

MEMORY MANYANGA

*In her capacity as the Executrix Dative of the  
estate of the late Levyson Simbarashe Manyanga*

DR 1483/15

versus

PATRICIA DARANGWA

*In her capacity as the Executrix Dative of the  
estate of the late Happison Sarimana DR 1909/97*

and

SAMUEL SARIMANA

and

CHIREDZI TOWN COUNCIL

and

THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE

TSANGA J

HARARE, 20 & 28 July, 1 & 4 August 2022 & 19 January 2023

### **Civil Trial**

*L Rufu* for the plaintiffs in reconvention

*D Mudadirwa*, for the defendant in reconvention

*No appearance* for the 3<sup>rd</sup> and 4<sup>th</sup> defendants

**TSANGA J:** This matter has its genesis before this court as follows: Memory Manyanga issued summons against the defendants seeking that she be declared the owner of Stand 2193, Tshovani Township, Chiredzi, and further that the cession of that stand into the second defendant's name, that is Samuel Sarimana, be declared invalid. In the alternative, she had claimed the sum of US\$15 474.00 at the prevailing interbank rate as compensation for the improvements she had made to the property. Her matter was struck off the roll due to the fact that a claim of the same nature under case number HC 6094/2019 had been dismissed for want of prosecution. She had nonetheless re-issued summons without officially applying for the matter to be reinstated. Her matter had thus been struck off the roll for this reason of technical non-compliance.

Since the second defendant had filed a counterclaim on receipt of plaintiff's summons seeking eviction of the plaintiff and all those claiming occupation through her from Stand No. 2193 Tshovani Township, Chiredzi, this matter subsequently continued with the hearing of that counter-claim at the request of the second defendant who placed reliance on Order 38 r 6 of the High Court Rules 2021 which permits a counter claim to proceed.

For ease, the parties will continue to be referred to as plaintiff and defendant as in the summons issued whilst bearing in mind that reference to defendant is to the second defendant since the third and fourth defendants did not defend the matter and the first defendant was only a witness for the second defendant in the counterclaim. In other words, the counterclaim is only pursued by one defendant, Samuel Sarimana who will be referred to as the defendant.

### **The background facts**

An undisputed fact is that Memory Manyanga is the one residing at 2193 Tshovani Township, Chiredzi. She has been so residing since 1998. It is also not in dispute that improvements to the house she resides in were effected by her. Her claim is that she her late husband Levyson Simbarashe Manyanga, bought the property in 1996 from Simeon Tivaone. According to her, Mr Simeon Tivaone had acquired that Stand following the swop with Happison Sarimana, the defendant's father. However, at Chiredzi Rural District Council, that property continued to reflect Happison Sarimana's name as no change of name had been effected. According to her this was for technical reasons connected to the need for development on the stand before it could be ceded officially to someone else. He had died in 1996. It is also not in dispute that when his estate was registered in 1997, this property was never declared. In the death notice and first inventory, he was said to have left no immovable property. The declarant had been by a very close a family member being his brother, one Silas Mbengo. One of his widows Esther had also been party to the winding up process having been declared a guardian to the deceased's heir, then a minor.

Also undisputed is that there had been absolutely no claim laid to the property for 19 years until the plaintiff sought the assistance of the deceased's family to have the property ceded to her. That is when the dispute which later morphed into this present counterclaim unfolded as the deceased's family refused to cede on account of the fact that at the Chiredzi District Council, the property reflected the name of the late Happison Sarimana.

His estate had been thus re-registered with the defendant's family laying claim to the property as belonging to the deceased and with Patricia Darangwa being appointed as executor.

