

TENDAI MATERA  
and  
FARAYI MATERA  
and  
FUNGAYI MATERA  
and  
RUTENDO MATERA  
versus  
SIKHULUWE MBAMBO  
and  
CLEVER MANDIZVIDZA (In his capacity as the executor Dative of Estate late Fungai Mtera)  
and  
ESTATE LATE FUNGAI MATERA REPRESENTED BY CLEVER MANDIZVIDZA IN HIS CAPACITY AS THE EXECUTOR DATIVE  
and  
MASTER OF THE HIGH COURT  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 6 February 2014

*Adv. T. Magwaliba*, for plaintiffs  
*T H Gunje* for 1<sup>st</sup> defendant  
No appearance for 2<sup>nd</sup> to 5<sup>th</sup> defendants.

CHITAKUNYE J. The first to fourth plaintiffs are children of the late Fungayi Mtera who died intestate at Harare on 5 May 2006. The first defendant is the surviving spouse of the late Fungayi Mtera. The brief facts of the case are that:-

On 9 March 2001 the late Fungai Mtera married first defendant in terms of the Marriages Act, [*Cap 5:11*]. Prior to that they had been living as husband and wife in a customary law union since 1999. At the time of their marriage they were staying at no. 6A Fern Road, Hatfield Harare. In the year 2001 they moved to stand 2105 Good Hope, West gate Harare. At that time they were staying with second, third and fourth plaintiffs.

In 2002 the late Fungai Matera and first defendant bought an immovable property; namely, Stand number 169 Good Hope Township of Subdivision D of Good Hope. The property was an undeveloped piece of land measuring 2 421 square metres. After acquiring the Stand the couple set upon constructing a dwelling house on the Stand. Title to the Stand was only obtained on 29 December 2006 after Fungai Matera had passed on. The Deed of transfer No. 9521/2006 was in the joint names of the Late Fungayi Matera and 1<sup>st</sup> defendant. The estate late Fungai Matera was registered under DR No. 2195/06 and late Israel Gumunyu was appointed as Executor Dative. The said Israel Gumunyu died before the estate was wound up and he was substituted by Clever Mandizvidza.

On 3 January 2009 the second defendant requested the fourth respondent to issue him with restricted letters of administration authorising him to transfer the half share of Stand 169 Good Hope Township of Subdivision D of Good Hope belonging to the late Fungai Matera to the surviving spouse, first defendant.

On 26 January 2009, the fourth defendant issued to the second defendant the requested letters of administration which authorised him to transfer the half share belonging to the late Fungai Matera in the aforesaid property to first defendant.

The second defendant proceeded to cause transfer of the said half share belonging to late Fungai Matera in the aforesaid property to be passed to first defendant on 29 January 2009. A Deed of Transfer in this respect was issued in the sole name of first defendant as per Deed of Transfer no. 0574/2009.

It is apparent that the basis upon which the letter of authority was sought and granted was that the second defendant said first defendant was the surviving spouse and he apparently had been made to believe she had been living in that property at the time of the death of the late Fungai Matera.

The plaintiffs, who are all children of the late Fungai Matera, from a prior Marriage were aggrieved by the transfer. They thus sued the defendants before this court. They claimed that as children of the late Fungai Matera they were heirs and beneficiaries to the estate late Fungai Matera together with first defendant. The transfer of the late Fungai Matera's half share to first defendant was therefore wrongful and null and void. As a result of these wrongful acts they have been prejudiced of their right to claim their shares in the half share belonging to the late Fungai Matera in the said property. They thus seek an order that:-

- a) an order declaring that Stand 169 Good Hope Township of Subdivision D of Good Hope is not matrimonial property as is contemplated by section 3A of the Deceased

Estates Succession Act, [*Cap 06:02*];

- b) an order declaring the transfer of the late Fungai Matera's half share in the said property to first defendant null and void;
- c) an order setting aside the transfer to first Defendant of the late Fungai Matera's half share in Stand 169 Good Hope Township of Subdivision D of Good Hope;
- d) an order compelling the first defendant to take all necessary steps to pass transfer of the half share belonging to the late Fungai Matera in the property known as Stand 169 Good Hope Township of Subdivision D of Good Hope into the third defendant's name within seven (7) days of service of this order upon her;
- e) in the event that the first defendant fails to strictly abide by the terms of paragraph (d) above, the Deputy Sheriff, Harare, be authorised to take such steps as are necessary to transfer the half share in the property aforesaid to third defendant;
- f) The first and third defendants pay costs of suit jointly and severally the one paying the other to be absolved.

The defendants' defence was to the effect that as the surviving spouse the first defendant was entitled to the property in question. In this regard defendants contended that the first defendant and the late Fungai Matera lived at Stand no. 169 Good Hope because that is the matrimonial home. At the time of the deceased's death the first defendant and deceased lived at the matrimonial house. Deceased was only moved to rented accommodation at 2105 Westgate shortly before his death because there was no electricity and water at 169 Good Hope and the circumstances of deceased's health required electricity. The parties retained/maintained 2105 Westgate lodgings as they were still building the Good Hope house which did not have enough space to accommodate all property and children.

