FILE NYONI

Versus

LIKUMBI KALIPA N.O.
(Executor estate Philimon Kalipa Khumalo)

And

DIRECTOR OF HOUSING & COMMUNITY SERVICES

And

THE DEPUTY SHERIFF OF HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 17 JUNE 2021 & 24 JUNE 2021

Court application

*A*pplicant in person
S. Siziba, for the 1st respondent

DUBEBANDA J: This is a court application for specific performance. Applicant seeks an order to compel 1st respondent to transfer into his name an immovable property being house number 1046 Chinotimba Township, Victoria Falls, and costs of suit. The application is opposed by the 1st respondent. 2nd and 3rd respondent did not file opposing papers and did not participate in these proceedings. I understand their position to be that they are content to abide by the order of this court, whatever it is.

Factual background

This application will be better understood against the background that follows. On the 21st September 2016, applicant and 1st respondent signed an agreement of sale in respect of an immovable property, being house number 1046 Chinotimba, Victoria Falls (property). The written agreement of sale says the purchase price is US$7 500.00. In his founding affidavit applicant avers that he paid a sum of $10 310.00 being the purchase price plus an amount to clear the amenities bill due on the property. In her notice of opposition, 1st respondent avers that applicant paid US$3 000.00 only. It is common cause that house number 1046

Chinotimba, Victoria Falls is estate property. A dispute has arisen culminating in applicant filing this application in this court.

The papers before court show that applicant prepared this application in person, i.e. without legal representation. He filed this application on the 21st July 217. On the 23rd January 2018, at the instance of the applicant, Messrs V.J. Mpofu & Associates Legal Practitioners filed a notice of assumption of agency. On the 22nd February 2018, applicant's heads of argument were filed. On the 22nd May 2018, Messrs V.J. Mpofu & Associates filed a notice of renunciation of agency. 1st respondent filed her notice of opposition without legal representation. Later on Messrs Ndove and Associates Legal Practitioners assumed agency to represent her.

1st respondent in her notice of opposition makes a plethora of serious allegations against V.J. Mpofu, a legal practitioner. He is alleged to have acted in cahoots with applicant and others to make certain misrepresentations that made 1st respondent sign the agreement of sale. When this matter was first down on the 23rdJune 2020, I noted that Mr V.J. Mpofu was seated in the public gallery. While applicant was busy trying to argue that 1st respondent had notice of the set down date, Mr V. J. Mpofu raised his hand and requested to make certain submissions as a fried of the court. I quickly turned down his request. I found it irregular that a legal practitioner of this court, will just rise from the gallery, unrobed and start to make submissions, worse still in a matter where he had filed a renunciation of agency. There is a set procedure for admission as *amicus curiae,* which he did not follow. See: *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*2002 (5) SA 713 {CC}; *In re S v Basson* CCT 30/03; *Fose v Minister of safety and Security*1997 (3) SA 798 (CC).

I take the view that Mr V.J. Mpofu is aware of the serious allegations made against him by 1st respondent. I say so because he had before him a copy of the notice of opposition when he prepared applicant's heads of argument. In her heads of argument, 1st respondent continues with the allegations against Mr. V.J. Mpofu. It is contended that Mr. V. J. Mpofu, because of his involvement and certain alleged conduct, must recuse himself from this matter. I take it that this contention was made before 1st respondent became aware that Messrs V.J. Mpofu& Associates had filed a notice of renunciation of agency. I note in passing that a legal

practitioner does not recuse himself or herself from a matter. A legal practitioner withdraws from a case. Recusal is a function of judicial office. See: *S v Mutsinziri* 1997 (2) ZLR 6 (HC). What is concerning though is that despite the serious allegations made against him, Mr V.J. Mpofu has not seen it appropriate to put his version before this court.

Preliminary points

At the commencement of this hearing, Adv. *Siziba*, counsel of 1st respondent informed the court that he intends to take points *in limine*. Counsel took the following preliminary points, *viz*; alleged non-compliance with rule 248(1) of the High Court Rules, 1971; non-compliance with section 120 of the Administration of Estates Act [Chapter 6:01]; and that there are material disputes of fact, which cannot be resolved in motion proceedings. I informed counsel that in this case I shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary points are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. See: *Mokhosi & 15 others V Justice Charles Hungwe & 5 Others* (Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019). I now deal with these preliminary points.

