

SIMON CHIKUNGUWO
versus
LAIZA CHIKUNGUWO
and
ESTATE LATE CALAMBAS CHIKUNGUWO
(Represented by Laiza Chikunguwo)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 2, 3 and 11 August 2017

Civil trial

P Sidhuli, for the plaintiff
M C Mandava for the 1st defendant

CHITAKUNYE J: This is a ruling in an application for absolution from the instance at the close of the plaintiff's case. The basic circumstances are as follows:

The plaintiff is a son to the first defendant. On the 2nd October 2013, the plaintiff issued summons against the first and second defendants seeking an order in the following terms:

1. An order declaring the agreement of sale entered into between the parties in 2001 legal and binding upon the parties
2. An order transferring the right, title and interest in House No. 1740 St. Mary's Chitungwiza to the Plaintiff within 21 days of the date of this order failing which the Sheriff is directed to sign all documents to effect such transfer to the Plaintiff.
3. Costs of suit

Alternatively

1. Payment of the sum of US\$ 15 000.00(fifteen thousand United States dollars) as damages for breach of contract.
2. Interest thereon at the prescribed rate from the date of summons
3. Costs of suit.

The first defendant contested the suit and denied that she had ever entered into the aforesaid agreement of sale. She in turn made a counter claim for the eviction of the plaintiff from the property in question. The counter claim was a replica to action proceedings she had

instituted in the Magistrates court on the 7th August 2013 case no. 542/13, which action had apparently spurred the plaintiff to also institute these proceedings in this court.

The basic facts that gave rise to the mother and son legal battle were to the effect that the late Simon Chikunguwo, husband to the first defendant and father to plaintiff, acquired Stand 1740, St. Mary's Chitungwiza. The property was apparently registered in his name. On the cession documents the names of the first defendant as spouse and his children were also endorsed. Upon his demise in about 1979 neither party was able to shade light on what happened to his estate serve to state that the house was ceded into the name of the late Calambas Chikunguwo. When the late Calambas died that is when the transaction between the plaintiff and the first defendant is said to have occurred.

In respect of what happened, the plaintiff's assertion was to the effect that:

"Sometime in 2001 well after the death of his father, the late Simon Chikunguwo and soon after the death of his young brother Calambas Chikunguwo, the 1st defendant gathered her family at one of her sons' residence in Zengeza 1, Chitungwiza. The purpose of the meeting was for the family to witness the sell to the plaintiff by the 1st defendant of House No. 1740 St Mary's Chitungwiza.

The family had generally accepted that it was her house (albeit wrongly) since it had belonged to her late husband and then to her late son Calambas Chikunguwo in whose name it was still registered."

The first defendant on the other hand contended that the family meeting in question was for the plaintiff to share rental proceeds he had been receiving amongst his siblings as the house was a family house and not that she was selling the house.

At a pre-trial conference held on the 30th October 2014 issues identified for determination comprised:

1. Whether or not there was ever any agreement of sale entered into between the parties in 2001
2. Whether or not the plaintiff has any right to seek any damages for breach of contract. If so, what is the quantum of the damages and nature thereof?

On the trial date I drew the attention of the parties to the fact that since the property subject of the dispute was registered in the name of the late Calambas there was need to include the following issues:

1. If at all there was a sale , was such sale valid in view of the fact that the property was registered in the name of a deceased person

2. Did the 1st defendant have the requisite authority to sell the property registered in the name of the late Calambas.

In a bid to provide answers to the above issues and in the process obtain relief as per his prayer the plaintiff gave evidence and called one witness. At the close of the plaintiff's case the 1st defendant applied for absolution from the instance.

In the application the 1st defendant contended that the plaintiff had lamentably failed to prove a *prima facie* case from which a reasonable court might find for the plaintiff. The application was opposed.

A defendant is perfectly entitled to apply for absolution from the instance at the close of the plaintiff's case where he believes that there is no evidence upon which a reasonable judicial officer could or might find for the plaintiff.

A plaintiff, on the other hand, will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might find for him. See *Walker v Industrial Equity Ltd* 1995(1) ZLR 87(S) and *MC Plumbing (Pvt) Ltd v Hualong Construction (pvt) ltd* HH88/15

Upon considering the pleadings and evidence led by the plaintiff it is clear to me that the plaintiff has failed to establish a *prima facie* case.

In his pleadings, the plaintiff acknowledged that the family had **wrongly** accepted that the property belonged to the first defendant when, at the time of the alleged sale the property was registered in the name of the late Calambas. In his *viva voce* evidence, the plaintiff confirmed that the property was in fact registered in the names of two of his brothers, namely Wonder Chikunguwo and Calambas Chikunguwo. These brothers were both deceased at the time of the sale. He also indicated that he in fact did not know the executors of the estates of the two late brothers.

By his own evidence the property belonged to the estates of the late Calambas and the Late Wonder. Those two estates were not part to the sale agreement the plaintiff alleged he entered into with the 1st defendant.

In terms of the Administration of Estates Act, [Chapter 6:01], the estate of a deceased person can only be represented by an executor duly appointed. (See ss 23 and 25). *In casu*, it was never the plaintiff's evidence that the first defendant had been appointed executor in respect of either or both of the estates of his late brothers.

