

WILSON CHARI
versus
COSMOS MOTSI
and
MASTER OF THE HIGH COURT
and
MUNICIPALITY OF CHITUNGWIZA
and
MIRIAM CHINYANGA
and
SARUDZAI MOTSI
and
TENDAI MOTSI
and
CHIPO MOTSI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 February and 20 October 2011

Opposed Application

T. Chakabva, for applicant
T. Tandi, for 4th to 7th respondents

CHITAKUNYE J. On 8 May 2008 applicant filed this application seeking an order compelling the first respondent to cede his rights, title and interest in stand No. 12637 Zengeza 5, Chitungwiza into the applicant's name and also that- fourth, fifth, sixth and seventh respondents be declared not to have any interest in Stand No. 12637 Zengeza 5, Chitungwiza

The basic facts are as follows:- The first respondent is the eldest surviving son of the late Benjamin Motsi. The fourth to seventh respondents are all children of the late Benjamin Motsi. Benjamin Motsi died intestate before the promulgation of Act 6/97. The first respondent was appointed heir to the estate late Benjamin Motsi on 12 June 2007. In that capacity he prepared a first and final Administration account and distribution plan in which he awarded himself the immovable property Stand 12637. In August 2007 he obtained a Certificate of Authority from

the Master of the High Court authorizing him to effect cession of stand no. 12637-12 Zizi Close, Zengeza 5 into his name.

On 14 December 2007 the fourth to seventh respondents obtained a High Court Order restraining the first respondent from disposing or alienating the immovable property pending an investigation by the Master of the High Court as to whether they were dependants of the estate. The order read as follows:-

“It is ordered by consent that:-

1. The matter be and is hereby referred to the Master of the High Court to hold an inquiry within ten (10) days of service of this Order to determine the following issues:-
 - 1.1 Whether the applicants are dependants to the Estate of the late Benjamin Motsi;
 - 1.2 Depending on how paragraph 1.1 above is determined, what alternative arrangements, if any, can be made for the dependants' accommodation?
2. Pending final determination of the above issues by the Master of this Court, the first respondent be and is hereby restrained and interdicted from selling, disposing of or in any manner alienating the property known as Stand 12637 Zengeza 5, Chitungwiza.”

Apparently the Master did not hold the envisaged inquiry within the 10 day period.

The first respondent nevertheless went ahead and sold the property to applicant in February 2008. The agreement of sale is dated 25 February 2008. The applicant's efforts to have cession effected were not successful. When applicant realized that the first respondent was not forthcoming in effecting cession, he approached this court for an order that:-

1. Fourth, fifth, sixth, and seventh respondents be declared not to have any interest in Stand No. 12637 Zengeza 5, Chitungwiza
2. The first respondent be ordered to cede rights, title and interest and effect cession in the property known as Stand 12637 Zengeza 5, Chitungwiza into the applicant's name within seven days of service of this order failing which the Deputy sheriff Harare is authorized to sign all necessary documents to effect cession of the property into applicant's name.
3. Third respondent be ordered to approve the cession of the property into applicant's name.

The first respondent did not oppose the application despite having been served with the application. The fourth to seventh respondents opposed the application.

The fourth to seventh respondents' opposition was premised on the fact that at the time the first respondent sold the property to applicant, there was in place a High Court order interdicting the first respondent from selling, disposing of or in any manner alienating the property in question pending an investigation by the Master on whether the respondents were dependants of the estate late Benjamin Motsi and, depending on how that is determined, what alternative arrangements if any, can be made for the dependant's accommodation. The respondents argued that the sale to applicant was therefore a nullity.

The applicant's position was basically that he was an innocent purchaser for value. At the time of the sale he was not aware of the order in question or even that there was a dispute amongst the Motsi family members.

He also alluded to the fact that the order required the Master to investigate within 10 days of the date of the order which was 7 December 2007 whereas he only bought the property on 25 February 2008 well after the 10 day period.

The applicant further argued that the fourth to seventh respondents had no *locus standi* to oppose the application as they only have a personal right to be accommodated by the first respondent and this is not enforceable against a 3rd party.

The first issue to consider is on the *locus standi* of fourth to seventh respondents and the status of the order they seek to rely on.

The respondents' contention was virtually to the effect that the order deprived the first respondent of the capacity to sell and so the sale was unlawful and a nullity.

I am of the view that the order was a temporal restraint which did not deprive the first respondent of the capacity to deal with the property as his own. The order did not take away the first respondent's ownership of the property in question but was a temporary stay whilst an inquiry was being made as to whether the fourth to seventh respondents were dependants of the

estate if they were, whether alternative accommodation could be found for them. Thus the first respondent still retained ownership of the property in his individual capacity.

My view is buttressed by the fact that the first respondent's appointment as heir was never challenged. As heir and in accordance with the legal position then obtaining, he inherited the immovable property in his individual capacity.

In this regard s 6 A of the Primary Courts Act 6 of 1981, which was the law obtaining before the promulgation of Act 6/97, provided that:-

“The heir at customary law of any deceased person to whom customary law was applicable shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased person and not devised by Will.”

In *Seva and Others v Dzuda* 1992 (2) ZLR 34 (S) at p 36 KORSAH JA interpreted this provision in these words:-

“This provision in my view is self evident and beyond question and requires no interpretation and explanation. It states in unambiguous language that where there is intestacy, the heir at African law of any deceased African succeeds to any immovable property of the deceased in his individual capacity. The heir does not hold such property in trust for any member or members of the family of the deceased. He succeeds to it as if the property was his own and is entitled to exercise all the rights of an absolute owner in respect thereof.”

