

GWIRE BILLY KASESE  
versus  
ESTHER NDINGADINI MAFUTHA  
(In her capacity as the executrix of the Estate late Walter Noah Mafutha)  
and  
MASTER OF THE HIGH COURT  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 23 September 2014 and 26 November 2014

**Opposed Matter**

*Adv. L Uriri*, for the applicant  
*M. Tshuma*, for the respondent

DUBE J: This is a claim for transfer of stand No. 12 Motetsi Road, Beatrice Cottages, Mbare Township, Harare, hereinafter referred to as the property. The brief facts of this application are as follows:-

On 29 July 1982 the applicant and the first respondent's husband, Walter Noah Mafutha entered into an agreement of sale with respect to the property for \$10 000-00 Zimbabwean dollars. The first respondent's husband is now deceased and the third respondent is being sued in her capacity as the executor of the estate of the late Noah Mafutha. The Master of the High Court and the Registrar of Deeds are being sued in their official capacities and did not defend the application. The sale of the property was in instalments in terms of which the applicant was required to pay \$79, 00 per month. Of this amount \$32 was payable to the City Council and \$47 into the deceased's account. A deposit of \$ 2000-00 was paid at the signing of the agreement.

The applicant avers that the parties did not attend to the cession of the property immediately as there were outstanding monies the respondent owed to the city authority. On 24 August 1982 the deceased paid \$2262-34 to the authority on behalf of the deceased and cleared the arrears. The amount covered 28, 6 months. By January 1984 the applicant had finished paying for the house. The deceased's agents decided to charge him rentals. The

applicant maintains that he made full payment for the property to the respondent's agents. On 26 March 1984 the deceased instituted proceedings claiming \$3537-00 being the outstanding purchase price. The applicant in 1989 paid \$7321-01 to the legal practitioners for Contact Real Estate for onward transmission to the deceased's legal practitioners in settlement of the claim. He asserts that he made full payment for the property. The applicant took occupation of the disputed property in 1984.

The applicant avers that after he paid the purchase price in 1989, he tried to get transfer of the property but the deceased had moved from his last known address and his whereabouts were not known. He made efforts to look for the deceased in vain. He tried to talk to the respondent but she was not forthcoming. He avers that he learnt that the deceased had passed on in the year 2005. In the same year the applicant made an application for transfer of the property under HC 5272/05. The court ordered that he file a claim with the Master of the High Court. The Master rejected his claim in April 2011. He approaches this court for an order to compel the Registrar of Deeds to transfer the property into his name.

The first respondent defends the matter and contends that the applicant failed to pay in accordance with the special conditions of the contract that stipulated that the payment was to be made into the deceased's account. That the applicant chose to pay to agents who erroneously deducted monies for alleged rentals that were not due. The respondent insisted that the applicant failed to pay the full purchase price. The respondent maintains that there is no proof that the balance of the purchase price was paid to deceased's legal practitioners.

At the hearing of this matter the first respondent raised two preliminary issues which she requested the court to consider. The first issue related to the existence of material disputes of facts existing on the papers. This point was later abandoned. The second point relates to the issue of prescription. The first respondent contends that the claim has prescribed as it was brought more than three years after the cause of action arose. The respondent submitted that as the applicant claims to have finished paying for the house in July 1989 the claim prescribed as it was sued upon more than 3 years later. She contended that the claim should have been brought by July 1992.

Adv. *Uririri* opposed the preliminary point. He argued that the claim has not prescribed. He submitted that the plea is misconceived as the claim involves a deceased estate which is governed by the provisions of s 52 (8) of the Administration of Estates Act

[*Cap 6:01*] which provides for any person interested in an estate to lodge with the Master any objections. That this is why this court ordered that the applicant file his claim for transfer of rights title and interest in the stand within 10 days of the order. The Master of the High Court was ordered to consider his claim resulting in a claim being lodged. The Master directed that the applicant apply for a compelling order. He contended that there is therefore no prescription to talk about.

The applicant argued that the death of the deceased had the effect of interrupting the debt and moreover the identity of the debtor was not known making it impossible to institute a claim. He submitted that a claim could only be lodged after the executor was appointed. The applicant submitted that he has acquired the property by acquisitive prescription.

On the merits, the parties agreed that the issue required to be resolved by the court is whether the applicant paid fully for the property.

