

RAZARO MUTAPATI  
and  
WILLIAM CHIRO

HIGH COURT OF ZIMBABWE  
KARWI J  
HARARE, 20 July 2010 and 14 October 2011

**Civil Trial**

*A. Muchandiona*, for plaintiff  
*Kufaruwenga*, for defendant

KARWI J: Plaintiff issued summons out of this court seeking an order

1. Directing the defendant to take all necessary steps to cede the rights in House No. 170 Mkoba 13 , Gweru to the plaintiff,
2. That if the defendant failed within 14 days of the court's order to take the necessary steps, the deputy sheriff Gweru be authorized to take such steps on defendant s behalf, and
3. Defendant to pay cost on the legal practitioner and client scale.

The facts of this matter are that at all material times until September 1986, the plaintiff was the registered holder of rights in House No. 170 Mkoba 13, Gweru [the house] having bought it from the City of Gweru in terms of a Home ownership Scheme agreement in 1983. Plaintiff had earlier on in 1978 been allocated the house by the then City of Gwelo on a tenancy basis. The defendant, who was a close relative of plaintiff joined the plaintiff's family and stayed with them. Plaintiff took the responsibility of looking after defendant since childhood because he was an orphan. Sometime in 1986, defendant is alleged by plaintiff to have fraudulently divested plaintiff of the ownership of the house. Plaintiff contends that he never intended to divest himself of the ownership of the house.

On the other hand defendant contended that he acquired the house in a lawful manner. He said that he accepted an offer from plaintiff for the house since the two were related.

He said plaintiff voluntarily ceded all his rights, interest and title in the house to him in 1986. Defendant contended that before he accepted the offer from plaintiff he had dealt with the house as his for a long time. He had also made improvements to the house in 2001, by extending it to eight rooms. Plaintiff never took any objections or any action during the period he was extending the house. It was also defendant's story during the trial that plaintiff had donated the house to him for the big job he had done in looking after his children during his absence from the house.

Plaintiff told the court that he was 77 years of age. The court observed that the plaintiff could not see properly. He could not read exhibits shown to him in court. He said that defendant was his late aunt's child. The man who married plaintiff's aunt objected to staying with defendant. As a result plaintiff and his wife in a way adopted defendant and looked after him from childhood. Plaintiff started looking after defendant from 1965. Defendant stayed with plaintiff's family in the rural areas until 1975 when he moved to Ascot Gweru with his uncle, one Matongo. Matongo is a brother to plaintiff's wife and plaintiff's wife is defendant's mother's young sister. Plaintiff who was staying at the house retired from employment in 1975 or thereabout. Plaintiff went to his rural home in Chivi to farm soon after his retirement. Plaintiff left Matongo, defendant and his children at the house. Plaintiff's children were going to school in Gweru from the house. Matongo assisted the defendant in securing a job at ZimAlloys, Gweru where the plaintiff had retired from. Matongo stayed at the house until about 1982 or 1983 and defendant remained at the house together with the plaintiff's children.

Plaintiff told the court that he had been allocated the house by the then City of Gwelo way back in 1978. He joined the Gweru City Council's Home Ownership Scheme in 1983. The house in question was the subject of that scheme. He signed certain papers at Council indicating that he had finished paying for the house under the previous rent to buy scheme. What remained was for him to sign the cession forms at the City Council.

He testified that sometime in 1986, Defendant visited him at his home in Chivi and complained that the City Council wanted to remove him from the house because his name had not been included amongst plaintiff's children, as was required by the Council bye laws. Defendant requested plaintiff to come with him to the City Council and register him

as one of his children so that he may not be removed from the house. Defendant had also given Plaintiff to understand that if he was not registered the house would be repossessed. In 1986 the witness proceeded to Gweru at Mkoba Administration offices and was made to sign a certain document which was not read to him. He signed the document after being told that the purpose of the document was to include defendant as an occupier not as owner of the house and would prevent the repossession of the house. He signed in the belief that he was securing defendant's stay at the house. He was shocked to learn later that the document he had signed was in fact a cession document which had the effect of divesting him of the ownership of the house. The cession document had the effect of transferring the house to defendant. He testified that it was never his intention to transfer his rights in the property to defendant. He said he was duped into signing the document by defendant and his friends at the Council offices. He added that when he arrived at the said offices he got the impression that the officers were already aware of defendant's case and were anticipating plaintiff's arrival. The papers he signed were ready for him. It appeared as if the whole thing had been preplanned by defendant and his friends at Council offices. It did not dawn on him at the time that he was being cheated. It was only in 2003, after it had been explained to him by the City Council that the defendant's claims were a fraudulent misrepresentation of Council's position.

