

FATIMA GWANDE
versus
MA- LORD MAKAYA
and
TUMAI MAKAYA
and
MASTER OF THE HIGH COURT
and
CENTRAL AFRICA BUILDING SOCIETY
and
REGISTRAR OF DEEDS

HIGH COURT, ZIMBAMBWE
KARWI J
HARARE, 18 March 2011 and 17 November 2011

Mr *Mandikumba*, for the plaintiff
G Chikukutu, for the 1st and 2nd defendants

KARWI J: The facts of this matter are generally common cause except for some material issues which the parties contest. What is common cause is that on 28 July 1983, the fifth defendant registered two ladies, namely, Bernadette Stanislaus Nyuke (“Bernadette”) and Ma–Lord Thotoane Makaya (Ma–Lord) as joint owners of Stand 349 Greencroft Township 8 of Subdivision A of Subdivision A and B of Mabelreghn. (“the property”). The fifth defendant simultaneously registered a mortgage bond in favour of the fourth defendant over the same property. The two new owners had offered the fourth defendant the property as security for a debt of \$19 000-00 which they owed that institution jointly, severally and in *solidium*. Nobody knows how the two ladies purchased the property and for how much. All the witnesses were speculating about those important issues. Some of the speculations were clearly motivated by greed.

Bernadette passed on 24 April 2004 before the mortgage debt was fully repaid. The late Bernadette did not have children of her own. She could not conceive. She had been married to Regis Makaya. She brought the second defendant (“Tumai”) up from the tender age of two years up till her death. Tumai is her step son, born from a marriage

between Bernadette's husband and another woman. Soon after Bernadette died, the plaintiff registered her estate at the Magistrates court. The plaintiff was then appointed executrix of Bernadette's estate and was awarded the property in terms of the First and Final Administration Account and Distribution Plan. This was sometime in 2004. On 22 August 2007 the Makaya family registered the late Bernadette's estate with the Master of the High Court in Harare and Tumai was awarded the property in terms of the First and Final Administration Account and Distribution Plan. Tumai then proceeded to take transfer of the property. He subsequently moved quickly to evict the plaintiff, who had taken occupation of the property soon after Bernadette had passed on, from the property. That eviction prompted the plaintiff to issue summons out of this court seeking the following relief:

1. A declaration that the second registration and administration of Bernadette's estate by Tumai was a nullity at law.
2. An order that the plaintiff is the lawful heir to the estate of the late Bernadette.
3. An order setting aside the title deeds obtained by Tumai transferring the property into his name.
4. An order that Tumai cannot inherit the property of the late Bernadette.
5. An order that the administration of the estate late Bernadette effected by the plaintiff be declared valid.
6. An order that the late Bernadette was the sole owner of the title, rights and interest in the property.
7. Cost of suit.

Ma- Lord and Tumai entered appearance to defend. However at the trial of this matter Ma-Lord was in default. The fourth defendant entered appearance but later got judgment by consent absolving it of all liability. The Master of this court filed a report in this matter in terms of which he recommended the granting of the orders being sought by the plaintiff as it appeared to him to be in the best interest of the estate and potential beneficiaries. The Master submitted that if what the plaintiff averred was correct, then the possibility of misrepresentation of facts by Tumai could not be ruled out. The Master was

referring to the fact that the registration of the estate first took place at the Magistrate's court and that the subsequent registration by Tumai was improper and had been overtaken by events and hence was of no legal force and effect. It is important to note that in her plea Ma-Lord stated that she had donated her half share of the property to Tumai as she was a joint owner of the property with the late Bernadette, that the second registration of Bernadette's estate by Tumai was valid and that a step-son can inherit the estate of his stepmother in terms of the Duma customary law. Both Ma-Lord and Tumai did not file any counter claim. Both of them did not give evidence in court. When the matter came up for trial, there were two trial issues –

1. whether the registration of the property to Tumai was valid, or
2. whether it should be set aside.

The plaintiff was the first to give evidence. She said that she was 75 years old. She is the late Bernadette's elder sister. She said Bernadette, who was a matron at Parirenyatwa Hospital advised her in the early 1980s that she had bought a house in Greencroft, in Harare. She then moved into the house together with her husband. Her husband died about a year after they had moved into the new house. The witness, who appeared composed and mature, said that the late Bernadette did not tell her how she had bought the house except that she borrowed \$400-00, which was part of the deposit from Pelagia, her sister. Bernadette did not have the whole deposit which was required. The witness said that she was not told the purchase price of the house. She said that at the time Bernadette died she was staying with Tumai and some of her children because Bernadette did not have children of her own.