Through the executor, authority to sell the property had been sought from the Master and granted. That sale on 24 May 2018 had been to Samuel Sarimana, the deceased's son and defendant herein. It was sold for the sum of \$22 000.00 with the intention that the proceeds be used to compensate the plaintiff for the improvements to the property. At the time of the sale the United States dollar was still the official currency. It is on the basis of that sale that he seeks the eviction of the plaintiff, the property having been since put in his name. The plaintiff steadfastly refused and refuses to leave the property on the grounds that the real facts speak to her actual ownership of the stand. She has also declined to accept any compensation which by 2019 was now pegged at ZW\$15 474.00 and remains pegged at that rate following currency changes

**The evidence in support of defendant's counterclaim for eviction**

The defendant called two witnesses in support of the counter-claim, namely, Tsitsi Dzinoshamisa Sithole who represented him by virtue of power of attorney, and, Patricia Darangwa the executor dative in the estate of his late father Happison Sarimana.

Tsitsi Dzinoshamisa Sithole told the court that the property had been bought by the defendant for US\$22 000 in 2018 from his father's estate and that the property was transferred into his name. However, she said he has not been living there because the plaintiff Memory Manyanga has been filing various claims laying claim to the house as hers. She said the property had been sold because Memory Manyanga had claimed payment for improvements to it. She was therefore seeking eviction of Memory Manyanga from the property on behalf of the defendant and also claiming holding over damages at the rate of ZW\$100.00 a day.

It was very apparent from her being cross examined that she knew virtually nothing about the background details relating to the earlier winding up of Happison's estate or any background details relating to the history of the property.

The second witness in the defendant's counter claim **Patricia Darangwa**, told the court that she had been appointed as executor in 2016. She acknowledged knowing that the estate had been previously registered. Her appointment came after Memory Manyanga had lodged a claim to Stand 2193. After her appointment as executor, she had convened a meeting with beneficiaries who said they had checked with Chiredzi Council and the property was in Happison's name. A letter had been written by the Council confirming this status. She said Memory Manyanga had ultimately lodged a claim for compensation but she acknowledged that she had indeed prior to this laid claim to ownership of the stand.

Regarding the claim, she said two affidavits had been produced by Memory Manyanga purportedly sworn to by her late husband Levyson Manyanga and Simeon Tivaone who had sold him the property. Having disputed their authenticity, she had taken them away from her because they were dated after Mr Sarimana's death. Since the estate was illiquid for the purpose of paying any compensation, the Master had been approached for permission to sell. It had been granted. She had then sold the property to Samuel Sarimana in May 2018, the late Happison's son, for the sum of \$22 000.00 and paid into a Trust account the sum of \$10 000.00 in the initial instance and then \$12 000.00 subsequently. The property had then been ceded into Samuel Sarimana's name. She had asked Memory Manyanga to supply her bank details but instead the latter had persisted with filing claims for ownership. She further explained that the amount due and payable to Memory Manyanga was now the sum of ZW\$15 474.00 due to currency changes.

In cross examination, it was pointed out to her that she had pleaded that the property was not known to the dependants of Happison Sarimana and yet in court she now sought to portray that at all times the widows were aware that Happison Sarimana had left property. Her response was that what she meant in her plea was that the family did not know of the transaction or sale to Mr Manyanga. It was also put to her that she was in fact the one who had written the letter putting in a claim for Memory Manyanga. Her response was that she had given her the paper to write. She also acknowledged taking the affidavits away from Memory Manyanga which she insisted had been doctored whilst at the same time admitting to no professional expertise in the line of detecting fraudulent documents. She was further cross examined on discrepancies in the final liquidation account on the significantly reduced and varying sums she said were payable to Memory Manyanga. Her response was that these were due to the fact that Memory Manyanga was supposed to pay rentals and also due to error in calculation on her part

She was equally cross examined on whether she had enquired from dependants of Happison Sarimana on why they had indicated in the Death Notice in 1997 that he had not left any immovable property. She said she had been told that a relative of the deceased had filed those documents but she had not spoken to him upon her assumption of office as executor when the estate was reopened and she came to the knowledge of these facts. As to why no claim had been made to the property for 19 years, she attributed this to the fact that the three widows left by the deceased lived in a remote rural area and were also illiterate. She further stated that each of the deceased's three widows had assumed the other was collecting the rentals.

