TALKMORE CHIGWIKO
versus
LEONARD CHIGWIKO
and
POSE DAHWA
and
MASTER OF THE HIGH COURT
and
DIRECTOR OF HOUSING, MARONDERA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 30 July &18 September 2013

S. Mhlanga for the applicant
R. Mahuni for the 2nd respondent
No appearance for 1st, 3rd & 4th respondents

ZHOU J: This is an application for the setting aside of the sale to and cession into the name of the second respondent of rights, title and interest in an immovable property known as No. 5 Gura Way, Marondera. The stand number of the property is described differently in the papers. In the Certificate of Authority to sell the property given by the third respondent, the Master of the High Court, it is described as Stand No. 2503 Chitepo Township Marondera also known as House No. 5 Gura Way Marondera. The valuation reports annexed to the applicant's papers describe it as Stand 2503 Dombotombo Township of Lot 4 of Longlands. What is clear, however, is that the parties are referring to the property at No. 5 Gura Way, Marondera. The background to the dispute surrounding the immovable property referred to above is as follows:

The applicant and the first respondent are half-brothers, born of the same father, the late Lenos Chigwiko, but with different mothers. Lenos Chigwiko died at Marondera on 1 January 1993. The immovable property was part of his deceased estate. At the time of his death he had contracted an unregistered customary law union with Ennie Chigwiko who is the mother of the applicant. They had five children together, namely Talkmore (the applicant), Linda, Precious, Clive, and Nicholas. The five were still minors at the time of the death of their father. Lenos Chigwiko had four other children with other women, namely, Leonard (the first respondent), Dumisani, Lilian and Lorraine. Upon the death of Lenos

Chigwiko the first respondent was appointed heir to his estate by the Assistant Master at the Magistrates' Court at Marondera.

Following the death of her husband, Ennie Chigwiko, instituted a claim for maintenance for herself and the minor children from the deceased estate in terms of the Deceased Persons Family Maintenance Act. The parties then negotiated a settlement to resolve the maintenance claim. In terms of the agreement reached the immovable property was to belong to the applicant and the first respondent in equal shares. The deceased's widow and her children were given the right to occupy the main house until the widow died or remarried and until the youngest of her children attained the age of majority. The first respondent had the right to occupy an outbuilding referred to in the agreement as a cottage. The agreement provided that when the youngest child attained majority the applicant and first respondent would then decide and agree on whether to sell, let out or just continue to occupy the property. The proceeds from the sale or hiring out of the property would be shared equally between the two of them. The widow and her children would look up to the applicant for support while the other children of the deceased would be looked after by the first respondent.

On 17 March 2010 the first respondent entered into an agreement with the second respondent in terms of which the former sold to the latter the property referred to above for a purchase price of US$9 800. The agreement was reduced to writing. The applicant disputed the agreement and even approached the third respondent. The applicant also contested the price at which the property was sold. The third respondent convened meetings of interested parties with a view to resolving the dispute regarding the sale of the property and the purchase price accepted by the first respondent from the second respondent. The meetings failed to resolve the dispute hence the instant application for the setting aside of the sale. The applicant essentially contends that the sale of the property to the second respondent must be set aside on the grounds (1) that it was concluded without his consent as provided for in the agreement referred to above, (2) that the price at which the property was sold is significantly lower than the real value of the property, and (3) the first respondent sold the property before he was authorised by the Master.

As regards the first ground, it seems to me that the agreement cannot be set aside on the basis that the sale was in breach of the agreement between the first respondent and the applicant. That agreement merely creates personal rights as between the parties to it. It does not on its own invalidate an agreement of sale of the property to a third party. As regards the

value of the property, the applicant has attached two valuation reports in which the open market value of the property is given as US$20 000. That amount is no doubt considerably higher than the price realised in terms of the agreement between the first and second respondents. I do not believe, however, that the mere fact that the property was sold at a price which is significantly lower than the market price would be a ground for setting aside the agreement of sale by a party whose interest in the property is based on an agreement with the heir who sold the property. There is no evidence of the second respondent having acted fraudulently in relation to the purchase price. If the applicant suffered any loss as a result of the price charged his recourse would be against the first respondent.

On the third ground, the applicant's contention is that the agreement of sale between the first and second respondents was concluded before the first respondent was appointed Executor Dative and given authority to sell the property by the third respondent. The letters of administration show that the appointment of the first respondent as executor dative for the purpose of effecting transfer of the property was made on 18 March 2010. Authority to dispose of the property otherwise than by public auction was given in terms of section 120 of the Administration of Estates Act (Chapter 6:01) on the same date. As already noted above, the agreement of sale between the first and second respondents was concluded on 17 March 2010. Section 120 of the Administration of Estates Act provides as follows:

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

Thus the authority to sell property belonging to a deceased estate other than by public auction is given by the Master, to an executor. The second respondent was not an executor at the time he entered into an agreement of sale of the property in dispute with the second respondent. Further, he had not been given authority to enter into such an agreement. In my view, the sale is a legal nullity as it was concluded in contravention of the clear provisions of the law.

It was contended on behalf of the second respondent that the fact that the applicant complained about the purchase price meant that he accepted the sale. That submission is not supported by the evidence placed before this Court. In a letter dated 30 March 2010 addressed to the third respondent the applicant disputed the sale on the ground that it had not been conducted by an executor and also that it had been concluded contrary to the agreement

which had been made by the parties. The reference to the low purchase price was to support the prejudice which the applicant alleged he would suffer if the sale was allowed to proceed. In any event, the authority to sell the property otherwise than by public auction could only be given by the Master. Such authority could only be given to an executor. Not only was the first respondent not an executor when he sold the property; he did not have the Master's authority to execute the sale. The famous statement in the celebrated case of *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I is apposite:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad … And every proceeding which is founded upon it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

See also *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153(S) at 157B-C.

The raising of the issue of the purchase price by the applicant or any other interested party does not, therefore, validate the sale. The cession of the rights, title and interest in the property to the second respondent is equally null and void.

As for costs, it seems to me that these should be paid by the first and second respondents who opposed the matter by filing opposing papers.

In the premises, it is ordered as follows:

1. The sale and cession of rights, title and interest in the property known as 5 Gura Way, Marondera, in favour of the second respondent by the first respondent be and are hereby set aside.
2. The costs shall be paid by the first and second respondents jointly and severally the one paying the other to be absolved.

Legal Resources Foundation Harare, applicant's legal practitioners
Nyamushaya Kasuso & Rubaya, second respondent's legal practitioners