

**MICHAEL TOZIVEPI KAPFUMO**

**Versus**

**KILLIAN MUTIMUTEMA**

**And**

**CONSTANCE MUSAFARE MUTIMUTEMA**  
**(Executrix Dative in the Estate of the late Augustine Mutizwa Mutimutema)**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 22, 23, 24, 25 JUNE 2021, 15 JULY 2021, 26 OCTOBER 2021, 9  
NOVEMBER 2021 & 28 APRIL 2022

**Civil trial**

*Ms. J. Mugova* for the plaintiff

*S. Mugadza* for the defendant

**DUBE-BANDA J:**

**Introduction**

1. On the 21<sup>st</sup> February 2017, plaintiff sued out a summons against 1<sup>st</sup> defendant which was later amended by consent to join 2<sup>nd</sup> defendant. Plaintiff claims transfer of stand number 9795 Glen View held under Deed of Transfer 3386/2015 (stand) from the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants into his name; eviction of 1<sup>st</sup> defendant and all those claiming occupation through her; rentals in the sum of USD\$500.00 per month from the date of summons to the date of eviction and costs of suit.
2. In his amended declaration plaintiff avers that in 2003 while resident in Botswana he purchased undeveloped piece of immovable property for \$150 000.00 from one Emilda Mapanzure through the agency of his nephew Benedict Chamboko *aka* Benedict Kapfumo (Benedict). Benedict died on the 24<sup>th</sup> October 2019. It was agreed that the property would be registered in 1<sup>st</sup> defendant's name as a nominee of the plaintiff. Unknown to plaintiff and without his consent the name of 1<sup>st</sup> defendant's the now late Augustine Mutizwa Mutimutema (husband) was included in the registration papers of the property. The 2<sup>nd</sup> defendant is the executor of the estate late Augustine Mutizwa Mutimutema (Mutimutema).

3. Plaintiff avers that he made improvements on the property and single handedly built a four bedroomed house on the stand. He avers that he built the house by sending money to Benedict for the purposes of building the house and paying the builders.
4. Plaintiff avers that transfer of the property was never effected into his name, notwithstanding his direction to Benedict and 1<sup>st</sup> defendant that he would personally attend to effecting transfer when he relocates to Zimbabwe. Upon his return to Zimbabwe he made efforts to effect transfer of the property into his name, and 1<sup>st</sup> defendant agreed to sign all the papers to effect transfer of the property in to plaintiff's name.
5. In their plea 1<sup>st</sup> and 2<sup>nd</sup> defendant aver that they purchased stand number 9795 Glenview (the same property plaintiff is claiming) from Emelda Tendai Mapanzure for ZW\$155.000.00. The property was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as their sole and exclusive property and there were no conditions to their title to the property.
6. It is averred that defendant and her husband intended to borrow money from plaintiff and Benedict and the two indicated that they would assist them to purchase a stand and build it in appreciation for being raised by them. This was because plaintiff was living in their house from Grade 7 until the time he enrolled at the University. He only left their house when he got married.
7. It is denied that plaintiff single handedly developed the property. It is admitted that plaintiff assisted with the purchase of some materials however defendants purchased bricks, cement and timber for the property. It is denied that 1<sup>st</sup> defendant agreed to transfer the property to plaintiff's name. Defendants believed that any monies advanced by plaintiff and Benedict were donations. Defendants aver that plaintiff has no right to seek the transfer of the property into his name. There is no basis for the eviction order sought by the plaintiff. Defendant pray that the plaintiff's claim be dismissed with costs.

8. At a pre-trial conference held before a judge in chambers the issues for determination were set-out as the following:
- (i) Whether or not plaintiff is entitled to transfer of stand No. 9795 Glenview Township, Harare from 1<sup>st</sup> defendant and her late husband into his name.
  - (ii) Whether or not plaintiff is entitled to hold over damages in the amount of US\$500.00 per month, from the date of issuance of summons to date of eviction from the property.
9. The *onus* is on the plaintiff on both issues. I take the view that issue 2 will arise for consideration in the event issue 1 is answered in favour of the plaintiff.

#### **Plaintiff's case**

10. I turn to consider the evidence adduced by the plaintiff.
11. Plaintiff was the first to testify in support of his case. He testified that he is a chartered accountant and a member of the Institute of Chartered Accountants of Zimbabwe. 1<sup>st</sup> defendant in his sister and the 2<sup>nd</sup> defendant the executor of the estate of the late Mutimutema. He testified that his mother fell sick and the 1<sup>st</sup> defendant requested that she stays with her in Harare. This would enable easy access to medical facilities and doctors. 1<sup>st</sup> defendant and her family were renting a small house. This made it very difficult for the sisters at the village and other relatives to visit his mother because the house in which she was staying with 1<sup>st</sup> defendant was small. Plaintiff said he agreed with Benedict his nephew – who is now late - son to the 1<sup>st</sup> defendant that he (plaintiff) should finance the building of a bigger accommodation so that his sick mother would live comfortable in her last days.

