

TAKUDZWA DOUGLAS CHITERE  
and  
OWEN MAKAHA  
versus  
RUSAPE TOWN COUNCIL  
and  
NOLEEN MAKAHA  
and  
FARAI MAKAHA

HIGH COURT OF ZIMBABWE  
WAMAMBO & MUCHAWA JJ  
HARARE, 20 January 2022 & 20 June 2022

**CIVIL APPEAL**

*L Mauwa*, for the appellants  
*O Chitowamombe*, for the 1<sup>st</sup> respondent  
2<sup>nd</sup> & 3<sup>rd</sup> respondents in person

**WAMAMBO J:** This is an appeal against the judgement of the Magistrate sitting at Rusape wherein she rendered an order dismissing the application with costs.

The background which essentially appears common cause is as follows:-

Agatha Makaha is the mother of second appellant and second and third respondents. She has since passed on. During her lifetime she donated stand no 943 Mabvazuva Township Rusape (hereinafter called the stand) to the second respondent. Second respondent in turn failed to construct a house thereat and sensing that she could do no further development on the stand donated the stand to second appellant. She however inserted a rider in her affidavit donating the stand to second appellant, that second appellant “must not sell this stand alone if he also fail to construct without the following people (sic) Agatha Makaha, herself third respondent and Peperua Makaha.”

Second appellant in turn sold the stand to first appellant. First appellant developed the stand into a ten roomed house. Whilst first appellant was busy constructing a house at the stand

second respondent made attempts to stop him from further construction on the ground that the stand was a family stand. Representations were made to Rusape Town Council officials. When the appellants attempted to effect a cession into first appellant's name they were unsuccessful. This culminated in the appellants approaching the Rusape Magistrates Court seeking an order compelling the first respondent (Rusape Town Council) to process the cession of the stand from the second appellant to the first appellant.

The court *a quo* found the application unmeritorious and dismissed it. It is against the dismissal of the application that the appellants have appealed to this court.

The appellants raised six grounds of appeal. The summary effect of the grounds is that the court *a quo* misdirected itself in circumstances where second appellant legally sold the stand. Further that the court *a quo* fell into error when it found that the stand formed part of the deceased (Agatha Makaha's) estate. Some of the grounds are repetitive and not clear and concise.

The court *a quo* clearly fell into error when it found that the stand formed part of Agatha Makaha's deceased estate. Agatha Makaha had already donated the stand to second respondent who in turn donated it to second appellant (albeit with a condition) during her lifetime. To further demonstrate this position Agatha Makaha is expressly mentioned as one of the persons second appellant should have consulted before selling the stand.

The court *a quo* found that the stand was "given" to second appellant to keep as family property. The court *a quo* found further that "the family members were wrong to allow the cession whilst they could have easily registered and executed the estate.

The court *a quo* seemed to base its decision more on moral grounds. Its findings suggest that second appellant took advantage of the situation and sold the stand to his sole advantage at the expense of other family members.

To my mind what escaped the court *a quo*'s attention is that personal rights had been granted to second appellant. In the same manner that second respondent made a sole decision to donate the stand to second appellant the second appellant then assumed rights wherein he could sell the stand.

The condition that second appellant should have consulted other family members does not detract from the fact that he now held rights to dispose of the property as he deemed fit.

To his credit second appellant strengthened his position by obtaining a lease agreement with first respondent with an option to buy the stand. This is encapsulated in clause 20 of the lease agreement that appears at page 55 of the record.

Although there seems to be some confusion on the subsequent agreements of sale, what is clear is that second appellant was legally empowered to dispose of the property.

There are agreements of sale in relation to the same stand between second appellant and one Tongayi Blesssing Chimbade, another between Tongayi Blessing Chimbade and first appellant and yet another between second appellant and first appellant.

The net effect however of the agreements of sale is that the stand currently is occupied by first appellant through one or other agreement of sale. I am cognisant that the record does not reflect any input or objection by Tongayi Blessing Chimbade. There is no evidence or suggestion on record that Tongayi Blessing Chimbade raised any objection to the stand being sold to first appellant. In any case, he may be taken to have waived his right to challenge the first appellant's right to the stand. See *Richard Ndemera v Jane Shamada* HH 62/19 at page 7. It is common cause that first appellant has built a ten roomed house at the stand. No one else raised any objections to the construction of this house apart from second appellant's siblings.

The second and third respondents strongly based their objections to the sale of the stand to first appellant on the ground that second appellant was obliged to consult them before effecting the sale.

The fallacy of that argument comes out if one supposes that the other family members had been consulted but had withheld their authorisation to the sale. What then would become of the stand? Who would have the final say? This considering that second appellant already held official documents heralding him as holding rights to the stand.

The second respondent effectively transferred her rights to the stand. Whether she did it inadvertently or not is not the issue.

Perhaps it is high time family members forsook the age old tradition of some common concept of a family property not hinged on a legal document. If it has to be family property it must be based on some sound legal footing like the lawful establishment of a family trust.

The question of the family being prejudiced is an overflow of second respondent's decision to give the property to second appellant. If second respondent had sold the stand she could equally have benefited.

In *Martin Nyahasha v K Mutyambizi and Saltana Enterprises (Pvt) Ltd and City of Harare* HH 392/18. DUBE J dealt with a matter involving a dispute over a stand. She found that by nature of the stand not being registered in the applicant's name applicant held personal rights over the stand as applicant had bought the stand on an above board basis and never lost rights to the property.

At page 3 DUBE J said:-

“Although the applicant has not registered the stand in his name he has recognisable rights to the stand. The applicant seeks an order to declare him the rightful owner of the land. He is not yet an owner but has existing and future rights in the stand. There is nothing to stop this court granting an order that reflects the legal position as reflected by the facts.”

In the instant case first appellant appears to have bought the stand innocently and in a straight forward manner. Although he is not owner by law he holds personal rights over the stand and the order he sought before the court *a quo* appears meritorious in the circumstances of the case. Whether second respondent has a claim and against whom for the developments she effected on the property is up to her to pursue if so advised.

For purposes of this appeal however I find that the court *a quo* misdirected itself by upgrading moral considerations and interpretations where the rights were legally based on the second appellant over the stand.

**We therefore order as follows:-**

1. The appeal succeeds with costs.
2. The order granted by the Magistrate sitting at Rusape be and is hereby set aside and substituted with the following order:-

The first respondent be and is hereby ordered to process the cession of House Number 943 Mabvazuva Township Rusape from second appellant to first appellant within 48 hours of service of this order failing which the Messenger of Court be

and is hereby ordered to execute the same at first respondent's cost.

MUCHAWA J: Agrees.....

*Mauwa & Associates*, appellant's legal practitioner  
*Chiwanza & Partners*, 1<sup>st</sup> respondent's legal practitioners