The defendants' stance was refuted by plaintiffs.

The issues referred for trial were as follows:-

1. Whether or not Stand 169 Good hope Township Subdivision D of Good Hope is matrimonial property as is contemplated by s 3A of the Deceased Estates Succession Act [Cap 06:02].
2. Whether the 1<sup>st</sup> defendant is entitled to acquire the half share of the late Fungai Matera in Stand 169 Good Hope Township of Subdivision D of Good Hope as her property.
3. Whether or not the transfer of the late Fungai Matera's half share in Stand 169 Good Hope of Subdivision D of Good Hope to the first defendant should be set aside.

The plaintiff's case was testified to by first plaintiff and fourth plaintiff. Their evidence was basically to the effect that their late father and first defendant never lived at 169 Good Hope during the life of the late Fungai Matera. First plaintiff confirmed that all the children were at one time living with the first defendant and late Fungai Matera. This was when the couple lived at 6A Fern road Hatfield. When the couple moved to Westgate she was no longer living with them but her three siblings namely second, third and fourth plaintiffs were still with them. She thus would visit and call on them when they lived in a rented accommodation at 2105 Westgate. Later, only the third and fourth plaintiffs remained with first defendant and late Fungai Matera. To her knowledge there was never a time the first defendant and late Fungai Matera went to live at 169 Good Hope. She was aware they had bought that stand and were in the processes of constructing a dwelling house thereon. Late Fungai Matera died before the house was completed, though it was almost complete. Though water had been connected, there was no electricity, not even electrical fittings; floors were yet to be done, no fitted wardrobes and other necessary finishings. The 2<sup>nd</sup> witness Rutendo Matera confirmed that she was the last born and lived with 1<sup>st</sup> defendant and late Fungai Matera till his death. He continued living with first defendant even after late Fungai Matera's death. She regarded 1<sup>st</sup> defendant as her mother. Her evidence was to the effect that they lived at 2105 Westgate from the time they left 6A Fern road Hatfield till late Fungai Matera's death on 5 May 2006. They only moved to 169 Good hope in 2008 when first defendant could no longer afford to pay rent whilst at the same time paying school fees. When defendants' contention that in January 2006 to mid February 2006, the first defendant and late Fungai had

moved to 169 Good hope, was put to her, Rutendo categorically denied that this ever happened. During that time she was staying with them and at no time did they move to stay at 169 Goodhope. To her knowledge no furniture was moved to 169 Goodhope during that time. The witness maintained the same stance under cross examination. She impressed me as a credible witness.

The first defendant thereafter gave evidence. Her evidence on the issues at hand was to the effect that the late Fungai, Rutendo and herself were living at 2105 Westgate. They had moved to this rented house in 2001. They had jointly acquired a Stand no 169 GoodHope, the property in dispute. They were in the process of constructing a dwelling house. Towards the end of 2005 they gave notice to their landlord of their intention to move to their property at the end of January 2006. They later extended their notice period. In mid January 2006 they moved to 169 GoodHope with limited furniture. They left Rutendo and the maid behind at 2105 Westgate. In February 2006 late Fungai Matera was diagnosed to be suffering from tuberculosis (TB). His health requirements were such that they resolved to move back to 2105 Westgate and continue their lease. Stand 169 had not been completed, there was no water and construction was ongoing resulting in a lot of dust being emitted. This condition was not conducive to the late Fungai Matera's health requirements. As a consequence they moved back to 2105 where they had left Rutendo and the Maid. According to first defendant they were at 169 Goodhope for about a month. When late Fungai Matera died on 5 May 2006, she continued staying at 2105 Westgate. She only moved to 169 Goodhope sometime in 2007 together with Rutendo. This was because she could no longer afford to complete construction, pay school fees for the children, Rutendo and Fungai Matera (junior), and at the same time pay rent for 2105 Westgate. The first defendant's evidence appeared contradictory in some aspects. For instance in her plea, specifically para. 8 it is stated that: -

“In October 2005 first defendant lived with first plaintiff and deceased at 169 Goodhope. The house was almost complete at the time of deceased's death.....”

In her evidence in court and in cross examining witnesses the first defendant's stance was that the late Fungai Matera and herself moved to 169 Goodhope in January 2006 and that they left the fourth plaintiff at 2105 Westgate. So besides the time of moving there is also the question of not moving with Rutendo which aspects are not consistent with her plea.

In her evidence in chief she gave the reason for moving from 2105 Westgate to 169 Goodhope in January 2006 as being that they could no longer afford to pay rent whilst constructing the house, but for some reason they paid rent for January and February as they

had left behind Rutendo and a maid. In reality the move if any did not result in any saving. It is pertinent to note that after the late Fungai Matera's demise, first defendant continued staying at 2105 Westgate with Rutendo and only moved to Stand 169 Goodhope sometime in 2007. She continued with the construction.

