

DOROTHY MANDA ZA
versus
GRACE MANDA ZA N.O.
and
GRACE MANDA ZA
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26 & 27 June, 2 & 11 August, 19 October 2023

Civil Trial

TV Chipanda, for the plaintiff
TB Ndoro, for 1st and 2nd defendants
No appearance for 3rd and 4th respondents

TSANGA J: The plaintiff issued summons seeking transfer of Stand 3976, 59th Street, New Canaan, Highfield, Harare. The house is the subject matter of a long standing dispute between two families. It is common cause that the house is registered in the name of the second defendant Grace Mandaza and her late husband Joel Mandaza. However, it is the circumstances under which it came to be so registered that have caused the dispute to be placed before this court.

According to Dorothy Mandaza, the plaintiff, who gave evidence in her own right as claimant, in 1960 she had obtained the forms from the local council in Highfields upon hearing that there would be houses available for allocation. However, the condition for being allocated a house was that one should have a marriage certificate. Her late husband, Adison Mandaza and she at the time only had an unregistered customary law union. Under the circumstances, Joel Mandaza, her brother-in-law who already had a certificate of his marriage with his wife Grace, who is the second defendant herein, is said to have volunteered to help. The house would be acquired on their behalf using their marriage certificate so as not to waste valuable time. The plaintiff said she had wanted to go to the rural areas to fetch her father so they could marry and it was this that the late Joel Mandaza had deemed unnecessary in the interests of striking

whilst the iron was still hot. Moreover, according to the plaintiff, there was already a practice of assisting each other within the Mandaza family as exemplified by the fact that Joel and Grace had themselves acquired a house using the same mode of operation where they used Joel's older brother's marriage certificate.

The house had thus been acquired. Joel Mandaza and his wife had that same year in 1960 moved to Zambia whilst the plaintiff and her husband had stayed in their house until such time as the house now under dispute had been allocated later that year. They had then moved in from that time to date, paying all rates and rentals to the local council. When the house under the rent to buy scheme was ready for transfer (in 1994), the plaintiff said she had paid the requisite sum of then \$2.00 to the council and had been told that the person under whose name the property was reflected would have to come. Joel and his wife had returned to the country in 1978. She had gone with Joel Mandaza and the title deeds had been issued under Joel and Grace's name, albeit according to her, still with the understanding that the property in reality did not belong to them.

Plaintiff's husband died in 2009. Her testimony was further that in 2010, at a memorial service for another relative, Joel had asked her if she had processed a death certificate for her late husband Adison and when she had indicated she had, he had stated that who would call her regarding transferring the house. However, Joel had later died in 2011 before passing transfer of the house. Grace became adamant that the house belonged to her and her husband and that she wanted to sell the house in order to buy a car.

The following emerged from her cross examination. In 1995 her late husband had approached a lawyer Tendai Biti at *Honey and Blanckenberg* legal practitioners concerning the transfer of the house to him. A letter had been written on the 29th of June 1995 demanding that transfer be effected. Joel Mandaza had responded to that letter on the 6th of July 1995 admitting that a marriage certificate was required but denying that he acted on behalf of the plaintiff or that he was a mere nominal owner. However, the legal case did not progress to its logical conclusion as it had been decided within the wider family circle that the matter should be solved without involving the courts. As for Grace claiming the house as hers, plaintiff said it could only be because her own husband had not appraised her fully of the circumstances surrounding its acquisition.

The next witness was **Jonathan Mandaza** a brother to both the now deceased Adison and Joel Mandaza. He is the current elder in the Mandaza family. He corroborated the plaintiff's evidence. He confirmed that the plaintiff and her late husband acquired the house

in 1960 and lived there ever since. He had spoken to his brother Adison about improving the house and had learnt from him that he was unable to do so whilst the title remained under Joel's name. He confirmed that at the time, a marriage certificate was indeed necessary to acquire a house adding that Joel and Grace had used William and Sabina's marriage certificate whilst yet another brother, David, had also used the marriage certificate of another brother to buy a house. He highlighted though that the arrangement between William and Joel had, however, not ended well because William later claimed the house as his and ended up having to repay Joel for improvements he had made to the house. His evidence was also that when Joel and Grace came back to this country in 1978, they had in fact bought a house in Houghton Park. He further gave evidence that following Joel's death they had met at Grace's house in 2011 and she had revealed that Joel had in fact left a will concerning the disputed house in Highfields to her and their three children.

In cross examination, he acknowledged that though very familiar with the dispute, he was not there when the papers for the disputed house were signed in 1960.