Plaintiff further testified that he confronted defendant about the matter soon after discovering the fraud and defendant claimed that plaintiff had surrendered ownership of the house to him. He was surprised to learn that defendant was now making those claims. He also denied ever surrendering ownership of the house to defendant. He also denied ever selling the house to him for \$50.

In answer to questions in cross examination, the plaintiff explained that he went to his rural home after retiring from ZimAlloys and then proceeded to work in Zvishavane. He left about six of his children staying at the house together with defendant. He would send money to his children for their upkeep and school fees. He got money to do so from his pension as well as from the proceeds of the sale of some of his cattle. He never requested defendant to sustain his children neither did he ask him to pay their school fees. More specifically, there were no arrear rates or rents over the house for which the plaintiff

could have asked the defendant to pay. He never asked defendant to pay for the home ownership scheme on his behalf neither did defendant pay for it. He also never asked for \$50 from defendant as payment for the house. He further said that his eyesight was failing him. At the time he signed the cession document he did not ask any questions as he completely trusted defendant. He said defendant had extended the house to eight rooms. He told the court that he wanted the house retransferred back to him.

Esnath Mutapati also gave evidence for plaintiff. She is plaintiff's wife and an aunt to defendant. She testified that she started looking after defendant when he was a little boy. This was before the liberation war. She stayed with him in the rural area in Chivi. She also stayed with him in the house in Gweru for sometime before plaintiff retired. She then moved back to the rural areas with the plaintiff and left defendant at the house together with some of her children and her brother, one Matongo. She would visit them and her children from time to time bringing money for the children's school fees and for their upkeep. She got the money from her husband's pension and also from his salary as he was then employed as a driver in Zvishavane. On occasions she would sell some beasts in order to pay for children's school fees. There was never an occasion when defendant was called upon to pay school fees for children on her behalf nor any rates nor rents for the house.

Esnath added that sometime in 1986 the defendant visited them in Chivi and reported that the City Council was giving him problems at the house as it wanted him to be registered as one of the occupants. As a result, plaintiff visited Gweru in the company of defendant in order to sort out the matter. She later got a report from the plaintiff to the effect that the problem had been sorted out. She was later surprised to learn that defendant was now claiming ownership of the house.

Under cross examination, the witness said that she visited the house on several occasions during the time defendant was staying at the house and the claim to ownership by defendant had never been raised. At one stage she saw that defendant was developing the house and she reported this to her husband which led plaintiff to question defendant about it. She stressed that there was never any arrangement to either sell the house or

donate it to defendant. There was also no way plaintiff could have done the same without her knowledge.

Albert Matongo also gave evidence .He is a brother to plaintiff's wife, uncle to defendant and brother in law to plaintiff. He said that sometime in 1978 he was requested by plaintiff to move into his house at number 170 Mkoba 13 Gweru so that he could look after plaintiff s children as plaintiff had retired from his job at ZimAlloys and had gone to live in the rural arrears together with his wife. He was not working at the time he moved into the house but later got employed that same year at Zimbabwe Railways. Defendant joined him at the house that same year and they stayed together with plaintiff's children. Defendant secured employment at ZimAlloys with the assistance of the witness in 1981. The witness stayed at the house for some years until he got transferred to work in Hwange in 1982. He said that during his stay at the house the plaintiff used to send money for his children s upkeep and for their school fees. Plaintiff's wife used to come with the money on several occasions as well. Plaintiff also kept all payments of rents and rates at Council up to date by way of regular payments. He added that there no arrears on payments to the City Council. He stressed that defendant never paid for the house, school fees nor for food during the whole period that he was staying at the house. There was never any occasion when plaintiff failed to meet any of his obligations. More specifically, plaintiff did not enter into any arrangement with defendant in as far as the house was concerned. In any case defendant was not employed during the time up to 1982. He had no capacity to make any payments. He said there was no way plaintiff would have entered into any arrangement with defendant concerning the house without his knowledge as he was very close to both plaintiff and defendant s families.

