

SIMON CHIPONDA TAF  
A  
versus  
SIBONILE TAF  
A  
and  
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABAW  
E  
CHITAKUNYE J  
HARARE, 30-31 October 2017 and 12 July, 2018

### **CIVIL TRIAL**

*T Mutebere*, for plaintiff  
*V Mukwachari*, for first defendant

CHITAKUNYE J. The Plaintiff was a father- in -law to the first defendant as first defendant was married to plaintiff's son, the late Charles Tafa who died on the 20<sup>th</sup> June 1993 in Harare. The second defendant is cited in his official capacity.

On the 12th July 2012 the plaintiff issued summons against the defendants seeking, *inter alia*, an order in these terms:-

1. Cancellation of Deed of transfer No. 8970 dated 27 October 1997 registered in favour of Sibonile Tafa the first defendant in this action.
2. Delivery of Stand number 884 Old Highfield, Harare held under Deed of Transfer No. 8970 dated 27 October 1997 registered in the name of the defendant to plaintiff.
3. The Registrar of Deeds be and is hereby ordered to facilitate the transfer of the said property into plaintiff's name
4. Costs of suit.

In his declaration the plaintiff alleged that he bought Stand number 884 Old Canaan, Highfield, Harare from Reuben Mbulayi in 1987. They however did not change ownership since the seller was still making payments to the City of Harare. Change of ownership was only to be effected once the seller had made full payment.

The plaintiff alleged that he was nevertheless given vacant possession of the property and he leased it to some tenants. Later he allowed his late son, Charles Tafa to occupy the property with his family.

Unbeknown to him the late Charles Tafa fraudulently changed ownership of the house from the seller into his name. Plaintiff further alleged that he only discovered this after the late Charles Tafa's widow, first defendant, wanted to sell the house as it was now in her name. Plaintiff thus sought that the property be transferred into his name as the correct purchaser of the property.

The first defendant contested the suit contending that the property belonged to her late husband and she had only inherited it as the surviving spouse.

The first defendant filed a counter claim for the eviction of the plaintiff and all those claiming occupation through him.

At the pre-trial conference held on the 16<sup>th</sup> May 2013 the following issues were referred for trial:-

1. Whether or not the first defendant registered Charles Tafa the deceased husband's estate without notifying and consulting the plaintiff and the rest of the Tafa family.
2. Whether or not Charles Tafa's title to the property in question was acquired fraudulently and without the knowledge of both the seller and the plaintiff.
3. Whether or not Plaintiff purchased Stand No. 884 Old Canaan, Highfield, Harare and is the rightful owner.
4. Whether or not the Plaintiff has a valid cause of action against 1<sup>st</sup> defendant
5. Whether or not the Plaintiff's claim is prescribed
6. Whether or not Deed of Transfer No. 8970/97 should be cancelled
7. Whether or not the defendant is entitled to an order evicting Plaintiff and all persons claiming through him from the property?

The plaintiff passed on before trial hence the trial had to await the appointment of an executor. The late Simon Tafa's other son, Stephen Tafa, was duly appointed executor and was substituted for the late Simon ChipondaTafa.

At trial plaintiff's case was testified to by two witnesses, namely Reuben Jonathan Mbulayi and the executor Stephen Tafa. The first defendant thereafter gave evidence. Both parties tendered their respective bundles of documents from which certain documents were made reference to.

Reuben Jonathan Mbulayi gave evidence to the effect that he sold stand 884 Old Canaan Highfield to the late Simon Chiponda Tafa and not to Charles Tafa. As far as he was concerned he never had any dealings with Charles Tafa over the property. The agreement of sale was in writing and had been witnessed by his wife and the plaintiff's two wives. After the sale they

never changed ownership of the property. He indicated that the impediment to the change of ownership was that he was staying in the rural areas whilst others were in Highfield so it was difficult for them to come together for the change of ownership. The witness could not however recall the year of the sale and the purchase price.