### **Evidence in response to counter claim**

In response to the counterclaim, Memory Manyanga insisted her husband had bought the property from one Simeon Tivaone who had swapped the property with the late Happison Sarimana. The properties swapped were stand 2193 Tshovani which was Happison's stand and stand 145 Tshovani, which was Simeon's. She said the parties to the sale, namely Simeon Tivaone and her husband Levyson Manyanga had each written two affidavits each in 1997 pertaining to sale their agreement. She had been in occupation of stand 2193 since 1998. She had not met Happison as he died in 1996. She had, however, met his brother Silas Mbengo in 2000 for the purpose of discussing the change of ownership. He had assured her that no-one would disturb her as they were aware of the swop. She had therefore proceeded with building developments on the property, starting by seeking building permission from the Council and being granted as well as over the years completing a nine roomed house. She further told the court that over the years she has been the one paying all bills for the property which are in her name.

Since cession could only take place after building developments she had again approached Silas Mbengo in 2016. He had directed her to the late Happison's wife, Esther, the one who had been appointed guardian to the minor heir Marwisa when the estate was initially wound up in 1997. Together with Silas the three of them had gone to Chiredzi Council. Whilst there Esther had called her son Marwisa in South Africa, who had advised that they ascertain in whose name the property was registered. It was then that they had learnt that the cession was in Happison's name. She stressed one had ever approached her over the years neither had they proffered an explanation when they met at Council offices as to why they had never come to say "stop building our property".

As for her meeting with Patricia Darangwa the executor, she had been phoned by her sometime after the meeting at the Council offices to come to her offices. She had gone there with one Taru Honyera because he was a witness on issues pertaining to the property, more pertinently in that he had in fact bought stand 145 Tshovani from Happison Sarimana himself following the swop.

She described how at Patricia Darangwa's offices, she had been given a letter to sign. This was notably after Taru Honyera had been told to go outside since she the executor only wanted to deal with Memory Manyanga in light of the letter from the Chiredzi Council. She had also been told that whether or not she signed, the property was going to be sold as she as

the executor had taken over the administration of the estate and intended to sell. She explained that as a result of these utterances that this was a *fait accompli* she had proceeded to sign the document placed before her. She said it was never explained to her what she was signing and instead she had thereafter been asked to go away. Contrary to Patricia Darangwa's evidence that she had come with her son at the meeting, she insisted that the person she had been with at all times was Taru Honyera who had not been interviewed.

She explained that prior to being summoned by Patricia Darangwa, two meetings had been held at the Master's office with the Sarimana family representatives at her behest in her quest for cession. She had been asked to invite Esther the deceased's widow since she needed the Sarimanas to come and sign the cession documents. They had refused to sign.

Materially, Mr **Taru Honyera** whom the late Happison Sarimana was said to have ultimately sold his swapped property to, being now stand 145 Tshovani, also came to give evidence against the counter-claim. He had gotten to know Happison Sarimana in 1994 when he was wanting to buy a house and had ultimately bought stand 145 from him. Mr Sarimana had explained to him that he had swapped his stand for this one with Simeon Tivaone as he did not have money to develop stand 2193. Stand 145 Tshovani, on the other hand, was developed already developed with a semi-detached house. He said he had gone to Chiredzi Council and had seen one Memory Nhemachena, a secretary there and explained to her his intentions regarding the purchase of stand 145. In particular he enquired if there would be any problems if he bought the stand. He was assured that it would be fine as there were affidavits in the file between Mr Sarimana and Mr Tivaone regarding their swop. He had read the affidavits. The affidavits, he said, essentially stated that if either of them intended to dispose of the property, the one who had his name to the property would assist. It was in this content that Simeon Tivaone had ultimately assisted him with putting stand 145 into his name.

