MARGARET DONZWA
versus
TINEI TAFADZWA MOYANA
and
ESTATE LATE MICHAEL MOYANA
and
AMBASSADOR A.T. DETE
and
DIRECTOR OF HOUSING- CHITUNGWIZA MUNICIPALITY
and
THE MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 25 October 2012 & 31 October 2018

Opposed matter

S Mushonga, for the applicant
N.T. Chingore, for the 3rd respondent
No appearance for 1st, 2nd, 4th and 5th respondents.

HLATSHWAYO J: This matter has taken many twists and turns including abortive attempts to settle out of court and rescission by consent of an order earlier issued in error without the knowledge of the other party. As late as October 2012 the parties were still pursuing dialogue. They have now requested that judgment be handed down in the matter.

The applicant, a businesswoman, seeks the following amended order:

> "IT IS ORDERED THAT:
>
> 1 (a) First, second and third respondents and all those claiming occupation through them vacate within 14 days of being served with a copy of this court order from Stand 456 – 42 Haka Street, Zengeza 1 Chitungwiza.
>
> (b) Upon their failure to vacate the Deputy Sheriff be and is hereby authorised to evict first, second and third respondents and all those claiming occupation though them from Stand 456 – 42 Haka Street Zengeza 1 Chitungwiza.
>
> 2 The fourth respondent, the Director of Housing, Chitungwiza Municipality be and is hereby interdicted from transferring Stand No. 456 – 4 Chitungwiza from applicants name without leave of this honourable court on notice to applicant or pending full resolution of this matter.

3 The first, second and third respondents to pay the applicants costs of suit."

The salient facts giving rise to this litigation are clearly set out in the applicant's founding affidavit, thus:

"3(a) On 1 December 2002 at Chitungwiza Municipality's sub office at Zengeza applicant met first respondent whom she was introduced to as a prospective seller of an immovable property in Zengeza 1.

(b) The applicant demanded to inspect the immovable property and also to see the ownership papers pertaining to this property.

4(a) Applicant was taken by 1st respondent to number 456 Haka Street Zengeza 1 and she inspected the house and also spoke to the tenants to find out if any one of them had a claim over the house and they all confirmed that the house belonged to first respondent.

(b) The water, electricity and rent cards were in 1st respondent's name. Applicant went further and enquired as to how 1st respondent had acquired the house upon which 4th respondent's employees showed applicant:-

(i) Certificates Heir and

(ii) Authority from an assistant master to cede the house from 2nd respondent into 1st respondent's name.

(c) Applicant inquired further why 1st respondent wanted to sell the house and he indicated that he wanted to secure a return ticket to the United Kingdom where his in-laws and friends had relocated.

5(a) Applicant duly agreed to purchase this property for a price of two million and four hundred thousand dollars ($2 400 000.00).

(b) The parties duly entered into a written agreement of sale a copy of which is hereto annexed and marked "A".

(ci) It was a term of the agreement that cession of ownership was to be done immediately upon payment of the full purchase price of $2 400 000.00.

(cii) Occupation was to be granted to the applicant on 31 December 2002.

6(a) The full payment of the purchase price was done and cession of names from 1st respondent to applicant was done on the spot.

(b) Occupation was granted to applicant on 31 December 2002.

7(a) The tenants started to pay their rentals directly to applicant on 31 December 2002.

(b) Applicant started to receive her rates, water bills and other, levies for the house in her name on that date as well and the transaction was fully implemented.

8(a) In July 2004 the applicant was surprised when she tried to collect her rentals from tenants only to be told that 3rd respondent had already collected the rentals and that the names on the property had been changed from her name into first respondent's name.

(b) Applicant visited the offices on fourth respondent where this issue of change of names was explained to her but no papers were given to her.

9(a) On 21 October 2004 applicant's legal practitioners wrote to 4th respondents as per **annexure "B"** hereto annexed.

(b) The 4th respondent then replied and attached documents hereto annexed and marked **"C1, C2, and C3"**.

(ci) In "**C2"** 5th respondent alleged that the letter of administration used by applicant did not originate from their office.

(cii) It is submitted that not all letters originate from 5th respondent's office. The assistant master who is in this case a magistrate can also authorise cession.

9(cii) In any case Tinei Moyana 1st respondent is a genuine **HEIR** and regardless of the alleged **FORGERY** (which is denied) the house even now is in his name.