Reuben further testified that as far as he was concerned no one has taken transfer of the property. When it was put to him that the property had in fact been registered in the name of Charles Chiponda Tafa, the witness then seemed to recall that there was a time he was approached by a member of the C.I.D who told him that the property was now being sold to plaintiff's son. That C.I.D member came with some documents which were to be used to effect transfer into Charles Tafa's name. According to this witness this C.I.D officer came in the company of a sister to Charles Tafa. When a Power of Attorney to make transfer dated 28<sup>th</sup> June 1988 was shown to him, he confirmed it as the document he signed after it was brought by the C.I.D officer.

Under cross examination the witness could not explain why in an affidavit dated 28 October 2011 he had stated that the property was still in his name when in 1988 he had given power of attorney for transfer to Charles Tafa.

It was apparent that the witness could not explain himself on a number of aspects on the transaction and on why if at all he had been induced to sign the power of attorney, he had not gone on to inform the plaintiff about the incident. Thus what came out of his evidence was just that he sold the property to plaintiff and not to Charles Tafa.

Whilst plaintiff's counsel alluded to the witness' old age and ill health as possible contributors to the witness' poor memory, such an excuse did not make up for the evidence required to prove plaintiff's case. For instance the assertion by plaintiff in his declaration that change of ownership was not effected because the seller was yet to complete payments to the City of Harare was contrary to this witness' assertion that the cause for failure to change ownership was because he stayed in the rural areas whilst others (meaning plaintiff) stayed in Highfield and so there were difficulties to meet for the change of ownership. Such contradictions tended to discredit plaintiff's version.

The next witness was the executor of the estate late Simon Chiponda Tafa, Stephen Tafa. This witness' evidence was mostly on what he said he heard his father say. He did not have knowledge of his own on the sale of the property between Reuben Jonathan Mbulayi and the plaintiff. He clearly indicated that he relied on what the plaintiff told him and also on what

the 1<sup>st</sup> witness and his mother said. His handicap was that he had only come in as executor and had not been part of the goings on in the matter.

When asked about the state of Charles Tafa's estate he indicated that in his view that estate has not been wound up because he did not know what happened to it. Unfortunately a plea of ignorance was not adequate for plaintiff's case. The rest of his evidence pertained to documents he was asked to comment on.

The first defendant thereafter gave evidence. Her evidence was to the effect that she met the late Charles Tafa in 1988 when she was at college in Chitungwiza. In 1989 she moved to Gweru as Charles Tafa was at Thornhill Air Base, Gweru. In February 1990 the two married in terms of customary law and on 7 December 1991 their marriage was solemnised in terms of the Marriage Act, Chapter 37 [5:11] They lived in Gweru for the duration of their marriage. As regards the property in question her evidence was to the effect that when she married the Late Charles Tafa he already owned that property. She testified that before his demise on 20 June 1993, rentals from that property were being deposited into the late Charles' CABS bank account. After his death she then registered his estate at Gweru Magistrate Court. Later an executor dative was appointed who then proceeded to administer the estate and she was awarded the property in question in terms of the first and final distribution account filed of record.

She further stated that as a consequence of being awarded the property, she had it registered in her name hence in 1997 the title deeds were issued in her name as per Deed of Transfer Number 8970/97.

It was this witness' evidence that an edict meeting was duly called at which initially only herself and one Mahiya attended. She said this Mahiya was a relative of the Tafa family. When the first edict meeting failed to take place due to reasons stated in the magistrate's letter dated 14 October 1993, another edict meeting was convened after an advert in the government gazette and a daily circulating newspaper. On the second meeting she was the only one who attended and a Mr Chaka Mashoko was appointed executor dative.

The first defendant was taken to task about her role in the administration of the estate and that she had given false information to the executor leading to the property being awarded to her without the participation of the Tafa family.