- 12.** Plaintiff testified that at that time he was working in Botswana. Benedict identified a stand which was up for sale i.e. the property at the center of this case. He paid \$150 000. 00 for the stand from funds sent from Botswana by plaintiff. Plaintiff said he could not travel from Botswana to take the transfer of the stand into his name. He asked Benedict to cause the stand to be transferred into his name i.e. Benedict's name. Benedict declined. Plaintiff then said the stand be transferred into 1<sup>st</sup> defendant's name. It was a verbal agreement with Benecit. It was because of the bond or relationship in the family that he did not think anyone would turn around and say the property is his or hers. He only found out later that the property was registered in the name of the 1<sup>st</sup> and her husband.
- 13.** Plaintiff said he bought the building material. He then purchased roof tiles, window frames from Botswana. The consignment was received in Zimbabwe by Benedict. Plaintiff said Benedict told him that the money sent from Botswana was used to build the property, except for the ceiling. Plaintiff testified that 1<sup>st</sup> defendant did not contribute to the development of the property and he is not aware of anyone else who contributed.
- 14.** Plaintiff said the property was under a cession, it was agreed that it would be transferred to him at the time of applying for title deeds. He said 1<sup>st</sup> defendant was his nominee. Plaintiff said in the company of his other sisters, aunt and half-brothers a meeting was held with 1<sup>st</sup> defendant about the transfer of the property to him. At the meeting 1<sup>st</sup> defendant claimed that her son Benedict contributed to the building of the property. Benedict was in Namibia and he was phoned during the meeting and the phone was put on loud speaker. Benedict disputed that he contributed to the development of the property and said what is in Exh. A4. Exh. A4 is an affidavit deposed by Benedict. second meeting was held and during the course of the meeting 1<sup>st</sup> defendant asked to be excused briefly for the purposes of making a phone call to her daughter to bring the papers for the property. Unknown to the plaintiff and other members of the family 1<sup>st</sup> defendant went to make a police report that people wanted to take her house. 1<sup>st</sup> defendant said she was not transferring the house to plaintiff and he can do whatever he wants. Plaintiff said it is at this point that he sought legal redress.

- 15.** Plaintiff testified that he wanted to lease out the property and make an income. This is so because when he returned from Botswana he got sick. He needed some income. He then offered 1<sup>st</sup> defendant use of two rooms at the house and this offer was rejected by the 1<sup>st</sup> defendant. He puts the value of occupation at USD500.00 per month. Plaintiff said it is not correct that he was raised by 1<sup>st</sup> defendant. He stayed at their house for a year and he was paying rentals. Whatever assistance he gave 1<sup>st</sup> defendant was because he was his sister and they had a strong family bond. He was not repaying anything.
- 16.** Under cross examination plaintiff disputed that 1<sup>st</sup> defendant contributed in paying for his education. His education was paid for by his mother. He said in some instances Jesuits Priests would help pay for his education. He said 1<sup>st</sup> defendant bought him a school trunk and school shoes. The Jesuits Priests paid for his A Level studies. Plaintiff accepted that 1<sup>st</sup> defendant's husband sometimes helped him when he needed help.
- 17.** Plaintiff testified that he sent \$150 000.00 for the purchase of the stand. The money was sent with the driver who used to travel from Botswana to Zimbabwe one in two weeks. The money was given to Benedict. It is Benedict who handed the purchase price to the seller. He said he was not aware whether there was an agreement of sale with the seller of the stand. He had appointed Benedict to do everything in respect of the purchase of the stand. He said he directed that the stand be registered in 1<sup>st</sup> defendant's name.
- 18.** Plaintiff conceded that the agreement of assignment (Exhibit B1) indicates the assignor as one Emelda Tendai Mapanzure and the assignees are 1<sup>st</sup> defendant and her husband. He conceded that the purchase price was \$155 0000.00. Plaintiff testified that he was not aware that the purchase price was \$155 000.00. He saw Exhibit B1 for the first time in court. Exh. B1 is a memorandum of agreement of assignment entered into between Emilda Tendai Mapanzure and 1<sup>st</sup> defendant and her husband. He said Benedict might have used the extra money he (plaintiff) used to send to add to the \$150 000.00 and to pay the purchase price of \$155 000.00. He conceded that he did not have receipts for the purchase price. It was put to the plaintiff that Benedict told the 1<sup>st</sup> defendant and her husband that part of the purchase price came from plaintiff and the other part from him (Benedict), plaintiff disagreed.