Ibbo Mandaza was the next witness for the plaintiff whose testimony was as follows: He is the 9th in the family and the youngest brother. He contextualised the dispute as fundamentally rooted in the colonial system when Africans could not buy a house without a marriage certificate. Brothers within the Mandaza family had as a result assisted each other with the use of a marriage certificate. He had gotten to know of the dispute between Adison and Joel in the 1990s. Adison had always regarded the house as his. He, Ibbo, was shocked that Joel laid claim to the house. The family had indeed over the years tried to intervene and it appeared that Joel had understood. He was therefore equally shocked to learn that Joel had left the house to his family in his will. This could have been because he had been too ill to attend to the transfer. As a family they tried to impress upon Grace, Joel's widow that the house belongs to Adison's family. Joel's daughter, Eve Gahadzikwa had tried nonetheless to effect transfer of the house for sale purposes and had asked that the plaintiff vacate when it was clear the house did not in reality belong to Joel. All payments for the house had been made by the plaintiff.

The final witness for the plaintiff was **Beverly Kudzai Kayenga**, the plaintiff's daughter. She had accompanied her father when he went to see Tendai Biti back then at Honey and Blanckenberg and was therefore aware of the dispute. They had lived at the disputed stand 3976 Highfields from her childhood. She had left for the United Kingdom and had learnt from her sister that her mother was about to be evicted from the house. As to why Grace was claiming

the house, she stated that this was because the title deed is in their name. As to why she believed her parents in fact own the house, she said this is because they paid for it and continue to live in it from the start. She highlighted that her father's drinking problem had also led his brother Joel to see him as too irresponsible to take ownership of the house for fear he would sell it.

The second defendant **Grace Mandaza**, was the only witness for the defence case. Her testimony was as follows: Her husband as head of the house was the one who had applied for the house in 1960. He did everything of that nature. She is opposed to transferring the house because it belongs her. They had never occupied the house because they left for Zambia in 1960 and returned in 1978. Having amassed some money they bought a house in Houghton Park, Harare. Indeed they had never paid utility bills because as is to be expected, the people actually staying there would do so. Whilst the house was allocated in 1960, the title deeds for the disputed house had come out in 1994. Her husband had initially gone without her to process the title deed but she had been asked to present herself. She had indeed gone with Dorothy the plaintiff, but only for the reason that the latter was the one who knew where the council offices were. Having been out of Zimbabwe for a while, she was no longer familiar with the location of certain places.

As for the alleged promise by her late husband to transfer the property, she was adamant that he could not have done so without involving her as she owned a half share. She was refusing to transfer because she still needs to be looked after and in any event, as per the will left by her husband Joel, the property in question as well as the one in Gunhill suburb, belongs to her and her three daughters. As for the house that her husband had originally acquired through William using his marriage certificate, indeed she had stayed there. The house had been built by her husband Joel assisted by his brother Walter. It was when they returned in 1978 from Zambia that William laid claim to the house on the basis that it had been acquired using his marriage certificate and was therefore his. As to whether it was indeed common practice for the brothers to assist those among them without a marriage certificate, she was not aware of any such arrangement being newlywed at the time. She clarified that William's claim had been made after they had returned from Zambia.

The Legal Arguments

Plaintiff's Arguments

Under the circumstances described above, the plaintiff's claim is therefore that she is the beneficial owner of the stand whilst the second defendant is the nominal registered owner.

Plaintiff's argument is also that the claim of prescription does not arise because there has been a continuing wrong perpetrated against the plaintiff since 1994 or around that time. This continuing wrong has resulted in the defendants failing to transfer the property to her. Moreover, the plaintiff argues that the dispute arose in 2011 as that is when the Grace tried to evict her on the basis of asserting her rights to the property. This was after the late Joel Mandaza's death when the plaintiff then approached this court. Prior to that, there had been no talk of eviction. Plaintiff equates as "custom and practice" the fact that it was common in the Mandaza family to make use of a marriage certificate belonging to another family member to secure housing. The custom is said to have been based on progression and good will. It is also emphasized that being proactive in this manner was common among black people at the time as a means of securing housing. Thus, as explained, the late Joel Mandaza and his wife used the marriage certificate that belonged to the late William Mandaza to obtain house number 408, Engineering, Highfields. The late David Mandaza used the marriage certificate belonging to Simon Mandaza to secure a house in Highfields identified as number 2357. In a similar fashion the plaintiff and her late husband had used a marriage certificate which belonged to Grace the husband to acquire the disputed property. In essence, the argument is that Grace and her late husband are owners in name only.