Whilst the questioning was intended to show that the administration of the estate was not done properly, there was nothing tangible to seriously suggest that first defendant unduly influenced the executor not to do his work in terms of the Administration of Estates Act,

Chapter 6:01. It is my view that if plaintiff was serious about challenging the manner in which that estate was administered, he ought to have cited the executor for the executor to answer for himself.

It is trite that pursuant to the provisions of section 5 of the Administration of Estates Act after a death a person nearest to or connected to the deceased is enjoined to give notice of such death to the Master in a prescribed form. This is what first defendant did as reflected on page 16 of the plaintiff's bundle of documents. The section does not require that one must consult other members of the deceased person's family before giving such notice. Equally when registering the estate the law does not require that such family members must be consulted before registration. As will be noted later on, the prescribed form for this process does not make provision for consultation of other family members before the notification of death and registration of a deceased estate with the Master. The information required is as indicated on the form at page 17 of plaintiff's bundle of documents.

Once an executor has been appointed it becomes the executor's responsibility to consult family members on the distribution plan in his or her administration of the estate.

It is in the light of the above that the issues will be dealt with in seriatim.

1. Whether or not the first defendant registered Charles Tafa, her deceased husband's estate without notifying and consulting the Plaintiff and the rest of the Tafa family.

The first witness for the plaintiff had nothing to say on this issue. The second witness made effort in that he mostly relied on documents tendered in plaintiff's bundle. The plaintiff's evidence on this issue was premised on documents tendered as exhibits. In this regard Stephen Tafa testified that from the bundle of documents it was apparent that 1<sup>st</sup> defendant registered the late Charles Tafa's estate without advising or consulting the plaintiff and the rest of his family. In this regard he referred to the advert in the government gazette giving notice of an edict meeting that was to be held on 14 October 1993 at Gweru Magistrate Court for the purposes of selection of an executor. He argued that that notice did not specifically invite the Tafa family to attend such meeting. He also alluded to a document at page 17 of plaintiff's bundle, which is an extract of the record under DR 2329/93. That document has a list of names and addresses of the late Charles Tafa's relatives. Stephen queried why the first defendant or the executor wrote 'N/A' where they were supposed to indicate the names of the late Charles' siblings. The witness thus argued that such was material non disclosure which amounts to

fraudulent conduct. It was his argument that as a result of the non disclosure no relative of the late Charles attended the edict meeting.

The first defendant on the other hand contended that the registration of the estate was properly done leading to the appointment of an executor. It was her evidence that the late Charles' relatives were invited. On the first day only one Mahiya came. In this regard she referred to a letter dated 14 October 1993 at page 15 of plaintiff's bundle from a magistrate at Gweru addressed to the Master of the High Court. In that letter the magistrate wrote, *inter alia*, that:-

“Today they appeared before me Mr. Dzonga of Chirunda Chihambakwe and Jumo together with a number of the late Charles Tafa's relatives for the purpose of appointing an Executor Dative.”

Though no executor was appointed on that day due to some challenges noted in that letter, it was first defendant's contention that that letter was evidence of the fact that the late Charles Tafa's relatives had been advised of the meeting.

The first defendant conceded that on the date the executor was eventually appointed she was the only one present as Mahiya who had come on the first day did not turn up. However, a proper advertisement had been done.

It is my view that the issue raised by plaintiff on this aspect does not carry much weight. It is common cause that the first defendant completed the Death Notice at page 16 of plaintiff's bundle. The portion where plaintiff alleged first defendant was supposed to state the names of the late Charles' siblings clearly states that:-

‘If there are no children, and either or both parents be dead, then give the names and addresses of the brothers and sisters of deceased.’