He said himself and the late Happison had reduced their own agreement in writing in a book which he said unfortunately he could not find due to the effluxion of time. He further explained that the reason why the two gentlemen could not have the property put in their names following their swop was because Mr Sarimana's stand was not developed and Council would therefore not permit a cession. He further told the court that at the time he entered into the negotiations for stand 145 Tshovani, Happison Sarimana had lodgers staying at the property following the swop.

The affidavits at the Council were, however, no longer in the file at the time that Memory Manyanga approached him for his assistance after encountering problems with the

Sarimanas' regarding the cession. He confirmed coming to Harare with Memory Manyanga to see the executor Patricia Darangwa who had insisted that he go out whilst she dealt alone with her.

He insisted that if there had been no swop as alleged by the Sarimanas, there would have been no need at the time that he bought the property to involve Mr Tivaone whom he only got to know in the context of needing him to cede the property to him since Mr Happison Sarimana could not do so. As for the Sarimana family claiming that stand 2193 was the late Happison's, he was emphatic that they were just trying to steal property away from Memory Manyanga as he could attest fully that there had indeed been a swop. This was particularly so as he had bought stand 145 Tshovani from Mr Happison Sarimana himself following the swop, with Simeon only facilitating the transfer.

### **The legal arguments**

The defendant through his lawyer Ms RUFU, emphasised the fact of the registration of the property in defendant's name and that he had managed to prove entitlement as compared to the plaintiff. The swop argument was said not to hold water for lack of documentary evidence. He also argued that the affidavits between the late L Manyanga and S Tivaone did not include Happison Sarimana who died on 21 December 1996. Moreover, they had also been signed after the latter's death. They were also said to be unattested to by a Commissioner of Oaths. In addition, there being no evidence to show that the swop was sanctioned by the Council, it was therefore submitted that the sale was unlawful. Taru Honyera's evidence was also said to be insufficient as it lacked documentary evidence. Furthermore, no witnesses had been called from Council. She therefore argued that the defendant had managed to prove *rei vindicatio* and was entitled to evict the plaintiff from his property. As for the payment of bills, defendant's lawyer argued that to be a separate claim which the plaintiff had not pleaded. Moreover, the bills could be claimed from the estate of the late Happison Sarimana. Therefore on a balance of probabilities, the defendant argued that judgment for eviction ought to be in his favour. The defendant relied in the main on *Rusape Town Council v Shadreck Mushambi* HH 141/17 to argue that where a cession or change of ownership is prohibited without the approval of council then the entire process is unlawful.

On the other hand, the plaintiff's lawyer Mr MUDADIRWA argued that the facts speak for themselves that Happison Sarimana did not own the property at the time of his death. He maintained that if he did, his estate would most certainly have claimed it at the time that they registered his estate the first time round in 1997. Moreover, his widow, Esther, was involved

in winding up his estate and would have known if her husband had any property. It was emphasised that it was clear from the facts that he had disposed of this property. Further, that if the property did not belong to the estate, then its cession to the defendant was also a nullity. Reliance for the nullity argument was placed on cases such as *Macfoy v United Africa Company* [1961] 3 ALL ER 1169 (PC at 1172; *Mutyasira v Gonyora N.O & Ors* HH180/2014; and *Manikwa & Another v ZIMDEF & Anor* SC73/2017 that nothing could stand on nothing. He also relied on *Chenga v Chikadaya and 3 Ors* SC 7/2013 for the position that transfer can be regarded as a nullity and reversed in the face of irrefutable facts that it should not have been granted.