Lydia Mupfumi who is plaintiff's daughter also gave evidence. She said that she and her sisters stayed and went to school from the house. When plaintiff and her mother went to stay in the rural arrears after her father had retired, she remained at the house together with her other four sisters. They were soon joined at the house by her uncle, Mr. Matongo and the defendant, who is her cousin. Plaintiff was paying for school fees for her and her siblings. He was also sending money for their upkeep. Her father was then working in Zvishavane. Her mother also used to visit them quite often bringing in school fees and

money for their upkeep. She said defendant never paid for their school fees neither did he contribute towards their welfare. She was not aware of any arrangement between plaintiff and defendant concerning the house. She said if plaintiff had sold or donated the house to defendant she would have known about it as she was the eldest child in the family. Under cross examination, the witness said that there were never any arrears in payments on the house and that at all material times the payments for the house were kept up to date. There would have been no cause for defendant to chip in with any payments on behalf of plaintiff.

Shangwa Mavesera, the Director of Housing for the City of Gweru, gave evidence. He told the court that he was aware of the dispute over the house between the parties. He had the file pertaining to the house which was kept at the Council offices. The file contained the whole history of the house. He testified that plaintiff was allocated the house in question in 1978 on a rental basis. During those colonial days one would be issued with a tenancy record immediately after being allocated a house as was the case in this matter. It was a requirement in terms of the existing bye laws that the names of the tenant and his dependants were to be registered on the tenancy register and all such persons would be issued with passes for them to stay at any of the houses. In that regard there were passes for Mr. Matongo, Clara Ngwenya and for defendant in the file. Unregistered people were not permitted to stay in any of the said houses. After the allocation, the house remained Council property.

Plaintiff signed for the home ownership scheme which had been introduced by Council in September 1983. This meant that plaintiff was allowed to purchase the house in instalments from then on. The witness said that sometime in 1983, defendant and his wife requested to have the house transferred into their names. Defendant intimated to Council that plaintiff had left Gweru and was now leaving elsewhere. Witness said defendant further indicated to Council that since he was related to plaintiff, it was in order if the house was transferred to him. Council explained to defendant that there was no way that could be done without the consent of plaintiff and also because defendant and his wife were not on the Council's housing waiting list. The witness said it looked like the efforts to have the house transferred to defendant were mainly being pushed and

driven by defendant's wife for she approached Council on more than two occasions and was interviewed by Council officials. The witness testified that three years later, defendant and plaintiff approached Council and both signed a cession form in terms of which the house was transferred from plaintiff to defendant. The process was conducted at the Suprintendant's offices in Mkoba. The signing of the cession form was witnessed by a Council employee by the name of Mherekumombe who had since left Council employment.

Mr. Mavesera also testified that there were anomalies associated with the signing of the cession. Council employees were supposed to fix the Council stamp on the cession document, which they did not do. Furthermore, the same officials were supposed to check the identity of the registered owner of the house before the signing, but in this case they did not. He said that plaintiff was known as Lazarus Goromondo in the Council records, but in this case he was identified as Lazarus Mutapati in the cession document. The witness also stressed that the home ownership scheme was introduced in 1983. If there were arrears on payments for rent, the house would not have gone on the home ownership scheme. It was a condition that one had to clear all arrears before one was invited to join the scheme. The witness said that according to the records at Council there were no arrears outstanding at all at anytime.