Clearly from the above the names of the deceased's siblings were to be given where he had no children and he was not survived by his parents. In *casu*, the parents of the late Charles were alive hence there was no need to give the names of the brothers and sisters. The other document where such information on brothers and sisters was not provided is the form at page 17 of the plaintiff's bundle. It is instructive to note that on this document first defendant stated the names and addresses of the late Charles' parents. The portion where Stephen said first defendant should have given the names of Charles' siblings does in fact exempt such a disclosure where the parents are alive. The portion complained of is couched as follows:

“Brothers and sisters of deceased, stating whether of full or half blood, and their addresses and dates of birth. In the case of half-brothers and half-sisters, the name of the step parent should be stated. Only those brothers and sisters, whether of full or half blood who survived the deceased are to be given in answer.”

The portion proceeds to instruct as follows:-

‘(Need not be answered if both parents survived the deceased or if the deceased left children)

Clearly therefore in so far as it is common cause that parents of the late Charles survived him, first defendant was not obligated to list the names of the 11 siblings. It is thus erroneous to suggest that she did not write down the names of the siblings in order that the property in question is distributed to her without any hindrance. The first defendant had disclosed the fact that the late Charles’ parents survived him and she provided their addresses.

Once such information was provided it was incumbent upon the convenor of the edict meeting to invite the relatives disclosed.

In terms of section 5 of the Administration of Estates Act what was expected was for any nearest person to notify the Master of the death of Charles Tafa. The section provides that:

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“(1) Whenever any person dies leaving any property in possession, reversion or expectancy or leaving a will, the nearest relative or connection of the deceased who is at or near the place of death, or in default of any such near relative or connection, the person who at or immediately after the death has the chief charge of the house in or of the place on which the death occurs shall, within fourteen days thereafter, cause a notice of death to be framed in the form A in the Second Schedule, and shall cause that notice, signed by himself, to be delivered or transmitted—

- (a) if the death occurs in Harare or the district thereof, to the Master;
- (b) if the death occurs in Bulawayo or the district thereof, to the Assistant Master;
- (c) if the death occurs in any other district, to the magistrate for that district.”

In *casu*, the death occurred in Harare and any member of the Tafa Family could easily have registered the death but they did not do so. To suggest that they did not know about the registration of the death by first defendant is improbable. Surely is it reasonable that up to 2011 when they were served with a notice to vacate Stand 884 Old Canaan, Highfield, they were not concerned about their son’s or brothers’ estate? If so, they then did not deserve to contest what was done by those who were concerned. Stephen Tafa could not explain how they could not have known but still failed to register the death and estate on their own. This was someone who was employed and whose terminal benefits and estate the parents would have been interested in. I am of the view that the probabilities are that the Tafa family knew about the registration and were advised of the edict meetings but for their own reasons chose not to attend the meetings.

It may also be noted that it was the Master of the High Court, in his capacity as custodian of all estates of deceased persons who on the 23<sup>rd</sup> of September 1993 wrote to the Magistrate at Gweru to convene an edict meeting in DR 2329/93. See page 1 of first defendant's bundle of documents.

It was thus not probable that plaintiff was not notified of the registration of the Estate of the late Charles Chiponda Tafa as his name and address and that of his wife had been provided by the first defendant when she completed the Death Notice and when she registered the estate late Charles Tafa with the Master.

2. Whether or not Charles Chiponda Tafa's title to the property in question was acquired fraudulently and without the knowledge of both the seller and the plaintiff.

This is an issue where plaintiff lamentably failed to prove its case. In his declaration plaintiff alleged that after purchase of the property he was given vacant possession. He leased the property for some time. Later he allowed his late son Charles Tafa to stay at the property with his family. In 2004 plaintiff's daughters moved into the property and have been in occupation since. He was thus shocked to discover much later, that the property had been registered in the late Charles Tafa's name. He only discovered this after first defendant had attempted to sell the property after the death of her husband and she had had the property registered in her name.

As aptly reiterated by GOWORA J (as she then was) in *Lasagne Investments (Pvt) Ltd & Others v Highdon Investments (Pvt) Ltd & Others* 2010(2) ZLR 296 (H) at 304C-D:

"The general principle regarding the burden of proof is simply stated as follows, he who avers must prove."

