

SIMBARASHE GODWIN MADZIMA  
and  
NIGEL MASIMBA MADZIMA  
versus  
FREDDY CHIMBARI N.O  
and  
KENIAS MUTYASIRA  
and  
MASTER OF THE HIGH COURT N.O  
and  
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 7 August & 27 September 2017

### **Civil Trial**

*A Muchandiona*, for the plaintiffs  
*T I Gumbo*, for the 1<sup>st</sup> defendant

TSANGA J: The chequered background to this matter which, in essence, is a quest for compensation for the value and improvements to certain property to the tune of \$150 000.00 is as follows: When Kenias Muzanya died on 24 December 2004 he left a will dated 16<sup>th</sup> December 2004. In it he directed that property known as 79 Brackenhurst Township, Christmas Gift Extension, in Gweru be sold and the proceeds be used to pay certain loans and other specified debts incurred during his earthly existence. His estate had duly been registered and an executor appointed. The executor at the time, one Kenias Mutyasira, had sold the property to the plaintiffs and the property had been transferred even though the Master had instructed him at some point following his authorisation, not to proceed with the sale as there was a dispute.

Miffed by the will which infringed on a matrimonial right and at the patent disinheritance, the deceased's estranged widow who was living in the property at the time

had challenged the will in a matter in which the plaintiffs had not been made a party. She had been successful and the will had been declared invalid on 21 June 2006 as it was deemed to contravene s 5 (3) of the Wills Act [*Chapter 6:06*], which prohibits disinheriting an entitled spouse through a will. The recalcitrant executor had subsequently been removed and a new one appointed. The sale of the house, relying on the directions of an invalid will as it did, was put in jeopardy. Pursuant to the voiding of the will the defendants (as plaintiffs) had then sought and successfully obtained a declarator in October 2013 against the current plaintiffs (as defendants) that the sale was null and void and of no legal effect. The transfer was also declared null and void. The estate was to be wound up as an intestate estate.

Of significance was the court's finding that all parties in the matter before were victims of official errors. Since the present plaintiffs clearly stood to suffer prejudice as they had paid value for property, the court stated that their remedy lay in suing the estate and those who had assisted to sell what could not be sold for what they lost in buying the property in dispute. This matter before me therefore represents such a specific quest by the plaintiffs.

What characterises the dispute before me is a lack of agreement on what should actually be repaid or whether any payment at all should be made. The plaintiffs seek payment of \$150 000 from the estate together with interest at 5% per annum as at the date of summons to date of payment in full. The sum claimed is based on the current market value of the property at today's value as per an evaluation report as well as improvements said to have been effected to the property by the plaintiffs. In the event of failure by the estate to pay market value, the plaintiffs seek transfer of that property to themselves within 90 days. On the other hand the beneficiaries through the current executor as the first defendant, have counter sued for eviction of the plaintiffs which they are entitled to in view of the order nullifying the sale. The two matters have been joined.

### **The evidence**

Mr Simbarashe Godwin Madzima, the first plaintiff and father to the minor child Nigel Masimba Madzima who is the second plaintiff, gave a history of the purchase of the property. He was based in the United Kingdom at the time of the purchase and had acted through his younger brother Pawed Madzima whom he gave a power of attorney and sent money for the purchase. His brother had exhaustively established that the sale was proper

before paying for the property. The sale had been concluded through the then estate executor Kenias Mutyasira. It was only after his brother had tried to move on to the property that he had learnt that there was a woman there, one Jessi Muzanya, the deceased's wife, who was refusing to leave the property. His brother had obtained an eviction order and had moved on to the property in 2009. Upon his return from England in 2010 the witness had himself moved on to the property and had effected improvements thereto which included flushing the existing borehole on the property, installing an irrigation system and putting water tanks. He had also constructed some pigsties, purchased a submersible pump for the borehole and had put burglar bars right around the house. Furthermore, he had settled outstanding electricity bills pertaining to the property. He had not kept vouchers because he had not had any expectation that the matter would end up in court since as far as he knew he was a *bona fide* purchaser who had been given title deeds. In short, he had regarded these as improvements to his home and had not seen the need to keep the receipts. These circumstances relating to the purchase were corroborated by his brother Pawed Edwin Madzima who also gave evidence. He was the one who had dealt with the previous administrator of the estate Mr Mutyasira in the purchase of the property acting on behalf of his brother.