It may also be noted that in citing the Estate Late Calambas Chikunguwo (represented by Laiza Chikunguwo) the plaintiff did not cite Laiza in her capacity as executor but in her

personal capacity as representing the estate late Calambas Chikunguwo. When asked about the status upon which he cited Laiza Chikunguwo as representing Estate Late Calambas, the plaintiff clearly showed that he had no basis serve that the said Laiza had been organising issues to do with the late Calambas' terminal and pension benefits at his former workplace for the benefit of the late Calambas' child. Evidently therefore the citation of the 1st defendant as representing the estate of the late Calambas was not in a capacity as the executor in the estate.

It is my view that if at all the plaintiff and the 1st defendant purported to enter into a sale agreement in respect of the property in question such agreement would not be valid. It has not been shown that the 1st defendant had authority to sell the property in question.

It is trite law that a deceased estate must be represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position. Because a deceased's estate is vested in the executor, he is the only person who has *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate. See *Nyandoro & Another v Nyandoro & Others* 2008 (2) ZLR 219.

Corollary, therefore, only a duly appointed executor can dispose of an immovable property forming part of a deceased person's estate upon obtaining the requisite consent from the Master of the High Court.

It is my view that the defect with the alleged sale transaction alluded to above is fatal to the plaintiff's claim for a transfer of the property into his name. Such transfer would only be possible if the sale was valid. *In casu*, any sale would be a nullity as the registered owners were not part to the transaction and if the 1st defendant pretended to represent the estate of the late owners she did so without authority.

It may also be noted that there was no adequate evidence to show that the purported sale met the basic requirements of a valid sale. Both the plaintiff and his witness could not recall the purchase price. All the plaintiff could recall was that it was in Zimbabwean currency and was equivalent to about fifteen thousand United States dollars. It is difficult to appreciate how he arrived at the conclusion that the purchase price was equivalent to US\$15 000.00 when he cannot recall what it was. The issue that remained unanswered is the exchange rate he used to determine the purchase price in United States dollars. His witness fell into the same problem whereby he could not recall the purchase price but somehow felt it was around US\$15 000.00 to US\$20 000.00.

What was evident was that the two witnesses had simply come up with their estimated current value of the property and chose to cite it as equivalent to the purchase price the plaintiff paid. This was clearly wrong as the purchase price paid does not necessarily translate to the true value of the property as valued. It was important for the plaintiff to disclose the purchase price he paid if at all there was a sale transaction. It was surprising that both the plaintiff and his witness were able to vividly recall the sums that were paid to each of the 1st defendant's children from the purchase price but were unable to recall or even fathom a guess as to what the purchase price was. This failure may imply that there was no purchase price at all.

Further, in his evidence, the plaintiff made it clear that his suit is for specific performance and not for damages. In fact in his evidence in chief, he never led evidence on the damages he suffered as a result of the alleged breach of contract. It was only under cross examination that he was asked on his alternative claim to which he retorted that he had not asked for damages or refund of the purchase price, his claim was for specific performance only.

The specific performance the plaintiff craved for cannot be granted because clearly the persons with registered rights and interests in the property were never part of the alleged sale and neither were the executors of the said late estates of Calambas and Wonder cited in these proceedings.

In the circumstances I am of the view that no reasonable court, applying its mind to the facts of the case might grant the relief sought.

As regards the alternative relief, no reasonable court would grant such a relief as not only did the plaintiff not provide proof of the damages suffered, but he clearly indicated that it was not his claim.

The circumstances of this case smack of a serious disservice to a client by a legal practitioner. As noted from the pleadings the legal practitioners were informed from the inception that the property was in fact registered in the names of a deceased person(s). Despite the clear provision in the Administration of Estates Act as to who should represent the interest of the estate of a deceased person, the legal practitioners did not deem it fit to ascertain who the executors were but merely chose to cite the first defendant to represent estate late Calambas in her personal capacity.

It was incumbent upon the legal practitioner to ensure that the correct party was cited in the pleadings and not just as stated by a lay person. The legal practitioner ought to have

realised that ownership of immovable property is derived from the registration of the property. Where a property is registered in the name of a deceased person, it forms part of that deceased person's estate and cannot be disposed off without the requisite authority and by the appropriate representative of such estate. It should be well known to legal practitioners that no proceedings can be taken for the alienation of part of the estate of a deceased person without citing the executor of such estate. In the same vein, no person should purport to be executor unless they have been duly appointed.

The conduct of any pretenders to the office of executorship is clearly punishable at law. Thus the mere mention that a property is registered in the name of a deceased person should alert any legal practitioner of the need to ascertain the duly appointed executor in that estate before purporting to sue anyone as representing that estate.

In *casu*, the plaintiff's claim can clearly not succeed.

Before concluding I wish to also observe that even the counter claim would have insurmountable difficulties for the same reasons as only a duly appointed executor can bring vindicatory action in respect of the estate of the deceased person. Other persons would only be entitled to protect assets of the estate pending the appointment of the executor. In *casu*, as the property was said to be registered in the name of Calambas and Wonder only the duly appointed executors in the above estates have the right to sue on behalf of the estate.

In the circumstances absolution from the instance is hereby granted.

The plaintiff shall bear the costs of suit.

M T Chiwaridzo Attorneys-at-Law, Plaintiff's legal practitioners
Legal Aid Directorate, 1st Defendant's legal practitioners