I will deal first with the preliminary issue. The applicant claims that he finished paying for the property in 1989. That is when he became entitled to transfer of the property and that is when the cause of action arose. The applicant avers that he looked for the deceased and failed to find him in order to get him to transfer the property. Noah Mafutha passed away on 14 September 1995. The respondent did not advise him of the deceased's death. The estate was registered the same year but the applicant was unaware of both the applicant's death and the fact that his estate had been registered in 1995. An executor to the estate was appointed on 15 February 1996. The applicant seems to have been unaware of this fact as well. The applicant states that he only became aware of the death in October 2005. He then instituted proceedings under HC 5272\05 seeking transfer of the property. He learnt that the respondent was appointed an executor of the estate when he saw the Master's report dated 6 August 2006. The respondent was subsequently joined to those proceedings. The issue of prescription was raised in the respondent's heads of argument in that application. The court ordered that the Master consider the applicant's claim for transfer of the property into the applicant's name and further that the applicant file a claim for the transfer within 10 days. The applicant did this resulting in this claim. The court was aware of the special plea of prescription when the order was made. The indications are the court overruled that defence

I will still deal with the merits of the special plea as there was no agreement between the parties as to whether the issue was dealt with and there is no written judgment under HC 5272/05. The applicant was required to have lodged his claim in 1992. The deceased was at

this stage still alive. Prescription was not interpreted. The applicant was not required to lodge his claim with the Master within three years after he fully paid the purchase price as the deceased was still alive. Section 52 (8) of the Administration of Estates Act [*Cap 6: 01*] which allows any person interested an estate to lodge with the Master any objection with the estate applies where there is a claim against a deceased estate. Before 1995, there was no requirement to lodge the claim with the master. The direction to lodge a claim with the Master was made because the claim was only lodged after the deceased was late. This is a simple case of a claimant failing to bring an action within three years of the cause of action.

The applicant's assertion that he failed to get transfer of the property because he looked for the deceased and failed to locate him has no merit. The deceased's address at the time of his death is the same as the one deceased used when he sued the applicant. If the applicant had failed to locate deceased, he could have applied for substituted service. The applicant has no reasonable explanation for failing to lodge the claim within three years of the full payment of the purchase price as the deceased was still alive.

The applicant argued that he has acquired the property by acquisitive prescription. Acquisitive prescription is provided for in the Prescription Act [*Cap 8: 11*]. Section four of the Act reads as follows;

**“4 Acquisition of things by prescription**

Subject to this Part and Part V, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for—

- (a) An uninterrupted period of thirty years; or
- (b) A period which, together with any periods for which such thing was so possessed by his predecessors in title constitutes an uninterrupted period of thirty years.”

Acquisitive prescription is a method which allows an occupier who has been in uninterrupted possession of a property for thirty years to acquire the property on the basis of his uninterrupted possession. A litigant seeking to rely on acquisitive prescription should show that he has been in uninterrupted and continuous possession of the property in dispute for a period of 30 years. The possession should be open as if he were the owner of the property.

After the deceased's claim for outstanding rentals was filed, the applicant moved into the premises in the year 2004. The applicant has been in occupation of the house for the past

30 years and is today still in occupation. His occupation has been open and interrupted. He has acquired the property by acquisitive prescription.

The respondent claims that the applicant did not pay the purchase price as stipulated in the contract of sale and that he therefore breached the contract. On 28 March 1984, the deceased filed summons s claiming \$3 535-66 being the outstanding balance. It is accepted that this is the money that was outstanding at that stage. It is therefore not necessary to do a calculation of how much was paid before the deceased issued a summons claiming the balance outstanding as the balance as at that date is clear. If indeed the applicant was in breach, the deceased did not opt to cancel the contract opting instead to accept the balance of the purchase price. The last payment for the stand was in 1989 after the deceased had instituted proceedings against the applicant. A receipt produced shows that on 15 July 1989, D.W Aitken and Company, the respondent's legal practitioners received \$7321.01 for the credit of the Mafutha-Chipunza case. The amount was clearly in lieu of the deceased's claim. The amount was over and above that which was claimed by the deceased. It is assumed that the extra money covered costs and or interest. It is clear from the evidence that the applicant paid fully for the property. The applicant met his contractual obligations by paying the outstanding balance and interest to the respondent's legal practitioners. If the money paid did not reach the intended recipient that is most unfortunate. The respondent's recourse lies with the deceased's lawyers. I am satisfied having gone through the history of this matter and analysed the payments made, that the applicant paid fully the purchase price of the property. The applicant is entitled to transfer of the house into his name.

In the result, it is ordered as follows:-

1. The 3<sup>rd</sup> respondent shall transfer to the applicant rights and interest in stand No. 12 Motetsi Road, Beatrice Cottages Mbare Township, Harare.
2. Costs follow the event.

*Honey & Blankenbery*, applicant's legal practitioners  
*Chinamasa, Mudimu & Muguranyanga*, respondent's legal practitioners