MILDRED CHIRUMIKO
versus
FRED JEKA
and
MELODY JEKA
and
RODWELL JEKA
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 November 2016

Special case in terms of Rule 199

R. Dembure, for the plaintiff
S. Banda, for the 1st, 2nd and 3rd defendants

CHITAKUNYE J: This matter commenced as an opposed court application. On the date of hearing the presiding judge directed that the matter be referred to trial. In that regard she ordered, *inter alia*, that:-

1. The matter be and is hereby referred to trial.
2. The application shall stand as the summons and the Notice of opposition as the notice of appearance to defend.
3. The applicant shall file a declaration within 10 days of this order and the matter shall thereafter proceed in terms of the rules.
4. The first, second and third respondents shall pay today's wasted costs jointly and severally, the one paying the other to be absolved.

The parties duly complied with the directive and a pre-trial conference was held. The sole issue referred to trial was couched as follows:

Whether or not the four (4) caveats registered against the property known as Msengezi 125, situate in the district of Chegutu as a result of a court order in case number 6478/04 should be removed.

When the parties appeared before me for trial counsel agreed that the matter should proceed as a special case in terms of Rule 199 of the High Court Rules, 1971 as amended. That rule provides, *inter alia*, that:-

> "(1) The parties to a civil action or suit may, after summons has been issued, concur in a statement of the question of law arising therein in the form of a special case for the opinion of the court."

Thereafter Rule 199 (3) states that:-

> "Upon the argument of such case, the court and the parties shall be at liberty to refer to the whole contents of such documents, and the court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether fact or law, which might have been drawn there from if proved at a trial."

The required statement of facts was duly submitted by the parties.

The brief background to the case is that the plaintiff is a daughter to the late Maxwell Jeka. She was appointed *Executrix dative* of the estate late Maxwell Jeka. It is in that capacity that she sued the defendants.

The first and third defendants are brothers to the late Maxwell Jeka hence the plaintiff's uncles. The second defendant is a sister to the late Maxwell Jeka hence the plaintiff's aunt.

The fourth and fifth defendants are cited in their official capacities.

The plaintiff's late grandfather, Fairley Charles Jeka, was the registered owner of a certain piece of land called Msengezi 125, situate in the district of Chegutu measuring 81.9126 hectares, herein after also referred to as the Farm, under Deed of Grant No. 29/63. The said Fairley C Jeka is the father to the first, second, third defendants, the late Maxwell Jeka and the late Darlington Jeka.

After the demise of Fairley Charles Jeka in 1968 the farm was registered in the name of Darlington Jeka who was the deceased's eldest male child under Deed of Transfer No.1232/72 dated 24 February 1972. As fate would have it, Darlington Jeka later died on 12 September 1983. When Darlington Jeka died the farm was registered in the name of Maxwell Jeka under Deed of Transfer No. 02543/94 on 20 April 1994.

The parties are not agreed as regards the circumstances under which Maxwell Jeka registered the farm in his name. The defendants alleged that he did so without their

knowledge. The Power of Attorney to pass transfer furnished by the applicant states that Maxwell Jeka inherited the farm by reason of intestate inheritance as the sole heir according to African law and custom. The defendants contended that Maxwell Jeka registered the farm in his own name clandestinely as he was not the heir to Darlington Jeka. He was not Darlington's son but a young brother. In terms of African Customary law and their custom he could not have been heir to Darlington as Darlington had his own children to take after him. It was thus not true that Maxwell was the sole heir to Darlington.

The defendants also disputed the authenticity of a copy of a document dated 15 February 1981 addressed 'To whom it may concern'. In that document Darlington Jeka purported to be passing the farm to Maxwell Jeka as per their late Father's wish that it should be inherited by Maxwell as their last born brother. The defendants contended that the signature thereon is not Darlington's. The authenticity of this document remained questionable. Nothing much will turn on this document.

During the lifetime of Maxwell Jeka he apparently tried to dispose of the farm. The defendants objected to the disposal.

On 7 July 2004 under case No. HC 6478/04, the first, second and third defendants obtained a judgement interdicting the late Maxwell Jeka from disposing the farm in the following terms:-

> "1. That 1st respondent or his agent be and is hereby interdicted and restrained from ceding, selling or otherwise alienating his right, title and interest in Msengezi 125.
> 2. That 1st and 2nd respondents be and are hereby interdicted from transferring the property called Msengezi 125, situate in the district of Hartley. .."