- 19.** Plaintiff testified that he became aware that the property was registered in the name of 1<sup>st</sup> defendant and her husband in 2016. He conceded that Exhibit B2 is a Deed of Transfer in favor of 1<sup>st</sup> defendant and her husband. He testified that cement, bricks and other building materials were purchased in Zimbabwe. He said it is Benedict who was buying and he did not give him receipts. It was put to the plaintiff that 1<sup>st</sup> defendant accepts that he (plaintiff) bought roof tiles, door frames and window frames. Plaintiff disputed that 1<sup>st</sup> defendant and her husband bought timber, pit sand and river sand and tiles etc.
- 20.** Plaintiff testified that Exhibit A4 was prepared in 2016. It is an affidavit deposed by Benedict in which he explains the circumstances surrounding the purchase of the stand. Plaintiff disputed that Exhibit A4 and A5 were created after the death of Benedict. He further testified that the going rate rentals of similar properties as the one in dispute is USD500. 00 per month. He was advised by other property owners in the area of such rentals. In re-examination the plaintiff testified that he returned to Zimbabwe in 2015 and started asking that the property be transferred into his name in 2016.
- 21.** Plaintiff was a very good witness, never stating more than he knew or believed and making concessions where necessary. He was a truthful witness and I accept his evidence without reservation.
- 22.** The second witness to testify for the plaintiff was Omega Faranisi. He worked with plaintiff in Botswana. Plaintiff was senior to him at work. Plaintiff used to ask him to bring cash, building materials and groceries to Zimbabwe from Botswana. Plaintiff also bought from Botswana tiles, French doors, window frames and door frames and the witness handed over these to Benedict in Harare. He did not know the amount of money he carried from plaintiff in Botswana to Benedict in Harare because it was put in a sealed envelope. He used to bring money twice or three times a month. This witness testified that he did not know the amount plaintiff used in building the property.

- 23.** Under cross examination he testified that he did not know whether Benedict used all the money received from plaintiff to buy materials for the property. He did not transport cement and timber from Botswana. What he could remember is that Benedict asked to use his truck to carry cement to the property. He does not know the amount Benedict used to buy building materials. It was put to him that 1<sup>st</sup> defendant contributed to the building of the property, his answer was simple that he does not know.
- 24.** Mr Omega Faranisi came across as a witness who had a reasonable recall of events. His evidence was not challenged in any material respects and there is no reason not to accept it.
- 25.** Akallian Kapfumo was the 3<sup>rd</sup> witness. This witness testified that she was born in 1946. She said plaintiff is her brother and 1<sup>st</sup> defendant her sister. Plaintiff is the last born in their family. She testified that it is their mother who carried the burden of paying plaintiff's school requirements. She testified that plaintiff paid for the building of the property. Plaintiff built the property because he wanted their mother to reside in a decent accommodation as the house in which she was staying with 1<sup>st</sup> defendant was not proper for her. She testified that 1<sup>st</sup> defendant did not pay school fees for the plaintiff, she only bought a school trunk and bedsheets for the plaintiff.
- 26.** This witness testified that a family meeting was held and 1<sup>st</sup> defendant said she had no alternative accommodation. Plaintiff offered her two rooms at the property, and she said she wanted four rooms. Plaintiff declined to give her four rooms, contending that he needed the rooms to lease out as he was ill and needed some income. During the meeting Benedict who was in Namibia was phoned. The phone was put on speaker. Benedict confirmed that the property belonged to plaintiff.

27. A second family meeting was held at the property. 1<sup>st</sup> defendant excused herself to make a call to 2<sup>nd</sup> defendant, whom she said had the papers for the property, she disappeared and proceeded to the police station to make a police report. This witness and other members of the family were invited to the police station. The police were told that the property belonged to plaintiff. Nothing much happened at the police station. This witness testified that it is not true that the property was built by 1<sup>st</sup> defendant and her husband. According to her the property belongs to the plaintiff and 1<sup>st</sup> defendant must apologize to her brother i.e. plaintiff.
28. Under cross examination this witness testified that plaintiff advised her that she built the house for their mother to have decent accommodation. She conceded that she did not see the papers for the property. It was put to this witness that during the phone call to Benedict 1<sup>st</sup> defendant told him (Benedict) that she bought bricks, cement and pit sand for the building of the house. This was disputed.
29. Akallian Kapfumo was a good witness. She was truthful and I have no qualms in accepting her testimony.
30. With the evidence of this witness the plaintiff closed his case and defendants applied for absolution from the instance. The law relating to absolution from the instance is settled in this jurisdiction. When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that a plaintiff has to make out a *prima facie* case – in the sense that there should be evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff. In *casu* on the evidence of the plaintiff and his two witnesses, and the documentary exhibits I came to the conclusion that a *prima facie* had been made which called for an answer from the defendants.
31. It is for these reasons that I dismissed the application for absolution and put the defendants to their defence.