### **Legal and Factual Analysis**

In *Stellenbosch Farmers Winery Group Ltd v Martell ET CIE & Ors* 2003 (1) SA 11 SCA it was highlighted that to come to a conclusion on disputed facts, findings must be made on:

- a) The credibility of the various factual witnesses
- b) Their reliability and
- c) The probabilities

In *Nicoz Diamond Insurance Ltd v Clovgate Elevator Company (Pvt) Ltd* HH 76/18 Hungwe J cited *Hees v Nel* 1994 PH F11 in which MAHOMED J dealt with this issue of credibility of witnesses as follows:

“Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony which often is a relative condition to be compared with the quality of the evidence of the conflicting witness. His consistency both within the context and structure of his own evidence and with the objective facts, his integrity, his candour, his age, his capacities and opportunities to be able to depose to the events he claims to have knowledge of. His personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability to effectively to communicate what he intends to say and the weight to be attached and the relevance of his version against the background of the pleadings.”

Where the factual position is contested it is also necessary to state the merits and demerits of each party’s case. See *Fox & Carney v Sibindi* 1989 (2) 173 AT 179

On the part of the defendant’s counter claim, it is true that on the face of it the property at Chiredzi Council remained registered in his father’s name. That, however, was the only basis upon which the family refused to give Memory Manyanga cession and instead re-registered the deceased’s estate. It was also evident from the facts that the property is now registered in his name as a result of the estate having been reopened and the defendant having

purchased the property from the estate, against the backdrop of contested facts by Memory Manyanga.

Regarding the reliability of the evidence of defendant's first witness Tsitsi Dzinoshamisa Sithole, it was manifest that she did not know much about the estate's historical administration and therefore her evidence was not of much value. The second witness, Patricia Darangwa suffered a credibility deficit. The argument that the widows were aware of the existence of the property and yet took no steps to lay claim for over 19 years made no sense.

Memory Manyanga's evidence, other hand, in response to the counter-claim, was unwaveringly consistent and indeed most probable. It was not disputed that the dependants of Happison Sarimana never once laid claim to the property at the time of his death and for years thereafter only seeking to do so because the property was still in his name with the Council. There was no claim ever laid to the property simply because Happison had swapped that property and had also sold the one he had swapped it for.

What also lends credence to Memory Manyanga's position is that she has solid evidence supporting this trajectory of events of a minimally developed property having been bought by her husband and that she had indeed submitted her plan to Chiredzi Council with approval and developed the stand at every stage thereafter. Further, the bills were in her name. Her evidence that she had met up with Silas Mbengo on two occasions in 2000 and 2016 regarding the cession was not refuted. It also lends credence to her claim that at all times her intention was to always seek cession once she had complied with the Council's requirements. Proceedings were only set in motion to divest the property from her once she sought cession. Instead of truth seeking the defendant's and later on the executor saw an opportunity they could not miss. There is absolutely no doubt that the probabilities support Memory Manyanga's version of events because the facts speak in favour of a swop having manifestly occurred between the late Happison Sarimana and Simeon Tivaone. The late Happison Sarimana then sold his property to Taru Honyera. Also when Happison died, the documents show that his brother Silas Mbengo had very honestly declared that he had no immovable property. Indeed as Taru Honyera confirmed, he had sold the property he had to him.

The confusion and all the difficulties that have ensued are because of the unfortunate human trait of putting greed before pure common sense. The claims by Memory Manyanga ought to have been investigated to their logical conclusion by the Sarimana family and by Patricia Darangwa before she agreed to re-administering estate and to seeking to sell the property. She ought to have been circumspect about re-administering an estate where the

deceased had been declared long back as having left no immovable property. She needed from the onset to talk directly to Silas Mbengo, the deceased brother who had made that declaration in the Death Notice and in the first inventory. As it turns out, the reason why he had stated that the deceased left no property is beyond doubt supported by the evidence that Memory Manyanga led as well as Taru Honyera.