Maxwell Jeka died on 21 September 2008 and his estate was registered with the Master of the High Court under DR 11/10. By the time of his demise four caveats had been registered against the Title to the farm pursuant to the above order.

The plaintiff was appointed the executrix dative of the said estate of the late Maxwell Jeka. In the course of her duties the plaintiff sought the Master's consent to sell Msengezi 125. The Master authorised the sale of Msengezi 125 farm in terms of s 120 of the Administration of Estates Act, [*Chapter 6:01*].

The plaintiff's efforts to sell the farm were however hindered by the fact that there are four caveats namely 63/2005; 493/2004; 120/2003 and 145/2004 registered by the fifth defendant against the Deed of Transfer No 02543/94 as a result of the court order in HC 6478/04.

The plaintiff thus approached this court seeking an order for the removal or upliftment of the said caveats registered against Deed of Transfer No. 02543/94.

The first, second and third defendants opposed the upliftment of the caveats. In their defence the defendants contended that the property in question was a family farm that was left by their father, the late Fairley Charles Jeka. The farm was then registered in the name of Darlington Jeka for him to hold in trust for all children of the late Fairley C Jeka. As confirmation of this when Darlington died the farm was not registered as part of his estate because the family was cognisance of the fact that the Farm was for the benefit of all the children of the late Fairley C Jeka. In the same vein the registration of the property in Maxwell's name was for him to hold the property in trust for the benefit of the sons and daughters of the late Fairley Charles Jeka and not that he was inheriting it as his exclusive property.

The issue as alluded to above is thus whether or not the four caveats registered against the Deed of Transfer No. 02543/94 of a certain piece of land known as Msengezi 125, situate in the district of Hartley should be removed or not.

The plaintiff's counsel argued that the registration of the farm in the name of Maxwell Jeka under Deed of transfer no. 02543/94 is conclusive evidence that Maxwell was the owner of the farm.

Counsel submitted that Maxwell owned the property in his individual capacity. On his demise therefore the property became part of his estate to be administered in terms of the Administration of Estates Act.

It is in these circumstances that counsel argued that the defendants had no real rights in the property. It was his view that the court order under case number HC 6478/04 did not create any real rights in favour of the first to third defendants. It only created personal rights enforceable against the late Maxwell.

He opined that the order bound the late Maxwell and his agent and not his successors in title in that it provided that:-

> "That 1st Respondent or his agent be and is hereby interdicted and restrained from ceding, selling or otherwise alienating his right, title and interest in Msengezi 125",

The personal rights created by the said order in favour of the defendants therefore lapsed upon the demise of Maxwell.

Counsel for the defendants on the other hand contended that the caveats should not be removed as no good reason has been given for their removal. He further contended that an

encumbrance on title cannot be extinguished solely because of the demise of the holder of such title. The defendants' contention was that the caveat was registered against a title deed and not the holder of such title.

Further counsel submitted that in any case the interdict was not just against the late Maxwell, but his agent as well.

A caveat maybe defined as an entry made in the books of the office of a registry or court to prevent a certain step being taken without previous notice to the person entering the caveat,(the caveator) *Jowitts Dictionary of English Law*, 2nd ed by John Burke.

In *Maphosa & Another* v *Cook & Others* 1997 (2) ZLR 314(H) MALABA J (as he then was) at p 316 C-E in reference to a caveat stated that:-

> "It is no more than a notice which the Registrar of Deeds is required to record in terms of section 5 (u) of the Deeds Registries Act [*Chapter 20:05*]."

The learned judge went on to quote with approval the effect of the notice as stated in *Liquidators Union & Rhodesia Wholesalers Ltd* v *Brown & Co*. 1922 AD 549 at 558-9 by KOTZE JA in these terms:

> "It will be desirable, before referring to s 201 of the companies Act to consider the law on the subject of the right possessed by a judgement creditor who has arrested the goods of his debtor under a writ of execution. While an ordinary arrest of property under the Roman-Dutch law gives no preference, an arrest effected on property in execution of a judgment creates a *pignus praetorium* or to speak more correctly *a pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the court. They pass out to the estate of the judgement debtor so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent's estate."

It is therefore clear that even though a caveat does not confer real rights it provides to the judgement creditor a judicial lien in the attached property for the recovery of the debt owed by the judgment debtor.

