

JULIA NDEMERA
and
COSMAS NDEMERA
versus
SIPHELILE MOYO
and
TAFADZWA CHITATE
and
THE DEPUTY SHERIFF N O

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
Harare, 28 October 2009

Opposed Application

P Matsanura, for the applicant
No appearance for the first respondent
S Rugwaro, for the second respondent

CHITAKUNYE J: On 9 April 2008 the two applicants entered into an agreement of sale of stand number 2700 Glen Norah A Harare with the first respondent. They paid the purchase price and had the stand ceded into their names.

On 14 April 2008 the applicants gave notice to occupants of the property to vacate the property so that they could take occupation.

The occupants did not vacate. The applicants have thus approached this court for an order for the eviction of the second respondent and all those claiming occupation through him. The first respondent filed a purported notice of opposition in which she in effect was in support of the eviction of the second respondent and all those claiming occupation through him.

The second respondent opposed the application and contended that the first respondent had no lawful authority or right to sell the property in question.

The basic facts were that the first respondent was married to the late Clement Chitate. No children were born of their marriage. In 1975 or 1982 as this date is disputed, she was chased away by the late Clement Chitate. She thereafter never came back to live as husband and wife with Clement Chitate.

Clement Chitate took on Evernice Rocky as wife and three children were born of this new marriage. The second defendant was one of the children born of this marriage. He was born in December 1985. The second respondent and his siblings have lived at this property since birth.

On 14 May 1992 Clement Chitate died. Jeremiah Bernard Chitate was duly appointed executor dative of the estate late Clement Chitate on 5 August 1993 in DR 272/93. Such letters of Administration in favour of Jeremiah Chitate were filed on record and have not been revoked to this date.

On 7 April 2008 the first respondent who from her own affidavit was not aware that the late Clement had remarried and sired three children, was granted a Certificate of Authority to effect transfer of house number 2700 Glen Norah A to herself as the surviving spouse in terms of s 33 (b) of the Administration of Estates Act [*Cap 6:01*] as amended in DR 209/08.

It was then that on 9 April 2008, barely two days after obtaining the certificate of authority, the first respondent purported to enter into an Agreement of sale with the applicants.

It is that agreement of sale that the applicants seek to enforce against the second respondent and his siblings who are in occupation of house number 2700 Glen Norah A.

The applicants and the first respondents did not refute the fact that Jeremiah Chitate was duly appointed executor dative of the estate late Clement Chitate in 1993 and that such appointment was never revoked. There was no assertion that it was at the very least challenged.

No irregularity with that appointment was alluded to. To this date that appointment is valid and is a prior appointment to the first respondent's purported appointment.

The issue is what is the effect of the first respondent's appointment on the prior appointment.

It is my view that the first respondent's purported appointment as executrix cannot automatically invalidate the earlier appointment. The appointment of Executor Dative is not revoked by a mere subsequent appointment of another executor.

When presented with the first respondent's purported certificate of authority the Master of the High Court in his letter dated 22 July 2008 to the Director of Housing and Community Services Harare wrote *inter alia* that:

“... there is a dispute regarding how Sipelile Moyo obtained the certificate of authority presented to you. The said Sipelile misrepresented information in a bid to defraud

potential beneficiaries in this matter. As such I am revoking the certificate of authority issued to her at the same (*sic*) I am proceeding to report this matter to the police as my office is informed that Sipelile proceeded to sale this property to unknown people.

Furthermore the administration of Sipelile was overtaken by events as the estate was registered way back in 1993 and an executor appointed. ..”

Clearly of the two appointments the first respondent’s was questionable.

The applicants and the first respondent in the face of the above letter did not deny that the first respondent’s certificate of authority was subsequently revoked.

It may also be noted that the first respondent’s papers are not properly signed. The affidavit in opposition has a thumbprint and an ‘x’. There is no identification of whose thumb print and ‘x’ it is. Neither is there the national identity number or some other identification mark peculiar to the first respondent. Equally on the agreement of sale, whilst the two applicants, as purchasers appended their signatures and additionally their national identification numbers are endorsed, for the first respondent, it is only a thumb print and an x without any identification as to whose thumb print it is.

The above anomalies create doubts as to who the first respondent is in actual fact.

Further doubts are created from her purported affidavit wherein she states that she was chased away in 1982 whereas the City Council document she tendered has an inscription to the effect that she was chased away on 19 February 1975.

Having conceded that she was chased away so many years ago, the first respondent could not show that she was still the late Clement Chitate’s wife by producing a marriage certificate or copy thereof. Since it was her contention that their marriage was registered and no divorce was ever granted, it was incumbent upon her to show the subsistence of such a marriage.

The City of Harare note she tendered as proof of marriage, was highly inadequate. The law is quite clear of the need to produce the marriage certificate or copy thereof obtained from the relevant registrar of marriages. The note from the City of Harare only shows she was at sometime in the past married to Clement Chitate, it does not confirm that such marriage subsisted till Clement Chitate’s death in 1992.

It may also be noted that in terms of the law obtaining at the time of Clement Chitate’s death the first respondent would not have been awarded the matrimonial home.

She thus could not in the year 2008 claim to be entitled to something she was not entitled to in terms of the law at the time of Clement Chitate's death. More so as in this case where someone was duly appointed executor dative.

After a careful analysis of the documents filed of record and hearing counsel, I am of the view that the first respondent's purported certificate of authority was void *ab initio* and as such she had no title to pass. See *F Katirawu v D Katirawu & Ors* HH 58-07.

It follows that the purported agreement of sale was a nullity. The applicants' contention that they were innocent purchasers cannot give life to a nullity.

Accordingly therefore the application is hereby dismissed with costs.

Matsanhura & Associates, applicants' legal practitioners

Justice for Children Trust, second respondent's legal practitioners