**Defendant's case**

- 32.** Coming to the defendants' case I also propose to consider the evidence adduced. 1<sup>st</sup> defendant testified in her defence. She testified that plaintiff is her brother. The house that plaintiff is claiming is hers and her late husband. She saved money to buy a house in Highfields, Harare. 1<sup>st</sup> defendant, her husband, plaintiff and Benedict (the son she had before she got married) discussed the issue of buying a house in Highfields. She was then advised by Benedict that if she buys a house in Highfields, it would be difficult to transfer it into her name. Then she bought a residential stand and asked Benedict and plaintiff to assist in the developing the stand. Due to the change in currencies she could not remember the amount she had for the purposes of buying a stand.
- 33.** Benedict and plaintiff then said they wanted to express their gratitude to 1<sup>st</sup> defendant and her husband for having looked after them when they were growing up. She was told this by Benedict in the presence of Constance Musafare Mutimutema (2<sup>nd</sup> defendant). She was then given \$150 000.00 to buy the stand. The money was collected by Benedict who collected the money and put some of his own money for the purchase of the stand. She also said her late husband, Bernard Mutimutema (Bernard) and Benedict contributed in paying for the stand.
- 34.** She testified that Bernard who was employed as an accountant contributed to paying of the stand. Her husband was employed as a truck driver and she was selling peanut butter, chicken and they sold three beats at the village and this is the money they used to contribute to the purchase price of the stand. She got part of the money from *lobola* payments for his two daughters. She could not remember the amount each contributed because of the change in currencies. She said it is not correct that plaintiff alone paid the purchase price of the stand and developed it. It is Benedict who negotiated the purchase of the stand, she saw the seller when they signed transfer papers.

- 35.** 1<sup>st</sup> defendant tendered into evidence a copy of the Memorandum of Agreement of Assignment entered into between Emilda Tendai Mapanzure (Assignor) and Augustane Mutizwa Mutimutema and Killian Mutimutema (assignee) (Exh. B1). Exhibit B1 shows that stand number 9795 Glen View was purchased for \$155 000.00. She testified that when she and her late husband signed Exh. B1, they were in the company of Benedict. She said she signed Exh. B1 as a purchaser of the Stand and not as a representative of the plaintiff.
- 36.** She testified that at the time the Stand was purchased, their mother was staying with her at a rented house in Kuwadzana, Harare. She testified that her late husband, Bernard, Benedict and plaintiff contributed to the development of the Stand. She and her late husband bought bricks, cement, window seals, timber, doors, plastered the house, tiled the floors and paid the builders. Plaintiff bought the roofing material, door frames and window frames.
- 37.** 1<sup>st</sup> defendant testified that Benedict wrote Exhs. A4 and A5 because he was alleging that she was bewitching him. She was no longer on talking terms with Benedict, he did not recognize her as her mother. He was siding with plaintiff. She is not aware of a meeting where a phone call was made to Benedict when he was in Namibia. However, plaintiff and other relatives came to her house and asked that the Stand be transferred to plaintiff, she refused. She then reported the matter at the police station. This was the third time plaintiff was coming to her house asking for a transfer of the property into his name. She then says Benedict who was in Namibia was phoned and he said plaintiff bought roofing material, door frames, and window frames. She said on the phone Benedict was supporting his mother, i.e. 1<sup>st</sup> defendant. She also said at that time there was a bad relationship between her and Benedict. On the phone he was supporting plaintiff. She testified that Benedict told plaintiff that she (1<sup>st</sup> defendant) possessed a goblin.

