HAROLD CHINOGUREI

versus

SHAMISO CHISEKO

and

THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 24 March 2011

Applicant in person

Miss *Machaka* for the respondent

CHIWESHE JP: The applicant seeks an order evicting first respondent from the premises known as House No. 50 Nzungu Street, Zengeza 1, Chitungwiza (the property).

The back ground facts to this application are common cause. The above property is part of the estate of the late Alfred Kudiwa who died in 2003. On 4 March 2009, his son Marshal Kudiwa, was appointed Executor Dative to that estate. In that capacity he sought and was granted by the Master of this honourable court authority to sell otherwise than by public auction this immovable property. A certificate to that effect dated 9 March 2009 is filed of record. Armed with that authority he entered into an agreement of sale with the applicant in terms of which he sold the property for the sum of US$7000.00. The agreement of sale was signed by the parties on 9 April 2009.

On 31 July 2009 the applicant wrote to the tenant residing at the property advising him that he was now the new owner of the property and directing that in future all rentals be forwarded to him. This directive went unheeded. The applicant then took steps to evict the tenant. It was at that stage that first respondent appeared alleging that she was also the owner of the same property having bought it from Marshal Kudiwa in terms of an agreement of sale dated 7 August 2008. The purchase price was US$9000.00. It is common cause that when Marshal Kudiwa entered into this earlier agreement of sale he had not received authority to do so from the Master of the High Court nor had he even been granted the letters of administration.

For that reason the applicant contends that the sale to the first respondent be declared null and void as Marshal Kudiwa had no powers, authority or capacity to sell an estate property without authority from the Master of the High Court.

I agree with the applicant. The duty of a surviving spouse, the next of kin, or a *curator bonis* is to preserve the estate which shall remain in his or her custody pending the appointment of an executor or such other lawfully appointed person who shall be in charge of the administration, distribution and final settlement of the joint estate. A surviving spouse, child or next of kin has no right to dispose of assets of the estate without lawful authority granted by the courts, the Master of the High Court or the duly appointed executor (see sections 20, 21 and 22 of the Administration of Estates Act [*Cap 6:07*] ).

In particular s 120 of the Act requires that even a duly appointed executor seeks the authority of the Master should it become necessary to dispose of immovable property otherwise than by public auction. It reads:

“If after due inquiry the Master is of opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to the such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.”

Section 114 of the Act provides for criminal penalties for persons who may violate these and various other provisions of the Act.

From the foregoing it is clear that the sale to the first respondent was neither sanctioned by the Master of the High Court nor is it justifiable. For that reason it was void  *ab initio* for non-compliance with the provisions of the Act. Further it is evident that the first respondent and her legal practitioners acted in bad faith. They knew or ought to have known that the immovable property they sought to purchase was part of the estate of a deceased person. They also knew or ought to have known that this property could not be dealt with without the involvement of a duly appointed executor and the authority of the Master. They knew that the seller had not received letters of administration and therefore that he did not have authority to dispose of the assets of the estate. They neither demanded to see nor were they shown such letters of administration by the purported seller. (See *Nemuseso vs Mashita and ors* 2009 (2) ZLR 298 (H) at p 306. See also *Klempman N.O. vs Law Union and Rock Insurance* 1957 (1) SA 506 W.

The first respondent argues that the Master’s authority is often obtained after the event. No authority or provision of the Act has been cited to support this contention. Even if it were to be shown that it was permissible to obtain such authority retrospectively, the fact remains that the Master neither granted his authority up front or subsequently. The sale remains unauthorised. It is unlikely that the Master would grant such authority now in view of the fact that he has already authorised the executor to dispose of the property to the applicant. The applicant has fully paid for the property. He states that the property has through Chitungwiza Municipality been ceded to him, a fact the respondents have not challenged. The applicant has the right to vindicate this property.

For these reasons I would hold that the sale to the first respondent, not having been authorised by the Master and having been executed by a person not holding letters of administration is null and void. It would be against public policy to hold otherwise. If this had been a normal case of double sale I would have given consideration to the first respondent’s argument that her sale was concluded before the applicant’s transaction and for that reason should be upheld. In view however of the legal improprieties discussed above, that argument cannot hold any water. It is as if no agreement was ever entered into. (See *Mugwebie vs Seed Co and Anor* 2000 (1) ZLR 93 (5). Her recourse should be against the seller.

The applicant, a self-actor, had neither cited nor served the Master with a copy of the application. I directed that the Master be served and that he submits a written report. The report is filed of record. Although he does not say so in as many words, it is evident that the Master does not oppose the grant of this application.

It was for these reasons that I granted the application with costs in the following terms:

It is ordered that the first respondent and all those claiming through her be and are hereby directed to vacate house 50 Nzungu Street, Zengeza1, Chitungwiza, on or before 30 April 2011, failing which the second respondent be and is hereby authorised to eject the said first respondent and all those claiming through her from the said property.

*C. Mpame & Associates, first respondent’s legal practitioners*