Under cross examination first defendant was asked as to where she was living before Late Fungai Matera's death to which she said she was living at 2105 Westgate. She thus confirmed plaintiff's evidence that at the time of late Fungai Matera's death the late Fungai Matera and first defendant were living at 2105 Westgate and not at 169 Goodhope. This evidence was however contrary to her plea wherein in para 6 it is stated, *inter alia*, that:-

“the Defendant and his (*sic*) late spouse lived at 169 Goodhope because that is the matrimonial home. At the time of the deceased death first defendant and deceased lived at the matrimonial house.”

That paragraph further states that-

“Deceased was only moved to rented accommodation at 2105 Westgate shortly before his death because there was no electricity and water at 169 Goodhope and the circumstances of deceased health required electricity. ....”

The evidence adduced showed that there was water at 169 Goodhope and that from first defendant's evidence deceased died about 3 months after the time she said they moved back to 2105 Westgate. He did not die shortly after moving to that residence.

The above inconsistencies and contradiction serve to show that first defendant may not have been candid to court in her version. The desire to cling onto what she perceived as her entitlement may have influenced her to be economical with the truth.

The defence witness Sithele Mbambo's evidence was not of much value. His evidence centred mainly on the assertion that in January 2006 he assisted first defendant and the late Fungai Matera to relocate to 169 Goodhope. Unfortunately such evidence could not mend the damage caused by first defendant's contradiction on such aspects as to whether they moved in October 2005, as per her plea or January 2006 as per evidence in Court. He could not deny that at the time of the late Fungai Matera's demise the couple were living at 2105 Westgate and not at 169 Good hope.

It is apparent that first defendant's contention is really based on being the surviving spouse and not so much on having been living in the house at the time of late Fungai Matera's death.

In their closing submissions counsel for plaintiff cited the case of *Laina Ndoro v Evidence Ndoro* HH 198/ 2012 as supportive on the interpretation of section 3A of the Deceased Estates Succession Act [Cap 06:02] as it relates to a woman who had been married and whose husband died intestate. Counsel for defendant contended that court should also consider the case of *Chimhowa and Others v Chimhowa and Others* HH 183/12 wherein the need to look at the intention of the legislature was emphasised.

Section 3A of the Deceased Estates Succession Act [Cap 06:02] states that:-

“The surviving spouse of every person who, on or after 1 November, 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate-

- (a) The house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person’s death; and
- (b) The household goods and effects which , immediately before the person’s death, were used in relation to the house or domestic premises referred to in paragraph (a);

Where such house, premises, goods and effects form part of the deceased person’s estate.”

The ordinary interpretation would clearly require a factual finding as to whether the first defendant lived at stand 169 Goodhope immediately before Fungai Matera’s demise. The word immediately would in my view refer to as at the time of, or just before death. In *casu* there is no denial that at the time of Fungai Matera’s death both the first defendant and the late Fungai Matera were not living at stand 169 Goodhope. It is true they most likely intended to live there as their matrimonial home but they did not. If one were to be liberal enough and accept the first defendant’s version that they had moved into that property for a month and returned to the rented accommodation for 3 months before the demise of Fungai Matera, this would still not assist the first defendant’s cause. She on her own said at the time of Fungai Matera’s death they were living at 2105 Westgate and not at stand 169 Goodhope.

Even if one were to approach the issue from the intention of the legislature it should be apparent that the legislature, by this provision did not intend that a surviving spouse is entitled to a house the parties have not lived in. Clearly it is the house the parties lived in. the mischief to be avoided was the practice of uprooting surviving spouses from their residences and leaving them without a roof over their heads. To qualify for consideration under this section 3A one must have been living in the house at or immediately before the spouse’s death. It is that link with the house which is protected. If the legislature intended that this

should include properties the surviving spouse has in the past lived in or where there is only one immovable property lived in or not, it could easily have stated so.

I am of the view that the first defendant was not living in the property, 169 Goodhope immediately before Fungai Matera's death. She therefore did not qualify for entitlement in terms of section 3A of the Deceased Estates Succession Act.

The corollary effect of the above finding is that the transfer of the half share was wrongful and cannot stand. It is common cause deceased left behind children who are beneficiaries together with the first defendant in the estate late Fungai Matera.

The first defendant as a surviving spouse is entitled to benefit from her late husband's half share in stand 169 Goodhope. The nature and extent of such share must be determined taking into account the other beneficiaries to the half share.

As it was common cause that 1st defendant has since completed the construction of the house such must be taken into account.

Accordingly it is ordered that:-

1. The transfer of the late Fungai Matera's half share in stand 169 Goodhope Township of Subdivision D of Good hope is hereby set aside.
2. The deed of transfer no 0574/2012 is hereby nullified.
3. The first defendant is hereby ordered to take such steps as are necessary to effect a reverse transfer from her name to estate late Fungai Matera in terms of the law Within seven (7) days from the date of service of this order upon her.
4. Should first defendant fail to comply with paragraph 2 above, the Sheriff, Harare be and is hereby directed to take such steps as are necessary to transfer the half share in the property aforesaid to third defendant.
5. The first and third defendant shall bear the costs of suit jointly and severally the one paying the other to be absolved.

*Mawere & Sibanda*, plaintiffs' legal practitioners  
*Gunje & Chasakara*, 1<sup>st</sup> to 3<sup>rd</sup> defendants' legal practitioners.