- 38.** 1<sup>st</sup> defendant tendered a copy of a Deed of Transfer in the name of Augustine Mutizwa Mutimutema and Killian Mutimutema (Exh. B2). The deed of transfer was executed on the 7<sup>th</sup> August 2015. 1<sup>st</sup> defendant further testified that plaintiff did not contribute to the building of the house. She said after 2004 she and her late husband bought floor tiles for the house, replaced a dureahall and a ceiling though it was not completed.
- 39.** In cross examination 1<sup>st</sup> respondent testified that she never had a discussion with the plaintiff concerning the acquisition and the development of the Stand. She and her husband had money to buy the Stand, but it was not enough. When it was put to her that in her evidence in chief she said she had enough money to buy the Stand, she insisted that the money they had was not enough to buy the Stand. When it was put to her that in an answering affidavit in the application for recession of judgment (answering affidavit) she said she requested a loan from the plaintiff, she disagreed. When the same question was put to her about requesting a loan from the plaintiff, she agreed and said indeed she requested a loan from him. She insisted that she contributed towards the purchase of the Stand.
- 40.** When put to her that in the answering affidavit she averred that plaintiff bought the Stand as an appreciation for fending for him when he was young, she disputed that plaintiff solely paid for the Stand. She conceded that she did not negotiate with the seller of the Stand, she was called by Benedict to sign the documents for the Stand. She disputed that she signed Exh. B1 as a nominee of the plaintiff. When it was put to her that she and her late husband did not buy any material for the building of the house, she said they bought some materials. She disputed that the Stand was solely paid for by the plaintiff, and that it is the plaintiff who bought the all building materials. She accepted that at a family meeting a phone call was made to Benedict who was in Namibia. She testified that when Benedict was telephoned he supported plaintiff. When put to her that in her plea she said the property was donated to her, she disagreed.
- 41.** In re-examination she testified that she met the sellers of the Stand for the first time at the Council offices. The meeting was arranged by Benedict. She said Benedict was supporting the plaintiff.

42. 1<sup>st</sup> defendant was untruthful in her evidence. She was unimpressive as a witness. She gave conflicting and contradicting evidence on many issues. I have reproduced 1<sup>st</sup> defendant's evidence to show the contradiction in it. All in all this witness was totally unreliable and her testimony is not worthy of any belief.
43. The 2<sup>nd</sup> defendant testified. She is the executor of the estate of the late Mutimutema. 1<sup>st</sup> defendant is her mother, and the late Mutimutema was her father. She testified that the property was purchased in 2003, and she was 16 years old at the time. She was the only child staying with 1<sup>st</sup> defendant and the late Mutimutema (parents) at the time. She said her parents started saving money to buy a house in 1999 to 2000. Her mother was a chicken farmer and her father was a truckdriver. Their other children would give them money and they also sold cattle at the village.
44. She testified that 1<sup>st</sup> defendant told Benedict that they wanted to buy a house in Highfield. Benedict advised against buying a house in Highfield and suggested that they buy a Stand. Two weeks later Benedict came to their home and said he found a person selling two Stands. He asked 1<sup>st</sup> defendant to view the Stands and chose the one she wanted. Benedict came and asked 1<sup>st</sup> defendant and deceased to accompany him to view the Stands. Her parents chose Stand number 9795 Glen View 7. Benedict was then given some money to purchase the Stand. She does not know the amount Benedict was given, all she knows is that he was given money for the purposes of paying for the Stand. Benedict said he would add some money and collect some from plaintiff to pay for the Stand. She said the Stand was purchased for \$155 000. 00. Benedict brought the seller to their home, and they all proceeded to the offices of the Municipality of Harare to sign documentation to effect change of name of the Stand.

- 45.** Benedict told 1<sup>st</sup> defendant and deceased that the Stand was theirs and they could start building a house. Plaintiff sent some building materials from Botswana. He sent roofing materials, window frames and door frames from Botswana. Her parents bought timber, cement, nails and bricks. Her brother Bernard paid for the plastering and plumbing of the house. She paid for the floor tiles. Plaintiff would sometimes send money when materials got finished.
- 46.** She testified that it was not true that the property was purchased to accommodate plaintiff's mother. She testified that towards the end of 2014 plaintiff told her that he wanted the property to be transferred into his name. He wanted some money as his business was facing challenges and he had not told his wife about the house, when his wife got to know he started having problems at home. She told her parents about what was said by the plaintiff and they were surprised. Plaintiff returned six months after the death of Mutimutema and said to 1<sup>st</sup> defendant that he wanted the property transferred into his name. 1<sup>st</sup> defendant refused and said the property was hers and the late husband.
- 47.** A family meeting was held where plaintiff said he wanted the house to be transferred into his name. 1<sup>st</sup> defendant said she needed time to think about it, and she did not have all the papers, e.g. her husband's death certificate. The plaintiff and some relatives returned to the house again asking that the property be transferred into plaintiff's name, she then advised 1<sup>st</sup> defendant to make a police report. A police report was made.
- 48.** In cross examination this witness testified that she saw Benedict being given money by 1<sup>st</sup> defendant and the late Mutimutema for the Stand. She does not know the amount that was given to Benedict. Her parents gave her the agreement of cession and deed of transfer to place in safe custody. She disputed that the property was for the plaintiff.

