

Judgment No S.C. 74\2001  
Civil Appeal No 158\2000

PASCOE NYAMARIVA GUNDA v (1) CLYDE NYAMARIVA  
GUNDA (2) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE  
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA  
HARARE JUNE 25 & SEPTEMBER 3, 2001

*R.J. Tsivama*, for the appellant

*N.P. Munangati*, for the first respondent

MUCHECHETERE JA: This is an appeal against the decision of the High Court, Harare, on 10 May 2000 in which the appellant was, amongst other matters, ordered to sign all such papers as are necessary to transfer his rights and title in Stand 4493, Mbare (“the Mbare house”) into the estate of the late Vincent Nyamariva (“the estate”) and to pay costs of suit.

The facts in the matter are that the first respondent is the eldest son and heir to the estate of the late Vincent Nyamariva (“Vincent”). Vincent was the appellant’s son. The appellant was the registered owner of the Mbare house. He occupied the property together with his family in accordance with the usual terms and conditions set out by the Municipality of Harare for occupation of such houses.

Vincent also lived at the Mbare house with his family at the same time that the appellant was in occupation. It was a term of the conditions of occupation of property by the Municipality of Harare that no person was allowed to occupy more than one council property in either Harare or Chitungwiza.

On 18 September 1978 the appellant entered into an agreement with one Anderson Marimo Chikosha ("Chikosha") in terms of which the latter was to cede his rights and interest in stand 6821 Zengeza Township in Chitungwiza ("the Chitungwiza house") to the appellant at the purchase price of \$650. The amount was paid. The proposed transaction was approved and accepted by the Chitungwiza Urban Council and the Ministry of Local Government and Housing in 1982. However, in order to circumvent the said policy of both Harare Municipality and Chitungwiza Urban Council of one house per person in either Harare or Chitungwiza the appellant is alleged to have entered into an agreement with Chikosha to the effect that the Chitungwiza house would be transferred to Vincent instead. Vincent however, never moved to the Chitungwiza house. He remained with his family at the Mbare house where he continued to meet all the municipal rates and charges for that house. The appellant instead moved to the Chitungwiza house and has remained there to date.

In June 1991 Vincent agreed to cede his rights and interest in the Chitungwiza house to the appellant and this transaction was approved by the Ministry of Local Government and Housing in August 1991.

As from 1 January 1981 all rented accommodation under the Municipality of Harare, that is the Mbare and Chitungwiza houses, was converted into home ownership schemes. To qualify one had to be the registered tenant of the property and also to be in physical occupation of the property on the effective date. It was then adjudged that the appellant qualified to be granted ownership of the Mbare house and on 31 July 1995 the title to that property was transferred to him. He, however, decided to sell the property instead.

The first respondent objected to the appellant selling the Mbare house. He alleged that in June 1991 when Vincent agreed to cede his rights and interest in the Chitungwiza house to the appellant it was also agreed that the Mbare house would be transferred to Vincent to be beneficially his own property. He indicated that the agreement was entered into partly because of the policy that the appellant could not be the registered owner of the two properties in the Harare and Chitungwiza Municipalities. He then made the application in the court *a quo* to have the Mbare house transferred to the estate in terms of the agreement.

The question which was before the court *a quo* was therefore whether at the time Vincent agreed to cede his rights and interest in the Chitungwiza house it was also agreed that the appellant would cede his rights and interests in the Mbare house to him (Vincent). In this connection the first respondent gave evidence in support of the contention by the estate. He stated that he and his sister and two younger brothers reside in the Mbare house. They have always resided in the Mbare house. He has always been aware that their late father, Vincent, was then the registered occupier of the Chitungwiza property. Before Vincent died he had advised

him (first respondent) that he (Vincent) and the appellant had agreed to swap the two properties. Vincent however died before the swap was formalised. The first respondent went on to state that shortly after the death of Vincent the appellant sought to sell the Mbare house. In order to do this he went and told untruths to the Municipality to the effect that he (appellant) was the sitting tenant of the Mbare house in 1982 when in fact he was not. The appellant was, at the time, residing in the Chitungwiza house as already indicated above. The first respondent further stated that Vincent had also given \$5 000 to the appellant for him to develop the Chitungwiza property. The implication was that this was on account of the fact that the Mbare house was to be Vincent's.