The defendants' arguments

On prescription, the defendant argues through her lawyer that the summons issued in 2011 are out of time. His argument is that during the time Grace and her husband were in Zambia, prescription was indeed suspended. However, he submits that they returned in 1978 and yet no claim was made within the requisite three years for claims such as this. Furthermore, title deeds having been granted in 1994, a claim for the cancellation of the deed should have been made at least then. The letter by Tendai Biti on behalf of the late Adison seeking transfer is said to have been written well within the prescription period. The demand is said to have been rejected. He submits that in any event a letter of demand does not interrupt prescription but is concrete evidence of the dispute.

The fact that the late Joel Mandaza nodded in 2010 when asked by Ibbo Mandaza to transfer the property is said to be of no evidentiary value. It is argued that the plaintiff was aggrieved by the intention to sell the house and hence the issuance of summons well outside the three year period when the second defendant returned from Zambia. It is therefore argued on behalf of the defendants that the effect of prescription is to render the claim unenforceable at law and that the matter should end there.

The argument by the plaintiff of a continuous wrong is said to be farfetched. They were no series or accumulation or continuous debts or injuries which can be said to be a continuous wrong.

On the merits, the argument is that the letter by the late Addison and response by Joel Mandaza in fact show there was no agreement. On facts, the plaintiff's evidence is said to be inconsistent as at first she said she had filled the forms but later said Joel had filled them. The other witnesses as are said to have given hearsay evidence. It is also emphasized that Grace never entered into any agreement regarding her share. As for the practices in within the Mandaza family said to amount to custom, the defendant draws on the definition of custom that it must satisfy the following requirements¹:

- a) it must be reasonable;
- b) long binding;
- c) uniformly observed; and
- d) It must be certain.

In this instance, it is argued that the incidences referred to do not amount to a long standing or long binding custom. The so called custom was not uniformly observed as William had not stuck to it, as he had demanded his house from the late Joel Mandaza.

In total, the defendants' argument is firstly, that the claim prescribed, and, secondly, that there was never an agreement to help plaintiff and her husband acquire a house using the second defendant's marriage certificate. As such, it is argued that the claim ought to be dismissed with costs.

Legal and Factual Analysis

I am inclined to agree with the defendant that the practice described does not amount to a custom in the strict legal sense of the word as defined above. But that said, it is a fact that people do find ways of getting around the law and often use the family through its own rules, members or structures as a way of doing so. The family stepping up to assist another to address a legal quagmire emanating from the strict requirements of state law is an example of the family operating as what has been described as "semi-autonomous social field"² with its own rule

¹ L Madhuku **An Introduction to Zimbabwean Law** (2010) Harare: Weaver Press & Friedrich Ebert Stiftung at p 25

² Sally Falk Moore *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study* Law and Society Review, Summer 1973 Vol 7, No 4 pp 719-746.

making powers and ways of getting around the requirements of impediments presented by state law. As the author and social anthropologist Sally Falk Moore explains:

“It is well established that between the body politic and the individual, there are interposed various smaller organized social fields to which the individual “belongs.” These social fields have their own **customs** and **rules** and the means of coercing or inducing compliance”³ (My emphasis)

The bottom line is that law and the social context within which it operates must be examined together for the reason that people do not always follow the law for reasons intended by the legislator and instead often use channels such as the family in this instance to come up with their own rules for circumventing the intended legal consequences.

The law within its wider social context is defined thus:

“...the law” is a short term for a very complex aggregation of principles, norms, ideas, rules, practices, and the activities of agencies of legislation, administration, adjudication and enforcement, backed by political power and legitimacy. The complex “law,” thus condensed into one term, is abstracted from the social context in which it exists, and is spoken of as if it were an entity capable of controlling that context. But the contrary can also be persuasively argued: that “it is society that controls law and not the reverse....”⁴

In other words, in this instance the administrative law requiring that houses would be allocated to those with marriage certificates or that a council house could not be allocated to someone who already had a house, met with ongoing social arrangements within families. These arrangements within families were aimed at assisting one another to circumvent the colonial legal requirements viewed as an impediment to acquiring a vital asset such as a home even by those customarily married but without a marriage certificate. In essence, social arrangements in some cases may often be stronger than the law as exemplified here where the practice of families stepping in to help each other was strong. At the same time it is also evident from case law that the formal law can also be later resorted to by those family members reneging from these internal social arrangements for whatever reasons. The law itself is the overarching framework against which these social arrangements develop in semi-autonomy from the law.

In *Sithokozile Munyika N.O. v Marshall Mwashoreni Dhliwayo & 2 Ors* HH 48 /15 this court observed as follows regarding such arrangements.