Mr Mutyasira had been removed in 2006 as an executor of the estate. He did not file any defence in this matter. The current executor Mr Chimbari gave evidence on behalf of the estate. He confirmed that the amount of Z\$420 000 000.00 had been received by the previous executor on behalf of the state. In 2015 following the court's decisions on the will and the agreement of sale, he had tried to look into the issue of various payments said to have been made from the money paid on behalf of the estate but as these had been in the old currency which had been devalued several times from 2006, he had been unable to unearth the information he wanted as a basis for payment of compensation. The evidence of the cancellation of the mortgage bond that was on the property was placed before the court. Suffice it to also say that the fact that the property was sold to the plaintiffs for the sum stated was not in dispute and the executor was clear that he could not deny that the purchase price had been paid to the former executor of the estate.

He explained to the court that his preferred approach had been for the parties to meet and agree on how much should be paid but that the plaintiffs wanted 100% compensation whereas on the other side the beneficiaries put emphasis on the judgment that set aside the

sale and equally argued that they had not received any proceeds. As the property is a 4 acre plot the current executor had also suggested that they sell part of the property to raise the compensation funds.

Jessie Muzanya, the widow, also took to the stand. Her evidence touched mainly on a description of the property at the time that it had been illegally sold. Whilst she was unaware of the mortgage bond taken in 2001, the evidence that the deceased had such a bond which was eventually paid off from the proceeds, was information that was placed before this court.

Materially therefore it was not in dispute that the property had been sold to the plaintiffs and that the previous executor had received those proceeds on behalf of the estate. He was the second defendant in this matter but did not defend the matter. The Master of the High Court as the third defendant was cited in his official capacity as the one responsible for the supervision of deceased estates. He did not defend the matter and neither did the Registrar of Deeds, also cited in his official capacity as the fourth defendant given the plaintiffs' quest for re-transfer of the house in the event of the estate failing to compensate the plaintiffs their money.

### **The legal position**

The plaintiff's argument that he cannot lose this property and at the same time not be given compensation to enable him to buy another property of similar value misses the point about the consequences of a void agreement. The effect of the declaration that an agreement is null and void is that there never was an agreement. What has been entered into under such circumstances has no legal effect and neither party can seek to enforce such an agreement. However, so as not to enrich one party at the expense of the other, the parties are returned to the position they were in prior to the void agreement. This position is clearly distinct from that where an agreement has been cancelled as rights accrue to the party affected up to the period of cancellation. The legal position relating to a void agreement as distinct from a cancelled one was clearly explained in the case of *Malunga & Anor v Wade* 2016 (1) ZLR 397 (H) 397 at p399E as follows:

“...the consequences of cancellation of an agreement are different from the consequences of nullification of an agreement. For the avoidance of doubt a cancelled agreement retains the rights accruing to the date of cancellation whereas an agreement that is null and void does not give rise to any rights at all and the court cannot enforce any in respect thereto.

And further at 400 B-D

“.....a void agreement does not create rights as between the respective parties. Where an agreement is nullified as *in casu* the position is that the parties revert to the *status quo ante* (i.e. before entering into the void contract). Where a *merx* had been delivered the one receiving the *merx* has an obligation to restore the possession of the *merx* to its lawful possessor or owner of the same and if any price or part thereof had been paid the one who received payment of the price has an obligation to refund it (restitution) as not do so would result in one of the parties being unjustly enriched. A party to a void agreement who approaches the court to enforce the right to restitution does not seek to enforce the void agreement but seeks the doing of justice between man and man.

To allow a situation where one of the parties benefits at the expense of the other in such circumstances in my view would be grossly inequitable and clearly against public policy. A strict application of the *par delictum* rule as is being urged by the defendant would result in the defendant retaining both the property and the amount the plaintiffs had paid towards the purchase price.”

The case of *Goncalves v Rodrigues* 2004 (1) 255 (H) which the plaintiff’s counsel cites to justify a 50-50 sharing of the property is factually distinguishable. Whilst the non-validity of a notarial deed was in issue, the case dealt with the division of property that the parties had bought property together and had effectively lived as husband and wife in a house registered in the names of one of the parties. The final decision on unjust enrichment ultimately reflected an accepted equitable position in marital type circumstances based on the facts that had been placed before the court.

