict Lands Act("the Act") was correct. At the hearing *Miss Tomana* submitted that the procedure was correct and she persisted in that argument in the heads of argument which she filed upon my request.

Section 3 of the Act provides as follows:

> "Any person who, by prescription or by virtue of any contract or transaction or in any other manner, has acquired the just and lawful right to the ownership of any immovable property in Zimbabwe registered in the name of any other person and cannot provide the registration of such property in his name in the Lands Register, the register of occupation stands or the register of claims, as the case may be, in the manner and according to the forms for that purpose by law provided, by reason of the death, mental incapacity, insolvency or absence from Zimbabwe of the person in whose name such property stands registered as aforesaid or of any person or persons through or from whom such right has been mediately or immediately derived or owing to any other cause may apply to the High Court to order the registration of the title to such property in his name in the land register, the register of occupation stands or the register of claims, as the case may be, of Zimbabwe."

The question is whether this provision of the Act is applicable to the present case. The applicant's alleged interest in the house arises from a sale of the interest allegedly acquired by the first respondent by virtue of inheritance. The first respondent's father had an agreement with the second respondent which, it would seem, entitled him to ownership of the house upon payment of the full purchase price to the second respondent and upon transfer of the house to him. When he died the house, apparently, had not been transferred to him. The first respondent is said to have inherited his father's interest in the house.

The first issue which arises from the applicant's affidavit is the need show by documentary evidence that the first respondent indeed acquired a right to the house by way of inheritance. This could very easily have been done by the production of a certificate nominating him as heir and by a deed assignment executed between him and the second respondent. No such document was produced. The farthest that the applicant went to show that the first respondent had any right in the house was an averment in para 7 of her affidavit that "certain bills and documents" from second respondent "started reflecting" that the first respondent had acquired an interest in the house. No "bills and documents" were attached to the affidavit. This, in my view, is not sufficient proof that the first respondent acquired any interest in the

house. Had the applicant obtained a deed of assignment from the second respondent in favour of the first respondent, the question would have been clearly answered. That question, however, remains unanswered and it is difficult to persuade this court to grant the order sought. The agreement of sale between the first and second respondents is not proof that the first respondent had any interest in the house which he could dispose of. It is proof however that the first respondent purported to cede his alleged interest in the house to the applicant, but that is not sufficient to establish the first respondent's entitlement to deal with the property in the manner that he is alleged to have done.

Section 3 of the Act is concerned, as is the concern of the whole Act, with ensuring that a person who has acquired the just and lawful right to the ownership of any immovable property the owner of which is either dead, or is mentally incapacitated or insolvent or is absent from Zimbabwe, is enabled to register the property in his name upon application to the High Court. The prerequisite for the grant of such order are clear:

(a) the applicant must have acquired the just and lawful right to ownership of the property in question;

(b) the person in whose name the property is registered is either dead, or mentally incapacitated, or insolvent or is absent form Zimbabwe.

(c) Any other cause.

The founding affidavit, as I have shown, did not conclusively establish that the applicant acquired the just and lawful right to ownership of the house because no evidence was placed before the court to show that the person from whom the applicant purports to have acquired the right was himself possessed of that right. The founding affidavit did not address the requirement that the person in whose name the house is registered is either dead, mentally incapacitated, insolvent or absent from Zimbabwe. It did not give any other sufficient cause. The applicant's interest in the house cannot be a just and lawful right to

ownership of the house if the first respondent had no such interest in the house in the first place. It is common cause that the house is legally owned by the second respondent, Chitungwiza Town Council. Until such time as the first respondent had legitimately inherited the house and had had the rights in the house ceded to him, and the second respondent's requirements had been fully met, he could not be said to have acquired a just and lawful right to the ownership of the house. Consequently the applicant could not be said to have acquired such a right either. Section 3 of the Act is a procedure applicable where the seller has acquired a just and lawful right to ownership of immovable property. That cannot be the case with "lease-to-buy" houses unless and until the Council's requirements are satisfied. In addition s 3 of the Act applies where the person in whose name the property in registered has died etc. The second respondent, being a legal *persona* and a local authority cannot be the subject of all the criteria set out in s 3 of the Act. That criteria applies to a natural human being who may be absent from Zimbabwe or may die, become mentally incapacitated or insolvent. There may be situations where the seller, being a legal *persona*, may be absent from Zimbabwe or has become insolvent and the section may, in those situations conceivably apply. This, however, is clearly not such the case.

The normal procedure in addressing the problem which was faced by the applicant i.e that he could not locate the first respondent was to seek substituted service after attempts were made to serve the court application to compel the first respondent to cede his interest in the house to the applicant was unsuccessful. This is permissible under the rules of this Court.

The present application cannot succeed because s 3 of the Act is not applicable to the facts of the matter, in particular, the application does not establish any of the criteria set out in s 3 of the Act nor does it indicate who or how the first respondent became lawfully entitled to the

ownership of the house in issue. If it was otherwise merited that the applicant should be registered by the second respondent as the holder of any rights to the house by way of cession, the proper approach was simply to have sought to compel the second respondent to effect a cession of rights in the house in favour of the applicant after the court application was served by way of substituted service. If the issue of the first respondent's rights in the house had been beyond any doubt, I probably would have regarded the publication of the court application as proper "substituted service" and confirmed the order. That, however, is not the case. These then are the reasons for which I refused to grant the order prayed for and for which I now discharge the provisional order. I make no order as to costs as that was not argued before me.

Accordingly the provisional order is discharged. There will be no order of costs.

Sawyer and Mkushi, legal practitioners for the Applicant