The plaintiff further testified that she registered Bernadette's estate soon after she died and administered it up to its finality. She said that she was awarded the property following agreement in her family that she should be awarded the property. She moved into the property soon after the death of Bernadette. She was later shocked when she was evicted from the house by Tumai who had obtained a default judgment to that effect. The plaintiff also said that Bernadette died before she fully serviced the mortgage bond, The plaintiff finished paying off the bond with the help of her relatives. She produced

evidence in the form of payment receipts and correspondence from the fourth defendant to prove that she had indeed made a number of payments until she finished paying off the debt. She also produced a letter from the fourth defendant in 2005 indicating that the loan had been fully repaid. She also told the court that she did not know how Ma-Lord ended up being registered as a joint owner of the estate. She indicated however that Ma-Lord never contributed towards the payment of the outstanding balance after Bernadette had died. She told the court that Ma-Lord had made it clear that she was not interested in anything to do with the Makayas. The plaintiff gave the impression that she was a truthful and honest witness. She clearly avoided talking about what she did not know. Her evidence had a ring of truth and she was not motivated by the need to gain even if she was an interested party. She scoffed at efforts by great Makaya to distort the truth, particularly his assertion that the Makayas could in terms of their custom inherit Bernadette's estate. She asserted with convincing confidence that her late sister's estate could only be distributed by her maiden family irregardless of the fact that Bernadette had been married.

Nathan Nyawo gave evidence for the plaintiff. He is married to Pelagia, the plaintiff young sister. He is a school headmaster. He appeared confident of what he was saying. He said that the late Bernadette had told him in the early 1980s that she wanted to buy a house but did not have all the deposit of some \$3000-00 which was required. He and his wife lent her \$400-00. The house was being sold for some amount between \$18 000-00 and \$20 000-00. He said Bernadette then managed to pay the deposit and secured the property through mortgage finance from the fourth defendant. The witness told the court that. He said that Bernadette had told him that she had taken Ma-Lord as a guarantor in order for her to get a mortgage bond. He said she had indicated that she agreed with Ma-Lord that she becomes her guarantor. He however said she did not know how Ma-Lord ended up being registered as a co-owner of the property. He said however that Ma-Lord was approached after Bernadette's death but indicated that she was not interested in anything to do with the Makayas.

Pelagia Nyawo, the plaintiff's young sister also gave evidence corroborating the evidence given by her husband. She however added that she and her husband together

with the plaintiff's daughters assisted each other in paying off the balance of the mortgage bond after Bernadette had passed on. She said she was aware that Bernadette had been paying installments for the house until she died. She also stated that Bernadette stayed at the property for 21 years up the time of her death and that Ma-Lord never stayed at the house and also never made any claim for a share of the house even after Bernadette's death.

Doctor Great Makaya gave evidence. He said he was married to Ma-Lord in 1972. The two separated in 1993 after many years of marriage. Bernadette was his stepmother who got married to his father after his mother had died. They lived in some flat in Glen Norah B, in Harare. He said he went hunting for a house soon after he returned from overseas in 1981. He wanted to purchase a house for his parents who were staying in a small flat in Glen Norah B in Harare at the time. He said he is the one who found the property in question. It was being sold by a certain white man who worked for Air Zimbabwe. He said the house was being sold for \$15 000-00. The witness said he gave Bernadette \$3000-00 which was needed as the deposit. He went to request for mortgage finance from the fourth defendant to cover the remainder of the purchase price. Both Bernadette and his father could not qualify for the mortgage. Bernadette's salary was not enough to qualify her for the loan. His father was old and unemployed. Since he had just returned home from overseas, and had just borrowed money to buy his own property, he could not further borrow any money. This resulted in Ma-Lord taking over and joined Bernadette in purchasing the property. The two then approached the fourth defendant and bought the property and owned it equally. They equally serviced the bond until they finished the repayments before Bernadette died. He did not know when the two ladies had finished paying off the loan. He later changed his story and said that he did not contribute towards the purchase of the house but would give money to Bernadette from time to time, particularly whenever he visited his parents. He would in some instances bring them some groceries. He said the payment for the property was the responsibility of the two ladies.