In an application or action for the removal or upliftment of a caveat or caveats, the applicant or plaintiff, as the case may be, has the onus to show that there is good cause for the removal or upliftment of the caveats. He has to satisfy the court that there are special circumstances why an order removing the caveats should be granted. In *Maphosa & another* v *Cook* (*supra*) court held that:-

> ".. the court has a discretion as to whether to uplift the caveat, if the applicants could discharge the onus of showing that there were special circumstances why an order uplifting the caveat should be granted. They would have to show not only that the property had been sold to them but also that there were facts or circumstances which would satisfy the court that it would be just and equitable to grant the relief sought."

In *The Sherriff for Zimbabwe* v *Hersel [Pvt] Ltd t/a Exim Freight and another* HH 856/15 at p 6 of the cyclostyled judgment MAFUSIRE J aptly stated that:-

> "As the cases of *Van Niekerk* and *Maphosa* above stressed, in a matter like this, special circumstances as would move the court to exercise its discretion to set aside a judicial attachment to pave way for the registration of the rights of a third party purchaser, are not merely the purchase and the subsequent assumption of control. There ought to be more going beyond this mere creation of these personal rights. It is, of course, impractical and even undesirable to prescribe what may constitute special circumstances. Every case will depend on its own set of facts."

In *casu*, the question is whether or not the plaintiff has discharged the requisite onus? The plaintiff's explanation for seeking the removal of the caveat was that the person against whom the court order was granted which resulted in the registration of the caveats, died in 2008. The caveats created personal right in favour of the first to third defendants as against the late Maxwell Jeka. Such rights cannot be enforceable against the executor or the deceased's successor in title. The first, second and third defendants' rights lapsed with Maxwell's death.

The argument that the caveat lapsed with the death of Maxwell does not hold water. It is trite that an executor of a deceased estate is a representative of the estate of the deceased. In this regard ss 23 and 25 of the Administration of Estates Act provide for the appointment of an executor as the legal representative of a deceased estate.

In *Lock hat's Estate* v *North British and Mercantile Insurance Co. Ltd* 1959(1) SA24 (N) at page 29 the court held that:-

> "The executors are the representatives of the deceased estate and as such are vested with the assets of the deceased."

Further in *The Law and Practice of Administration of Estates*, 5th ed. By D. Meyerowitz at p 123 the esteemed author aptly stated that:

> "An executor is not a mere procurator or agent for the heirs but is legally vested with the administration of the estate. A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them."

It was therefore not correct for the applicant to put herself in the position of successor in title, she is the legal representative of the estate late Maxwell. In that regard she is expected to administer the estate and ensure that all assets and liabilities of the estate are accounted for in terms of the law.

Whilst accepting that the caveats placed against the title deed did not confer real rights on the respondent but personal rights against the registered owner of the real rights, I am of the view that as the applicant is the representative of the estate late Maxwell she cannot absolve herself from attending to encumbrances or liabilities left behind by the late Maxwell more so as they attached to the estate late Maxwell. The order interdicted Maxwell or his agent. In *casu*, the applicant is the agent in her capacity as the representative of the estate late Maxwell. She cannot run away from attending to the encumbrances that attached to the estate of the late Maxwell.

In the circumstances the order obtained under case No. HC 6478/04 also operates as against the plaintiff or any other executor appointed to administer the late Maxwell's estate. It is incumbent upon the plaintiff to attend to the cause of the caveat so as to administer the estate. In this case the defendants' cause was that the farm was only being held in trust for the sons and daughters of the late Fairley C Jeka by Darlington Jeka. This is why the farm was never made part of the estate late Darlington Jeka upon his demise.

The farm was instead registered under the name of Maxwell in circumstances the parties are not agreed. The defendants' contention was that they believed whoever was to hold the farm in his name would continue to hold it in trust just as Darlington had done and on his demise the farm would not be part of his estate.

The contention by the defendants was based on what they believed was the situation. Unfortunately their belief was not the law. The law is to the effect that the person who inherits an immovable property inherits it in his individual capacity. Thus once the property was registered in Maxwell's name it became his property.

In this regard s 14 of the Deeds Registries Act, [*chapter 20:05*], provides that ownership of land may be conveyed from one person to another by means of a deed of transfer executed or attested by a registrar. Thus the registration at the deeds office grants one title as owner.

In *Takafuma* v *Takafuma* 1994 (2) ZLR 103(S) at 105H-106 MCNALLY JA aptly noted that:-

> "The registration of rights in immovable property in terms of the Deeds Registries Act,…. Is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. ….. The real right of ownership, or *jus in re propria,* is the total of all the possible rights in a thing."