Defendant gave evidence. It was not really clear from his evidence what his defence was. He was not consistent. His stories kept on changing as he gave evidence. He started by telling the court that he initially went to stay at the house following an invitation to do so by the plaintiff's wife. Before this he had been staying with his uncle, Mr. Matongo at Ascot, in Gweru. He moved into the house together with Mr. Matongo. This followed the retirement of plaintiff and his subsequent movement from Gweru to the rural arrears. This was in 1979. He said they stayed with plaintiff's nine children. Defendant was neither married nor working at the time he moved into plaintiff's house. Mr. Matongo secured a job for him at ZimAlloys in 1981. He also got married in the same year. He testified that he used to bring food for plaintiff's children and paid for his children's school fees. Plaintiff never used to look after his children and also did not pay for their school fees. After making the payments on behalf of plaintiff for three years Council wrote a letter

inviting plaintiff to come and sign home ownership papers. In response, defendant and his wife visited Council and advised them that he was the one left in charge of the house by plaintiff who had resettled in the rural arrears. Council insisted on plaintiff's signature not defendants. Defendant then advised plaintiff. Plaintiff sent his wife to Gweru and the home ownership scheme was then extended to plaintiff. After this, some \$1500 was required to be paid over a two year period together with monthly rentals. Defendant said he paid that amount and also continued paying the rentals on a monthly basis. Defendant said that plaintiff had indicated to him that he had lost two houses in Gweru before due to his failure to pay for them to the City Council. He therefore indicated that he was not interested in the house. He urged defendant to pay in order for his children to have shelter from where they would go to school and for the sake of defendant as well. As a result, defendant said he then paid the \$1500 to Council over the period of three years and three months. Subsequently, plaintiff visited Gweru and the two went to the Council offices at Mkoba and the house was transferred from plaintiff to him after plaintiff had signed cession papers. Defendant also told the court that he paid the cession fee of \$50 to the Municipality. Defendant said plaintiff came to Gweru on his own to sign the cession. He never went to his rural home to call him to Gweru.

Defendant gave another explanation on how the transfer took place. He said that plaintiff approached him and requested him to assist him in paying school fees for his children and pay rent for the house since he was not working. Plaintiff indicated that his relatives did not want to assist him. He promised to reimburse him. Following the arrangement he paid school fees for plaintiff's children and also paid rentals for the house and bought food for plaintiff's children. He paid bus fare for one of the children who used to commute daily to school. He said that he paid fees for the children for a period of 15 years and paid rentals for a period of 30 years. Defendant said that despite the promise for reimbursement by plaintiff, he was never compensated. Because plaintiff failed to meet his promise to reimburse, defendant said he strongly opposed the claim by plaintiff to have the house transferred back to him. He was of the view that if the plaintiff wanted back his house, he should first reimburse him for the various payments he made on his behalf. He said he had furnished his lawyer with a list of how much he wanted to be

reimbursed. Because of expiration of time, he wanted to compile another list of the amount of money he wanted the plaintiff to pay him.

Defendant said he extended the house after it had been transferred to him. He built a further four rooms consisting of two more bedrooms, a kitchen and a sitting room. He did this after borrowing \$100 from Old Mutual. He said he was encouraged to extend the house by plaintiff. This was so because he made the developments openly and plaintiff did not raise any objection.

During cross examination, defendant suggested that the suit by the plaintiff was motivated by greed and jealous. He said this was because the whole dispute started when he started to extend the house. He said the relationship got worse after he had managed to sent his son to Solusi University. His son was now working as a manager at Agri Foods [Pvt] Limited. Defendant further suggested that he was being influenced by his eldest daughter, Linda, whom he had chased away from the house because she used to bring boys to the house during the time they were staying together.

Defendant's wife, Colleta Chiro also gave evidence in support of her husband's case. She said she started staying at the house in 1981 soon after getting married to defendant. She found defendant staying with plaintiff's children. She said defendant was looking after the children. She said plaintiff would on occasions bring in food for them but defendant was responsible for the children's welfare most of the time. She added that defendant also used to chip in with the children s fees. Defendant was the one who paid the rent for the house all the time. She said she was made to understand that plaintiff had requested defendant to pay rentals for the house to save it from repossession by Council. She also testified that she had visited Council offices on several occasions in 1983 in order to regularize her stay together with that of her husband at the house. She explained that during that time people in the houses used to be registered on blue cards. Anyone found by Council not on the blue card would not be allowed to stay in the house. She denied that she had visited Council offices during that time for purposes of wanting to usurp plaintiff of his ownership of the house. She denied this even after she was shown a record of interviews she had had with Council officials which reflected her intention to be registered as the new owner of the house. In fact the said Council records show clearly

