

DANIEL MAPENDA
versus
DOCTOR STEPHEN MASAIRE
(In his capacity as Executor Dative of Estate Late Stephen
Nduna Gwenze Masaire DR 546/17)
and
MASTER OF THE HIGH COURT OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 29 September & 13 October 2023

Opposed Matter

Mr *T W Nyamakura*, for the applicant
Mr *T Musarurwa*, for the 1st respondent
No appearance for the 2nd respondent

MUCHAWA J: This is a court application for a declarator in which the following draft order is sought:

“IT BE AND IS HEREBY ORDERED THAT:

1. The application for a declaratory order be and is hereby granted in favour of the applicant in the following terms;
 - (a) Applicant be and is hereby declared the lawful holder of rights, title and interests in the immovable property known as Stand 909 Hatfield Township of Lots 182-185 Block C of Hatfield Estate, Harare.
 - (b) The decision of the first respondent to reject the applicant’s claim be and is hereby set aside.
 - (c) The first respondent be and is hereby directed to exclude Stand 909 Hatfield Township of Lots 182-185 Block C of Hatfield Estate, Harare from the distribution account of Estate Late Stephen Nduna Gwenze Masaire. In the event that the plaintiff had already approved the final distribution account at the date of this order, such distribution plan be and is hereby set aside.
 - (d) The first respondent and the second respondent be and are hereby ordered to take all necessary steps and to do all that is relevant and necessary to effect transfer of ownership of stand 909 Hatfield Township of Lots 182-185 Block C of Hatfield Estate, Harare in favour of the applicant within 90 days of the granting of this order.
 - (e) Each party shall pay its own costs.”

The background facts to this matter are that the late Stephen Nduna Gwenze Masaire was the holder of title in a property known as “Remaining Extent of Lots Numbers 182, 183, 184 and 185 Block C, portion of Hatfield Estate measuring 1,7657 hectares” registered under

Deed of Transfer 1371/80. Sometime in 1991 he applied for and was granted a subdivision permit in respect of this land. The proposed subdivision was meant to create two properties from the original property, namely Stand Numbers 909 and 910 Hatfield Township.

On 2 June 1992, the late Stephen Nduna Gwenze Masaire entered into an agreement of sale with the applicant in respect of the proposed subdivision Stand Number 909 Hatfield Township. In terms of the agreement of sale, the property was sold for \$ 30 000 dollars and this amount was paid in full on the date of sale. Transfer of the property would be effected after the following would have been satisfactorily completed:

- a) The buyer was to make available a separate water connection and a satisfactory form of sewerage disposal to Stand Number 909 Hatfield at the buyer's own expense.
- b) City of Harare would instal piped culverts at the entrance to Stand Number 909 Hatfield at the buyer's own expense.
- c) The buyer would acquire, from the Director of Works at City of Harare, a certificate that conditions (a) and (b) above had been complied with.
- d) A survey of Stand Number 909 was to be carried out by the buyer.
- e) The seller on his part was required to pay 12.5% of the value of the Stand Number 909 Hatfield in line with the Permit No S/D/747 dated 20 November 1991.
- f) The seller was to comply with the signing of documents as called upon by the purchaser or his attorneys.
- g) In the event that the subdivision failed to take place and transfer was not effected due to the inability of the seller to execute his part, the full amount of the purchase price including any expenses incurred by the buyer, in pursuance of the contract would immediately become payable. Interest would be recovered at the Standard Chartered Bank minimum lending rate ruling at that time.
- h) In the event of death of either party, the transfer would continue as if both parties were present.

It turns out that the seller, Stephen Nduna Gwenze Masaire died on 23 January 2006, by which time, no transfer of Stand Number 909 Hatfield had been effected to the applicant. Doctor Stephen Masaire was appointed executor dative of the Late Stephen Nduna Gwenze Masaire and is sued in that capacity.

The second respondent is sued in its capacity as the office reposed with the administration of all deceased estates in Zimbabwe. A report from the second respondent shows that indeed the estate of the late Stephen Nduna Gwenze Masaire is registered with their office under DR 546/17, and it has to date been procedurally wound up with all statutory provisions having been observed after advertising for claims as well as the account lying for inspection. The applicant did lodge a claim with the first respondent which was rejected. Thereafter the distribution account was confirmed in which the property held under Deed of Transfer 1371/80 in the late Stephen Nduna Gwenze Masaire was awarded to Doctor Stephen Masaire.

The applicant did not persist with a point *in limine* it had raised in its heads of argument relating to the impropriety of the opposing affidavit in which the first respondent had attested to the affidavit but an agent, Ever Batshabber Murwira had appeared before a commissioner of oaths and executed same. Preference was given to proceeding to the merits and a supplementary affidavit was admitted by consent of the parties to address this.

Whereas the second respondent indicated that it would stand by the decision of this court, the first respondent is vehemently opposed to the granting of the order sought. Several points *in limine* are raised as follows:

1. That the order sought cannot be granted as it is impossible of performance.
2. That the matter has prescribed.
3. That the applicant should have proceeded in terms of s 116(1) of the Administration of Estates Act [*Chapter 6:01*] instead of approaching this court.
4. That there are material disputes of fact which are incapable of resolution in an application of this nature.

I heard the parties on the points *in limine* and reserved my ruling. It is my firm belief that this matter can be disposed of on the first point only and there is no need to detain myself on the other points. Below is my ruling.