The case of *Seva and Others v Dzuda* (*supra*) is almost on all fours with the present case. In that case the deceased ‘V’ was the registered owner of a house in Mbare. He died intestate on 14 April 1987. First and second appellants were married to the deceased according to customary law. The third, fourth, and fifth appellants were all children of the deceased.

All the appellants were resident at the property during the lifetime of ‘V’ and continued their occupation of the property up to the time of the appeal. Peter Chakoloma, as the eldest son was heir. He thereafter sold the property to the respondent and the respondent took delivery thereof by registration of cession of rights to the ownership, registered at the City of Harare on 2

September 1987. When respondent tried to take occupation the appellants, who as intimated earlier were living at the property, refused to vacate the property. The respondent approached court for an order of ejection of the appellants and all persons claiming occupation of the property through them together with costs of suit.

The sole question for determination was whether or not Peter Chakoloma had a legal right to dispose of the property which he had inherited. If he had, then the respondent has a legal right of ownership and is entitled to his relief. After deliberating on the law then obtaining at pages 36G-H and 37A-C KORSAN JA came to the conclusion that:-

“The legal position then is that the appellants inherited no legal interest in the property which they could protect in law against third parties. Peter Chakoloma may owe a duty to support his father’s wives and half siblings, and that obligation could be enforced in law if Peter Chakoloma had himself sought to evict the appellants with a view of occupying the property himself without providing alternative shelter for them.

The respondent, who is a third party to the obligations between Peter Chakoloma and the appellants, owes no duty of support to the appellants. He acquired the property which Peter Chakoloma had succeeded to in his individual capacity and was thus entitled to dispose of as he wished. As the owner of the property, the respondent is entitled to evict the appellants there from. The only rights that the appellants have, if any, are against Peter Chakoloma. As against the respondent they had no legal rights which are enforceable by law.”

At p 35 of the *Seva* case (*supra*) KORSAN JA said of the parties’ rights:-

“...as the eldest son had inherited this house in his personal capacity, he had the right to dispose of it as he wished. He was entitled to sell it to the buyer, as he had done. The wife and remaining children had no enforceable rights against the buyer. The only rights they had, if any, were against the eldest son. They therefore had no defence to the action for eviction brought by the buyer.”

In *casu* the Master of the High Court provided at least three reports all to the effect that as the first respondent had inherited the property in his individual capacity he had the right to sell or deal with the property in the manner he deemed fit. He went on to point out that his

investigations revealed that fourth to seventh respondents were in fact not dependants of the Estate late Benjamin Motsi.

In his supplementary report of 17 December 2008 the Master reiterated his point that the first respondent was the only beneficiary. In paragraph 3 of the report he went on to state that:-

“The court should also take note that this estate was authorized for distribution and awarded to the heir who inherited the house in question and that decision remains unchallenged in the courts of law hence heir remains the legitimate beneficiary. Furthermore, as at date of death, I am made to understand that these children were not staying at this house save for Tendai who has since relocated and the now late Lovemore Motsi.”

In his last report of 30 April 2010, the Master further reiterated his point that first respondent as heir is the only beneficiary as deceased died before the promulgation of Act 6/97.

The Master also alluded to the fact that other family members were of the view that the house must remain a family house. That in my view exposed the respondents' lack of understanding of the law then obtaining. It is an aspect they must be made to understand that the heir inherited the immovable property in his individual capacity and not on behalf of or in trust for the family.

I am therefore of the view that the fourth to seventh respondents have no legal right to challenge the real rights applicant acquired from the owner of the immovable property by virtue of the Agreement of sale. Their claim, if any, is against the first respondent.

On the issue of the validity of the agreement of sale, I am of the view that the agreement of sale is valid. The High Court Order fourth to seventh respondents sought to rely on did not deprive first respondent of his rights as owner or as heir. The import of that Order was to enable the Master to ascertain if fourth to seventh respondents were dependants or not for the purpose of first respondent providing them with alternative accommodation. Since the Master's findings were to the effect that these respondents were not dependants of the estate late Benjamin Motsi, it meant that first respondent had no obligation to provide them with alternative accommodation.

The Master's findings also confirm that first respondent was perfectly entitled to deal with his property as he pleased. The Agreement of sale can thus not be annulled at the instance of fourth to seventh respondents. They have no *locus standi* to interfere with the agreement of sale.

As regards the first respondent he has an obligation to fulfill his side of the Agreement of Sale by ensuring that cession is effected in favor of applicant.

Accordingly it is hereby ordered that:-

1. The fourth, fifth, sixth and seventh respondents be and are hereby declared to have no enforceable rights and interest in Stand No. 12637 Zengeza 5, Chitungwiza.
2. The first respondent is hereby ordered to cede rights, title and interest and to effect cession in the property known as Stand No. 12637 Zengeza 5, Chitungwiza into the applicant's name within seven (7) days of date of service of this order failing which the Deputy Sheriff Harare is hereby authorized to sign all necessary documents to effect cession of the property into the applicant's name.
3. The third respondent is hereby ordered to approve the cession of the property into applicant's name upon the filing of all necessary documents for cession.
4. Fourth to seventh respondents shall jointly and severally bear the costs of suit.

Kwenda and Associates, applicant's legal practitioners
Kantor and Immerman, 4th-7th respondents' legal practitioners