that she had embarked on a scheme to deprive plaintiff of his house. In the said records she was advising Council that plaintiff had left Gweru many years ago and was now staying in Zvishavane, and that therefore the house should be transferred to her and her husband since they were related to plaintiff. Colleta also added that at one time plaintiff's wife visited them at the house and discouraged her and her husband from taking up an offer by Council of a house elsewhere saying the house in dispute was theirs. She said that the house was given to defendant as a donation following what defendant had done to assist plaintiff over many years. She said it was plaintiff's token of appreciation for the assistance her husband had offered to him.

At the pre trial conference of this matter, parties agreed to refer the following issues for trial;

1. Whether or not plaintiff's claim was prescribed.
2. Whether the defendant fraudulently acquired the rights in House no. 170 Mkoba 13, Gweru.
3. Whether the defendant should re-transfer the rights in House no. 170 Mkoba 13, Gweru to plaintiff
4. Whether the plaintiff sold house no. 170 Mkoba 13 Gweru to defendant
5. If plaintiff succeeds in his claim, whether defendant should pay costs of suit on a higher scale.

The issue pertaining to prescription seems to have been abandoned as no party pursued it during the trial. The crux of this matter is whether or not the defendant fraudulently acquired rights in the house in question. It seems to me that this was the case. It is apparent that the plaintiff neither sold nor donated the house to defendant. There was no clear arrangement which defendant established to the court under which he could have acquired the house. Plaintiff, who is of advanced age gave his evidence very well. He narrated a story of betrayal by defendant who he brought up as his adopted son. He started looking after him when he was a little boy after his parents had divorced. Plaintiff narrated a story defendant who later turned against him and took away his house under the disguise that he was registering defendant as an occupier of his house and not as owner. Plaintiff described how shocked he was to discover that defendant was now laying a claim to the ownership of his house. Plaintiff's evidence was consistent and had

a ring of truth. He was not shaken at all in cross examination. His evidence was closely corroborated by his wife, daughter and his brother in law, Mr. Matongo. Clearly, plaintiff had no motive to lie. Suggestions that he was being driven by jealous and greed are far fetched and unsupported by any piece of evidence. Equally was the suggestion that he was being influenced by his eldest daughter, Linda. She is now a married woman. To suggest that she still carried a vendetta against defendant for having been reprimanded for some childish prank many years after marriage does not make sense. I have no hesitating in accepting the evidence of plaintiff and all the witnesses who supported his story. I accept that defendant hatched a plan to make plaintiff sign a cession for the transfer of the house to himself under a fraudulent misrepresentation that the plaintiff was adding defendant as one of the occupiers in his house. The document was not read to him by Council officials before he signed it. It appeared that the officials were acting in cohorts with defendant as everything had been put in place waiting for the plaintiff to sign. Plaintiff was indeed awaited and told the court that when he arrived at the Council offices, he was told that they had been waiting for him. The cession documents signed by plaintiff were attended with irregularities. There was no Council date stamp on the papers. Plaintiff who was known as Mr. Razaro Goromondo in the Council records was let to sign after being identified as Razaro Mutapati. Furthermore, the national identity numbers of the parties were not affixed to the documents. The Council did not show that there were arrear payments due at any time contrary to what defendant said in court. The Director of Housing at Gweru, Mr. Mavesera testified that those were serious irregularities which put into question the whole transaction.

Defendant who resisted plaintiff's claim did so based on various contrasting stories. Defendant was a very poor witness who failed to narrate a consistent and straight story. At the end of the day one could not tell exactly what defendant was relying on as his defence. Firstly, in his pleadings, defendant said that the house was sold to him by plaintiff for a sum of \$50.00. In his further particulars which were filed of record on 9 March 2005 defendant said

“Agreement was oral. Defendant would pay a sum of \$50.00 and would allow plaintiff's children who were still going to school to reside in the house.”