In *casu*, the plaintiff had the onus to prove the allegations made in the declaration that:-

- a) he purchased the property in question namely stand number 884 Old Canaan Highfield Harare
- b) that Charles Tafa obtained transfer of the property fraudulently;
- c) the seller neither knew nor consented to the transfer of the property to the late Charles Tafa and so such transfer was not authorised and is thus illegal.

The persons who were tasked with discharging the onus were the two plaintiff's witnesses Reuben Jonathan Mbulayi, as seller, and Stephen Tafa, the executor aided by the documents tendered.

The seller testified that he sold the property to the late Simon Tafa and not to the late Charles Tafa. He however could not find the agreement of sale to confirm parties to the agreement of sale.

As regards whether the late Charles Chiponda Tafa obtained transfer fraudulently or not, this could not be proved without citing the executor of the estate late Charles ChipondaTafa. It was not disputed that transfer was effected in 1988 and though the seller and plaintiff had indicated that the seller did not know about the transfer, this turned out not to be true.

In his *viva voce* evidence the seller confirmed that he indeed signed a Power of Attorney to make Transfer of the property to Charles Chiponda Tafa. It was his evidence that he was visited by a member of the C.I.D who asked him to sign the power of attorney as the property was being sold to Charles Chiponda Tafa. According to the seller the C.I.D officer came in the company of the late Charles Tafa's sister and so this was not something just between the alleged C.I.D officer and the seller but there was a member of plaintiff's family who accompanied the officer. The witness did not allege that he was forced to sign but that he was told that the property was being sold to Charles Tafa and these documents were for transfer to the said Charles Tafa. It may be noted that the power of attorney signed on the 28<sup>th</sup> June 1988 states that the property had been sold by Reuben J Mbulayi to Charles Chiponda Tafa for \$13 000.00 which sum had been paid or secured.

The witness indicated that he had not informed the late Simon Tafa of the fact that he had signed the power of attorney. No reason was advanced for such failure. If indeed he had sold the property to Simon Tafa but within a year of such sale he had then been made to sign transfer documents in favour of someone else other than the buyer, the witness would have been expected to at least inform the buyer if such signing had been against his will. This is especially so in that the buyer was still expected to seek transfer at any time. Though it was suggested that the seller is now of old age and so could not recall a lot of the events, in 1988 when he signed the power of attorney he was not aged and that is the time he could have informed the plaintiff. The fact that he did not deem it fit to inform plaintiff tends to suggest that he may in fact have sold the property to the late Charles Chiponda Tafa.

The other aspect that supports this conclusion is the contradictory versions as to why no transfer was effected to plaintiff.

In paragraph 4 of his declaration plaintiff alleged that transfer was not effected since the seller was still making payments to City of Harare and transfer could only be effected once payment was completed. On the other hand in his affidavit dated 28 October 2011 at page 12 of the plaintiff's bundle, he stated that both of them (seller and buyer) forgot to change ownership after the full purchase price was paid.

This stance by plaintiff is further contradicted by the fact that the power of attorney that the seller signed shows that the seller had obtained title from the City of Harare in 1983 and so there was no merit in stating that ownership could not be changed because the seller was still paying to the City of Harare. In fact the Deed of Grant which was tendered as part of plaintiff's bundle of documents shows that Reuben Mbulayi the seller obtained title on 26 July 1983.

A further contradiction is that the seller denied under cross examination that transfer was not effected because the parties forgot or that he had not yet obtained title. Instead he gave his own reason as being that he was staying in the rural area whilst the buyer was in the urban area and there were difficulties in meeting.

In his affidavit dated 28 October 2011, the seller had also stated that he had not changed ownership and that to his knowledge the property was still in his name. This statement was uttered despite the fact that he had signed a power of attorney and other transfer documents in 1988. The seller was at a loss on how to extricate himself from the maze/cobweb of contradictions. He surely could not pretend not to know that he had authorised the transfer and aver that the property was still in his name. The seller referred to the fact that some utility bills were still being issued in his name as evidence that title had not been changed. Unfortunately utility bills are not evidence of title but title deeds, which in this case were in Charles Chiponda Tafa's name as from 14 October 1988.