Dr Makaya said that Ma-Lord later donated her share of the property to Tumai. She put down the donation in writing. The witness said he was not sure if Bernadette's

family were advised. Dr. Makaya also said that sometime in 2007 the Makaya family met and decided to register Bernadette's estate, which they did. They informed Bernadette's family but nobody came for a family meeting. He said that following the finalization of Bernadette's estate, Tumai was the owner of the property. This was because he had the 50% donated to him by Ma-Lord and the 50% he got after he inherited Bernadette's 50% share. Tumai had inherited the 50% owned by the late Bernadette. In answer to questions in cross examination, Dr. Makaya said the Nyawos were lying when they said they had lent Bernadette \$400-00 because it was him who had paid the deposit. He said Bernadette did not need the \$400-00. He said Ma-Lord went to Lesotho in 2007 where she permanently resides. He also said that he could not dispute the fact there was an outstanding balance on the loan after Bernadette died and that the balance was finished off by the plaintiff and her relatives.

The court found Dr. Makaya to be a very poor witness. Most of his evidence was hearsay. He had no first hand knowledge about what happened. For example, he did not know how much each lady was paying towards the repayment of the loan. He was not sure whether or not there was any outstanding balance on the loan after Bernadette died. At one stage he said the loan had been fully repaid when Bernadette died. That certainly was not true the court later discovered from documentary evidence produced by the plaintiff which showed that she finished paying off the loan after Bernadette had died. Dr. Makaya and those from his family, who attended at the Master's office in 2007 to register Bernadette's estate lied when they entered Tumai as Bernadette's son. They misled the Master to believe that Tumai was Bernadette son. Following that misrepresentation the Master accepted Tumai as both executor and beneficiary of Bernadette's estate, which included the property. It follows that therefore that the Master opined, correctly in my view, that all that followed this false and misleading misrepresentation, was without any force or effect in law.

Mr Botha Mazungunye, who is the current Chief Mazungunye of the Duma clan was the last to give evidence. He told the court that in terms of the Duma custom they cannot share a woman's estate in the absence of her maiden family. The issue raised that Tumai inherited Bernadette's share of the property does not hold in view of the fact that

the registration of the estate by the Makaya had no force or effect in law because it was tainted by a false misrepresentation that Tumai was Bernadette's son, when in fact he was only a stepson. Besides, Tumai cannot inherit from his stepmother as of right on terms of customary law, let alone Duma customary law. Both ways, Tumai cannot lawfully get the late Bernadette's share in the property.

I now turn to consider Ma-Lord's share in the property. It is common cause that Ma-Lord is registered on the Deed of Transfer as a joint owner of the property. They hold ownership jointly, severally and in solidum. It is equally true that she is a joint mortgagee together with the late Bernadette. The mortgage bond bears testimony to that fact. The affidavit produced in evidence by the Makayas as proof that Ma-Lord donated her share to Tumai has not been authenticated. The affidavit is not a deed of donation as required by law. Ma-Lord herself did not give evidence to the effect that she donated her share to Tumai. I am not convinced that the affidavit is that of Ma-Lord. It could simply have been forged. My suspicion is further raised by the fact that the same Makaya family once lied about Tumai's relationship to Bernadette at the Master's office. As a result I am not convinced that Ma-Lord indeed donated her share in the property to Tumai. It also has to be borne in mind that both Tumai and Ma-Lord did not file any counter claims. It follows from the above that the second registration of Bernadette's estate cannot stand as it was tainted by fraud. It is also a fact that Tumai's claim that Ma-Lord donated her share to him has not been convincingly proved. This means that the Title Deed in Tumai's name must fall away and must be cancelled.

In the result, it is ordered as follows:

1. That the second registration of and administration of the late Bernadette's estate by Tumai be and is hereby declared a nullity at law.
2. That the plaintiff be and is hereby declared the lawful heir to the estate of the late Bernadette.
3. That the Title Deed obtained by Tumai transferring the property into his name be and is hereby cancelled and that the fifth defendant be and is hereby ordered to give immediate effect to this order.

4. That the registration and administration of the late Bernadette under DR 746/04 be and is hereby declared valid.
5. That the plaintiff be and is awarded 50% share in the property and that Ma-Lord be and is declared sole owner of 50% share in the property.
6. That the first and second defendants pay the plaintiff's costs of suit.

Chigwanda Legal Practitioners, plaintiff's legal practitioners
Mungeni & Muzvondiwa Legal Practitioners, 1st and 2nd defendants' legal practitioners