“Ultimately the reality is that simulations such as these within family contexts to acquire property or facilitate transfers in instances where city council officials may appear to be placing impediments are not uncommon. It is not an unusual occurrence in our setting for parties to acquire property by navigating their way through the city council’s requirements. (See for

³ Sally Falk Moore above at p 721

⁴ Sally Falk Moore above at p 719

instance *Kamanga v Estate Late Chikondo as represented by Oswald Bute Chikondo (in his capacity as executor) and Ors* 93/2011).

Also disputes such as these often times in our context have their origins in some desire to maximise the opportunity to acquire property within an extended family context if one cannot take it up themselves, as opposed to letting the opportunity slip without helping one's own."

Prescription itself does not feature in these arrangements given that both parties will have been complicit in breaking the state law. *Cyril Chikadaya v Zakeyo Chikadaya & Anor* HH 1/2002 is a case that represents such a situation. The plaintiff who at that time had another property within the Council area when it was the policy of the Council not to permit any one person to have two properties registered in his name, had then bought brought using his young brother and had it registered in the latter's name in 1980. The understanding was that his young brother would later register in the name of the plaintiff's children. In 1982, the property had been ceded from the seller's name into the young brother's name. Materially it was only in 1998, some sixteen years later that the plaintiff had then requested his brother to transfer the property into his son's name. When the brother reneged from this agreement and refused to do so, the court recognised the arrangement and ordered him to sign all necessary papers to cede his rights.

Importantly the court resolved the matter by engaging the factual circumstances and analysing the credibility of the witnesses and the balance of probabilities in terms of which version was to be preferred. The court concluded as follows:

"Accordingly, I find that it was Cyril who bought the Stand from Danda and that the cession was registered in the name of Zakaya in order to get round the policy of the council that a person who already owned a stand in the townships should not be able to acquire a second stand."

The issue generally where parties are equally at fault (*in par delictum*), is whether the principle that the loss should lie where it falls should be relaxed and if so why. The court in *Chakadaya v Chikadaya* utilised *Dube v Khumalo* 1986 (2) ZLR 103 (SC) to relax the *in par delictum* rule as follows:

"The facts in this case are similar to those in the case of *Dube v Khumalo* 1986 (2) ZLR 103 (SC). In that case GUBBAY JA held that the parties were *in pari delicto* insofar as they had purported to buy the stand in question in the name of Khumalo when in fact it was Dube that was buying it. They had defrauded the Municipality of Bulawayo. However he then went on to hold that the *par delictum* rule should be relaxed in order to do justice between the parties. In view of the similarities between the two cases, I feel that the *pari delictum* rule should likewise be relaxed in this case in order to do justice between the parties."

In the case before me, the reason given for having the property registered in the name of the first defendant and her husband was said to be because the plaintiff and her husband did

not have a marriage certificate which was required at the time. It was a fact that a marriage certificate was a requirement in order to get a house. From the evidence of the plaintiff this court is most certainly of the view that the arrangement described by the plaintiff for the acquisition of the property took place for the reason that she articulated. She had no reason to lie. Though not present at the time, her witnesses corroborated the dispute as it has been understood over the years that it has created the family rift.

Grace said it was her husband who did everything. The sole reason for her insisting that the property belongs to her and her late husband is because it was registered in their names. Moreover, from her cross examination it was also clear why they later laid claim to the house as theirs. She and her husband also initially acquired a house under similar circumstances for this reason of need of a marriage certificate but William had reneged on their agreement. This was a key factor for them too reneging on theirs. Prescription does not come into play in the case before me as indeed both were acting outside the law in their transaction as courts have recognised in matters such as this. The special plea of prescription is thus dismissed.

There is no doubt that in this case where the circumstances of the acquisition of the house have been more likely than not, been truthfully explained by the plaintiff. She and her late husband indeed lived in the house all their lives meeting all the bills because the house had been acquired on their behalf because they did not have a marriage certificate at the time. Justice demands that the *in par delictum* rule be relaxed and that title be transferred to her by the defendants.

It is accordingly ordered that:

1. The first and second defendants transfer Stand 3973 Highfield Township in the District of Salisbury into plaintiff's name.
2. In the event of the first and second defendants failing to voluntarily transfer the aforesaid immovable property into plaintiff's name within ten days from the date of this order, the Deputy Sheriff is authorised to sign all relevant documents to effect such transfer into plaintiff's name.
3. The first and second defendants shall pay costs of this suit.

Tendai Biti Law, plaintiff's legal practitioners
Ziumbe and Partners, first and second defendant's legal practitioners