One David Antony Govera ("Govera") also gave evidence in support of the contention by the estate. Govera is the Deputy Director of Housing and Community Services of the Chitungwiza Municipality. He is also related to both parties in this matter, the appellant and Vincent. He confirmed that the appellant and Vincent approached him at his office at the Chitungwiza Municipality and that each one was residing in the house registered in the name of the other. They indicated that they would swap the properties, that is, that each would retain the property he occupied - the appellant the Chitungwiza house and the late Vincent Nyamariva, the Mbare house. A written statement to that effect by the two was produced in court. They then both indicated that they would take steps to formalise the agreement. He approved the swap and advised the two to formalise it by having the transfers registered. Later Govera was surprised to be told that the appellant intended to sell the Mbare property. He maintained that it was still the Harare and Chitungwiza Municipality policies that no person was to own more than one house in the

Municipality and that, in the circumstances, the appellant was bound to retain only one house. And that since the appellant was not residing in the Mbare house he had to give up that house in favour of the Chitungwiza house as agreed in “the swap deal”.

One Alias Magosa (“Magosa”) also gave evidence for the estate. He was Vincent’s friend. He confirmed that Vincent did indeed give \$5 000 to the appellant for the latter to develop the Chitungwiza house. According to him Vincent was always in occupation of the Mbare house and paid all the municipal charges for the property. Vincent had also told him (Magosa) that he had swapped the Mbare house with the appellant who instead took the Chitungwiza house.

Naboth Chiriva also gave evidence for the estate. He was also related to both parties and he lived in a house neighbouring the Mbare house. He stated that the two families of the parties were initially living together at the Mbare house but that the appellant later decided to move to the Chitungwiza house which was said to be bigger and more suitable for extension. Both parties then indicated that they had swapped houses.

The appellant’s evidence on the other hand was to the effect that he bought the Chitungwiza house from Chikosha. After buying the house he realised that it was against Municipal policy to own two houses in Harare and Chitungwiza. In view of this he asked Chikosha to cede the Chitungwiza property to Vincent. This was effected. He denied that there ever was a swap. He agreed that he received \$5 000 from Vincent but stated that this money was in connection with the estate of his other son Lewis. He, however, used the money to extend the Chitungwiza house.

He was, therefore, adamant that both houses belonged to him and that he only agreed to the Chitungwiza house being ceded to Vincent to circumvent Municipality policy.

Under cross-examination he agreed with most of the evidence given by Govera in connection with the cession. He admitted that he lied to the Municipality that he was living in the Mbare house at the time he sought to sell it. He also admitted that from 1978 all the Municipality charges for the Mbare house were paid by Vincent who continued to live at the house.

The learned trial judge relied mostly on the evidence of Govera in coming to the conclusion he did. I agree that that was proper because the rest of the evidence of the other witnesses for the estate, although in support of the State's contention, was mostly hearsay and the witnesses had no direct knowledge of the details surrounding the alleged swapping of the properties. Govera's evidence was direct and the learned trial judge, in my view, properly believed it. It was not strongly challenged by the appellant and was in accord with the probabilities. These are to the effect that faced with the fact that the appellant could not own the two properties in the municipalities, he chose to have the other property owned and registered in his son's name, Vincent. Indeed in a way the appellant's evidence confirms this. This would also be in accord with the probability that the appellant saw it as a way to benefit his son. His belated change of mind, in my view, is an afterthought and would still run contrary to the spirit and purport of the Municipality's policy of one person one house in the two municipalities.

I do not consider that having come to the above conclusion on the facts, that is, that the parties swapped houses, there is any necessity for a consideration of the issue and law as to whether or not the appellant came to court with unclean hands and how that would affect the transaction between the parties. The issue was discussed at some length by the learned trial judge at pages 10 to 11 of the cyclo-styled judgment (HH-23-2000). Suffice to say I would agree with the conclusion arrived at by the learned trial judge.

In the result the appeal is dismissed with costs.

McNALLY JA: I agree

EBRAHIM JA: I agree

*Sawyer & Mkushi*, appellant's legal practitioners

*Munangati & Associates*, first respondent's legal practitioners