It may also be noted that the plaintiff's assertion in his declaration that he initially leased the property to tenants after which he later allowed his son Charles to occupy the house with his family, and by that insinuating that it could have been during his occupation that he changed ownership, was discredited by the fact that first defendant clearly stated that they only married in 1990 when they were already in Gweru and so there was no Charles Tafa's family that was given occupation of that property before that year. Her evidence that they never stayed in that property as a family was never challenged. She also indicated that it was in fact her husband

who used to receive rentals from tenants in the property through his CABS bank account. None of plaintiff's witnesses countered the above testimony by first defendant.

The plaintiff's evidence on this issue was so discredited that in his closing submissions counsel for the plaintiff conceded that:-

"It is herein admitted that there is no clear evidence as to who caused the property to be transferred into Charles Tafa's name and whether it was done fraudulently."

If therefore plaintiff has not proved that the property was fraudulently transferred into the late Charles Tafa's name, it follows that the property belonged to Charles Tafa. The circumstances of its purchase and transfer as testified to by the seller left this court unconvinced that any fraud was perpetrated. If anything the probability was that the late Charles may have bought the property hence the seller duly signed a power of transfer authorising the transfer as the buyer had paid the full purchase price of \$13 000.00.

It may also be noted that besides the 'not so good' evidence of the seller on the terms of the agreement of sale, the plaintiff's two wives who were said to have been witnesses to the sale agreement were not called to testify. The plaintiff sought to primarily rely on the evidence of the seller who seemed to suffer from loss of memory on a lot of the events.

I thus conclude that plaintiff has failed to prove that the property was sold to plaintiff and not to Charles. Equally the plaintiff has failed to prove that transfer into Charles Chiponda Tafa's name was done fraudulently and without the knowledge of the seller.

3. Whether or not Plaintiff purchased Stand No. 884 Old Canaan, Highfield, Harare and is the rightful owner.

This issue was adequately answered in the above discourse on issue number 2. I am of the view that the evidence adduced did not prove that plaintiff was the rightful owner. No fraud was proved against the late Charles Tafa and so his title to the property as depicted in the Deed of Transfer number 7539/88 remained untainted.

It is true that when the first defendant married the late Charles Tafa the property had already been acquired and so she could only testify to what her late husband told her and the fact that the property was already registered in her husbands' name. That in my view was what was expected of her.

As aptly noted in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) 105 H-106 A:

"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...”

Such real rights having been conferred on the late Charles Tafa, it follows that the property was properly part of the estate late Charles Tafa and the executor dative was entitled to consider it as such.

4. Whether or not the Plaintiff has a valid cause of action against first defendant

The plaintiff’s counsel argued that plaintiff has a valid cause of action against first defendant in that she caused the registration of the Late Charles Tafa’s estate and its distribution without disclosing material information that deceased had brothers and sisters. He submitted that prior to the 1997 amendment to the Administration of Estates Act, the executor of a deceased estate was compelled to consult all members of the deceased’s family and beneficiaries before a distribution plan could be approved by the Master of the High Court. Counsel contended that in *casu*, this was never done. He also argued that the deceased’s parents were never consulted as well as the brothers and sisters. In making the above submissions counsel seemed oblivious to the fact that first defendant was not the executor in the Estate of late Charles Tafa.

Further submissions were made to the effect that under customary law the property in question was to be inherited by members of the Tafa family and not the first defendant as it was acquired prior to the 1997 Amendment Act and further that the estate was distributed before the 1997 amendments as well. According to plaintiff’s counsel, first defendant could not inherit the said property at law.