(ciii) The conduct of Tinei Moyana in getting the house in his name with full approval of the 4th respondent must not prejudice applicant an **INNOCENT THIRD PARTY** who bought the house for value.

10(a) The third respondent whom applicant now understands to be an **UNCLE** to 1st respondent has no direct or indirect interest in the estate late Michael Moyana brother – in law in terms of the administration of estates.

(b) The third respondent cannot be heard to connive with 1st respondent as annexure **"C3"** clearly shows in order to simply deprive the applicant of the property she bought for **VALUE** without offering a refund plus interest or at least reasonable damages.

(c) The sale between applicant and 1st respondent was on 1 December 2002 and the purported complaint was only raised on 14 July 2004 a period of over one and half years whilst applicant was enjoying peaceful ownership and occupation.

(d) The third respondent if he was indeed aggrieved must have approached this Honourable Court for an order reversing this transaction but chose to use **POLITICAL** power to push out applicants."

The applicant's first grievance is that the reversal of the cession was improperly done without a High Court Order and without informing her. She, however, does not allege that the fourth respondent did not properly follow its own internal procedure in effecting the reversal. She was afforded access to the internal documentation and correspondence surrounding the transaction and does not seem to take issue with the same. Her administrative rights to be given the reasons for the decision made and to be given an opportunity to be heard seem to have been respected. Certainly, she does not challenge the decision on the merits as she does not allege any irrationality or unfairness on the part of the fourth respondent. The applicant only makes bald, unsubstantiated statements that 'political influence' was used by the third respondent and that the fourth respondent yielded to 'political pressure' in effecting the reversal. Therefore, no cause or remedy cognizable at law has been established by these disparate allegations.

However, it seems to me that the burden of this application is a claim for the return of the property, i.e. a *rei vindicatio.* If an immovable is being recovered as in this case, such a claim usually takes the form of an application for an order of ejectment and rectification of transfer records. As aptly observed by the learned authors C G Van der Merwe and M J de Waal, *The Law of Things & Servitudes* 1993, Butterworth p171, an owner instituting, the *rei vindicatio*_ must prove that "he is the owner of the thing … If the defendant alleges that his immediate predecessor was not the owner of the things the owner will have to show that such predecessor was indeed the owner of the thing" (emphasis added).

The applicant in this matter does not seriously contend that her predecessor, the first respondent, was the owner of the property. She lamely asserts that he is a proper heir, the admittedly fraudulent letters of heirship notwithstanding. Her predecessor in title in his sworn affidavit clearly states that he perpetrated a fraud and masqueraded as a duly authorised executor. His affidavit confessing the fraud is reproduced in full below:

The affidavit of Tinei Tafadzwa Moyana, the first respondent, dated 15 July 2004 describes how the fraud was carried out:

> "I was assisted to forge a High Court document of airship (sic) by employees of Chitungwiza Municipality namely Mr Talent Rwambiwa, Mr Sixpence and Mr Mabamba. This document has been removed from files from Zengeza Two Council Offices by Talent Rwambiwa. The document contained information which stated that it belonged to one of Chitungwiza tenants. So we deleted the names of this tenant by simply sticking papers and then photocopied the document. The information contained on the existing document was typed at Zengeza

> Council Offices. With this document we were then able to illegally sale (*sic*) the property which belonged to my deceased parents".

In summary, therefore, the applicant is not in a position to establish that her predecessor in title was the owner of the property. Accordingly the *rei vindicatio* is not available to her. The submissions on her behalf that she was an innocent, *bona fide* third party who was caught up in a fraudulent scheme does not assist her case. Her claim should have been directed against the fraudsters. In her founding affidavit, the applicant appears to appreciate that her remedy lay in a claim for "a refund plus interest or at least reasonable damages". However, when in the notice of opposition the third respondent stated that the family of the deceased "is prepared to refund applicant the amount paid by her together with interest a *tempore morae*" the applicant ignored this offer in her answering affidavit.

In the final analysis, the applicant having failed to establish a claim on the basis of administrative infractions on the part of the fourth respondent and having failed to satisfy the requirements for a *rei vindicatio,* her application is still born and stands to be dismissed with costs following the outcome.

Accordingly, the application is dismissed with costs.

Mushonga & Associates, applicant's legal practitioners
Chingore & Garabga, 3rd Respondent's legal practitioners