49. This witness testified that she accompanied 1<sup>st</sup> defendant and the late Mutimutema to view the two stands that were on offer, and they choose Stand 9795 Glenview. The 1<sup>st</sup> defendant did not testify about viewing the stands. According to 1<sup>st</sup> defendant everything was done by Benedict. 2<sup>nd</sup> defendant testified about issues she had no knowledge of. The only inference to be drawn is that this witness was untruthful, she was merely trying to build a case that the property was for her parents. All in all this witness was totally unreliable and his testimony is not worthy of any belief.

50. I now turn to consider the issues for determination as set out in the pre-trial conference minute.

#### **Whether or not plaintiff is entitled to transfer of property into his name**

51. In his pleadings plaintiff contended that he purchased a stand number 7995 Glen View Harare, for \$150 000.00. It is said the stand was to be registered in the name of the 1<sup>st</sup> defendant as his nominee. Unknown to plaintiff the stand was registered in the names of the 1<sup>st</sup> defendant and her husband. He avers that he built a four bed-roomed house on the Stand. The Stand was to be transferred into his name when he relocated to Zimbabwe. Upon his return to Zimbabwe in 2014, he contacted 1<sup>st</sup> defendant who agreed to have the property transferred into plaintiff's name. In her evidence 2<sup>nd</sup> defendant agreed that 1<sup>st</sup> defendant initially agreed to have the property transferred to the plaintiff's name. Although she put a twist to it by saying she agreed because of the pressure from the extended family members.

- 52.** In their plea defendants' aver that the stand was purchased for \$155 000.00 by 1<sup>st</sup> defendant and her husband. It is contended that they had saved money to purchase a house in Highfiled. Benedict advised them that Highfield properties had challenges in transferring. He advised them to buy a Stand in Glenview. 1<sup>st</sup> defendant and her husband intended to borrow money from the plaintiff and Benedict, the two said they would in turn assist them buy a stand and develop it in appreciation of having been raised by them. It is avered that when plaintiff demanded transfer of the property into his name, 1<sup>st</sup> defendant refused.
- 53.** Plaintiff obtained a default judgment against 1<sup>st</sup> defendant for the transfer of the stand. 1<sup>st</sup> defendant applied for a recession of that judgment. In her affidavit (Exh. C1) in support of the application she averred that plaintiff bought an undeveloped stand called 9795 Glenview 7, Harare. He bought the stand for the 1<sup>st</sup> defendant. She averred that plaintiff bought the stand for her and promised to assist in developing it. In Exh. C1 1<sup>st</sup> defendant further averred that she looked after plaintiff since he began his secondary education, up until the time he completed his secondary education. The plaintiff bought the stand as a token of appreciation of how 1<sup>st</sup> defendant cared for him. This is what the 1<sup>st</sup> defendant said under oath.
- 54.** In the defendants' plea it is Benedict who advised 1<sup>st</sup> defendant and her husband not to buy a house in Highfiled. It is averred that he advised that Highfield properties had challenges in transferring. He advised them to buy a stand in Glenview. In her evidence in court she testified that it is Benedict who advised her that if she buys a house in Highfields, it would be difficult to transfer it into her name. In the answering affidavit (Exh.C3) to the recession of judgment 1<sup>st</sup> defendant avers that she asked for a loan from plaintiff who discouraged her from buying a built up house. It is said plaintiff advised that it was difficult to change ownership of a built up house, and advised them to buy a stand and develop it.
- 55.** In her evidence in chief 1<sup>st</sup> defendant gave conflicting evidence. She first testified that she bought a residential stand and asked Benedict and plaintiff to assist in developing the stand. Due to the change in currencies she could not remember the amount she had

for the purposes of buying a stand. She was then given \$150 000.00 by plaintiff to buy the stand. The money was collected by Benedict, who put some of his own money for the purchase of the stand. She also said her late husband, Bernard and Benedict contributed in paying for the stand.

- 56.** In the answering affidavit (Exh.C3) to the recession of judgment 1<sup>st</sup> defendant says plaintiff bought the Stand for her as a token of appreciation for having looked after him. She does not say that late husband, Benedict and Bernard contributed in paying for the stand. She admitted that Benedict did not contribute to the purchase of the stand. The contention in her evidence in this court that her late husband, Benedict and Bernard contributed to the purchase of the Stand is an recent fabrication. It is an after-thought.
- 57.** Benedict in an affidavit which is before court as Exhibit A4 avers that during the year 2003, plaintiff, who was resident in Botswana requested him to look for a property on his behalf. The purpose for the purchase of the property was to ensure that plaintiff's ill mother had accommodation. He says he purchased the property with funds sent by plaintiff from Botswana. 1<sup>st</sup> defendant in Exh. C3 in answer Benedict's affidavit says Benedict is in cahoots with plaintiff as they claim that she is a witch. She disputes that she was informed that property was bought to accommodate plaintiff's ill-mother. The affidavit of Benedict corroborates the plaintiff's evidence in material respects.
- 58.** It is not in dispute that the Stand was purchased for \$155 000.00. 1<sup>st</sup> defendant accepts that the \$150 000.00 came from the plaintiff. This leaves a balance of \$5000.00. Plaintiff testified that the balance of \$5000.00 came from him. He used to send a lot of money, and if there was a shortfall Benedict would have used the extra cash to meet such shortfall. Plaintiff has a credible explanation for the \$5 000.00. I find it factually proved that the plaintiff solely paid the purchase price for the Stand.
- 59.** Plaintiff says he single-handedly paid for the development of the Stand. In his evidence in this court plaintiff testified that he bought the building material. He purchased roof tiles, window frames from Botswana. The consignment was received in Zimbabwe by Benedict. Plaintiff said Benedict told him that the money he sent from Botswana was

