

TIMOTHY MUTIZWA DZORWA N.O.
versus
GOROMONZI RURAL DISTRICT COUNCIL
and
JACOB NYAKUDYA
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 30 November 2021 & 21 July 2022

Opposed Application

T Govere, for the applicant
T Magwaliba with *K Mabhaudhi*, for the 2nd respondent

KATIYO J: The applicants approached this honorable court seeking a declaratory order of an immovable property. The applicant in his official capacity as the Executor Dative of the Estate Late Kizito Dzorwa approached this Honorable court seeking a Declaratory Order in terms of s 14 of the High Court Act [*Chapter 7:06*]. It is common cause that the applicant's late father was granted a lease by the first respondents over a certain commercial premise measuring 2023 square meters comprising of a butchery, bottle store, grinding mill and general dealer all situated at Rusike Communal Land Mungate Business Centre under Chief Chinamora Domboshava in Goromonzi District. The copies of the lease agreements are dated 27 July 1966, 03 September 1966 and 29 January 1970 respectively.

The applicant's father passed away on 24 February 1978 and the applicant's brother Tendai Dzorwa was appointed as Executor Dative on 13 September 2006, however, he too passed away on 14 May 2007. The applicant was then appointed as Executor Dative. The second respondent claims that in 1977 his father the late Rabson Mutuna Nyakudya purchased stand TT23204 measuring 840 square meters from the applicants late father Kizito Dzorwa.

The second respondent further claims that in 1977 Chief Chinamora confirmed the sale of the property where he requested the name change of the property from Kizito Dzorwa to Rabson Mutuna. Cession of the immovable property on Stand TT 23204 was granted to the second respondents late father. Moreso the second respondent late father began operating the grinding mill on Stand TT 23204 and named the business Nyakudya Grinding Mill.

The second respondent's father passed away in 1985 and the second respondent and his brothers continued operating the grinding mill until 2006 where they leased out Nyakudya Grinding Mill to one Chirandu Mbanje. In 2007 the applicant sought an ejection through summons under case number 415/07 in the Magistrates Court which culminated in his eviction in 2017. The applicant claims that Stand TT 23204 still belongs to his late father's estate as supported by a letter written by Mrs Chinyemba the Chief Executive Officer of Goromonzi Rural District Council. The applicant is therefore seeking a declaratory against the second respondent who is opposing the application. The second respondent is of the opinion that the applicant has no locus standi since estate late Kizito Dzorwa was finalized. The second respondent also argues that the applicants claim has prescribed in terms of the Prescription Act [*Chapter 8:11*].

Prescription

The second respondent has enjoyed undisturbed occupation of the land in question for 30 years that is from 1977 to 2017 when the applicant evicted the respondent's tenant. The law as in Section 4 of the Prescription Act [*Chapter 8:11*] which states that:

“a person shall by prescription become an owner of a thing he has possessed openly and as if he were the owner thereof for

- a) an uninterrupted period of thirty years; or
- b) a period which, together with any periods for which such thing was so possessed by his predecessors in the title, constitutes an uninterrupted period of thirty years.”

In the case of *Bulgareomin Ltd v Government of the Republic of Bulgaria & Ors* HH732/15 CHIGUMBA J commented as follows:

“any person who acquires full juristic possession, without force and peaceably, so openly and patently to the owner or another or both, and without recognizing the title of the owner, becomes the true owner thereof after the passage of a period of thirty years. The court also observed that a possessor seeking transfer on the basis of acquisitive prescription must show that its possession was adverse to the rights of the owner and that open possession was exercised without recognizing the title of the owner.”

The applicant was passive for 30 years whilst the second respondents enjoyed peaceful use of the property. The second respondent enjoyed 30 years of undisturbed use of this property in question and thus when the applicant evicted the second respondents tenant prescription had already taken effect. The applicant submitted that prescription had been disturbed because of the judgment obtained from the magistrate courts however what the applicant failed to realise is that the judgment from the magistrate did not have any effect on the applicant as they were not party to the legal proceedings and the applicant only effected his judgement in 2017. Thus

this court believes that the property has prescribed and it now belonged to the second respondent.

Locus Standi

The applicant's *locus standi* in this matter was questioned by the second respondent who stated that the applicant does not have locus standi as his tenure as Executor Dative had ended. The court is of the view that executor dative duties only come to an end when all the property is distributed and discharged of his duties. This view is supported by s 52 (11) [Chapter 06:01]:

“Upon the final and complete liquidation of the estate to the satisfaction of the Master the executor shall then be entitled to obtain his discharge from the Master as such executor.”

In this matter the applicant contends that the property belongs to the estate late Kizito Dzorwa therefore he can still act in his official capacity as Executor Dative. In *Clark v Barnacle N.O. & 2 Ors* MORTON J in stating the legal position had this to say:

“It is that, whether testate or intestate, an executor wither testamentary of dative, must be appointed so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.”

In this matter the applicant has *locus standi* and is allowed by the law to represent the interests of the estate late Kizito Dzorwa. There is nothing to prove that he was discharged from his duties as an executor.

Declaratory Order

A Declaratory Order is governed by the provisions of s 14 of the High Court Act [Chapter 7:06] which states as follows:

“High Court may determine future or contingent rights The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

In the case of *RK Footware Manufacturers Pvt Ltd v Boka Book Sales* 1986 (2) ZRL 209 SANDURA JP as he was then held and commented as follows:

“the court has to identify two considerations that the court has to look at when determining whether or not to issue a declaratory order. He stated that the court had to consider whether the applicant was an interested person in an existing future of contingent right of obligation and secondly whether the case was a proper one for the court to exercise its discretion.”

In the case of *Recoy Investments (Pvt) Ltd v Tarcon* 2011(2) ZLR 65(H) the court held that for a declaratory order to succeed there a certain conditions that need to be met. This means

that if the applicant fails to meet one or both of the conditions the court has to use its discretion to either grant or dismiss this order .the conditions that the applicant has to meet are that the applicant should be an interested party and inquire into and determine any existing, future or contingent right or obligation. The applicant has failed to show that he has an existing future or contingent right in this matter. This shows that the applicant has no interest in realising this right. The property in question is on close proximity with the applicants other properties. The fact that the applicant failed to even collect rent or claim occupation of his property shows that applicant had no, existing interest in the property. The applicant waited ten years to evict the second respondent's tenant which is clear indication that the applicant did not have an interest in the property.

In the result the court concludes as follows:

Having perused the papers and listening to both counsels the court orders as follows:-

1. Application for declaratory order be and is hereby dismissed
2. No order as to costs

Govere Law Chambers, applicant's legal practitioners
Hove and Associates, second respondent's legal practitioners