FOLY CORNISHE (PRIVATE) LIMITED
and
JOHN HUMPREYS
versus
SHINGIRAYI TAPOMWA N.O
and
ESTATE LATE MISHECK TAPOMWA
and
T E MUDAMBANUKI
and
MANTSEBO AND COMPANY (represented by
Calvin Tichaona Mantsebo,Tapiwa Givemore
Kausuo, Steward Nyamushaya and Admire Rubaya
practicing in partnership as Mantsebo and Company)
and
ADMIRE RUBAYA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 21 October 2010 and 16 November 2011

Advocate *Fitches*, for the applicants
T Dzvetero, for the 1st and 2nd respondents

MAKONI J: The applicants approached this court seeking an order that Deed of Transfer No. 8361/2008 pertaining to stand number 2558 Glen Lorne Township measuring 18, 2024 hectares (the property) registered in the name of Estate Late Michael Tapomwa be cancelled in terms of s 8 of the Deeds Registry Act [*Cap 20*:*05*] (The Act). They also seek that Deed of Transfer No. 6050/2006 dated 23 August 2006, pertaining to the property, registered in the name of the first applicant be revived in terms of s 8 (2)(a) of the Act. They also seek costs against the first, second, third, fourth and fifth respondents on a legal practitioner-client scale jointly and severally the one paying the other being absolved.

I will try as much as is possible to give a brief background of the matter considering that the founding affidavit is 39 pages long, the opposing affidavit 10 pages and the parties do not seem to agree on the facts.

Sometime in 2008, the second respondent instituted proceedings in the magistrate court against the applicants. He sought and obtained an order in default, to the effect that the

property be deemed to be part of the Estate of the late Misheck Taponwa and that the applicants sign the necessary papers to effect transfer. The transfer was duly effected by the Registrar of Deeds pursuant to the default order. When the applicants became aware of this fact through rumours, they then approached this court seeking the relief as stated in para 1 of the judgment.

The parties differ materially as to the basis of the first and second respondents seeking transfer of the property. The respondents aver that the property was pledged to the late Taponwa by the applicants. The applicants dispute this fact.

The first and second respondents raised two points in *limine*. The first one is that this court has no jurisdiction to grant the order sought whose effect is to reverse the order granted in default by the magistrates' court. The second point is that there are material disputes of fact which cannot be resolved on the papers.

I will deal with the points in *seriatum*.

Jurisdiction

It was submitted on behalf of the first and second respondents that the transfer was done on the basis of a court order which is still extant. Section 8 of the Act only applies where transfer was done in error.

It was further submitted that there are material disputes of fact which cannot be resolved on the papers. The applicants adopted the wrong procedure.

The material disputes of fact are:

(i) Whether or not the property in question was allocated to the late Misheck Tapomwa as compensation for unpaid salaries;

(ii) Whether or not the late Tapomwa was an independent contractor or employee of the second respondent;

(iii) Whether or not the property in question was part of the Estate of the late Tapomwa;

(iv) Whether or not the applicants were served; and

(v) Whether or not the first respondent sold the property before the winding up of the Estate late Tapomwa.

Mr *Fitches* for the applicants submitted that the magistrates' court order obtaining title was a nullity. Everything built upon it is a nullity. The magistrates' court had no jurisdiction to deal with the matter and the final order was granted *ex parte*.

He further submitted that there is no dispute of fact as it is common cause that the first applicant was the first registered title holder of the stand. It is incorrect to allege a dispute of fact pertaining to "whether or not the property in question was part and parcel of the second respondent's Estate" as the deceased never took title during his lifetime. The alleged promise/pledge/allocation would be a personal right requiring registration in order for title to pass.

It is not clear from the papers why Mr *Fitches* made the submission that the final order was granted *ex parte*. A perusal of the papers from the magistrate court show that the application was issued on notice to the other party. The respondents aver that service was effected on the other party. They did not file any papers in opposition and as a result a default judgment was granted. It is this default judgment that resulted in the transfer that the applicants seek to set aside in terms of s 8 of the Act. The question one has to ask is whether this court can set aside the transfer in terms of s 8 of the Act when there is a court order that is still extant.

In my view, s 8 of the Act was put in place to regulate the administrative functions and powers of the Registrar. It was to guard against situations where the registrar, sitting in his office, would make a decision to cancel a deed of registration for whatever reason. In terms of that section, the registrar can only cancel a deed in terms of a court order. The applicant to the court order must have given the court good and sufficient cause to do so.

In my view, the situations envisaged by the legislature were such as the circumstances in *Ellen Ruparanganda* v *Demetrius John Petrakis & Ors* SC 53/05. The transfer in that matter was cancelled on the basis that the respondents never signed any documents authorising the sale and the transfer of their property to Rukayi who passed it on to the appellant. Other situations would be where the transfer was done in error or there are typographical errors in relation to the stand number. The legislature could not have contemplated s 8 of the Act to be used in a case where transfer is done pursuant to a court order.

I agree with the opinion expressed by PITTMAN J in *Nyaguwa* v *Gwinyayi* 1981 ZLR 25 at p 27 A-C. I will quote in *extensio* his opinion:

> "I was of the opinion that, in this country, each court is a creature of statute, and its powers are created and defined by statute. The function of every civil court is to recognise what it believes to be the rights of the parties before it.

> Once the civil court has given such recognition, that recognition must be accepted by each of the other courts, whatever its relative position in the hierarchy of courts maybe, unless authority to overrule such recognition has been conformed upon it by statute. If one court were to claim that it has some interest power to overrule another court, instead of a power specifically created by statute, in effect it would be claiming power to nullify the body of statute law which specifically relates to the establishment and powers of each of the civil courts in the country. As no power to overrule the decisions of the magistrates' courts has been vested in the General Division of the High Court, I considered that this court could not grant the order sought by the petitioner."

The High Court Act [*Cap 7*:*06*] has provided for ways in which this court can interfere with decisions of the inferior court. It can be way of review as provided in s 27 of or by way of appeal as provided for in s 30 of the High Court Act [*Cap 7*:*06*].

The applicants have not adopted any of the above procedures. In effect they are asking this court to do what PITTMAN J in *Nyanguwa* (*supra*) said we cannot do which is to claim to have power to nullify the body of statute law which specifically relates to the establishment and powers of each of the civil courts.

Mr *Fitches* argued that the procedure adopted by the applicants is correct based on superior court precedent and is the only way to cancel a deed. The section exist for just such a situation. He referred to *Matanhire* v *BP Shell Marketing Services* (*Pvt*) *Ltd* 2005 (1) ZLR 140 (S) at 147 G – H where the Supreme Court pronounced that the first ground of appeal could not succeed as it was predicated on a court order that was patently incompetent and irregular. The order being referred to is that of MAVANGIRA J whereby she issued directions in a matter that was pending before the Labour Court. This was held to be incompetent.

My view is that the Supreme Court's pronouncement, did not have the effect of setting aside the judgment of MAVANGIRA J or declare it a nullity as there was no appeal against that judgment before it.

In view of the above finding, it will not be necessary to deal with the second point in *limine* as it touches on the merits.

Accordingly, I will uphold the first point in *limine* raised by the first and second respondents. The application is not properly before me.

I will therefore make the following order:

1) The application is dismissed.
2) The applicants to pay the first and second respondents' costs.

Linda Chipato, 1st and 2nd applicants' legal practitioners
Mantsebo & Company, 1st and 2nd respondents' legal practitioners
Manase &Manase, 3rd, 4th and 5th respondents' legal practitioners