

RICHARD KUDZANAI CHIGUMBA  
versus  
TAURAI CLIFF CHIGUMBA  
and  
TINASHE ZENDA N.O  
and  
MASTER OF HIGH COURT DR 538/09  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
HARARE, 17 February, 2 March and 26 May 2022

### **Opposed Application**

*P Chin'ombe*, for the applicant  
*V Masaiti*, for the 1<sup>st</sup> respondent  
*C Sakupwanyana*, for the 2<sup>nd</sup> respondent  
No appearance for the 3<sup>rd</sup> and 4<sup>th</sup> respondent

WAMAMBO J: In this matter falls two applications, the main application and a counter application. In the course of the hearing a number of issues were clarified and concessions made.

In a nutshell the dispute arose over a beneficiaries' sharing agreement entered into by members of the Chigumba Family after the death of the head of the family Stanslas Tonderayi Chigumba (the deceased). The deceased passed on on 11 December 2006. The beneficiaries sharing agreement was entered into on 29 May 2018. The dispute is essentially between Richard Kudzanai Chigumba (the applicant in the main case) and Taurai Cliff Chigumba (the first respondent in the main case). In the counter application Taurai Cliff Chigumba is the applicant while Richard Kudzanai Chigumba is the first respondent. For expediency I will refer to the main protagonists as Richard and Taurai. These two are brothers born of the deceased.

The dispute arose around two clauses in the beneficiaries sharing agreement (hereinafter called the agreement). The clauses are clauses 3(a) (i) and 3(e) (i).

According to clause 3(a)(i) Taurai was among other property awarded:

“A subdivision of Stand number 57 Kilwinning Road, Hatfield, Harare measuring 300 square metres subject to the City of Harare’s approval and issuance of a subdivision permit on the area which they allow for a subdivision in that area.”

According to clause 3(e)(i) Taurai was awarded:

The remainder of No. 57 Kilwinning, Hatfield, Harare after a subdivision to Taurai Cliff Chigumba. Stand No. 57 Kilwinning Road, Hatfield is described in the deed of transfer as Remainder of Lot 205AB, Hatfield Estate.

The parties started off poles apart according to their draft orders and supporting documents.

During the hearing, however, two documents were filed by consent. The documents clarified the central issues at play. The documents are a deed of transfer reflecting that the remainder of Lot 205AB Hatfield estate (which is the property in issue) measures 7007 square metres. The other document is a letter written by the Acting Director of Works, City of Harare reflecting that according to the operative City of Harare, Waterfalls/Hatfield Local Plan Number 26 the minimum subdivision allowed is 2 000m<sup>2</sup>. This letter was in response to a request to subdivide remainder of Lot 205AB Hatfield, Harare.

Upon reflection and some prodding the parties later came up with proposals to effectively solve the dispute. These proposals effectively narrowed the issues to be decided to a question of how many square metres, should be awarded to Richard and Taurai respectively on the property in issue.

The proposals came about as a result of the fact that the 300m<sup>2</sup> awarded to Taurai in terms of the agreement was untenable according to the City of Harare as referred to earlier.

The suggestion put across on behalf of Richard is that Taurai be awarded 2 000m<sup>2</sup> of the property in question while Richard is awarded the rest of the extent of the property. The motivation behind this suggestion is that Taurai according to the original agreement had only been awarded a paltry 300m<sup>2</sup>. It was only because of the City of Harare not allowing such a small extent in the particular area that Richard could afford his brother only the minimum and no more.

It was proposed on behalf of Taurai that he should be granted 3 007m<sup>2</sup> of the property while his brother Richard be awarded 4 000m<sup>2</sup> on the extent where the main house is located. The motivation on behalf of Taurai is that Richard as per the original intention will get the more valuable portion of the property. It was not clear to me why Taurai should get most half of the extent of the property. I say this because Taurai had agreed to be granted only 300m<sup>2</sup>

under the original agreement. The intention of the parties appears to be that Richard would get the substantial portion of the property.

To argue as was submitted on behalf of Taurai that he agreed to 300m<sup>2</sup> without knowing the full extent of the property is untenable.

It was the duty of the parties to ensure due diligence before signing the agreement. I have to note that second respondent in both applications appears neutral in the disposition of the matter. He is the one who drafted the agreement. It was correctly submitted that Courts do not write contracts for parties. Further that the court should assist the parties towards what they intended according to the contract. See *Hoffman & Carvallon v Minister of Agriculture* 1947(2) SA 855(J).

In the circumstances of this case. I find that the intention of the parties was that Richard would get the substantial portion of the property in question. Further that Taurai would get a substantially smaller portion of the property. This becomes clear when one considers an extent of 300m<sup>2</sup> a property of 7 007m<sup>2</sup>.

If Taurai was not vigilant or alert enough to investigate the full extent of the property it is his fault. He appended his signature on the agreement agreeing to be awarded 300m<sup>2</sup>. That Richard has proposed that 2 000m<sup>2</sup> of the property be awarded to Taurai is because he has shifted from the original position where he sought the whole property to himself. Taurai on the other side has literally jumped from 300m<sup>2</sup> thanks to City of Harare Regulations to proposing being awarded 3007m<sup>2</sup>.

On a balance of equities, I consider Richard's proposal to be more in tandem with the intention of the parties as encapsulated in the agreement. That is to say Richard would get the lion's share while Taurai would get but a small fraction of the property.

There is no mention in the agreement of which party would be granted the portion of the property where the house is situated. The drafter of the agreement did not address this issue. Considering the proportions as agreed to I find that the intention was further that the principal owner of the property is Richard. To that end he should be awarded the portion where the house is situated.

The niceties will obviously be resolved by the City of Harare officials. The parties have agreed that the Surveyor General's fees for the subdivision be shared equally between Richard and Taurai. There was also agreement that there be no order as to costs. There was agreement that apart from the two clauses in dispute the rest of the agreement is not contested. To that end I will concentrate on clauses 3(a)(i) and 3(e)(i) of the Agreement in granting an

efficacious order. In the circumstances I find the following order to meet the justice of the case.

It be and is hereby ordered as follows:

1. The beneficiaries sharing agreement dated 29 May 2019 filed with the third respondent is amended to the following extent:
  - (a) Clauses 3(a)(i) and 3(e)(i) thereof be and are hereby deleted and substituted with the following: The first respondent Taurai Cliff Chigumba be and is hereby awarded 2 000m<sup>2</sup> of Stand 57 Kilwinning Road, Hatfield, Harare (also known as Remainder of Lot 205AB, Hatfield Estate) and applicant Richard Kudzanai Chigumba be and is hereby awarded the rest of the said property inclusive of the portion of the property where the main house is situated.
  - (b) The Surveyor General's fees shall be shared equally between the applicant and first respondent.
  - (c) There be no order as to costs.

*Jarvis Palframan*, applicant's legal practitioners  
*Saidi Law Firm*, first respondent's legal practitioners  
*Messrs Hungwe & Partners*, second respondent's legal practitioners