Order 32 rule 248(1) of the High Court Rules, 1971 require that an application in connection with the state of a deceased person shall be served on the Master. 1st respondent contends that non-compliance with this rule renders the application fatally flawed. The rule provides thus:

> In the case of any application in connection with-
> (a) the estate of a deceased person; or
> (b) …….
> a copy of the application shall be served on the Master not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such a report.

The rule does not require that the Master be joined in the application. It requires by peremptory language that he be served with the application. 1strespondent contends that non-compliance with this rule renders the application fatally flawed. I respectfully disagree. I take the view that what the rule requires is that the court shall not proceed to a hearing unless it is satisfiedthat the application has been served on the Master. The rule does not speak to the

contents of the application, but to service of the application. This distinction must be observed, otherwise the purpose of the rule might be lost. My view is that non-compliance does not render the application itself fatally defective. In my view, a court may either remove the matter from the roll or on good cause shown postpone the matter for the purposes of serving the Master with a copy of the application. In *casu*, the property subject to the sale agreement is estate property. A copy of the application was not served on the Master. This non-service does not render the application fatally defective and a nullity. Had it not been for the second point of law taken by the 1st respondent, I would have either removed this matter from the roll or postponed it to enable the application to be served on the Master. Finally on this issue, the point *in limine* that as a result of non-service on the Master the application is a nullity has no merit and is refused.

In her submissions 1st respondent took a point of law, which it is argued went to the root of the matter and its determination could dispose of this matter one way or the other. She submitted that the agreement of sale between the parties was null and void for want of compliance with section 120 of the Administration of Estates Act [Chapter 6:01] (Act). The sale of estate property by private treaty is subject to section 120 of the Act. The section says:

> If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.

The empowering provision enjoins the Master to conduct a due diligence inquiry, and if he is of the opinion that it would be to the advantage of persons interested in the estate to sell any property by private treaty he would then grant the necessary authority to the executor to sell. I take the view that such a consent cannot be granted after the sale. It must be precede the sale. The Master's consent is a condition precedent to the sale. By operation of section 120, without the consent of the Master there can be no sale of estate property by private treaty. To sale and then seek authority ex *post facto* is not in compliance with section 120 of the Act. It defeats the empowering provision. In terms of the provision the Master's due inquiry must be conducted *prior* the sale, not ex *pos*t facto the sale. See: *Maria Salome Katsiga v Hilda Tambudzai Charlie and Nyasha Lovemore Machakaire and Master of High*

Court and Registrar of Deeds HH 6/09; *David Chigodora and Nelia Chigodora v Thomas C. T Rodrigues and Thomas C.T. Rodrigues (N.O) and The Registrar of Deed and The Master of The High Court and The Deputy Sheriff* HH 276/10.

In *casu*, the subject matter of the sale agreement is estate property. On the 2nd November 2016, the Resident Magistrate, Victoria Falls granted an order in the following terms:

> In the Magistrates Court DRVF 14/15
> For the Province of Matabeleland North
> Held at Victoria Falls
>
> Ruling
>
> Likumbi Kalipha the executrix is hereby granted authority to sell the property which is number 1045 Chinotimba, township, Victoria Falls.
>
> R.P. Gakanje
> Magistrate

The agreement was signed on the 21st September 2016. The ruling or the section 120 Authority is date stamped 2nd November 2016. 1st respondent contends that the sale of the property preceded the section 120 Authority. I agree. To sale and then seek authority *ex post facto* is inconsistent and not in compliance with the section 120 of the Act. Therefore, the sale was invalid and unlawful. The sale was a nullity. Accordingly, I am satisfied that the agreement of sale itself falls foul of section 120 of the Act. In the result, the point of law taken *in limine* is answered in favour of the 1st respondent. This application falls to be dismissed.

Costs are always at the discretion of the court. Applicant has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. Accordingly, the applicant must bear the 1st respondent's costs.

In light of the decision I have reached on the issue in relation to section 120 of the Administration of Estates Act, it will serve no useful purpose to determine the point *in limine* in respect of the alleged material dispute of facts.

Disposition

In the result, I order as follows:

1. The point *in limine* in respect of non-compliance with section 120 of the Administration of Estates Act [Chapter 6:01] is upheld.
2. This application is dismissed with costs of suit.

Ndove and Associates, 1st respondent's legal practitioners