The agreement in the case before me was void because the will upon which the property had been sold had been declared by the court to be an invalid will on account of excluding the wife and disposing of the matrimonial home. The amount paid had been credited to the estate and there is ample evidence in support of plaintiff’s contention that the proceeds had indeed been used towards settlement of a mortgage that was outstanding on the property. The will itself was declared invalid in June 2006. The house had been transferred in November 2006. The declaration that the sale was null, and, though formally declared by the court in 2013 effectively went back to the time of the agreement of sale itself. As such the value to be compensated is the value that was paid at the time of the defective sale in August 2005.

The real issue, bearing in mind the lucid exposition of the position regarding an agreement that is void, is, what is refundable to the plaintiff. In his evidence the plaintiff clarified to the court that having been based in England at the time, he had sent £10 000.00 to his brother at the time as purchase price for the property in question. This had however been paid in Zimbabwean dollars through Western Union. The amount paid was Z\$420 000 000.00. This currency has since been demonetised and replaced by a multi-currency regime in which the US dollars has effectively been the dominant currency. In any event a claim that was in the now demonetised Zimbabwean dollars can be expressed in the currency in actual use to redress any loss suffered in a claim. See *Stuart v National Railways of Zimbabwe* 2014 ZLR (1) 39 (H); *Samanyau & Ors v Fleximail (Pvt) Ltd* 2011 ZLR (1) 527 (H).

The official rate of the Zimbabwean dollar to the US\$ on 26 August 2005 the date of the payment of the purchase price in full as per the agreement of sale was one US \$ to Z\$24 108.80<sup>1</sup>. This means therefore that the US\$ equivalent of the Z\$420 000 000.00 paid at the time was US\$17 421.00. In fact this figure tallies with the pound equivalent which the plaintiff himself says he expended on the purchase of the house. It is this amount with interest at the official rate to the date of repayment which should be refunded by the estate as a result of the void sale. The improvements which were in any event not proven are not in issue as the amount to be refunded is at the date of the agreement of sale. In any event this court notes that the nature of some of the improvements are removable and the plaintiffs can take them when they vacate the property. The plaintiffs have also been in occupation of the property since 2009 when they obtained an order of evictions against the widow which in essence balances whatever improvements they may have effected which are not removable.

The first defendant as executor of the estate counter sued for eviction of the plaintiffs. He is entitled to do so in the face of the void agreement. However, a three month period to allow the plaintiffs to vacate and find a new home would not be unreasonable under the circumstances of the case. The holding over damages at the rate of \$700.00 per month from November 2014 to date have not been proven by the first defendant. In any case the beneficiaries' refusal to pay any compensation at all was unreasonable and compounded the

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<sup>1</sup> Taken from Comesa Foreign Exchange Rates –Bank of Uganda.  
[https://www.or.ug/bou/collateral/comesa\\_forms/2005/Aug/comesa\\_26\\_August](https://www.or.ug/bou/collateral/comesa_forms/2005/Aug/comesa_26_August)

delay in the finalisation of this matter. It is undoubtedly ultimately the plaintiffs who have been most inconvenienced by the unfortunate turn of events in this matter.

In the result I hold as follows:

1. The first defendant on behalf of the deceased estate shall refund the plaintiffs the sum of US\$17 421 together with interest at the rate of 5% per annum effective from the 26<sup>th</sup> of August 2005 to date of payment in full within three months of this order.
2. Subject to paragraph 3 below, the 1<sup>st</sup> defendant is granted an order of ejectment against the Plaintiffs together with all persons claiming any right of occupation through them from plot 79 Brackenhurst Township of Christmas Gift Extension, Gweru.
3. The plaintiffs and all persons claiming any right of occupation through them to plot 79 Brackenhurst Township of Christmas Gift Extension, Gweru shall vacate the premises within three months of the date of this order.
4. Each party shall pay their own costs of suit.

*Danziger & Partners*, plaintiff's legal practitioners  
*Atherstone and Cook*, 1<sup>st</sup> defendant's legal practitioners