used to build the property, except for the ceiling. Plaintiff testified that 1<sup>st</sup> defendant did not contribute to the development of the property and he is not aware of anyone else who contributed. Omega Faranisi corroborated plaintiff evidence in material respects.

- 60.** In Exh. A5 Benedict said plaintiff single handedly built the four bedroomed house on the stand. Door frames, window frames, and harvey tiles used in the building were delivered from Botswana through Omega Faranisi. Plaintiff sent him money to purchase bricks and cement here in Zimbabwe. This corroborates the evidence of plaintiff and Omega Faranisi in material respects. On the totality of the evidence I am satisfied that plaintiff single-handedly paid for the building of a house on stand number 9795 Glenview 7, Harare.
- 61.** The high watermark of plaintiff's case is that 1<sup>st</sup> defendant entered into the agreement with the sellers of stand number 9795 Glenview 7, Harare as his nominee, and that he did not authorise the late Mutimutema to sign the agreement and have his name in the deed of transfer.
- 62.** A nominee is defined as a person who is not the owner, in whose name a property is registered. A nominee holds the property for the benefit and on behalf of the owner. . A nominee is therefore not the true owner of the property. See: *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Company (Pty) Ltd* 1971 1 SA 441 (A) at 456F. It is therefore clear that a nominee holds the property on behalf of the beneficial owner who is the person who is the real, *de-jure* owner of the property, and entitled to all gains, profits and benefits accruing through such property.

- 63.** In *casu* plaintiff paid the purchase price for the stand. He solely built a housing structure on the stand. He was resident and working in Botswana at that time. He initially suggested that the stand be registered in the name of Benedict. Benedict declined to have the stand registered in his name. Plaintiff then suggested that it be registered in the name of 1<sup>st</sup> defendant, his sister. 1<sup>st</sup> defendant then decided to have the Stand registered in her name and that of her husband. 1<sup>st</sup> defendant and her late husband signed the cession and the deed of transfer in their names. These are the circumstances under which the stand was registered in the name of the 1<sup>st</sup> dedfendant and the late Mutimutema.
- 64.** Plaintiff contends that when he relocated to Zimbabwe 1<sup>st</sup> defendant initially agreed to transfer the stand to him. This position was corroborated by 2<sup>nd</sup> defendant, although she tried to put a spin into it. There is evidence that at the second family meeting, 1<sup>st</sup> defendant left the meeting and said she wanted to make a telephone call to her daughter who had the papers for the property. This was corroborated by Killina Kapfumo. 2<sup>nd</sup> defendant infact confirmed in her evidence that she was in possession of the cession and deed of transfer of the property.
- 65.** I find it proved that 1<sup>st</sup> defendant initially agreed to transfer the property to plaintiff, and then made a turn. No amount of family pressure could have made her to agree to transfer the property to plaintiff if indeed she genuinely believed that the property was hers and her late husband. 1<sup>st</sup> defendant is merely taking an advantage of the fact that property is registered in her name and that of the late Mutimutema. Even in the family meeting a call was made to Benedict, he confirmed to all and sundry that plaintiff paid for the satnd and built a house on the stand. 1<sup>st</sup> defendant merely clings on the deed of transfer. In *CBZ Bank Limited v David Moyo & Another* SC 17/18 the court held thus:

I must state that a deed of transfer or registration of cession is not conclusive proof of ownership or the rights of a cessionary. See the cases of *Young v Van Rensburg* 1991 (2) ZLR 149 (S) at 156 D-G and *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 237 B-D. It simply raises a presumption in favour of the holder of the title deed or the rights of a cessionary until the claimant proves on a balance of probabilities that he innocently bought the property or cessionary rights from the owner of the

property or cedent. See the case of *Cunning v Cunning* 1984 (4) SA 585 (T). In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable. The fact that it can be challenged is vital for the disposal of this appeal.