Whether the order sought is impossible of performance

Mr *Musarurwa* submitted that the order sought cannot be granted and is impossible of performance as the applicant seeks to be declared owner of Stand Number 909 Hatfield Township, a stand which is non-existent as it was supposed to be created but never came into existence. It was explained that the land in issue never materialised as the applicant failed to comply with the obligations listed as (a) to (c) in the agreement of sale, which conditions were

precedent to the transfer of the property. He is alleged to have failed to make available a separate water connection and satisfactory sewerage disposal, to have City of Harare instal piped culverts at his expense and acquire a certificate of compliance from the Director of Works, City of Harare even though he caused a survey of the proposed subdivision to be carried out.

Reference was also made to the permit to subdivide the land, which has one condition stipulating that the Registrar of Deeds cannot register title in respect of the subdivided properties until the same conditions above are met.

It was contended that this court cannot declare the applicant a lawful holder of rights, title and interest in a property that is yet to come into existence as the conditions of the subdivision permit have not been met. Equally the order compelling the first respondent to do all things necessary to effect transfer of the non-existent property to the applicant is alleged to be incapable of execution. The request to cause transfer to be done to the applicant is alleged to falter on the same grounds, particularly as the Registrar of Deeds is prohibited by law from effecting the transfer. Reference is made to the case of *Icejay Investments Limited v Nu Aero (Private) Limited & Anor* HH 404/21.

It is prayed that the point *in limine* be upheld, and the matter be dismissed with costs.

Per contra, Mr Nyamakura submitted that the land in issue does exist as the applicant complied with the subdivision permit which appears on p 11 of the record. The land is said to have been subdivided as per correspondence on record pp 14 and 15 where the subdivision was then approved under reference SD/747.

Commenting on the agreement of sale as it appears on p 10, Mr Nyamakura argued that the agreement places performance as condition of transfer not the coming into existence of the contract. He contended that the point *in limine* should be dismissed, therefore.

In response, Mr Musarurwa added that for a subdivision to be complete there must be title deeds which are not available *in casu* and that it is not the City Council or Surveyor General who create a stand but the title deeds. He emphasized on the impossibility of enforcement of the order sought.

I wish to start with the “Permit to Subdivide” which is on p 11 from the City of Harare of 20 November 1991. It shows that the seller was granted a permit to subdivide the land in issue subject to the meeting of certain conditions which were then incorporated in the agreement of sale. *Inter alia*, condition 2 was to the following effect:

2. “Stands 909 and 910 Hatfield Township shall not be transferred, leased nor shall any development be permitted thereon until such a time as it has been certified by the Director of Works that a separate water connection and a satisfactory form of sewerage disposal have been made available thereto”

The letter on p 13 shows that survey of the properties in issue was duly done and the records were lodged with the Surveyor General. On pp 14 to 15 are the survey diagrams which were lodged with the Surveyor General. The one on p 15 shows that the subdivision of the property in the manner proposed was approved under reference SD/747.

This matter is on all fours with that of *Icejay Investments Limited (supra)*. In that case there was a subdivision permit whose conditions had not been met and transfer and ancillary relief was sought. The court made the following findings:

“The permit *in casu* was issued in terms of section 40 of the RTCP Act. It authorised the subdivision of Kintyre Estate A to create Lots 1 to 105. Condition 10 of the permit restricted the transfer of the Lots listed in the permit until conditions 3, 5 and 8 were fulfilled. If the Registrar of Deeds was prohibited from registering transfer of the Lots until those conditions were fulfilled, then it follows that this court cannot compel the second respondent to sign all documents necessary to effect transfer of the property to the applicant in the absence of proof that the Registrar of Deeds would approve such transfer. Put differently, this court needs to be satisfied that the conditions precedent to the transfer of the property as set out in the permit were complied with before it can grant an order compelling the second respondent to take all steps necessary to transfer the property to the applicant. This court cannot grant an order that is essentially a *brutum fulmen*.

Regrettably, no evidence was placed before the court to show that conditions 3, 5 and 8 of the permit were fulfilled to the Council’s satisfaction. The SA is not beyond reproach. It is impugnable on the ground that it seeks to facilitate the transfer of a property in circumstances that violate the conditions of a permit, and by extension the very law in terms of which that permit was issued. The application must fall on that point. The argument by the applicant’s counsel that risk, profit and liability would only pass on to the applicant on transfer also falls away in light of this finding on the validity of the SA.”

In *casu* there is a subdivision permit issued in terms of the Regional Town and Country Planning Act, 1976. It too authorizes the subdivision sought. Condition 2 restricted the transfer of Stands 909 and 910 Hatfield Township until the conditions set out had been met. Condition 6 prohibits the Registrar of Deeds from transferring Stands 909 and 910 Hatfield, Harare except:

- (a) “On production of a receipt of the monies required in terms of condition (1) and in addition,
- (b) On production of a certificate from the Director of Works to the effect that Conditions (2) and (3) have been complied with.”

What this means is that Stands 909 and 910 have not yet come into existence. This court cannot declare that the applicant is the lawful holder of rights, title and interests which have not been created yet as the Registrar is prohibited from transferring such stands. There no such

rights nor title. It follows that this court cannot compel the second respondent to sign all documents necessary to effect transfer of the property to the applicant in the absence of proof that the Registrar of Deeds would approve such transfer. Put differently, this court needs to be satisfied that the conditions precedent to the transfer of the property as set out in the permit were complied with before it can grant an order compelling the second respondent to take all steps necessary to transfer the property to the applicant. (Per MUSITHU J in *Icejay (supra)*).

It is my finding that the order sought is incapable or impossible of performance. The rest of the ancillary relief sought cannot be sustained too.

The prayer for costs on a higher scale was not properly argued for and I will grant costs on an ordinary scale.

Accordingly:

1. The point *in limine* is upheld.
2. The court application for a declarator is dismissed with costs on an ordinary scale.

Bere Brothers, applicant's legal practitioners
Rungwandi & Company, first respondent's legal practitioners