This court also leans in favour of Memory's evidence that she was made to sign an already prepared document that she should be compensated as opposed to that document originating from her as Patricia Darangwa tried to present by stating that she had merely given her a paper to write. She was a far more consistent witness than Patricia Darangwa who tried to change the essence of the plea to reflect that the dependants always knew of the property when she had already pleaded that they clearly did not. She needed to be far more rigorous than her cursory attempt at explaining why the family had laid zero claim to the property only doing so when Memory Manyanga sought cession and therefore laying claim to the property on the strength of the fact that the property had remained registered in Happison's name. This was clearly an attempt by the Sarimanas' to reap where they did not sow by now laying claim to the property regardless of the explanation that Memory Manyanga had tendered at the outset even before the sale as to what had actually occurred.

Taru Honyera's evidence was also very compelling. He was the one living person who had bought a swapped property from Happison Sarimana himself. Even without the affidavits or the lost note book as documentary evidence, the facts spoke convincingly as to why the property he bought from Happison had remained in Simeon's name at the time even though he had most certainly swapped that property. This court accepts as much because even though Taru Honyera did not produce the book which he said was lost, his description of the factual circumstances that it was Simeon who had then handled his cession because the property was still in his name was believable. How else does one explain why the Happison's family from the onset registered his estate as having no immovable property when his estate was registered in 1997?

Indeed these kind of situations where cession is in a party's name with the Council even though in reality the factual circumstances do not support that position, are not uncommon. They are in fact all too many and as a result our courts have allowed justice to be done where the facts clearly speak to what would have transpired. Courts have indeed allowed vindication

of rights despite the fact that another person has become the registered owner of a property in question property. See for example *Cladius Chenga v Virginia Chikadaya & 3 Ors* SC 7/2013.

Turning to the argument that the entire process was unlawful because Council forbade cession without its approval in writing, again Taru Honyera's evidence was helpful in this regard. Whilst the parties swapped stands, there was no illegal cession that took place. His evidence that there were affidavits which were in file at Council which stated that in the event of either party wishing to sell following their swap, then the party in whose name the stand was still registered would assist the buyer. It is indeed for this reason that Simeon was the one roped in by Happison to assist with the cession part despite Happison being the seller of stand 145 Tshovani, Chiredzi. Happison's name remained reflected in the file for stand 2193 because his stand did not yet meet the development requirements for cession to be changed. That does not mean that he did not swap his stand or surrender his rights to it. The facts show that he clearly did. Once the conditions regarding development had been fulfilled it was only then that Memory sought cession into her name. It is therefore vital that each case be understood fully on its own merits.

There is no doubt that the defendant went on to purchase stand 2193, Tshovani, Chiredzi well knowing the claim by Memory Manyanga and the circumstances she had explained that led to the cession remaining in the name of his late father.. The reality is that once swapped and the full events as captured more fully in this trial ensued, Happison Sarimana no longer had rights and interests in that property.

It would be a travesty to uphold a claim for eviction when clearly the facts speak for themselves that the property no longer belonged to Happison Sarimana at the time of his death.

For the avoidance of any further merry go round on this matter, this is clearly a case where not only should the counter claim be dismissed but where for completeness arising from that conclusion, the sale and subsequent cession of the property to the defendant Samuel Sarimana ought to be declared a nullity since the late Happison Sarimana effectively had surrendered rights to the property at the time of his death. Finality must be brought to the matter.

**In the result**

- a. The counter-claim for eviction of Memory Manyanga by the defendant Samuel Sarimana from Stand 2193, Tshovani Township, Chiredzi, is hereby dismissed with costs.
- b. The sale and cession of Stand 2193, Tshovani, Chiredzi into Samuel Sarimana's name are hereby declared a nullity.

- c. Chiredzi District Council is ordered to transfer the cession of Stand 2193, Tshovani Township, Chiredzi, to Memory Manyanga.
- d. The Defendant, Samuel Sarimana, shall pay the costs of the counter-claim.

*Nsingo & Associates*, plaintiff's legal practitioners  
*Rufu-Makoni Legal Practitioners*, defendant's legal practitioners