The defendant’s counsel on the other hand contended that plaintiff had failed to prove any cause of action against the first defendant. In any case the assertion that in terms of customary law first defendant was not entitled to inherit the late Charles Tafa, property in terms of the then obtaining law, was an 11<sup>th</sup> hour irregular amendment as the plaintiff’s case was simply that the property had been fraudulently registered into Charles Tafa’s name and subsequently into first defendant’s name. The plaintiff’s declaration was clear that the plaintiff was basing his claim on fraud and not what counsel was now raising.

From the pleadings filed of record and evidence led, I am of the view that plaintiff’s stance was premised on the manner in which the property was registered into the name of the late Charles Tafa and subsequently into first defendant’s name. It was in that regard that first defendant was accused of not having provided information on all the brothers and sisters of the late Charles Tafa in the administration of the estate. The question is: was the first defendant

required to provide all the names of Charles Tafa's brothers and sisters or even all the names of beneficiaries to the estate late Charles Tafa? I did not hear plaintiff's counsel to be serious in this regard as he could not point to any statutory provision in this regard. Equally one may ask: was it the duty of a potential beneficiary to consult all family members of Charles Tafa in the administration of the estate? The answer is no. It would appear to me that plaintiff confused the role of a potential beneficiary in the registration and administration of an estate with that of the executor. In this regard the plaintiff through Stephen Tafa gave evidence suggesting that first defendant finalised the administration of the estate and distributed the immovable property to herself.

In dealing with issue number 1 I alluded to the process of notifying the Master by any one nearest or connected to a deceased person under provisions of section 5 of the Administration of Estates Act. I also alluded to the particular sections in the Death Notice that was to the effect that where one is survived by their children or parents there was no need to state the brothers and sisters. It was clear during that discourse that all that was required of first defendant was to register the death and, where the deceased's parents are alive, give their names and addresses. It was not mandatory to provide the names of all brothers and sisters of deceased.

The task of consulting family members in the administration of an estate, if any, is reposed in the executor as the legal representative of the estate.

Once an estate has been registered it is the duty of the executor to perform his duties in terms of the law. The first defendant as a surviving spouse was only a potential beneficiary whilst the estate was being administered.

If there were any anomalies in the administration the plaintiff was supposed to cite the executor as it is the executor with responsibility. In *casu*, the plaintiff did not deem it necessary to cite or even join the executor of the estate late Charles Tafa. It is the executor who would have confirmed whether or not he consulted some members of deceased's family and what consideration he took in the distribution of the deceased's estate.

The submission by plaintiff's counsel that in terms of customary law first defendant was not supposed to inherit Charles Tafa's immovable property is contentious. Its resolution would depend on the choice of law as first defendant and the late Charles Tafa were married in terms of the Marriage Act, chapter 5:11.

Before its repeal by section 7 of Act 6 of 1997, Section 13 of the Customary Marriages Act [*Chapter 5:07*] provided that the solemnisation of a marriage between Africans in terms of the Marriage Act did not affect the property of the spouse which shall devolve according to

customary law unless disposed by a will. However, in *Mujawo v Chogugudza* 1992 (2) ZLR 321, the Supreme Court after going through the above section on the choice of law, held that the estates of Africans married in accordance with the general law are governed by general law as section 13 of the Customary Marriages Act had been repealed by implications by the Legal Age of Majority Act as read with section 3 of the Customary Law and Primary Courts Act 1981. At 330C-D MANYARARA JA stated that:

“In my view, it was pointless to conduct the enquiry referred to for the reason already explained, that the deceased’s civil marriage is conclusive proof that his status cannot be regarded as that of a person who had contracted marriage according to African law and custom.”

It thus follows that as the late Charles Tafa was married in terms of the Marriage Act, his estate had to be administered in terms of the general law. On that note the estate was administered in terms of sections 25 and 52 of the Administration of Estates Act.

The executor was duly appointed and performed his duties according to his letters of appointment.

If plaintiff’s claim was to succeed against first defendant it must first succeed against the estate late Charles Tafa, which in this case it has not.