See also *Machiva* v *CBZ* 2000(1) ZLR 302(H)

The net effect of the above discourse is that the farm by virtue of its registration in Maxwell's name became part of his estate. On his demise it became part of his estate to be administered in terms of the Administration of Estates Act.

This therefore means that for as long as the property remained registered in the late Maxwell's name at the Deeds Registry, it is part of his estate.

Whilst one may sympathize with the defendants, their recourse is not in holding onto the caveat *ad infinitum*, they ought to have pursued their claim against the late Maxwell if they believed he had clandestinely registered the farm in his name when that should not have been so.

If they believe they still have a claim against the estate late Maxwell they can still lay their claims against the plaintiff in her capacity as executrix dative of the estate late Maxwell. The defendant's contention that the interdict is *ad infinitum* and it should remain so is ill advised. For as long as the property is in the name of late Maxwell the executrix is mandated to administer the estate in the interest of beneficiaries of the said estate.

The defendants' other contention that the late Maxwell Jeka as a brother to the late Darlington could not have been heir to late Darlington under customary law may have some merit it. The misfortune is that despite such knowledge nothing concrete was done to reverse the appointment of late Maxwell as heir to estate Darlington Jeka or the registration of the Farm in the name of the late Maxwell.

I am mindful of the fact that the defendants referred to case no. 12044/04 wherein they claimed that they sought that the late Maxwell be ordered to transfer 4/5 shares of the farm to them. Unfortunately they could not state the outcome of that case. It is also not clear from that case number as to which court handled that application. In the same vein in this case defendants did not make any counter claim and so no defendants' claim stands to be decided upon in this case. The desire to maintain the caveats *ad infinitum* without taking any positive steps to realize what they believe they are entitled to cannot be used to stop the proper administration of the estate.

In the circumstances I am of the view that the defendants' reasons for seeking that the caveats be maintained *ad infinitum* is untenable. This is an estate of a deceased person and it must be administered according to law. The executrix has the mandate to administer the estate of late Maxwell.

I am of the view that this is a case were the defendants should have been advised from the onset that in the absence of an order reversing the registration of title in Maxwell's name

that farm, in terms of the law, remained part of his estate. The family arrangements that they were alluding to would not hold as the law is clear that one who inherits immovable property, inherits it in his or her individual capacity and not in trust for other family members. This would probably have saved them a lot of costs in litigation on an issue that has been decided by the courts. See *Matamo* v *Matambo* 1969(3) SA717 and *Guzuza* v *Chinamasa* HC-H-246/83.

It is pertinent to point out that where a person or family intends that a property must be for the benefit of the whole family there are legal ways in which such intention can be achieved without allowing the registration of title in one member of the family. There are instances where all the intended beneficiaries have their names registered on the title deeds with equal shares. Where, as was contended in this case, the property was to be held in trust, then a family trust could easily have been formed with the Trustees and beneficiaries stated therein.

In as far as what the plaintiff seeks to do is demanded by law there may not be any need to go further in justifying the removal of the caveats. All she has to do is to inform the caveators of the steps she intends to take and let them make their claims. She must then deal with any claims in terms of the law. I would however caution plaintiff against rushing to dispose of the property before attending to any claims that may be raised against the estate of the late Maxwell Jeka.

The plaintiff has discharged the onus on her so that the estate can be administered to its logical conclusion. The order for the removal of the caveats will thus be granted.

In the plaintiff's declaration the plaintiff claimed costs on a legal practitioner - client scale against the first to third defendants. In the closing submissions such costs were not persisted with. It is my view that the circumstances of this case do not justify costs on a punitive scale. This is a typical family dispute whereby family members from a traditional perspective believed they were entitled to their claim. They appear to have been operating the farm as a family asset oblivious of the consequences of registering the farm in the name of one of them. In the circumstances it would be patently unjust to penalize them with punitive costs.

Accordingly it is hereby ordered that:

1. The fifth defendant shall remove the following caveats 120/2003, 145/2004, 493/2004 and 63/2005 registered against Deed of transfer No. 2543/94 in respect of certain

piece of land situate in the District of Hartley, called Msengezi 125 measuring eight one, nine one two six [81.9126] hectares.

2. The first, second and third defendants shall pay costs of suit on the ordinary scale jointly and severally one paying the other to be absolved.

Mabulala & Dembure, plaintiff's legal practitioners
J. Mambara & Partners, 1st, 2nd and 3rd defendants' legal practitioners