It should be noted that earlier on defendant had said in his plea that plaintiff had sold the house to him. During the trial defendant abandoned this line of defence and said that the house was donated to him as a token of appreciation for what he had done on plaintiff's behalf, that is paying fees for his children paying rent for the house and generally looking after his children while he was away. There was clear evidence that plaintiff continued to meet his obligations in the payment of fees, rent and for the upkeep of his children. He could still do this despite the fact that he had retired. He testified that soon after retiring he secured a job at Zvishavane as a driver. Besides he was in receipt of a pension and would also occasionally sell his beasts in order to meet his obligations. His wife corroborated this when she said she regularly visited the house bringing food supplies and money for both fees and rent. It follows therefore that there would have been no need for defendant to assist in any way. Mr. Matongo actually testified that plaintiff was in a better off position financially than defendant. Defendant's wife did not help the situation. Her evidence did not read well. Her evidence was riddled with inconsistencies. She denied what was not deniable. She denied that she was the one driving efforts to dupe plaintiff of his house from way back in 1983 when in fact Council records clearly show that that was so. She started on this drive to deprive plaintiff of his property barely three years after getting married to defendant. Council records did not show that plaintiff did not at all in arrears in as far as his obligations to Council were concerned. Furthermore most of the crucial factual details were not known to her since she was not present.

This case is best understood if it is properly placed in its proper context. It is a fact that the case involves very close relatives. The parties and all the witnesses are closely related. Plaintiff's wife is an aunt to defendant. Mr. Matongo is his uncle and brother to plaintiff's wife. It is inconceivable that plaintiff and his family would turn against defendant whom they looked after for a very long time as their own son. Matongo would have no reason to abandon defendant who is his nephew. There was no plausible reason at all proffered for plaintiff to raise allegations of fraud against the defendant. This shows that defendant and his wife were not telling the court the truth. All the evidence before the court clearly suggest that defendant fraudulently deprived plaintiff of his house. I therefore find that indeed defendant fraudulently acquired the rights in the house under

dispute. It follows therefore that defendant should retransfer the same house back to its rightful owner, the plaintiff. There is no evidence of any sale or donation of the house by plaintiff to defendant. Defendant failed to establish that the house was either sold or donated to him.

There is evidence before this court showing that defendant made improvements to the house. That is not disputed. What may be disputed is the extent of the improvements. Evidence would seem to indicate that defendant extended the house from a four roomed house to something like ten rooms. Some of the witnesses talked of eight rooms. It is also noted that as soon as the City of Gweru was notified of the dispute by plaintiff, it ordered that defendant would not deal in any matter whatsoever with the house. The City sort of placed a caveat on the house. It is my considered view that purely because this case involves very close relatives and in order to promote and avoid further polarization of relations, the following orders are found appropriate. It is ordered that the defendant retransfers the house to the plaintiff on condition that plaintiff pays to defendant for all the improvements defendant made to the house. The value of such improvements shall be assessed by an established estate agent appointed solely for that purpose by the Registrar of this court. The costs of such a valuation shall be borne by defendant by way of a deduction from the value of the compensation due to him from plaintiff. Further in the spirit of burying the dispute between the parties, the defendant shall pay costs of suit on the ordinary scale.

On the whole, it is ordered as follows;

1. Defendant shall upon payment to him by plaintiff, the value of improvements he effected on the house, take all necessary steps to cede the right, title and interest in house number 170 Mkoba 13 Gweru to the plaintiff. The value of such improvements shall be assessed by an established Estate Agent, appointed by the Registrar of this court. The costs of such assessment shall be borne by defendant by way of a deduction from the compensation due to him from plaintiff after assessment.
2. In the event that the defendant fails to comply with para 1 above within 14 days of the service of this order upon him, then the Deputy Sheriff for Gweru shall be empowered to take such steps on behalf of the defendant.
3. Defendant shall pay costs of suit.

*Danziger & Partners*, plaintiff's legal practitioners  
*Chitere Chidawanyika & Partners*, defendant's legal practitioners