

1636/06

BENJAMIN SIBINDI

Versus

NKOSILATHI MXOTSHWA

And

SAZINI MXOTSHWA

And

MNCEDISI MXOTSHWA

And

PHATHISANI MXOTSHWA

And

THABO MXOTSHWA

And

MESSENGER OF COURT

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 18 MARCH 2008 & 19 FEBRUARY 2009

B Ndove for applicant

N Mazibuko, for respondents

Opposed Court Application

KAMOCHA J: On 8 January 2004 the present applicant issued summons seeking an order compelling the 1st to the 5th respondents, who are beneficiaries of the estate of the late Smart Milton Mxotshwa Sibanda, to transfer their rights, title and interest in house number 70996 Lobengula West, Bulawayo into his name. All the five respondents are children of the late Smart Milton Mxotshwa Sibanda who died on 13 February 2000. The children jointly inherited the house which is at the centre of this dispute – being house number 70996 Lobengula West, Bulawayo.

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Applicant alleged that the said house was not eligible for distribution to the respondents as he claimed to have purchased it following a verbal agreement he had entered into with the deceased some time in 1981. He alleged that the house was sold for \$500,00 which amount he allegedly paid in full in 1982. He took occupation of the house in 1981. However, the said Smart Milton Mxotshwa Sibanda continuously deferred the cession of his rights, title and interest in the property until he unfortunately died.

After the deceased's death the 1st respondent was appointed executor of the estate. When asked to transfer the rights, title and interest in the property to the applicant, he refused to do so until the estate was wound up. Hence this protracted litigation.

All in all the parties have sought redress in the courts no less than five times in this court once in the Magistrates' Court and once more in the Small Claims Court.

On 8 January 2004 the applicant Benjamin Sibindi hereinafter referred to as Sibindi issued summons out of this court seeking to compel the respondents hereinafter referred to as the Mxotshwas to transfer their rights, title and interest in house number 70996 – the property.

The Mxotshwas excepted to the plaintiff's summons and filed a plea in bar. The exception was three pronged.

Firstly, the respondents alleged that the agreement between Sibindi and their late father was invalid and unenforceable because it was not sanctioned in writing by City of Bulawayo as required by clause 12 of the Agreement their late father and City of Bulawayo signed.

Clause 12 of the agreement signed by their father on 21 April 1981 stipulated thus:-

“The purchaser shall not at any time before the said piece of land has been transferred into his name, sell the said piece of land or cede, assign, transfer or make over any of his rights under this agreement without the written consent of the municipality.”

It is now common ground that City of Bulawayo did not give its consent, in writing to respondents' father to sell the property to Sibindi.

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Secondly, the Mxotshwas pleaded in bar that the 4th and 5th respondents who were minors could not be sued unless assisted by a guardian. It is not disputed that the two minors were sued in their individual capacities unassisted by a guardian. Consequently the claim against them is void and a nullity.

Thirdly, the Mxotshwas asserted that their father's estate was wound up on 10 January 2003. Sibindi failed to lay a claim against this estate before it was wound up. He was accordingly barred in terms of section 45(3) of the Administration of Estates Act, [Chapter 6:01]. Sibindi does not dispute that he failed to lodge his claim with the executor within the specified period or thereafter.

Instead, Sibindi, on 25 April 2006, filed a chamber application wherein he was granted the following order:-

1. the 1st to 5th respondent's exception and plea in bar filed on the 2nd March 2004 under case number HC 65/04 be and is hereby struck off for want of prosecution;
2. that 1st to 5th respondents be and are hereby ordered to file their plea on the merits to the main case within 10 days of service of this order upon them; and
3. the 1st to 5th respondents shall jointly and severally pay costs of this application on an attorney-client scale."

The above application was made on the strength that the Mxotshwas had not prosecuted their exception and plea in bar for a period in excess of two years. Sibindi felt that such an inordinate delay tended to prejudice him. It delayed the fair trial of the action.

Sibindi was correct except that he was remiss in finalising the matter by way of a chamber application whereby the exception and plea in bar were struck out for want of prosecution.

After the filing of the exception the parties should have adopted the procedure laid down in order 21 Rule 138 of the rules of this court. Since the exception and plea on bar were not being prosecuted as required by law the parties should have proceeded to have the main case brought to trial.

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The Mxotshwas have blamed their erstwhile legal practitioner for failing to prosecute their case timeously. There can be no doubt that they also are to blame for the inordinate delay. But, in my view, that did not entitle Sibindi to obtain a final order in a very contentious matter by way of a chamber application. The respondents did not have notice of the chamber application and were not party to it. Clearly such an order cannot be allowed to stand.

It seems to me that although the exception and plea in bar had been previously handled in a very perfunctory manner they could resolve the ownership wrangle one way or the other without the need of a trial if handled with care and diligence by their current legal practitioners.

In the result I would issue the following order:

It is ordered that:-

- (a) the order of this court granted in case number HC 905/06 on 29 May 2006, be and is hereby rescinded;
- (b) the Mxotshwas be and are hereby given leave to seek a date of set down in respect of the exception and plea in bar within 21 days of the date of this order failing which they are to plead over to the merits; and
- (c) Sibindi shall pay the wasted costs on the ordinary scale.

Messrs Maronedze, Mkuku, Ndove and Partners, 1st to 5th respondents' legal practitioners

Messrs Calderwood, Bryce Hendrie and Partners, respondents' legal practitioners