5. Whether or not the Plaintiff’s claim is prescribed

Not much was testified on this issue. The plaintiff’s stance was simply that he only learnt of the change of ownership in 2011 and so he brought this action in time. The first defendant’s stance was to the effect that title was transferred in 1988 and plaintiff must have had knowledge then. As indicated above not much was contended in this regard as plaintiff has since passed on and those who testified had no knowledge about that issue.

In any case in his closing submissions first defendant’s counsel submitted that he was abandoning the issue of prescription.

6. Whether or not Deed of Transfer No. 8970/97 should be cancelled.

Whether or not the deed of transfer No 8970/97 transferring title from the late Charles Tafa to first defendant should be cancelled was contested. The plaintiff’s stance was premised on the manner in which the estate late Charles Tafa was administered which issue I have already made pronouncement on. Counsel for plaintiff argued that the executor was tricked by first defendant who withheld information from him in a bid to try and create a picture that the deceased had no brothers and sisters. Thereafter the executor made an error by failing to consult the deceased’s parents who were listed in the death notice.

As has been alluded to before, the death notice on which first defendant endorsed the names and addresses of deceased's parents, did not require that she must also indicate the names of the brothers and sisters. As already quoted above, the relevant section on the death notice instructs that:-

“If there are no children, and either or both parents be dead, then give the names and addresses of the brothers and sisters of deceased.”

In *casu*, the parents were alive hence first defendant duly endorsed their names and addresses on the form and omitted to write the names of the brothers and sisters as this was not required where the deceased was survived by his children or parents.

It was up to the convenor of the edict meeting to invite the relatives of the deceased to an edict meeting; in this case, the deceased's parents as their names and addresses had been furnished. Once an executor was appointed it was upon that executor to consult family members and not for first defendant. To therefore seek to blame first defendant for perceived omissions by the executor was not proper. Had plaintiff been serious on the error or omissions by the executor he could have cited the executor so that he answers for himself. Failure to cite the executor was thus fatal to plaintiff's contention in this regard.

The submission that the second defendant was tricked into approving an erroneous distribution plan was also not well thought out. The Master's role was supervisory in nature; that is to confirm that all aspects of the administration of the estate had been attended to and in his report he confirmed this. It may also be noted that cancellation of Deed of Transfer No 8970/97 would only lead to the property reverting to being held by estate late Charles Tafa, which estate was wound up in terms of a confirmed final distribution account. The plaintiff in his prayer has not sought for the reopening of that estate but just sought that that property be transferred to his name; apparently without the executor of the estate late Charles Tafa's involvement. This serves to confirm the plaintiff's greediness to get the property at any cost even without following proper procedures in terms of the law.

I am of the view that no good cause has been shown for the cancellation of the deed of transfer.

7. Whether or not the defendant is entitled to an order evicting Plaintiff and all persons claiming through him from the property?

As plaintiff has failed on a balance of probabilities to satisfy court on the need to cancel the deed of transfer Number 8970/97, it follows that the property remains in the name of the

first defendant as owner. As owner first defendant is entitled to deal with the property as she pleases. She can thus seek the eviction of anyone who is in occupation of the property without her authority or, where such authority was previously given, but has been withdrawn. In as far as first defendant gave notice to the persons in occupation to vacate and such persons, through the letter by Christine Tafa dated 3 November 2011 expressed resistance to the notice of eviction, it is only proper that an order for eviction be granted. The first defendant's counter claim will thus be granted.

Accordingly therefore:

1. The plaintiff's claim is hereby dismissed with costs.

The first defendant's claim is hereby granted as follows:

2. The plaintiff and all those claiming occupation through him be and are hereby ordered to vacate Stand number 884 Old Canaan, Highfield, Harare within 30 days of the date of this order.
3. The estate of the late Simon Chiponda Tafa shall bear the costs of this suit.

*Mutebere and Company*, plaintiff's legal practitioners  
*T. H Chitapi & Associates*, first defendant's legal practitioners.