66. The fact that the property is registered in the name of 1<sup>st</sup> defendant and her late husband is not conclusive. It simply raises a presumption in favour of the holders of the title deed until the claimant proves on a balance of probabilities that he is the real owner of the property. Plaintiff has successfully rebutted the presumption and shown that the property was registered in the name of 1<sup>st</sup> defendant as a mere nominee, and that the name of the late Mutimutema was included without his (plaintiff) consent. Therefore the issue whether or not plaintiff is entitled to transfer of property into his name is answered in favour of the plaintiff.

**Whether or not plaintiff is entitled to hold over damages in the amount of US\$500.00 per month, from the date of issuance of summons to date of eviction from the property.**

67. Plaintiff's evidence is that he puts the value of occupation to US\$500.00 per month. He therefore seeks US\$500.00 per month as holdover damages from the date of issuance of summons to the date of eviction. I do not agree. As regards holding over damages, the parties did not have a lease agreement. Their relationship was not a contractual one premised on a lease agreement with a fixed and agreed rental amount, but a family arrangement.

68. In *Silonda v Nkomo* HB 60-19, BERE J (as he then was) expressed the view that where parties entered into a sale agreement, the court could not read into it anything other than what such agreement states. It could therefore not be taken as a lease agreement to entitle a litigant to claim holding over damages. Whilst this judgment was appealed, the

Supreme Court in its judgment SC6/2022 did not interfere with the learned judge's exposition of the law as this was not one of the grounds of appeal ventilated before the Supreme Court. This exposition of the law applies with full force in this case. The parties did not enter into a lease agreement. 1<sup>st</sup> defendant and her family resided at the property not as tenants but family relations of the plaintiff. For this reason the claim for holding over damages is not sustainable.

69. Again there is just no evidence that the value of occupation of the property is US\$500.00 per month, except for the *ipso dicta* of the plaintiff.
70. The issue of whether or not plaintiff is entitled to hold over damages in the amount of US\$500.00 per month, from the date of issuance of summons to date of eviction is answered in favour of the 1<sup>st</sup> defendant.

***Rei vindicatio***

71. Plaintiff contended that this matter has all the hallmarks of an action *rei vindicatio*. It is on this basis that plaintiff seeks the eviction of the 1<sup>st</sup> defendant and all those claiming the right of occupation through her from the property. The property is registered in the name of the 1<sup>st</sup> defendant and her late husband represented in these proceedings by the 2<sup>nd</sup> defendant, the executor. Plaintiff testified that he did not authorize the inclusion of the name of the late Mutimutema in the Deed of Transfer. He therefore could not lawfully claim title to the property. This means transfer to him without plaintiff's consent and was unlawful.
72. In respect of the 1<sup>st</sup> defendant the property was transferred into her name as the plaintiff's nominee. She was called upon to transfer the property to plaintiff, first agreed and then reneged and refused to sign the transfer papers. She cannot lawfully claim title to the property. Therefore in this case the principles of the *rei vindicatio* apply with full force and effect. The property should be returned to its rightful owner, i.e. the plaintiff. See: *Nzara & Ors. v Kashumba N.O. & Ors.* SC 18/18; *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236. In the circumstances the eviction may be lawfully carried out even before the property is transferred to the name of the plaintiff.

73. In the circumstances the claim for the transfer of the property into the name of the plaintiff must succeed, and the claim for eviction of the 1<sup>st</sup> defendant and all those claiming occupation through her from the property must also succeed.
74. The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the defendants.

In the result, it is ordered that:

1. 1<sup>st</sup> and 2<sup>nd</sup> defendants be and are hereby ordered to sign all necessary transfer documents to enable the transfer of an immovable property being Stand number 9795 Glenview Township of Glenview, also known as Stand number 9795 Glenview 7, Harare, held under Deed of Transfer number 3386/2015 (property) to the name of the plaintiff.
2. Signing of transfer documents described in *para* 1 above shall be effected within seven (7) days of the date of this order.
3. Should the 1<sup>st</sup> and 2<sup>nd</sup> defendants fail, refuse or neglect to sign the transfer documents as aforesaid, the Sheriff of the High Court be and is hereby authorized to sign the documents on behalf of the defendants.
4. 1<sup>st</sup> defendant and all those claiming occupation through her are and hereby evicted from the property.
5. 1<sup>st</sup> and 2<sup>nd</sup> defendant jointly and severally, each paying the other to be absolved pay the cost of suit.

*Mlotshwa & Maguwudze* plaintiff's legal practitioners  
*Madanhi, Mugadza & Company* defendant's legal practitioners